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 10 Xcentric Ventures, LLC and
 Edward Magedson

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

15 **ASIA ECONOMIC INSTITUTE, LLC,**
 16 ***et al.*,**

17 **Plaintiffs,**

18 v.

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

20 **Defendants.**

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

**MOTION FOR SANCTIONS
 PURSUANT TO FED.R.CIV.P. 11**

Hearing Date: **October 4, 2010**
 Time: **1:30 p.m.**
 Courtroom: **6**

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 23 Pursuant to Rule 11(c), Fed.R.Civ.P., Defendants XCENTRIC VENTURES, LLC
 24 and EDWARD MAGEDSON (collectively, "Defendants") respectfully request that the
 25 Court enter an Order sanctioning Plaintiffs Asia Economic Institute, LLC, Raymond
 26 Mobrez, and Iliana Llaneras for their violations of Rule 11(b), Fed.R.Civ.P. Plaintiffs
 27 filed with the Court a First Amended Complaint which (1) has been presented for an
 28 improper purpose; (2) contains claims and legal contentions that are not warranted by

1 existing law; and (3) contains factual allegations which have no evidentiary support, each
2 of which is a direct violation of Rule 11(b). Defendants have presented this Motion to
3 Plaintiffs and requested that they withdraw the First Amended Complaint entirely or
4 correct each of the deficiencies identified within this Motion. In response, Plaintiffs have
5 moved to file a Second Amended Complaint, which does not include RICO claims, but
6 has once again asserted the vast majority of the allegations identified in this Rule 11
7 Motion as baseless. Twenty-one days have passed and Plaintiffs have elected to correct
8 some but not all of these problems. As a result, sanctions are warranted pursuant to Rule
9 11(c)(2).¹

10 This motion is made following a 21-day period after service on Plaintiffs, which
11 Defendants believes also complies with L.R. 7-3.

12 DATED this 3rd day of September, 2010.

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

15
16 /s/Maria Crimi Speth
17 Maria Crimi Speth
18 Attorneys for Defendants

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27 ¹ This Rule 11 Motion and the Rule 11 Motion served on Plaintiffs 21 days ago are not identical because Plaintiffs
28 have removed some claims and allegations. In order to comply with the 21-day hold, Defendants have added no
content to this motion except a reference to the removed allegations. Defendants have, however, deleted some of the
arguments and updated the fact chart (below) to reflect the removed allegations and the new paragraphs.

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2 **I. THEORY UNDERLYING RULE 11**

3 “Filing a complaint in federal court is no trifling undertaking. An attorney’s
4 signature on a complaint is tantamount to a warranty that the complaint is well grounded
5 in fact” *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1127 (9th Cir.2002). “[T]he central
6 purpose of Rule 11 is to deter baseless filings in district court and thus, consistent with the
7 Rules Enabling Act’s grant of authority, streamline the administration and procedure of
8 the federal courts.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393, 110 S. Ct.
9 2447, 2454, 110 L. Ed. 2d 359 (1990) (citing Advisory Committee Note on Rule 11, 28
10 U.S.C.App., p. 576). “Rule 11 imposes a duty on attorneys to certify that they have
11 conducted a reasonable inquiry and have determined that any papers filed with the court
12 are well grounded in fact, legally tenable, and ‘not interposed for any improper purpose.’”
13 *Id.*

14 As the Notes of the Advisory Committee on Rules point out, the language of Rule
15 11 “stresses the need for some prefiling inquiry into both the facts and the law to satisfy
16 the affirmative duty imposed by the rule. The standard is one of reasonableness under the
17 circumstances.... This standard is more stringent than the original good-faith formula and
18 thus it is expected that a greater range of circumstances will trigger its violation.”
19 Fed.R.Civ.P. 11, Notes of Advisory Committee, 28 U.S.C.A. Rules of Civil Procedure
20 (Supp.1988); *see Rachel v. Banana Republic, Inc.*, 831 F.2d 1503, 1508 (9th Cir.1987)
21 (counsel has affirmative duty of investigation into law and fact before filing). Under Rule
22 11(b), an attorney has a “nondelegable responsibility” to “personally ... validate the truth
23 and legal reasonableness of the papers filed,” *Pavelic & LeFlore v. Marvel Entm't Group*,
24 493 U.S. 120, 126, 110 S.Ct. 456, 107 L.Ed.2d 438 (1989), and “to conduct a reasonable
25 factual investigation,” *Christian*, 286 F.3d at 1127. To determine whether the inquiry
26 actually conducted was adequate, the court applies a standard of “objective reasonableness
27 under the circumstances.” *Hudson v. Moore Business Forms, Inc.*, 836 F.2d 1156, 1159
28 (9th Cir.1987).

