

Xcentric Ventures LLC, an )  
 Arizona limited liability )  
 corporation, and Jaburg & ) No. **CV 10-1931-PHX-NVW**  
 Wilk, P.C., a professional )  
 corporation, )  
 )  
 Plaintiff, ) **Phoenix, Arizona**  
 vs. ) **September 21, 2010**  
 ) **1:40 p.m.**  
 )  
 Shawn Richeson, )  
 )  
 Defendant. )

BEFORE: **THE HONORABLE NEIL V. WAKE**  
UNITED STATES DISTRICT JUDGE

(*Motion for Preliminary Injunction*)

Official Court Reporter:  
Laurie A. Adams, RMR, CRR  
Sandra Day O'Connor U.S. Courthouse, Suite 312  
401 West Washington Street, SPC 43  
Phoenix, Arizona 85003-2151  
(602) 322-7256

Proceedings Reported by Stenographic Court Reporter  
Transcript Prepared by Computer-Aided Transcription

1 APPEARANCES:

2 For the Plaintiffs:

3 JABURG & WILK, P.C.

4 By: **Maria Crimi Speth, Esq.**

5 By: **Adam S. Kunz, Esq.**

6 3200 N. Central Avenue

7 Suite 2000

8 Phoenix, AZ 85012

9 For the Defendant:

10 IN PROPRIA PERSONA

11 By: **Shawn Richeson**

12 1906 Twilight Drive

13 Killeen, TX 76543

## P R O C E E D I N G S

THE COURTROOM DEPUTY: Civil Case 2010-1931, Xcentric LLC, et al., versus Shawn Richeson. This is the time set for a preliminary injunction hearing.

Counsel, please announce for the record.

13:40:35

MR. KUNZ: Thank you, Your Honor. I'm Adam Kunz for Xcentric Ventures and Jaburg & Wilk.

MS. SPETH: Maria Speth for Xcentric Ventures and Jaburg & Wilk.

MR. RICHESON: Shawn Richeson the defendant.

13:40:46

THE COURT: Speak into microphone, please.

MR. RICHESON: I'm Shawn Richeson, the defendant.

THE COURT: All right. Good afternoon.

All right. Mr. Kunz, how do you want to proceed in terms of putting in the evidence you want to put in?

13:41:02

MR. KUNZ: Well, Your Honor, if I may have your indulgence, what I'd like to do first is look at defendant Richeson's answer and motion, Page 10 of 13.

THE COURT: Didn't I already rule on this?

MR. KUNZ: Not about what I'm going to draw your attention to, Your Honor. He certainly did apply for a preliminary injunction that would apply for us, and I believe you directed him that if he did it in the proper way it would be considered. But the very first paragraph in Section 2 says, "Defendant does hereby stipulate to the plaintiffs' pending

13:41:28

13:41:41

1 application and motion for temporary injunction during the  
2 advancement of this cause of action."

3 THE COURT: Mr. Richeson, is that correct?

4 MR. RICHESON: Yes, Your Honor, and no. When I first  
5 applied for an expansion on that temporary injunction, I was -- 13:41:55  
6 I applied the law wrong. So you had ruled on it yesterday, and  
7 at this time I'd like to go ahead and hold a hearing.

8 THE COURT: Well, go ahead and what?

9 MR. RICHESON: And have you do your hearing on this,  
10 Your Honor. I don't want to arbitrarily stipulate. 13:42:12

11 THE COURT: I don't understand what you are saying.  
12 You are agreeing to the injunctive relief that the plaintiff is  
13 seeking, correct?

14 MR. RICHESON: No, Your Honor. I'm not agreeing to  
15 that. 13:42:26

16 THE COURT: So are you retracting what you wrote here  
17 in your answer?

18 MR. RICHESON: Yes, Your Honor.

19 THE COURT: Well, Mr. Kunz, I'm not sure he can  
20 retract it but are you prepared to proceed? 13:42:38

21 MR. KUNZ: I would be prepared to proceed, Your Honor,  
22 but I don't think he can retract it.

23 THE COURT: Well, Mr. Richeson, could you explain to  
24 me -- actually, it would be better if you would come up to the  
25 podium because the microphone is better there. 13:42:56

1 MR. RICHESON: Okay, Your Honor.

2 THE COURT: Would you explain to me what your basis is  
3 for seeking leave to retract what you wrote here, which looks  
4 like something that normally a lawyer would rely on when they  
5 read it? What's your basis for retracting it and asking to  
6 proceed with evidence today? 13:43:11

