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

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

vs.

16 XCENTRIC VENTURES, LLC, an)
 17 Arizona LLC, d/b/a as BADBUSINESS)
 18 BUREAU and/or)
 19 BADBUSINESSBUREAU.COM)
 20 and/or RIP OFF REPORT and/or)
 21 RIPOFFREPORT.COM; BAD)
 22 BUSINESS BUREAU, LLC, organized)
 23 and existing under the laws of St.)
 24 Kitts/Nevis, West Indies; EDWARD)
 25 MAGEDSON an individual, and DOES)
 26 1 through 100, inclusive,)
 27 Defendants.)

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

The Honorable Stephen V. Wilson

**REPLY MEMORANDUM OF
 POINTS AND AUTHORITIES IN
 FURTHER SUPPORT OF
 PLAINTIFFS'
 MOTION FOR
 RECONSIDERATION OF ORDER
 GRANTING PARTIAL
 SUMMARY JUDGMENT ON
 PLAINTIFFS RICO CLAIMS
 PREDICATED ON EXTORTION
 AND FOR RECONSIDERATION
 OF ORDER DENYING RELIEF
 UNDER RULE 56(F)**

Date: September 20, 2010

Time: 1:30 p.m.

Ctrm: 6

REPLY MEMORANDUM OF POINTS AND AUTHORITIES

I. Introductory Statement

Defendants make several arguments in their Opposition to this Motion for Reconsideration (“Opp.”) all of which are without merit. Defendants ignore the case law controlling partial grants of summary judgment. Defendants also fail to address the new facts discovered since the Order of July 19, 2010 [DN-94] (“Order”) was made. Finally, Defendants have not opposed this Motion whatsoever with regards to reconsideration of the denial of Rule 56(f) relief.

II. Plaintiffs Have Not Repeated Arguments Pursuant to L. R. 7-18

Defendants erroneously argue that this Motion should be denied because it merely rehashes old arguments. Opp. at 2. Defendants do not, however, point to any specific arguments that were raised on the original motion.

Indeed they cannot. Plaintiffs’ motion consists of new arguments based on new evidence, new facts, and with respect to the causation standards for RICO, a request to review the legal standards applied in the Order. Defendants fail to address King Tuna, Inc. v. Anova Food, Inc., 2009 U.S. Dist. LEXIS 22901 at 5-7 (C.D. Cal. March 10, 2009); M.Z. v. Lake Elsinor Unified Sch. Dist., 2008 U.S. Dist. LEXIS 81931 at *15 (C.D. Cal. August 13, 2008) and Watson v. Palm Crest Apts., 2009 U.S. Dist. LEXIS 62002 at *5 (C.D. Cal. July 6, 2009) holding that motions for reconsideration are appropriate where the Court overlooked allegations or evidence presented on the original motion, or relied on false premises.

III. Defendants Ignore New Evidence Showing Their Earlier Factual Claims Are False or Incomplete

Defendants mischaracterize this motion when they contend that the Second Questionnaire is the only item that concerns facts in existence at the time of the original Order. Opp. at 3. New facts and evidence show that many of the sweeping claims made by Defendants based about facts in existence at the time of the original Order were simply false or misleading. Plaintiffs now understand that there have

1 been instances in October and December 2009 in which Defendants have
2 deactivated or removed Reports that involved an exchange of money and mutual
3 release of claims. See QED Settlement, Borodkin Dec. Ex. 3 at ¶2.c. These facts
4 concern a settlement made on May 15, 2009 with QED and Richard Russo,
5 Borodkin Dec. Ex. 3, and Defendants' actions in October and December 2009 in
6 deactivating reports. See Borodkin Dec. ¶¶4-5, Exs. 2-3; Blackert Dec. ¶¶8-13,
7 Exs. 1-2. This new information creates a material issue of fact warranting
8 reconsideration that there is no triable issue of fact on whether reports are ever
9 removed or ever taken down for money. See Order at 40:1-10.

10 In addition, even if Reports do not generally technically "come down," new
11 evidence regarding facts in existence at the time the Order was made show that
12 Defendants knowingly offer for money, to alter the HTML coding on Reports to
13 alleviate the harm caused by how a Report appears in search engine results on the
14 Internet. Defendants have offered, in the context of settlement and in soliciting for
15 the CAP Program, to manually insert additional text into the body and HTML of
16 Reports that alter how the Reports appear in search engines. This is not just in the
17 Second Questionnaire, but also in the May 2009 QED Settlement. See Borodkin
18 Dec. Ex. 3 at ¶2.d. Second Questionnaire, Declaration of Lisa J. Borodkin
19 ("Borodkin Dec.") Ex. 1 at 1; Reed Dec. ¶¶20-23 and Ex. D.