1 **II. PROCEDURAL HISTORY OF THIS LITIGATION**

2 Plaintiffs and their counsel have had plenty of opportunities to adequately
3 investigate their claims against Defendants, yet, as is made clear by the recent filing of the
4 First Amended Complaint, have either chosen not to do so, or otherwise ignored the facts
5 which they have been provided.

6 This lawsuit was first initiated on or around January 27, 2010. Defendants
7 immediately filed a Special Motion to Strike the Complaint under the anti-SLAPP statute,
8 explaining that each of the defamation-related causes of action failed as a matter of law.
9 On April 20, 2010, the Court denied Defendants’ request, finding that the statements
10 posted on the Rip-Off Report website do not implicate matters of public interest. *See*
11 Doc. No. 23 at p. 19.

12 As the case progressed forward, it was proven that the individual Plaintiffs (Mr.
13 Mobrez and Ms. Llaneras) committed perjury in this case by manufacturing and
14 presenting sworn false testimony accusing Mr. Magedson of demanding \$5,000 in order to
15 make negative information disappear from the Rip-Off Report website. It was further
16 apparent that Plaintiffs could not establish the necessary predicate acts to prove their
17 RICO claims. Counsel for Defendants consistently communicated with counsel for
18 Plaintiffs, explaining that there was no good faith basis upon which they could base their
19 RICO or extortion claims. Counsel for Defendants also consistently requested that
20 Plaintiffs withdraw their claims, since there was no evidence or legal theory which could
21 support them; however, counsel for Plaintiffs refused to withdraw the Complaint against
22 Defendants.

23 At an initial case status conference, the Court bifurcated the trial in this case, and
24 allowed Plaintiffs to only litigate the issue of liability on their RICO claims as the first
25 matter to proceed to trial. Plaintiffs then filed a motion before Magistrate Judge Walsh to
26 bifurcate discovery so as to limit discovery prior to the trial to the RICO and extortion
27 claims only. This motion was granted. *See* Doc No. 82. Under these guidelines,
28 Defendants took the deposition of Plaintiff Mobrez, while Plaintiffs – twice – took the

1 deposition of Defendant Ed Magedson, once in his individual capacity, and once on behalf
2 of Defendant Xcentric. The parties also engaged in written discovery.

3 On or around May 24, 2010, Defendants filed a Motion for Partial Summary
4 Judgment, asserting that no material facts were in dispute and that Plaintiffs were unable
5 to prevail on their claims for RICO and extortion as a matter of law. *See* Doc. No. 40.
6 This Motion was supported by six declarations, as well as numerous other exhibits. *Id.*
7 On July 12, 2010, the Court granted Defendants' Motion, finding that no unlawful threats
8 were made by Defendants to Plaintiffs, and therefore no predicate acts had occurred which
9 would give rise to Plaintiffs' causes of action for RICO with extortion as the predicate act.
10 *See* Doc. No. 94.

11 At that same hearing, the Court raised the issue of whether the Plaintiffs'
12 Complaint was sufficient to state a plausible claim for RICO violations based on the
13 alleged predicate acts of wire fraud. Defendants argued that the Complaint was not
14 sufficient, and made an oral motion to dismiss those claims for failure to plead the alleged
15 acts of wire fraud with particularity. *See* Doc No. 94. Plaintiffs requested leave of the
16 Court, based on "newly discovered evidence," to file an amended complaint to allow them
17 to assert essentially the same causes of action which had just been dismissed. The Court
18 gave Plaintiffs the opportunity to file an amended complaint; however, in doing so, it
19 reminded Plaintiffs of their obligations under Rule 11 and suggested that appropriate
20 investigations be undertaken before any filings were made. *Id.*

21 Disturbingly, on July 27, 2010, Plaintiffs filed their eighty-four page First
22 Amended Complaint ("FAC"), alleging a variety of causes of action including, claims for
23 RICO violations. *See* Doc. No. 96. In filing this FAC, Plaintiffs violated a number of
24 provisions of Rule 11, since the FAC (1) has been presented for an improper purpose; (2)
25 contains claims and legal contentions that are not warranted by existing law; and (3)
26 contains factual allegations which have no evidentiary support.