7 MR. RICHESON: Your Honor, I improperly made that  
8 application. I didn't have a great deal of time to respond and  
9 enter my counterclaims. And as I read over the rules of --  
10 Federal Rules of Civil Procedure, I see that I did things quite 13:43:30  
11 wrong. So when I drafted my answer, I tried to mix together my  
12 application for a temporary injunction to expand the scope of  
13 Mrs. Speth's temporary injunction. And after receiving Your  
14 Honor's ruling yesterday, it became clear that I did this  
15 improperly. So at this time, I would like to -- 13:43:50

16 THE COURT: Well, I heard what you said. But it's  
17 really not making sense to me, because what my ruling was is  
18 that you, like any litigant, you are free to ask for injunctive  
19 relief if you can demonstrate the facts and the legal  
20 principles that would warrant granting that relief. But there 13:44:08  
21 are procedures for following that. And that's all I ruled,  
22 that this is not the correct procedure. You can make such a  
23 request and we would schedule it in due course.

24 My question to you is different. It says here, as Mr.  
25 Kunz pointed out, that in your answer you consented to the 13:44:27

1 temporary injunction during the advancement of this cause. And  
2 so I'm asking you what your basis is for seeking to be relieved  
3 from that, which is different from your failure to properly  
4 present your request for your own injunction, which we will, if  
5 it's done right, we will consider it in due course. 13:44:52

6 But what is your basis for seeking to be relieved of  
7 this stipulation for the entry of a temporary injunction during  
8 the pendency of this case?

9 MR. RICHESON: Now that the question's been posed like  
10 that, Your Honor, there really is no basis for my retraction of 13:45:10  
11 that.

12 THE COURT: Very well then. I will accept the  
13 stipulation and hold the defendant to it. And I think that  
14 eliminates the need for the plaintiffs to go forward with the  
15 evidence to prove up the factual basis for their injunction. 13:45:25  
16 And that's your -- that's what you are seeking, Mr. Kunz,  
17 correct?

18 MR. KUNZ: Yes, Your Honor. That's exactly right.

19 THE COURT: Now, Mr. Richeson, let me just say again,  
20 if you want to seek an injunction, you have to file a 13:45:42  
21 counterclaim. It has to -- stating a claim is a technical  
22 legal expression. What it means is that it describes something  
23 for which the law provides a remedy that is something that's  
24 contrary to the law and for which a remedy will be provided,  
25 and then you have to meet other responsibilities as well to get 13:46:02

1 an injunction.

2 An injunction, in the beginning of the case, is an  
3 extraordinary remedy. It's not granted as a matter of course,  
4 and it's done to prevent irreparable harm and most of the time  
5 somewhat similarly, it can be done to prevent a change in the 13:46:18  
6 status quo that would preclude the Court from granting  
7 effective relief at a later time. And there are other  
8 justifications as well, but those are the main ones.

9 So you can file such a motion. You file it, the other  
10 side responds to it, I look at it. I typically will call you 13:46:34  
11 all in. You are from out of town, right?

12 MR. RICHESON: Yes, Your Honor.

13 THE COURT: For non-evidentiary matters, non-trials, I  
14 allow people out of state to appear by telephone. We usually  
15 get on the phone schedule a time to have that hearing and then 13:46:50  
16 we have that hearing. But we're not to that phase yet on any  
17 relief requested by you.

18 So I think you can take your seat, because that  
19 answers my questions. I do have some other things I need to  
20 put to both sides. 13:47:08

21 Mr. Kunz, Judge Teilborg raised the question of  
22 jurisdictional amount in this case.

23 MR. KUNZ: Yes.

24 THE COURT: I did want to explore that. What is the  
25 basis for jurisdictional amount in this case? And Judge 13:47:22

1 Teilborg told me -- and there's always a risk I might not get  
2 this entirely correct, so you can help me out. But he told me  
3 that you explicitly disclaimed any relief or damages based on  
4 actual damages to either of the plaintiffs.

5 Now, is that correct?

13:47:49

6 MR. KUNZ: It is correct that neither plaintiff is  
7 seeking actual damage. We certainly didn't claim that it  
8 didn't happen, but we are not seeking it as a remedy here.

9 THE COURT: And so walk me through the jurisdictional  
10 amount. And Mr. Richeson, let me explain what this is about.

13:48:08

11 For -- the federal courts don't hear all cases. The state  
12 courts can hear essentially any case, but for a case to be  
13 brought in federal court, it has to be brought under a specific  
14 statute that gives this court jurisdiction. And one such  
15 source of jurisdiction is lawsuits between citizens of  
16 different states where there is more than \$75,000 in  
17 controversy. That is, the lawsuit is over more than \$75,000.

