

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

ASIA ECONOMIC INSTITUTE,)	CASE NO: 2:10-CV-1360-SVW-PJW
)	
Plaintiff,)	CIVIL
)	
vs.)	Los Angeles, California
)	
XCENTRIC VENTURES, LLC,)	Friday, August 6, 2010
ET AL.,)	
)	(2:09 p.m. to 2:38 p.m.)
Defendants.)	

TELEPHONIC HEARING RE EX PARTE APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND PROTECTIVE ORDER (DOCUMENT #101)

BEFORE THE HONORABLE PATRICK J. WALSH,
UNITED STATES MAGISTRATE JUDGE

Appearances:	See Next Page
Court Reporter:	Recorded; CourtSmart
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APPEARANCES FOR:

Plaintiff:

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Defendants:

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1 Los Angeles, California; Friday, August 6, 2010; 2:09 p.m.

2 (Telephonic Hearing)

3 (Call to Order)

4 **THE CLERK:** Okay. Calling Case Number CV-10-1360-
5 SVW(PJWx), *Asia Economic versus Xcentric Ventures, et al.*
6 Counsel, please state your appearances for the record.

7 **MR. BLACKERT:** Hi. This is Daniel Blackert
8 representing Plaintiffs.

9 **MS. BORODKIN:** Good afternoon. Lisa Borodkin for
10 Plaintiff.

11 **MS. SPETH:** Maria Speth for Defendants.

12 **MR. GINGRAS:** And David Gingras for Defendants. I'm
13 not sure if anyone else can hear that echo on the line.

14 **THE COURT:** I can kind of hear it but I don't know if
15 it's going to interfere. How about anybody else?

16 **MR. BLACKERT:** I'm okay with it. I can't hear it,
17 though. This is Mr. Blackert speaking.

18 **MS. SPEAKER:** Mr. Blackert's echo is the worst of all
19 it seems. Are you on speaker?

20 **MR. BLACKERT:** I am on speaker. Would you like me to
21 transfer to non?

22 **MS. SPEAKER:** It might help.

23 **THE COURT:** Yeah.

24 **MR. BLACKERT:** Okay. Let me try it.

25 **THE COURT:** Okay. It's out there for everybody.

1 **MR. BLACKERT:** Okay. I transferred to non-speaker
2 phone now.

3 **THE COURT:** I'm sorry?

4 **MR. BLACKERT:** I transferred to non-speaker phone
5 now.

6 **MS. SPEAKER:** There's still a bad echo.

7 **MR. SPEAKER:** I think the echo is getting worse.

8 **THE COURT:** Okay. I'm having trouble hearing it
9 so --

10 **MR. BLACKERT:** Would you like me to call back in on
11 another line? Would that be easier?

12 **THE COURT:** Yeah, why don't you do that? Why don't
13 you call in on another line and we'll wait for you.

14 **MR. BLACKERT:** Okay. I apologize, your Honor.

15 **MS. SPEAKER:** It actually just got way better.

16 **MR. SPEAKER:** It got way better. Yeah, it did.

17 **THE COURT:** Okay. So stick on and let's everybody
18 concentrate on talking into the mouthpiece or whatever you have
19 there so that we can try and make sure we don't miss anything.

20 **MR. SPEAKER:** Okay, your Honor.

21 **THE COURT:** All right. The motion before the Court
22 is a motion for a temporary restraining order. The Court has
23 interpreted it as a motion for a protective order, which is why
24 the magistrate judge is going to rule on it as opposed to the
25 district judge. I did run it past Judge Wilson and he agrees.

1 There are several things that the Plaintiffs are
2 requesting. They want a protective order to prevent
3 Defendant's counsel from interfering with Plaintiffs' witnesses
4 and I get -- what's that?

5 **(Pause)**

6 And I guess it's Mr. Hutcherson (phonetic) that
7 focused on -- is it a Mr. or a Mrs.?

8 **MS. SPEAKER:** Mister.