1 On August 17, 2010, Plaintiffs sought leave to file their Second Amended
2 Complaint.

3 **III. PLAINTIFFS HAVE VIOLATED RULE 11(B)(3)**

4 Rule 11(b)(3) explains that by filing a pleading with the Court, the attorney
5 certifies that:

6 to the best of the person’s knowledge, information, and belief, formed after
7 an inquiry reasonable under the circumstances...the factual contentions
8 have evidentiary support or, if specifically so identified, will likely have
evidentiary support after a reasonable opportunity for further investigation
or discovery.

9 Fed.R.Civ.P. Rule 11(b)(3). The FAC is rife with factual contentions that are wholly
10 lacking in any evidentiary support. Moreover, as to most of these false allegations,
11 Plaintiffs and their counsel had actual knowledge that the allegations which they are
12 presenting are false. Even if Plaintiffs only “chose to state as a fact what was at the best a
13 guess and a hope, [they] engaged in misrepresentation.” *In re Curl*, 803 F.2d 1004, 1006
14 (9th Cir.1986), *overruled on other grounds, Partington v. Gedan*, 923 F.2d 686 (9th
15 Cir.1991) (en banc).

16 Due to the size of the FAC (84 pages and 371 paragraphs) and the quantity of
17 factual contentions made by Plaintiffs that are devoid of evidentiary support, for the ease
18 of the Court, Defendants have created a chart (Exhibit “A”) pointing out each allegation
19 made by Plaintiffs which is in violation of Rule 11(b)(3).² After serving this Rule 11
20 Motion, Defendants have updated this chart to reflect the paragraph in the proposed
21 Second Amended Complaint and to remove from the chart allegations that Plaintiffs did
22 not include in the proposed Second Amended Complaint.

23 The statements in the FAC are presented as facts; yet these statements are either
24 knowingly false or unsupported by any evidence, either existing or having potential to
25 exist. The Ninth Circuit has explained why misrepresentation by attorneys to a court
26 cannot be taken lightly:

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28 ² This chart does not include all allegations within the FAC which Defendants deny. It only contains those
allegations which violate Rule 11.

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The vice of misrepresentation is not that it is likely to succeed but that it imposes an extra burden on the court. The burden of ascertaining the true state of the record would be intolerable if misrepresentation was common. The court relies on the lawyers before it to state clearly, candidly, and accurately the record as it in fact exists.

In re Girardi, --- F.3d ----, 2010 WL 2735731 (9th Cir. 2010) (internal quotation omitted). The complete absence of evidence to support the allegations identified above suggests that Plaintiffs, at best, failed to conduct a reasonable inquiry, and, at worst, made deliberate misrepresentations to this Court. See *Mezzetti v. State Farm Mut. Auto. Ins. Co.*, 346 F.Supp.2d 1058, 1067 (N.D.Cal.2004) (noting that “[g]obbledygook can be no less obfuscatory than an outright lie”). Each of Plaintiffs’ statements identified in the chart above demonstrates that the factual contentions they have made lack evidentiary support or even the potential to discover such evidentiary support, in violation of Rule 11(b)(3).

IV. PLAINTIFFS HAVE VIOLATED RULE 11(B)(2)

Rule 11(b)(2) explains that by filing a pleading with the Court, the attorney certifies that:

to the best of the person’s knowledge, information, and belief, formed after an inquiry reasonable under the circumstances... the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.