13:48:26

18 Now, you are a citizen of Texas, right?

19 MR. RICHESON: Yes, Your Honor.

20 THE COURT: And Mr. Kunz.

13:48:46

21 MR. KUNZ: You wish me to address your question?

22 THE COURT: You can come up to the podium. And I  
23 would like to hear your presentation as to how it is that you  
24 get jurisdictional amount in this case.

25 MR. KUNZ: First, Your Honor, we're seeking nominal

13:49:04



1 damages, which I realize doesn't add much to the sum. Secondly  
2 would be presumed damages under the cause of actions we have  
3 brought which exceeds \$75,000 alone. And most --

4 THE COURT: How is that? I have looked at that, and I  
5 don't find anything that answers that question. Certainly 13:49:23  
6 doesn't answer it in your favor. So walk me through that in  
7 more detail as to how the presumed damages of these causes of  
8 action can get to the \$75,000 because it seems to me if it  
9 does, every single lawsuit for these claims will meet the  
10 federal jurisdictional amount. 13:49:47

11 Go ahead.

12 MS. KUNZ: May I confer with Ms. Speth?

13 THE COURT: Certainly.

14 (Discussion off the record between plaintiffs'  
15 counsel.) 13:50:38

16 MR. KUNZ: Your Honor, our position is that the  
17 presumed damages is governed by the amount claimed by the  
18 plaintiffs in this case, not by any particular statutory  
19 amount. And that we would seek more than \$75,000 without  
20 proving the actual damages. 13:50:55

21 THE COURT: Well, for -- to meet the jurisdictional  
22 amount for an original jurisdiction case, it must be not clear  
23 to a legal certainty that you don't get to that amount. And  
24 I'm looking for any basis to see how you would get \$75,000  
25 presumed damages when you disclaim any actual damages whatever. 13:51:15

1 You can get a dollar or \$100 for nominal damages.

2 But when the baseline of your claim is nominal damages  
3 and from that you build presumed damages, and again, I repeat  
4 myself, but the unusual circumstance here is that -- and I have  
5 never seen a case like this. I mean, I understand why you did 13:51:39  
6 it, but I have never seen a case like this, where you have  
7 disclaimed any actual damages. So once we mentally factor out  
8 all actual damages and your baseline is nominal damages, how is  
9 it anything other than a legal certainty that you cannot get  
10 \$75,000 presumed damages when you have no actual damages? 13:51:59

11 MR. KUNZ: Well, let me answer that the best I can.  
12 And I don't mean to parse words. But we have not disclaimed  
13 expressly, we're simply not seeking. And I think there's an  
14 important difference there, because if we needed to try to  
15 prove actual damages we would want the door open for us to do 13:52:19  
16 that.

17 THE COURT: I understand from what Judge Teilborg told  
18 me that the reason you don't want to implicate actual damages  
19 is that neither the plaintiffs want to have their business  
20 affairs and profits opened up to discovery, correct? 13:52:32

21 MR. KUNZ: Yes.

22 THE COURT: I don't see how you accomplish that. Even  
23 if you don't seek monetary damages, if you are going to be  
24 asking for general damages and presumed damages, I don't see  
25 how you can prevent the defendant from inquiring into those 13:52:48

1 subjects because surely those subjects, even if you don't want  
2 your compensation you are entitled to are going to be relevant  
3 to what presumed damages would be. Because if you stand up and  
4 ask for \$75,000 or 75 million, it's okay for the defendant to  
5 come back and see what your likely damages are, what your 13:53:09  
6 profits are from this activity. It seems to me that you are  
7 not going to shut off the discovery that you don't want to have  
8 gone into by having it both ways, saying I don't want to be  
9 paid for my actual damages but I want the benefit of it anyway  
10 for presumed damages. I just don't see how you are going to 13:53:26  
11 stop the discovery that you don't want to go forward.

12 MR. KUNZ: I understand what you are saying, Judge  
13 Wake. Truly I do. Let me tell you how we would like to do it,  
14 which I think is legitimate.

15 The amount of \$75,000, first of all, is not \$75 13:53:39  
16 million. And if we claim that there should be \$75 million of  
17 presumed damages I suppose that we would have to bring our  
18 equity partners or firm accountant to the stand and tell you  
19 that we have many clients who pay us more than that. However,  
20 the figure \$75,000 is well within the reach of the amount a 13:53:58  
21 typical client would pay us for a typical single piece of  
22 litigation.