20 Moreover, the new evidence shows that the revisions for CAP members are
21 tantamount to removing Reports. The example Report Number 412338 for Blue
22 Coast Financial referenced by the Second Questionnaire shows a Report originally
23 posted January 15, 2009 regarding a CAP member was retracted and replaced on
24 April 9, 2010 so that none of the original Report remains. See Supplemental
25 Borodkin Dec. Ex. 1; Ex. 7 to First Amended Complaint [DN-96-7]. These facts
26 were in existence at the time of the Order but unknown to Plaintiffs, because
27 Defendants did not provide the Second Questionnaire to Plaintiffs until ordered to
28 do so by this Court on July 12, 2010.

IV. Reconsideration Is Appropriate to Request Review for Legal Error.

Defendants argue that the newly discovered evidence that Defendants offer to replace bad Reports with good Reports, as demonstrated by the Blue Coast Financial Report in the Second Questionnaire, does not warrant reconsideration because this Court found that it “cannot change the court’s conclusion that Plaintiffs failed to raise a triable issue of fact as to whether they were extorted.” Opp. at 4. In so doing, Defendants fail to discuss the extensive discussion at pages 19-25 of Plaintiffs’ moving brief of the Supreme Court’s standards for RICO causation.

Defendants also argue that a request to reconsider legal conclusions is improper. Opp. at 5. Defendants ignore Plaintiffs’ citation to Fahmy v. Hogge, 2009 U.S. Dist. LEXIS 87103 at *17 (C.D. Cal. Oct. 14, 2008), holding that a court may grant reconsideration under Local Civil Rule 7-18 for legal error. Not only is such a request permitted, but the Ninth Circuit Court of Appeals holds that a district court “necessarily abuse[s] its discretion” if its denial of a motion for reconsideration “rested upon an erroneous view of the law.” See Phelps v. Alameida, 569 F.3d 1120, 1128, 1131 (9th Cir. Cal. 2009) (reversing and remanding denial of motion for reconsideration where order was “predicated on two indisputably erroneous legal rulings”) (citing Faile v. Upjohn Co., 988 F.2d 985, 986-87 (9th Cir. 1993)).

In this case, it is respectfully submitted that this Court’s Order relied upon Defendants’ legal erroneous summary judgment briefing implying a non-existent first-party victim requirement into a RICO claim predicated on extortion. As explained by the Supreme Court in Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 128 S.Ct. 2131, 170 L.Ed. 2d 1012 (2008), the only causation required by the RICO statute is that the Defendants’ pattern of racketeering caused damage to Plaintiffs; a RICO plaintiff need not have been the direct victim of each predicate act

1 of racketeering in order to have standing under RICO. See Bridge, 553 U.S. at ___,
2 128 S. Ct. at 2136. 170 L.Ed. 2d at 1028.

3 Defendants' argument urges this Court to disregard the Supreme Court's
4 statement in Bridge that courts are not to read into the RICO statute additional
5 restrictions that Congress did not include:

6 [W]e are not at liberty to rewrite RICO to reflect their—or our—views of
7 good policy. We have repeatedly refused to adopt narrowing constructions
8 of RICO in order to make it conform to a preconceived notion of what
9 Congress intended to proscribe. See, e.g., National Organization for Women,
10 Inc. v. Scheidler, 510 U.S. 249, 252, 114 S. Ct. 798, 127 L. Ed. 2d 99 (1994)
11 (rejecting the argument that "RICO requires proof that either the
12 racketeering enterprise or the predicate acts of racketeering were motivated
13 by an economic purpose"); H. J. Inc. v. Northwestern Bell Telephone Co.,
14 492 U.S. 229, 244, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989) (rejecting "the
15 argument for reading an organized crime limitation into RICO's pattern
16 concept"); Sedima, S. P. R. L. v. Imrex Co., 473 U.S. 479, 481, 105 S. Ct.
17 3275, 87 L. Ed. 2d 346 (1985) (rejecting the view that RICO provides a
18 private right of action "only against defendants who had been convicted on
19 criminal charges, and only where there had occurred a 'racketeering
20 injury'").