Fed.R.Civ.P. Rule 11(b)(2). An attorney’s responsibility under Rule 11 to conduct reasonable pre-filing investigation is particularly important where, as here, claims have been made under Racketeer Influenced and Corrupt Organizations Act (RICO). *Burnette v. Godshall*, N.D.Cal.1993, 828 F.Supp. 1439, *affirmed* 72 F.3d 766

Plaintiffs have made frivolous legal arguments regarding the use of trademarks in HTML code, as well as the use of computer code itself, for the purpose of finding liability against a website. In Paragraphs 80 and 81 of the FAC, Plaintiffs reference two cases, citing them for propositions which neither can be read to support. Citing *Brookfield Commons. v. W. Coast Entm’t Corp.*, 174 F.3d 1036, 1065 (9th Cir. 1999), Paragraph 80 argues that courts “regularly enjoin” the use of infringing trademarks through their

1 inclusion in the “description and keyword metatags of HTML.” In *Brookfield*, the court
2 found that use of a confusingly similar mark in a web site’s metatags is actionable under
3 Lanham Act. *Id.* However, this holding was limited to the context of initial interest
4 confusion when the defendant uses the plaintiff’s trademark “in a manner calculated ‘to
5 capture initial consumer attention.’” *Interstellar Starship Services, Ltd. v. Epix, Inc.*, 304
6 F.3d 936, 941 (9th Cir. 2002) (quoting *Brookfield*, 174 F.3d at 1062). When determining
7 whether trademark infringement has occurred on a website, the Ninth Circuit has
8 explained that a court must evaluate “(1) the similarity of the marks, (2) the relatedness of
9 the goods or services, and (3) the parties’ simultaneous use of the Web as a marketing
10 channel,” coupled with the other four *Sleekcraft* factors. *Id.* (quoting *GoTo.Com, Inc. v.*
11 *Walt Disney Co.*, 202 F.3d 1199, 1204 (9th Cir.2000)); *see also AMF Inc. v. Sleekcraft*
12 *Boats*, 599 F.2d 341, 346 (9th Cir.1979). Plaintiffs neglected to provide the Court with a
13 complete, accurate recitation of current case law regarding initial interest confusion for
14 metatags.

15 Similarly, citing *Universal City Studios v. Corley*, 273 F.3d 429, 448 (2d. Cir.
16 2001), Plaintiffs assert that courts consider computer code to be “speech,” thereby
17 recognizing the “power and impression” of search results on the internet, and holding
18 parties accountable for what the HTML code contains. *See* FAC at ¶¶ 81-82. Again,
19 Plaintiffs neglect to explain the context and limitations of the holding in *Corley* in an
20 effort to mislead the Court. As the *Corley* court explained, “The functionality of
21 computer code [] affects the scope of its First Amendment protection.” *Corley*, 273 F.3d
22 at 452. Importantly, the computer code the *Corley* court was referring to was decryption
23 software, which possessed a “skeleton key” or a “combination that can open a locked
24 door.” *Id.* at 453. Notably, even though this decision has been present in the Second
25 Circuit for nine years, it has not yet been adopted by any court in the Ninth Circuit,
26 including this one, for the purpose advocated by Plaintiffs.

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1 Plaintiffs have also misinterpreted copyright law, and, in particular, 17 U.S.C. §
2 101. Plaintiffs are asking the Court to find that the transfer of an exclusive license in a
3 copyright protected work is the same thing as the transfer of ownership in that work. This
4 is not an accurate reflection of the law, and there is no statute or case law which interprets
5 the license granted to Xcentric in this manner. The Court *Effects Associates, Inc. v.*
6 *Cohen*, 908 F.2d 555 (9th Cir. 1990) explained that “Copyright ownership is comprised of
7 a bundle of rights” and the granting of a license is giving up “only one stick from that
8 bundle.” *Id.* at 559. The plain language of 17 U.S.C. § 201(d)(2) limits the rights of an
9 exclusive licensee to those “protections and remedies” afforded in the 1976 Act, thereby
10 identifying the distinction between an exclusive license and copyright ownership. *See*
11 *Gardner v. Nike, Inc.*, 279 F.3d 774, 780 (9th Cir. 2002). The Ninth Circuit in *Gardner*
12 analyzed – and rejected – the very argument advocated by Plaintiffs in trying to blur the
13 line between an exclusive licensee and a copyright owner. That court explained:

14 Appellants contend that, if a licensee of exclusive rights under the copyright
15 is characterized by the 1976 Act as an “owner” of those rights under §
16 201(d)(2), then it must follow that such “ownership” carries with it an
17 unrestricted right to freely transfer the license. However, Appellants’
18 argument ignores the plain language of § 201(d)(2), which states that the
19 owner of such exclusive rights is entitled only to “the protection and
remedies” accorded the copyright owner under the 1976 Act. This explicit
language limits the rights afforded to an owner of exclusive rights. Based
on basic principles of statutory construction, the specific language of §
201(d)(2) is given precedence over the more general language of § 101 and
§ 201(d)(1).