23 Now, I believe there is no real dispute that Mr.  
24 Richeson's prime objective in spreading lies about Jaburg &  
25 Wilk was to make sure, I think one of the quotes is, we would 13:54:17

1 have to stand on a street corner offering to sue for food. And  
2 if Mr. Richeson was successful in deterring even a single  
3 typical litigation client, the damages would very likely exceed  
4 \$75,000.

5 Now, I don't think it takes specific discovery into 13:54:35  
6 our privileged files --

7 THE COURT: Well, actually, you know, if this case  
8 were to go to trial you have to prove that up as a  
9 jurisdictional matter. There's a Ninth Circuit case we're all  
10 familiar with where a judge of this court got reversed in a 13:54:53  
11 diversity case because at trial, he didn't require any proof of  
12 the amount. And the Court said no case and threw it out on  
13 appeal.

14 So you are going to have to come in and prove what you  
15 just told me at trial or before you can get any judgment in the 13:55:08  
16 case. It's not presumed.

17 Go ahead.

18 MR. KUNZ: I apologize. I didn't mean to interrupt.

19 If what you are telling me is that I have to do  
20 exactly what I promised you to do, I can certainly do that. If 13:55:23  
21 what you are telling me is that I have to haul the firm's  
22 clients into the witness box --

23 THE COURT: Let me interrupt you. I'm not telling you  
24 how to try the case. I'm just saying that you can't go to  
25 trial and get a judgment in your favor without proving 13:55:38

1 jurisdictional amount. You cannot ignore it. I'm not telling  
2 you how you have to prove it, but you can't ignore it. So you  
3 can figure out how to prove it, but if you don't have any  
4 evidence of it, dismissal for lack of jurisdiction is the only  
5 permissible outcome.

13:55:56

6 I'm not trying to quarrel with you. I'm trying to  
7 understand this, because I can understand why you and Xcentric,  
8 for a variety of reasons, would like your business affairs not  
9 to be inquired into. I understand that perfectly.

10 But -- and you can certainly go to the superior court,  
11 but you have an extra burden to come here.

13:56:18

12 MR. KUNZ: I understand what you are saying, Your  
13 Honor. And I can represent that we will very carefully plan  
14 our strategies to prove the elements we need to understanding  
15 that we may be subject to not only a motion in limine but a  
16 motion to dismiss.

13:56:37

17 If I may, Your Honor. I didn't --

18 THE COURT: Go ahead. I'm listening.

19 MR. KUNZ: In this particular instance, punitive  
20 damages are also important, and the most important component of  
21 the damages. And the conduct certainly warrants them, and the  
22 amount required to deter not only Mr. Richeson, who is  
23 essentially judgment proof, but others who would engage in the  
24 same conduct is certainly in excess of \$75,000.

13:56:57

25 THE COURT: Again, under the U.S. Supreme Court cases

13:57:18

1 setting very rough due process limitations on punitive damages,  
2 you cannot possibly get from nominal damages to \$75,000 in  
3 punitive damages.

4 MR. KUNZ: I under --

5 THE COURT: Go ahead.

13:57:36

6 MR. KUNZ: I understand you are being skeptical about  
7 that. But I believe we have authority to indicate that in  
8 appropriate cases, nominal damages or other elements are proved  
9 that punitive damages as a deterrent are appropriate.

10 THE COURT: Go ahead.

13:57:51

11 MR. KUNZ: I'm finished. Thank you.

12 THE COURT: Now, your Count 1, interference with  
13 contract, that's for both plaintiffs?

14 MR. KUNZ: Correct.

15 THE COURT: And I take it there is going to be no  
16 interference with the contractual attorney/client relationship  
17 between Xcentric and the law firm, is there?

13:58:02

18 MR. KUNZ: On the contrary. There has been.

19 THE COURT: I would think that the relationship has  
20 been thriving. Are you telling us that you are in -- that your  
21 client or your law firm is considering diminishing that  
22 relationship because of Mr. Richeson's actions?

13:58:16

23 MR. KUNZ: Let me give you one example that I'm  
24 comfortable giving you, which is apparent from uncontested  
25 facts in this case.

13:58:36

1           Mr. Richeson's extortion forced Xcentric Ventures to  
2 do something that it doesn't do, that's against its policy to  
3 make redactions under threat.