21 We see no reason to change course here. RICO's text provides no basis for
22 imposing a first-party reliance requirement. If the absence of such a
23 requirement leads to the undue proliferation of RICO suits, the "correction
24 must lie with Congress." Id., at 499, 105 S. Ct. 3275, 87 L. Ed. 2d 346. "***It is
25 not for the judiciary to eliminate the private action in situations where
26 Congress has provided it.***" Id., at 499-500, 105 S. Ct. 3275, 87 L. Ed. 2d
27 346.

28 Bridge v. Phoenix Bond & Indem. Co., 553 U.S. at ___, 128 S.Ct. at 2136, 170
L.Ed. 2d at 1028 (2008) (emphasis added).

Were this Court to adopt Defendants' argument that a RICO plaintiff
alleging injury based on racketeering conduct must also show that it was the sole
victim of each predicate act of RICO would defy the reasoning and clear mandate
of Bridge and fly in the face of Congress' intent in providing a remedy under

1 RICO. Plaintiffs respectfully submit that imposing such an extra-statutory
2 requirement that Defendants must have personally extorted Plaintiffs on each
3 separate occasion would be error.

4 This argument was not raised before. Bridge was not discussed in the
5 original opposition to summary judgment because Defendants' moving brief on
6 summary judgment did not focus on the purported requirement of first-party injury
7 by predicate acts of RICO. Instead, Defendants' moving brief disputed the
8 "pattern" element of racketeering, claiming at most that only one episode of
9 attempted extortion had occurred. [DN-40 at 15] Defendants argued for the first
10 time on Reply -- without citing any legal authority -- that third-party evidence from
11 witnesses Tina Norris and Patricia Brast was "irrelevant" to this case, do not
12 establish that any harm was caused to Plaintiffs, and did not reveal a "pattern" of
13 any unlawful activity by Defendants. DN-74 at 8.

14 Defendants did not, and have never, cited any case holding that there is a
15 requirement that a RICO plaintiff must be the first-party victim of each individual
16 predicate act under RICO as well, nor does the statute so provide. Defendants'
17 conclusory, unsupported arguments simply ignore the overwhelming facts that
18 Defendants' price quotes for CAP for many thousands of dollars, together with the
19 newly discovered evidence that the CAP program systematically promises to
20 change search results into positive content, shows that Defendants systematically
21 engaged in a systematic pattern of extortion, which the Supreme Court in Bridge
22 held is enough to show proximate cause.

23 **V. Evidence that Subjects Cannot Post Rebuttals Is Relevant**

24 Defendants argue that other new evidence creating genuine issues of fact
25 discussed in the original order are "irrelevant." Opp. at 4. Defendants' assertion
26 blatantly ignores this Court's comment in the Order that it will "only address facts
27 that are **relevant** to the RICO/extortion claim." Order at 4:8 (emphasis added).
28 This Court recited allegedly undisputed evidence that subjects can always file free

1 rebuttals in making its Order. Thus, the new evidence that Defendants falsely
2 claimed that subjects of Reports can always post rebuttals is relevant to
3 reconsideration of the Order.

4 On this Motion, Plaintiffs submit evidence that certain subjects of Reports
5 attempted to post rebuttals but could not do so. The relevance is that if Defendants
6 hamper the ability of subjects of Reports to defend themselves while
7 simultaneously soliciting the subjects of Reports to join the CAP program, which
8 promises to change search results – the scenario that happened to Ms. Norris –
9 there is a pattern of racketeering that harms victims, including Plaintiffs.

10 Defendants argue that Plaintiffs have presented no reason why evidence that
11 rebuttals could not always be posted existed at the time the motion was brought
12 could not have been earlier discovered. Opp. at 4-5. The failure to post all
13 rebuttals is just one of the many new facts that were discovered between the time
14 of the briefing on the motion for summary judgment and this Motion for
15 Reconsideration. The facts emerged as Plaintiffs were attempting to gain a better
16 understanding of the conflicting evidence regarding whether Defendants had made
17 exceptions to their stated policy of never removing Reports. As Plaintiffs gained a
18 better understanding of exactly the fine lines that Defendants drew between such
19 literal statement as “redacting” names from Reports versus taking down Reports,
20 see, e.g., Gingras Declaration, Exs. 6 and 7 to Blackert Dec., new testimony
21 emerged regarding other selective applications of Defendants’ stated policies.