20 *Id.* Instead of the granting of an exclusive right being the equivalent to blanket copyright
21 ownership, as Plaintiffs have advocated, the Ninth Circuit has explained that the exclusive
22 licensee becomes the *owner of the particular right* in the copyright which was transferred
23 to them. *See Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 886 (9th Cir. 2005).
24 There is no basis to argue as Plaintiffs have that this exclusive license is a transfer of the
25 entirety of the copyright ownership. *Id.* Plaintiffs again have made legal contentions that
26 are not justified under the law as it currently stands, nor is there any reason to believe that
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1 a court will change their standing interpretation of the language of the 1976 Copyright
2 Act.

3 Plaintiffs have also made legal conclusions in Paragraphs 183-184 which are
4 unsupportable as a matter of law regarding Xcentric being in violation of Section 5 of the
5 FTC Act, 15 U.S.C. § 45, and the Codes of Federal Regulations, 16 C.F.R. Part 255.0 *et*
6 *seq.* Plaintiffs argue that Xcentric is obligated to “disclose that it is paid money to make
7 these testimonials and endorsements.” Plaintiffs are asking that the Court impose a much
8 broader regulation on Defendants than the FTC does. Moreover, what Plaintiffs have
9 pointed to are FTC’s Endorsement Guides. These are not new legal principles; they
10 simply provide new examples to show how these standards apply in social media. In full,
11 those FTC endorsement guidelines can be found at
12 <http://ftc.gov/os/2009/10/091005revisedendorsementguides.pdf>. However, the FTC has
13 recognized that since these guidelines were published in October, 2009, a general state of
14 confusion has occurred regarding what, if anything, website owners need to do. To
15 address the confusion, the FTC created a fact sheet on the Revised Endorsement Guides.
16 *See* <http://ftc.gov/bcp/edu/pubs/business/adv/bus71.shtm>. Interestingly enough, these
17 Guides are simply intended to “provide the basis for voluntary compliance.” *See* 16
18 C.F.R. § 255.0(a) (emphasis added). The Guides were issued under the authority of 15
19 U.S.C. § 45, which outlaws “unfair methods of competition in or affecting commerce, and
20 unfair or deceptive acts or practices in or affecting commerce,” and authorizes the FTC to
21 enforce this prohibition by the adoption of rules and by issuing orders to cease and desist
22 against violators. It does not, notably, contemplate using these guides as the basis for a
23 private right of action, nor is there any basis to believe such an extension is warranted,
24 given that the FTC itself as exclaimed it will not likely be policing websites for violations
25 of these Guides. *See* <http://ftc.gov/bcp/edu/pubs/business/adv/bus71.shtm>.

26 Before filing a civil action, an attorney has a duty to make an investigation to ascertain
27 that it has at least some merit, and further to ascertain that the damages sought appear to
28

1 bear a reasonable relation to injuries actually sustained. *Rhinehart v. Stauffer*, 638 F.2d
2 1169 (9th Cir. 1979). Plaintiffs have identified certain damages, which they claim are
3 recoverable. However, certain items identified are not recoverable damages as a matter of
4 law, including (1) Plaintiffs’ rent for their office space for the entire time Plaintiffs have
5 been in business; (2) Plaintiffs’ phone and internet connections for the entire time
6 Plaintiffs have been in business; (3) Plaintiffs’ move-in costs for starting up their
7 business; (4) Plaintiffs’ start-up costs for their business; (5) Plaintiffs’ lobbying costs; (6)
8 amounts spent on SEO consultants and services; (7) cost of registering and maintaining
9 domain names; and (8) lost profits from commercial transactions Plaintiffs allegedly
10 would have entered into. None of these “damages” are actually recoverable as a matter of
11 law. In *Holmes v. Securities Investor Protection Corporation*, 503 U.S. 258, 268, 112
12 S.Ct. 1311, 117 L.Ed.2d 532 (1992), the Supreme Court held that a plaintiff may sue
13 under § 1964(c) only if the alleged RICO violation was the proximate cause of the
14 plaintiff’s injury.