4           THE COURT: I'm asking about the attorney/client  
5 relationship, Jaburg & Wilk's contract with Xcentric and back 13:58:52  
6 and forth. That's what I'm asking about. I'm asking whether  
7 you are alleging that that relationship is in threat of being  
8 harmed from the perspective of either the attorney or the  
9 client. And your comment about redaction strikes me as not  
10 responding to that. 13:59:12

11           MR. KUNZ: I need to find a way to express this so you  
12 understand that it is responsive. I'm not claiming that the  
13 relationship is destroyed. But I am claiming that the  
14 relationship is damaged and has been interfered with. The  
15 extortionate threats to destroy the reputation of Jaburg & Wilk 13:59:29  
16 forced Xcentric Ventures to make concessions.

17           THE COURT: So what.

18           MR. KUNZ: It's an interference of the contractual  
19 relationship between attorney and clients.

20           THE COURT: I completely do not see that the firm 13:59:45  
21 renders legal services and gets paid. There is a complete gap  
22 between what you are saying and the firm's interests. I just  
23 don't understand that. The firm renders services, sends a bill  
24 and are paid. So what if they redacted something? I don't see  
25 the connection. 14:00:07

1 MR. KUNZ: Judge Wake, I'm happy to try and explain it  
2 to you. But I certainly want to avoid debating with you.  
3 Would you like me to try and elaborate?

4 THE COURT: No. Please. Because I do not see any  
5 connection there at all that would constitute interference with 14:00:18  
6 the law firm's contract with Xcentric or interference with  
7 Xcentric's contract with the law firm that might be some other  
8 business injury to Xcentric. But how does it interfere with  
9 the attorney/client contract?

10 MR. KUNZ: Putting aside other ways that there was 14:00:38  
11 interference between Xcentric's other clients versus the  
12 relationship between Xcentric and Jaburg & Wilk, putting that  
13 aside, the relationship between attorney and client is far more  
14 than the mercenary relationship for simply getting paid to do  
15 some service work. 14:01:01

16 THE COURT: But this tort compensates for loss of  
17 economic value.

18 MR. KUNZ: Yes.

19 THE COURT: So walk me through how you get there.

20 MR. KUNZ: The -- Your Honor, are you telling me that 14:01:09  
21 unless we can show a reduction in the economic value of the  
22 contract that we can't claim an interference? Because if you  
23 are telling me --

24 THE COURT: What else are you claiming? What  
25 non-economic interference are you claiming? Seems to be an 14:01:29



1 oxymoron for this tort.

2 MR. KUNZ: Well, I'm very daunted in the face of you  
3 telling me it's an oxymoron. But the relationship of trust and  
4 confidence, the fiduciary relationship between an attorney and  
5 client, the client's complete confidence in the attorney to  
6 serve their interests above all else is damaged when the law  
7 firm has to go to the client and say will you please change  
8 your fundamental policies, even for a brief period of time, in  
9 order to preserve us from the great harm threatened from  
10 Richeson. That is not putting the client's interests ahead of  
11 the attorney's.

14:01:45

14:02:03

12 THE COURT: Then you need to withdraw, or Ms. Speth  
13 needs to withdraw and you have a claim. But you have not  
14 withdrawn, have you?

15 MR. KUNZ: We have not withdrawn.

14:02:13

16 And for the record, and most respectfully, I don't  
17 think the harm has to rise to the level of the law firm  
18 withdrawing, in other words, the relationship being destroyed  
19 or inoperable in order for it to be damaged.

20 THE COURT: I do believe it has to be an economically  
21 measurable injury, and I haven't heard anything from you yet  
22 that gets into that realm on this Count 1.

14:02:31

23 Now, there may be relationships with other clients.

24 MR. KUNZ: And I certainly agree, and I think it  
25 almost goes without saying how relationships with other clients

14:02:51

1 are damaged. But I'm not sure if you are asking --

2 THE COURT: Well, I'm asking you, looking at this  
3 aspect of the relations with other clients or other customers,  
4 how -- jurisdictional amount always has to be quantified.  
5 There's nothing loosey-goosey about it. If you can't get 14:03:19  
6 through one of the accepted measures of the quantification to  
7 \$75,000 you are out of court. You have to go to state court.  
8 So I'm asking how you measure the jurisdictional amount aspect  
9 of this for relationships with other clients.