22 Indeed, Defendants are now doing an abrupt about-face in their briefing on
23 the Motion to Dismiss, no longer claiming that such absolutist statements as “we
24 do not take down reports” should be taken literally. Instead, Defendants are
25 backtracking to a position that such absolutist statements such as “Like any other
26 policy, exceptions may be made.” See Motion to Dismiss at 15:26-27 [DN-110].
27 Such a backtracking is cold comfort to a desperate subject of a Report, frantically
28 seeking any means possible to temper the devastating effect of a Report.

1 Prior to Defendants revising their version of their previously absolutist
2 statement about Reports never coming down, Plaintiffs did not focus on the
3 accuracy of Defendants' statement about posting a rebuttal "at any time." Plaintiffs
4 included a reference to rebuttals in their Statement of Genuine Issues to show that
5 rebuttals did not appear in search results, see PSGI ¶¶20-22 [DN-64], not to
6 concede that a subject can always file a rebuttal "at any time."¹ The new evidence
7 is relevant to reconsideration.

8 **VI. New Facts Occurring After the Order Support Reconsideration**

9 Defendants argue at pages 2 and 3 of their Opposition that reconsideration
10 cannot be based on new facts. However, a case cited by Defendants, Motorola, Inc.
11 v. J.B. Rodgers Mechanical Contractors, 215 F.R.D. 581, 586 (D. Ariz. 2003),
12 holds that reconsideration may be granted where "there are new material facts that
13 happened after the Court's decision." Defendants even concede that unlawful
14 threats made against Plaintiffs on July 20, 2010 or retaliatory actions against
15 witness Kent Hutcherson on August 6, 2010 may give rise to new claims, but argue
16 that they would have to be pursued in a separate action. Opp. at 3. Judicial
17 efficiency would be better served by reconsideration at this time.

18 Defendants' citations to Fantasyland Video, Inc. v. County of San Diego,
19 505 F.3d 996, 1005 (9th Cir. 2007), NLRB v. Jacob E. Decker & Sons, 569 F.2d
20 357 (5th Cir. 1978) and Washington v. United States, 214 F.2d 33 (9th Cir. 1954)
21 are procedurally inapposite. NLRB and Washington were decisions after trial, and
22 Fantasyland followed a complete grant of summary judgment. Unlike the Order for
23 in this case, the orders in those cases were all final, appealable orders.

24
25
26 ¹ Defendants' overly personal, irrelevant remarks at 4:14-18 of the Opposition about a concerned
27 witness that attended the July 12, 2010 hearing on this matter are disturbing. They bear no
28 relevance to the legal issues on this Motion and serve no purpose other than to embarrass and
stigmatize the witness and chill further exercise of the right to attend the public proceedings.
This witness has a particularly persistent criminal stalker whose Reports Defendants have
refused to remove, despite her pleas and submission of police and law enforcement reports.

1 Defendants completely ignore the case law that partial summary judgment
2 orders that do not dispose of all claims in the action are non-final, non-appealable
3 orders unless the Court issues a Rule 54(b) certificate. See Bonner v. Perry, 564
4 F.3d 424, 427 (6th Cir. 2009). Therefore, they can be altered. See St. Paul Fire &
5 Marine Ins. Co. v. F.H., 55 F.3d 1420, 1425 (9th Cir. 1995), overruled on other
6 grounds, Government Empls. Ins. Co. v. Dizol, 133 F.3d 1220, 1223 (9th Cir.
7 1998), holding that a court may revise an order at any time before **final** judgment.
8 Therefore, this Court may consider the new facts occurring after the Order in
9 ruling on this Motion for Reconsideration. Defendants' bald statement that "as a
10 matter of law events that took place *after* this court entered partial summary
11 judgment on July 12, 2010 cannot support reconsideration of the court's prior
12 ruling," Opp. 2:23-25, misapplies the procedural record and contradicts St. Paul.

13 Thus this Court may consider on this Motion, new facts of threats and offers
14 to grant illegal releases of prospective future retaliatory lawsuits made on July 20,
15 2010, see Blackert Dec. ¶¶14-15, 23, Ex. 6 at 7; Mobrez Dec. ¶¶13-14; Borodkin
16 Dec. ¶¶6-8 and the punitive actions taken against an important witness for
17 Plaintiffs, see Blackert Dec. ¶¶19-21, Exs. 4-5; Borodkin Dec. ¶¶10-11, Ex. 5, in
18 reconsidering whether Defendants have engaged in a pattern of racketeering with
19 extortion as a predicate act, that caused harm to Plaintiffs.