15 Plaintiffs knew or should have known that they needed a causal connection
16 between their alleged damages and the predicate acts. This Court warned Plaintiffs’
17 counsel at the oral argument on the motion for summary judgment that it is a Rule 11
18 violation to plead a wire fraud claim without knowing what the damages are and how
19 those damages are related to the predicate acts. Instead of heeding this Court’s warning,
20 Plaintiffs pled that virtually every expense that Plaintiffs incurred in the conduct of AEI’s
21 business is a damage causally related to the predicate acts. Plaintiffs go so far as to
22 include their rent in the damages even though they know they can not allege with a
23 straight face that the rent was incurred as a result of the predicate acts.

24 In Paragraphs 309-355, Plaintiffs attempt to allege a cause of action against
25 Xcentric for “common law defamation,” “defamation per se,” “false light,” “intentional
26 interference with prospective economic relations,” “negligent interference with
27 prospective economic relations,” “negligent interference with economic relations,” and
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1 “injunction.” Plaintiffs are aware that every court of law which has addressed this
2 question, including the current Court before which this case is pending, has held that
3 Xcentric is immune from liability for defamation for statements authored by third parties
4 pursuant to the Communications Decency Act, 47 U.S.C. § 230. Thus, Plaintiffs have
5 asked this Court to find these causes of action exist when no existing case law would
6 allow them to do so, and where no reasonable extension of case law or creation of new
7 law would allow them to do so.

8 **V. PLAINTIFFS HAVE VIOLATED RULE 11(B)(1)**

9 Rule 11(b)(1) explains that by filing a pleading with the Court, the attorney
10 certifies that:

11 to the best of the person’s knowledge, information, and belief, formed after
12 an inquiry reasonable under the circumstances... it is not being presented
13 for any improper purpose, such as to harass, cause unnecessary delay, or
14 needlessly increase the cost of litigation.

15 Fed.R.Civ.P. Rule 11(b)(1). The Court in Townsend noted that sanctions must be
16 imposed if either (a) the paper is filed for an improper purpose or (b) the paper is
17 frivolous. *See, e.g., Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1362 (9th
18 Cir.1990). The word “frivolous” is shorthand used to denote a filing that is both (i)
19 baseless and (ii) made without a reasonable and competent inquiry. *Id.* Although the
20 “improper purpose” and “frivolousness” inquiries are separate and distinct, they will often
21 overlap since evidence bearing on frivolousness or non-frivolousness will often be highly
22 probative of purpose. *Id.* The standard governing both inquiries is objective. *Id.* (citing
23 *Zaldivar v. City of Los Angeles*, 780 F.2d 823, 829 (9th Cir.1986)). Plaintiffs here have
24 filed their FAC both for an improper purpose, as well as it being a frivolous pleading.

25 “The key question in assessing frivolousness is whether a complaint states an
26 arguable claim-not whether the pleader is correct in his perception of the law.” *Hudson v.*
27 *Moore Bus. Forms, Inc.*, 836 F.2d 1156, 1159 (9th Cir. 1987). Evidence of the
28 frivolousness of Plaintiffs’ filing is abundant, and can be easily understood if the Court is
to look at the big picture of the FAC. Although Plaintiffs throw a number of baseless and

1 unsubstantiated claims out for review, these are, at least facially, potentially salacious
2 enough to give the Court pause. Yet the analysis is not whether Plaintiffs individual
3 “fact” allegations are interesting, but whether Plaintiffs have stated an arguable claim.
4 Unquestionably, they have not.

5 The Court recognized the serious problems with Plaintiffs’ original complaint at
6 the July 12, 2010 hearing. Plaintiffs had in their possession each piece of evidence and
7 information utilized in crafting the FAC. Generally speaking, the arguments identified by
8 Plaintiffs as to *why* they could pursue their claims are directly in line with the arguments
9 which they actually advocate in the FAC. Yet the Court specifically addressed these
10 arguments, and explained to Plaintiffs that, absent something more, they still would be
11 unable to state a cognizable claim for wire fraud. In fact, the Court explained to Plaintiffs
12 not only the deficiencies in their pleading, and specifically, in their allegations concerning
13 the predicate act of wire fraud, but the Court also cautioned Plaintiffs about its concerns
14 regarding the reasonable investigation necessary before a pleading is filed :

15 See, that’s the problem, ma’am. This is, in my view, pretty – I’m looking for
16 a word that is not pejorative that still makes the point -- pretty unacceptable
17 lawyering because under Rule 11 you’ve now admitted to a Rule 11
18 violation. You filed a wire fraud allegation as a predicate act for your RICO.
19 As you stand at the lectern, you can’t even, in a best-world sense, articulate a
20 wire fraud. You now say you have to speak to your client. The rules clearly
21 say that you have to have a good-faith basis for alleging something in a
22 complaint, and how could you have had a good-faith basis without speaking
23 to your client and now being totally unable to articulate a basis?