10 MR. KUNZ: How do we measure it? Candidly we haven't 14:03:46  
11 marshaled the proof yet.

12 THE COURT: I fear that it is entirely speculative.  
13 Entirely speculative. Because first of all, your firm  
14 represents quality business clients and other people. Do they  
15 read Mr. Richeson's web pages, and do they pay any attention? 14:04:11  
16 And don't you have to prove a probability that people who are  
17 your clients or are likely to be your clients see that and be  
18 deterred by it which seems -- I suppose anything could happen  
19 in the world, but there has to be a realistic prospect of it  
20 happening. What is that realistic prospect of that? 14:04:40

21 MR. KUNZ: Well, let me give you one example. Let's  
22 say a potential client, one who is seeking, say, estate  
23 planning services from the branch of our firm that does that,  
24 decides to do a Google search on the name of our firm and that  
25 prominently featured in the search engine results, whether it's 14:05:00

1 Google or Yahoo or Bing or any of the other search engines is a  
2 prominent posting saying, "Jaburg & Wilk hires child molesters  
3 to be partners and covers it up." That is enough in this legal  
4 market to deter a potential client for them simply to move on  
5 and consider a different firm that can offer the same services. 14:05:24

6 THE COURT: My concern with that is that every step of  
7 it is sheer speculation.

8 MR. KUNZ: Well --

9 THE COURT: Well, obviously I'm having this dialogue  
10 with you because I am concerned about the jurisdictional amount 14:05:43  
11 here. And we'll give you ample opportunity to address  
12 everything that may matter.

13 Let me ask about Count 2. This is the Arizona  
14 racketeering count --

15 MR. KUNZ: Yes. 14:05:57

16 THE COURT: -- for theft. Who is asserting this  
17 count?

18 MR. KUNZ: Jaburg & Wilk.

19 THE COURT: And not Xcentric?

20 MR. KUNZ: I believe Xcentric Ventures is also 14:06:09  
21 asserting the count.

22 THE COURT: What's being stolen from each of them?

23 MR. KUNZ: Xcentric is forced by the extortion to  
24 alter the postings on rip-off report web page. So there's an  
25 active extortion that forces Xcentric Ventures to give up, if 14:06:33

1 you will, its valuable property in the postings on the  
2 internet.

3 THE COURT: But the statute requires theft by  
4 extortion to obtain property or service by means of a threat.  
5 What property or service is each plaintiff --

14:06:54

6 MR. KUNZ: Well, the property that Xcentric is giving  
7 up is the right to maintain its postings.

8 THE COURT: But it's not its postings. The reason it  
9 claims to escape defamation liability is that they are not the  
10 postings of Xcentric. So I'm challenged as to how an immunity  
11 from defamation that exists solely by virtue of the disclaimer  
12 of those defamatory postings, allegedly defamatory postings,  
13 can become the property of Xcentric to support why -- this is a  
14 criminal statute as well. It's not just a civil remedy. It's  
15 a criminal statute. So this is a bit of a challenge, too, as  
16 to what property Xcentric has in these postings supposedly made  
17 by third persons with no involvement with Xcentric.

14:07:11

14:07:35

18 MR. KUNZ: Xcentric has the same rights in those  
19 postings as any license holder of any copyright has in the  
20 material that they are licensed to have. And the CDA immunity  
21 under Section 230 applies because Xcentric did not create the  
22 context at issue. But Xcentric certainly has the right to, in  
23 fact, the exclusive right to have the content and to have it  
24 displayed on the web page as it was posted by its authors. And  
25 being forced to take that content down is taking the property

14:07:56

14:08:26

1 right away from Xcentric.

2 THE COURT: Well, we're just having a highly  
3 preliminary discussion here, and I don't want you to take  
4 anything I'm saying, any questions I'm asking as reflecting any  
5 final resolution of anything.

14:08:41

6 But I am highly skeptical of that as well.

7 And what about Jaburg & Wilk? How are they being --  
8 what is their cause of action under the Arizona racketeering  
9 statute for the theft?

10 MR. KUNZ: They are the victim of the extortion. And  
11 the property they lose is the interest in their attorney/client  
12 relationship both with Xcentric and other clients.

14:09:01

13 THE COURT: You know, a long time ago, I tried a  
14 six-week jury trial on the Arizona racketeering statute, and  
15 that was like 25 years ago, back then I thought I was the  
16 world's leading authority on that statute. And I don't even  
17 think that now.

14:09:20

18 But among the general things I recall, these are  
19 criminal statutes, and there may be serious question here as to  
20 whether you have even stated a claim for racketeering.

14:09:43

21 Now, you have obviously stated a claim for defamation.  
22 You may well have stated a claim -- well, I suspect you claim  
23 you have stated a claim for tortious interference with  
24 contract. My concern is the dollar amounts of the values of  
25 it.

14:10:06

1           And when we get to Count 3, the statutory harassment  
2 claim, this is a state statute that has virtually no appellate  
3 case law. And it's actually a relatively new statute. And  
4 it's somewhat sweeping in its language. It's meant generally  
5 for peacekeeping in troubled situations. But again, under the 14:10:41  
6 Arizona harassment statute, the linchpin there is basically  
7 conduct activity that disturbs other people. Again, how do you  
8 get to \$75,000 on that statute?