20 **VII. This Court May Consider Defendants' Posting of Reports about** 21 **Witnesses As Intimidation and Undermining Claims to CDA Immunity**

22 This Court can also consider the effects of Defendants' tactics in threatening
23 Plaintiffs by proxy through threats to witnesses and the fact that Defendants
24 personally posted a negative Report about the witness, undermining their claim to
25 Communications Decency Act immunity. Plaintiffs have submitted evidence that
26 Defendants personally wrote a Report about witness Kent Hutcherson after his
27 participation in this case. See Blackert Dec. ¶22, Ex. 5; Borodkin Dec. ¶11, Ex. 5.
28

1 This new development merits reconsideration to the extent the Order was
2 heavily influenced by the claim that all content on Defendants' website is written
3 by third parties. In this case, Defendants expressly threatened to expose the witness
4 to disgrace by threatening to create a "Hall of Shame" on their website if he did not
5 comply with their demands, and followed through on that threat. See Borodkin
6 Dec. ¶¶10-11, Ex. 5, Blackert Dec. ¶¶19-22, Exs. 3-5. Defendants thus cannot
7 rightfully claim the immunity under the Communications Decency Act accorded to
8 mere passive conduits of third-party speech in cases like Fair Hous. Council of San
9 Fernando Valley v. Roommates.Com, LLC, 521 F.3d 1157, 1169 (9th Cir. 2008).

10 **VIII. Defendants Have Not Opposed Reconsideration of Rule 56(f) Relief**

11 Defendants have submitted no argument or authority in opposition to this
12 Motion to the extent it seeks reconsideration of the Order denying Plaintiffs'
13 Motion for Rule 56(f) relief. Notably, Defendants have not attempted to resist this
14 motion by denying the new facts of threats made on September 20, 2010 discussed
15 at pages 16-18 of the Motion. Defendants filed a Motion to Strike, but have cited
16 no law to refute those new facts as justifying reconsideration of reconsideration of
17 the motion denying leave to take additional discovery. Defendants have no
18 provided their version of events, vaguely promising to tell the Court in secret their
19 version of events, while simultaneously requesting sanctions against Plaintiffs.

20 The new discovery sought is supported by the Borodkin and Blackert
21 declarations as required by Rule 56(f). Specifically, Plaintiffs would seek leave to
22 take discovery of (1) other settlement arrangements that were made either as an
23 exchange of money payments for revising or redacting the text of Reports and
24 HTML, and (2) other instances in which Defendants offered a release of claims
25 against counsel in exchange for money settlements against clients.

26 As discussed more thoroughly in Plaintiffs' Opposition to Defendants'
27 Motion to Strike at 4-7 [DN-132], such matter is discoverable and not privileged.
28 See United States v. ASCAP, 1996 U.S. Dist. LEXIS 4159 (S.D.N.Y. Apr. 2,

1 1996), See also Bd. of Trs. v. Tyco Int'l. Ltd., 253 F.R.D. 521, 523 (C.D. Cal.
2 2008) (no federal settlement privilege governing confidentiality of settlement
3 agreements and related documents). No privilege applies to bar consideration of
4 illegal threats or to consider such facts as the basis for seeking discovery. See
5 Uforma/Shelby Bus. Forms v. NLRB, 111 F.3d 1284, 1294 (6th Cir. 1997)
6 Phoenix Solutions, Inc. v. Wells Fargo Bank, N.A., 254 F.R.D. 568, 584 (N.D.
7 Cal. 2008); Vulcan Hart Corp. (St. Louis Div.) v. NLRB, 718 F.2d 269, 277 (8th
8 Cir. 1983); 23 Wright & Graham Fed. Prac. And Proc.: Evid § 5314 (1st ed.
9 1980).

10 Because this motion for reconsideration of the denial of Rule 56(f) relief is
11 unopposed, it should be granted. Plaintiffs should be permitted to take discovery
12 of (1) offers to settle and to revise reports in exchange for settlement payments
13 and (2) settlement payments procured by threats.

14 **IX. Conclusion**

15 For the foregoing reasons, this Motion for Reconsideration of the Order
16 granting partial summary judgment and denying leave to take Rule 56(f) discovery
17 should be granted.

18 DATED: September 7, 2010

Respectfully submitted,

21 By: /s/ Lisa J. Borodkin

22 Daniel F. Blackert

23 Lisa J. Borodkin

24 Attorneys for Plaintiffs,

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CERTIFICATE OF SERVICE

I certify that on September 7, 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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