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 13 Edward Magedson

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

16
 17 **ASIA ECONOMIC INSTITUTE, LLC,**
 18 ***et al.*,**

19 **Plaintiffs,**

20 v.

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

22 **Defendants.**

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

**REPLY IN SUPPORT OF
 DEFENDANTS'
 MOTION TO DISMISS
 PLAINTIFFS' FIRST AMENDED
 COMPLAINT**

Hearing Date: Sept. 20, 2010
 Time: 1:30 PM
 Courtroom: 6

23
 24 As the court has observed—this case is an unfortunate procedural and substantive
 25 mess. In order to assist the court in reaching a correct resolution of the case, Defendants
 26 offer this short Reply in support of their Motion to Dismiss (Doc. #110). As explained
 27 herein, this case is currently ripe for a full and complete disposition on the merits, and this
 28 court should dispose of the case accordingly.

**REPLY ISO DEFENDANTS'
 MOTION TO DISMISS**

2:10-cv-01360-SVW-PJW

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1 As of today, there are several unresolved dispositive (or partially dispositive)
2 motions pending before the court including the following:

TITLE	Filer	Doc. #	File Date
Motion to Dismiss re First Amended Complaint	Defendants	110	8/6/10
Motion to Strike	Defendants	124	8/23/10
Motion for Summary Judgment	Defendants	40	5/24/10

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8 In an effort to keep this case alive longer, Plaintiffs have also filed two additional
9 motions including a Motion for Leave to file a Second Amended Complaint (Doc. #116)
10 and a Motion for Reconsideration (Doc. #118 & #127). Defendants have filed separate
11 briefs opposing those motions.

12 However, it is important for the court to note that with respect to Defendants'
13 pending Motion to Dismiss (Doc. #110), that motion is entirely unopposed as to the first
14 and second causes of action (for RICO/wire fraud and RICO conspiracy) in the First
15 Amended Complaint. Specifically, on August 16, 2010, Plaintiffs filed a Notice of Non-
16 Opposition (Doc. #115) explaining that they did not oppose the Motion to Dismiss to the
17 extent it seeks dismissal of the first two claims in the FAC.

18 Other than that notice, Plaintiffs have not filed any substantive opposition to
19 Defendants' Motion to Dismiss to the extent it seeks the dismissal of any *other* claims in
20 the FAC. This is important because the Motion to Dismiss was not limited to only
21 Plaintiffs' RICO claims. Rather, in addition to the first and second claims, the motion
22 also expressly seeks the dismissal of the third (unfair business practices), eleventh
23 ("deceit" under Cal. Civ. Code §§ 1709–10) and twelfth (fraud) causes of action in the
24 FAC. Rather than offering any substantive defense as to the third, eleventh and twelfth
25 causes of action, Plaintiffs' Notice of Non-Opposition simply suggests that Plaintiffs
26 should not have to oppose the Motion to Dismiss as to any non-RICO claims because the
27 court previously ordered that the case "remains bifurcated as to the RICO Causes of
28 Action only" Notice of Non-Opposition, Doc. #115, at 2:14–15.

1 Plaintiffs cannot have it both ways. If the court's order bifurcating the case as to
 2 the RICO claims was actually intended to also mean that neither party may take any
 3 action with respect to advancing or disputing any other claims, then Plaintiffs clearly
 4 violated that order by filing a First Amended Complaint which includes several new state
 5 law claims and allegations (such as the third, eleventh and twelfth causes of action in the
 6 FAC) which this court never granted Plaintiffs leave to bring. On the other hand, if
 7 Plaintiffs were acting consistently with the court's intent when they amended their
 8 Complaint to include non-RICO claims, then it is surely appropriate for Defendants to
 9 dispute those claims with a motion under Rule 9(b) or Rule 12(b)(6), as they have done.