9 **THE COURT:** Yeah, Mr. Hutcherson. I'm sorry. And
10 apparently issued a press release saying that -- involved in
11 litigation and Defendants are demanding that he retract the
12 press release, and Plaintiffs believe that that's infringing on
13 opportunity to present the case.

14 Am I right, Ms. Borodkin?

15 **MS. BORODKIN:** Your Honor, there's a little nuance.
16 I think we were mostly focusing on their demand that he correct
17 and submit to this Court another declaration.

18 **THE COURT:** Okay. And I do understand that as well.
19 But I'm going to deny that request. If he submits another
20 declaration, you can point it out and we'll see where that's
21 going to go, okay? First of all, I don't really consider him
22 your witness or the Defendants' witness. He's just a witness.
23 You're alleging that he's been subject to improper influence by
24 the Defendants. I don't know if that's true. We're going to
25 wait and let's see how it plays out and see if anything comes

1 up, and you present that evidence either to me or Judge Wilson
2 at a later time.

3 Go ahead, Ms. Borodkin.

4 **MS. BORODKIN:** If that's the Court's ruling, that's
5 fine. We made our arguments in our papers. We understand
6 there are important First Amendment considerations here. The
7 thing that we found to be of concern was this follow-up email
8 that Defendants did not respond to of threatening to put him in
9 the hall of shame, which seemed very clearly calculated to try
10 to pressure him further.

11 And we just wanted to understand that we have
12 currently a certain status where discovery is not proceeding.
13 Defendants can take discovery, they can make requests; but for
14 them to demand that he do one thing or another and then also
15 put in their papers that they plan to file a lawsuit against
16 him, you know, to me the demand to make him file a new
17 declaration with the Court seemed a little over zealous.

18 **THE COURT:** I understand. I understand your
19 position. If he does file a new declaration and you feel that
20 it was obtained improperly, you raise those issues then, all
21 right?

22 **MS. BORODKIN:** Sure, your Honor.

23 **THE COURT:** Okay. The next issue is about the
24 overwriting of the old website pages. You were concerned that
25 it was going to be lost forever when they changed their website

1 pages. But what they're saying is their new system keeps a
2 backup in place, so all these cases are going to be preserved,
3 correct?

4 **MS. BORODKIN:** Your Honor, there's some technical
5 details here. I don't agree 100 percent with the analysis of
6 the presentation that was put into the record. There's a
7 couple of issues here. I'm reading the declaration that was
8 provided by Defendants' expert, Justin Crossman (phonetic). It
9 says they are currently not preserving systematically the
10 static portions of the web page and they're working on it. In
11 Paragraph 10 it says they're working on a system to do that.

12 What they are saying in the declaration is that they
13 generally take copies. But that's not quite the same, because
14 that has been an issue since we filed the action. And we'd
15 like them to make sure that they're doing it systematically.
16 And we'd like to know if there have been pages that are lost
17 and haven't been saved. We'd like to know what that is and not
18 knock ourselves out trying to take discovery of something that
19 no longer exists.

20 **THE COURT:** All right. Mr. Gingras, Ms. Speth, how
21 do you respond? How are you maintaining these copies of the
22 web pages when you've changed to a new web page?

23 **MS. SPETH:** Yes. I think that Ms. Borodkin is not
24 paying any attention to the provision in Mr. Crossman's
25 declaration where he says that he's been instructed that if

1 there's any changes to the static pages he is to keep a full
2 copy as well as the source code. And also, as we pointed out
3 in our response, Ms. Borodkin can herself simply print out the
4 pages that she wants, as well as the source code.

5 **THE COURT:** Right. Okay. Ms. Borodkin, I'm
6 satisfied with the Defendants' representations that they're
7 preserving it, and I do agree with them that you can copy
8 those. You can print out those pages and I'm sure your tech
9 guy can copy those pages.