9           MR. KUNZ: I don't know that we can get to \$75,000  
10 based on the harassment. 14:11:17

11           THE COURT: Every little bit helps.

12           So then the defamation, I mean, this is, again,  
13 without expressing any final judgment or opinion, at least just  
14 on the face of it, appears to be egregious defamation.

15           MR. KUNZ: Your Honor, may I qualify my last answer? 14:11:44

16           THE COURT: Yeah.

17           MR. KUNZ: Because I want it to be clear. Actual  
18 damages for harassment may be difficult to prove in the amount  
19 of 75,000. And I understand your concerns about the  
20 constitutional boundaries of punitive damages. But again, we 14:11:59  
21 rely on the punitive damages element.

22           THE COURT: Well, and again, going back to the  
23 statutory harassment, that's -- the sole remedy under that  
24 statute is the injunction. Of course for injunction cases  
25 there's various tests as to how you measure the amount in 14:12:14

1 controversy.

2 Well, I have done -- I have been asking a lot of  
3 questions. Is there anything else you would like to present to  
4 me on either the merits or -- well, let me back up before I put  
5 that open-ended question to you. 14:12:52

6 I do want to get to a level of comfort that I do not  
7 yet have about the jurisdictional amount. And we can do this  
8 very quickly, because this is time urgent.

9 I also have some concern about the scope of the  
10 injunction. Let me go back to the jurisdictional amount. With 14:13:21  
11 you disclaiming any actual damages, and where the only relief  
12 you are seeking is, again, the nominal damages, the general  
13 damages, the punitive damages, and the injunction, we can look  
14 to the injunction as a measure of jurisdictional amount. And  
15 there are different cases that articulate different measures of 14:13:50  
16 that.

17 But -- so I think I would benefit from some briefing  
18 from you on two aspects of this: One is the injunction measure  
19 of damages. Some cases look at it as the equivalent of the  
20 economic benefit to the plaintiff and some look at it as the 14:14:21  
21 equivalent of the economic detriment to the defendant. It  
22 would seem that there is no other economic detriment to the  
23 defendant from this injunctive relief that you seek, none or  
24 little. Doesn't have to be none. We can just say little.

25 So I will benefit from you looking at the authorities 14:14:45

1 and applying them to this case. And then also, there are  
2 plenty of cases out there dealing with punitive damages and  
3 jurisdictional amount. Plenty of them. And I have authored  
4 some of them myself. And it's not enough to simply ask for a  
5 large amount of punitive damages. You have to have more than  
6 that. And one view for which you will find plenty of case  
7 authority is that punitive damages are inherently speculative,  
8 and you have to have something specific and concrete to get  
9 that down to a real number. Otherwise, it's not sufficient for  
10 jurisdictional amount.

14:15:11

14:15:29

11 That's one view. There are a lot more district court  
12 opinions on this than circuit court opinions. And there's some  
13 divergence on district court opinions. And then especially  
14 look at this general damage. And when you look at it, think  
15 about what is on my mind, which is I fear that your theory of  
16 jurisdictional amount, if it's valid, will apply in every case.  
17 And every time anybody sues for defamation for which you can  
18 get general damages, all you have to do is say and I want  
19 \$75,000, in every single case, if there's diversity in  
20 citizenship, will be met.

14:15:52

14:16:19

21 I think that's the logical consequence of your theory,  
22 and it seems intuitively wrong to me because we don't do  
23 punitive damage. We don't indulge in a similar deference.  
24 There has to be something more than speculativeness.

25 So those are -- you can brief -- and we'll talk about

14:16:42



1 a time to get this done that I, in particular, would like to  
2 have addressed.

3 The other thing is the injunction itself. Looking at  
4 the temporary restraining order, now I understand when you all  
5 filed this action you were acting under -- with great haste and 14:17:26  
6 great emergency that was entirely -- appears to be entirely  
7 justified. Nevertheless, this language is awfully broad in the  
8 restraining order, sending or causing you to send any  
9 threatening communications; publishing or causing to published  
10 any false or misleading communications about plaintiffs; 14:17:52  
11 interfering with contractual relationship.

12 If you dig into the case law on injunctions, I think  
13 you will find that much, maybe all of that, would not be  
14 enforceable with contempt sanctions. To have an enforceable  
15 injunction, the language of the injunction has to be clear, 14:18:08  
16 specific, concrete, and injunction language that basically says  
17 go and sin no more is not good enough to have somebody put in  
18 jail for contempt or have other contempt remedies.