10 Apparently, Plaintiffs' position is that they should be permitted to take any and
 11 every conceivable action to attack and disparage Defendants, yet Defendants have no right
 12 to respond or to present any arguments in their defense. This is not the law. As such and
 13 because Plaintiffs have filed no substantive opposition to any of the arguments in
 14 Defendants' Motion to Dismiss, that motion should be considered unopposed and should
 15 be granted in its entirety. If the motion is granted, the remaining claims in this case (with
 16 dismissed claims shown as ~~strikethrough~~) will be as follows:

FAC Claim #	Cause of Action
1	RICO Wire Fraud (Dismissal Unopposed)
2	RICO Conspiracy (Dismissal Unopposed)
3	Unfair Business Practices; Bus. & Prof. Code § 17200
4	Common Law Defamation
5	Defamation Per Se
6	False Light
7	Intentional Interference w/ Prospective Economic Relations
8	Negligent Interference w/ Prospective Economic Relations
9	Negligent Interference w/ Economic Relations
10	Injunction
11	Deceit — Cal. Civ. Code §§ 1709-10
12	Fraud — Cal. Civ. Code § 1572

1 Defendants note that in this posture, there will be no federal claims remaining in
2 the case and, as such, no basis for federal question jurisdiction under 28 U.S.C. § 1331.
3 Given the anticipated absence of federal claims, Plaintiffs’ Notice of Non-Opposition
4 suggests that Plaintiffs will move to remand the case: “WHEREAS, Plaintiffs will also
5 promptly move to remand this action to California Superior Court, County of Los Angeles
6 for determination of the remaining claims, which all arise under state law” Doc. #115
7 at 3:1–3.

8 Shortly before this notice was filed, Plaintiffs’ counsel briefly attempted to meet
9 and confer about the possibility of moving to remand the case once the federal claims
10 were dismissed. Notably, this would be the second such motion—on March 29, 2010
11 Plaintiffs brought an initial Motion to Remand (Doc. #12) which was withdrawn a few
12 days later on April 7, 2010 (Doc. #17). Despite this and despite suggesting that another
13 Motion to Remand was forthcoming, it appears that Plaintiffs have, once again,
14 abandoned their efforts to seek remand of the case.

15 On this point and as was previously explained in their opposition (Doc. #14) to
16 Plaintiffs’ first Motion to Remand, even if all federal claims are dismissed from this case,
17 remand would be improper because the court still has diversity jurisdiction under 28
18 U.S.C. § 1332(a). In that context, discretionary remand is not available under 28 U.S.C. §
19 1441(c) because “[T]he exercise of diversity jurisdiction is not discretionary.” *Brockman*
20 *v. Merabank*, 40 F.3d 1013, 1017 (9th Cir. 1994) (emphasis added) (citing *Carnegie-*
21 *Mellon University v. Cohill*, 484 U.S. 343, 356, 108 S.Ct. 614, 622, 98 L.Ed. 720 (1988)).
22 Because diversity jurisdiction exists here even in the absence of any federal claims, an
23 order remanding this case would be clearly erroneous and reversible on appeal. *See*
24 *Williams v. Costco Wholesale Corp.*, 471 F.3d 975, 977 (9th Cir. 2006) (reversing district
25 court’s remand order after all federal claims were withdrawn because diversity
26 jurisdiction existed over state-law claims and in such a case, “The district court had no
27 discretion to remand these claims to state court.”)
28

1 The same is true here. Even in the absence of any federal claims, the parties are
2 citizens of different states and the amount at issue is alleged to exceed \$75,000. For that
3 reason, diversity jurisdiction exists and the case cannot be remanded to state court.
4 Instead, an on-the-merits adjudication must be reached in this court.

5 As such, Defendants believe that reaching the appropriate disposition of this case is
6 very simple. First, the court should grant Defendants' unopposed Motion to Dismiss
7 (Doc. #110) leaving only the handful of remaining state-law claims. Second, as for the
8 remaining claims, each of these claims are barred by the Communications Decency Act
9 for the reasons set forth in Defendants' fully-briefed Motion for Summary Judgment
10 (Doc. #40). Because the court only granted that motion to the extent it addressed
11 Plaintiffs' extortion claims and did not resolve the balance of the motion, the court should
12 now do so by granting the remainder of the motion in its entirety. This would produce a
13 final, on-the-merits adjudication of all remaining claims in this case and it would be the
14 only factually and legally appropriate disposition of this case.

15 DATED this 7th day of September, 2010.

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

18 /s Maria Crimi Speth
19 Maria Crimi Speth
20 Attorneys for Defendants
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on September 7, 2010 I electronically transmitted the attached
3 document to the Clerk's Office using the CM/ECF System for filing, and for transmittal of
4 a Notice of Electronic Filing to the following CM/ECF registrants:
5

6 Ms. Lisa J. 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 Stephen V. Wilson
14 U.S. District Judge

15 /s/ Debbie Gower
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