24 *See* Transcript for July 12, 2010 hearing at p. 7. Unfortunately, it appears that Plaintiffs
25 failed to heed the Court’s warning.

26 A major purpose of the 1983 amendments to Rule 11 was to enable district courts
27 to deter dilatory or abusive pretrial tactics and to streamline litigation. *See Golden Eagle*
28 *Distrib. Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1536 (9th Cir.1986) (discussing views
of advisory committee members). Recognizing that that sanctions should not be used to
“chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories,” *In re*
Yagman, 796 F.2d 1165, 1182, amended, 803 F.2d 1085 (9th Cir.1986), the Ninth Circuit

1 has also explained that it must “draw the line between creative lawyering and abuse of the
2 judicial process.” *Stewart v. Am. Int’l Oil & Gas Co.*, 845 F.2d 196, 201 (9th Cir. 1988).
3 Here, the process was abused. While “[a] district court confronted with solid evidence of
4 a pleading’s frivolousness may in circumstances that warrant it infer that it was filed for
5 an improper purpose,” the Court does not need to make such an inference, since Plaintiffs
6 have also filed the FAC for an improper purpose. *Townsend*, 929 F.2d at 1365. An
7 example of the improper purpose of Plaintiffs’ filing is the fact that Plaintiffs failed to
8 heed the Court’s advice about the necessary elements of wire fraud, namely, the causation
9 elements. The Ninth Circuit has held that that “[w]ithout question, successive complaints
10 based upon propositions of law previously rejected may constitute harassment under Rule
11 11.” *G.C. & K.B. Investments, Inc. v. Wilson*, 326 F.3d 1096, 1110 (9th Cir. 2003)
12 (internal citations omitted). This is now Plaintiffs’ second bite at the apple, and they are
13 no closer to pleading any legally cognizable claim than they were when the Court
14 dismissed the original Complaint.

15 Plaintiffs’ improper purpose appears to be to cost Xcentric so much money in the
16 litigation that it will give in and remove or edit the posting about Plaintiff regardless of the
17 merits of the claim. Without a doubt, the filing of the FAC was done for the purpose of
18 harassing Defendants and costing them money, which is an improper purpose under
19 Rule 11.

20 VI. SANCTIONS ARE WARRANTED

21 “An attorney who signs the paper without such a substantiated belief ‘**shall**’ be
22 penalized by ‘an appropriate sanction.’” *Hartmax*, 496 U.S. at 393 (emphasis added).
23 The Court in *Hartmax* succinctly explained why Plaintiffs and their counsel must be
24 sanctioned: “Baseless filing puts the machinery of justice in motion, burdening courts and
25 individuals alike with needless expense and delay.” *Id.* at 398. As established herein,
26 Plaintiffs are in violation of three separate sections of Rule 11. Because each violation
27 subjects Plaintiffs – and their counsel – to sanctions, Defendants request that the Court
28

1 order Plaintiffs to pay all of Defendants' attorney fees incurred in defending this frivolous
2 lawsuit and such other relief as the Court deems appropriate.

3 **VII. CONCLUSION**

4 For all of the foregoing reasons, Defendants request that the Court order Plaintiffs
5 and their counsel to pay all of Defendants' attorney fees incurred in defending this
6 frivolous lawsuit and such other relief as the Court deems appropriate.

7 DATED this 3rd day of September, 2010.

8
9 **JABURG & WILK, P.C.**

10
11 /s/Maria Crimi Speth
12 Maria Crimi Speth
13 Attorneys for Defendants
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1 **CERTIFICATE OF SERVICE**

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

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13 And a courtesy copy of the foregoing delivered to:

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

16 /s/Debra Gower

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