19 So -- and I am always reluctant to enter injunctions  
20 with that level of generalities. So I'm going to invite you 14:18:34  
21 to, assuming we get over this jurisdictional amount problem, to  
22 submit a revised form of preliminary injunction.

23 Now, granted, Mr. Richeson has agreed to this, and so  
24 I don't see that I'm asking for any difficult revision. But  
25 I'm asking you to think concrete and empirically about the 14:19:01

1 actions that you want restrained. Because if they are  
2 continued and we have proceedings to enforce, I don't want to  
3 be in a position where I am telling you later what I'm telling  
4 you now, which is I don't think this is clear enough to support  
5 contempt remedies.

14:19:23

6 So you can go through the specific things that he's  
7 done. Sometimes it's difficult, because when you get specific  
8 there may be ways to weasel around it and you legitimately  
9 worry about that. But I don't want to have -- Ms. Speth  
10 recalls I have lengthy enforcement proceedings before, and I  
11 don't want to either put myself or the litigants through  
12 lengthy and costly enforcement proceedings to find out then  
13 that the language is too broad to support contempt remedies.

14:19:48

14 Now, I understand the time urgency of this and I will  
15 move as quickly as I can. I have asked you to do two things.  
16 When can you get them done? One is a legal brief and the other  
17 is tweaking this injunctive language to make it more narrow.

14:20:12

18 MR. KUNZ: I think we can narrow the injunction  
19 language within two weeks and brief within a month.

20 THE COURT: Okay. I mean, if you had it done  
21 tomorrow, I'd have a ruling for you in a couple of days. But  
22 if you want to take a month, that's up to you.

14:20:29

23 I will tell you what I will do. Since the time  
24 urgency is entirely yours, and I am committed to acting as  
25 promptly as possible once I have this information from you, I'm

14:20:49

1 content not to set a deadline because you will be motivated for  
2 your client's interest to get it done sooner rather than later.

3 I hope you would not take a month unless, of course,  
4 if you have reached an accommodation with Mr. Richeson that  
5 takes the time urgency away, then, of course, you don't have  
6 the time pressure. Is that the situation you are in right now  
7 with Mr. Richeson?

14:21:11

8 MR. KUNZ: We have not reached an agreement with Mr.  
9 Richeson, but I would like the Court to know that if Mr.  
10 Richeson would agree to an appropriate permanent injunction, we  
11 would dismiss immediately.

14:21:28

12 THE COURT: That sounds like a discussion you all  
13 should have in that room right outside the doors after we  
14 recess. You may be able be to work all of this out.

15 All right. I think I'm not going to set a deadline.  
16 I'm going to leave it to you, Mr. Kunz, to -- actually, I am  
17 not going to set a deadline, but I don't want this to drift off  
18 indefinitely. If you think you are going to have something  
19 resolved I want to have it resolved or come back and file these  
20 briefs. Without setting a firm deadline, I'd like to know this  
21 is resolved within a month. All right? I'm not setting a  
22 deadline, but if you don't get a settlement, then file this  
23 more narrow injunction language and the jurisdictional  
24 briefing. And I will act on it quickly.

14:21:41

14:22:05

25 So all right. Now, Mr. Richeson, have you pretty much

14:22:22

1 understood the way this ends right now?

2 MR. RICHESON: Oddly, I followed everything to the  
3 end. I actually understand it all.

4 THE COURT: All right. All right. So then it is  
5 ordered, with the agreement of the plaintiff, that the 14:22:38  
6 application for preliminary injunction is taken under  
7 advisement pending the receipt of further briefing and a  
8 revised form of draft preliminary injunction from the  
9 plaintiffs and the further documentation to be filed within a  
10 month. 14:23:07

11 It is further ordered that with consent of the  
12 defendant, the temporary restraining order is continued in  
13 effect until the Court rules after receipt of those further  
14 filings from the plaintiff.

15 Is there anything I have left out, Mr. Kunz? 14:23:21

16 MR. KUNZ: No. I appreciate understanding about the  
17 TRO. Thank you for elaborating that.

18 THE COURT: All right. If there's nothing else, then  
19 we will be adjourned for the day.

20 MR. KUNZ: Thank you. 14:23:36

21 (Proceeding recessed at 2:23 p.m.)  
22  
23  
24  
25

C E R T I F I C A T E

I, LAURIE A. ADAMS, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 30th day of September, 2010.

s/Laurie A. Adams

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Laurie A. Adams, RMR, CRR