10 **MS. BORODKIN:** Your Honor, if I could be heard. That
11 is true as of today, August 6th. I'm proceeding on that
12 representation. However, for portions of the web page between
13 January 28th, 2009 when the action was filed and today I would
14 request that we get some clarity on did they save or should we
15 just assume that was lost unless we took copies of it. Because
16 what I'm reading from this declaration is that he's been
17 instructed now but he hasn't made any representations and
18 counsel hasn't put in any declaration about what steps were
19 taken in the past.

20 **THE COURT:** Ms. Speth, what happened between today
21 and January 28th of '09?

22 **MS. SPETH:** A couple of things, your Honor. First of
23 all, there was a preservation of a complete -- in Paragraph 5
24 of this declaration he points out that before the migration to
25 the new software he did a preservation of the complete website

1 as it existed. And he has that and that is preserved.

2 Secondly, when he made changes -- what he said to me
3 and the way his declaration reads, generally, when he makes
4 changes to the static pages he says that he does keep a copy.
5 What he couldn't feel like -- he says I can't say 100 percent
6 for sure that I kept every single one. For instance, if I went
7 in and changed a tiny little word, I might not have done a
8 full, you know, source code copy before I did that. So I don't
9 want to say absolutely positively. He said but any time I've
10 made substantive changes I've done that.

11 So not only do we have printouts of what you can see
12 but of the source code. He's done his backups of the source
13 code when he's gone in and made changes to the home page. He
14 didn't feel comfortable to say every single time, because he
15 said there might have been like a minor change that he just
16 didn't think to do the source code. I said going forward I
17 don't care if it is of the word "and," make sure you copy it.
18 So that's kind of where we're at.

19 **THE COURT:** Okay. Ms. Borodkin, I'm satisfied. It
20 appears to me that the vast majority of everything has been
21 saved. When discovery is re-instituted you can depose him and
22 find out what, if anything, is missing or what he thinks is
23 missing and we're going to go from there.

24 **MS. BORODKIN:** Your Honor, can I address another
25 technical subject that came up in their declaration? As far as

1 backups, it looks like from their declaration at Paragraph 17
2 they have a third-party vendor that overwrites -- or sorry.
3 They make backups that are good for 30 days. And my previous
4 experience in these Texas cases is that unless the vendor's
5 instructed to set aside the backup tapes, these 30-day backup
6 tapes get put back into the rotation where they're overwritten
7 and recycled again. And we would like the Defendants to let us
8 know if they're doing more than what's in this declaration.
9 Because it looks like that they're just recycling it every
10 30 days.

11 **THE COURT:** Ms. Speth?

12 **MS. SPETH:** Yes. The backup is probably overwritten
13 after 30 days. It is a third-party vendor. They charge \$2,000
14 a month to do backups. At the end of 30 days they very likely
15 start over with a new tape. First of all, that's only a backup
16 and that's why Mr. Crossman was trying to differentiate between
17 preserving as we do it and the backup. The backup is if there
18 is a disaster. The preservation is going on every day; every
19 minute it's being preserved. But --

20 **THE COURT:** By you.

21 **MS. SPETH:** I'm sorry?

22 **THE COURT:** By you.

23 **MS. SPETH:** By us, correct. And there's --

24 **THE COURT:** By Mr. Crossman.

25 **MS. SPETH:** Right. There's a third-party vendor

1 doing the 30-day thing.

2 The only other thing I would say -- and I'm not
3 agreeing to this -- but if the Court was inclined to say,
4 "Okay, you've got to tell your third-party vendor to back up
5 for more than 30 days," there's going to be an enormous cost
6 involved in that, and I don't know why we should bear the cost.
7 I don't think it should have to be done at all because we are
8 already preserving it. But I mean I think she's completely not
9 keeping in mind that that \$2,000 a month would go, you know,
10 exponentially up if we said to the vendor: You have to, you
11 know, keep it forever kind of thing.

12 **THE COURT:** Ms. Borodkin, I agree with Ms. Speth.
13 They are preserving a copy. They're not preserving two.

14 **MS. BORODKIN:** Your Honor, my experience from
15 speaking with experts is the tapes cost about \$60 for them to
16 put it on the shelf.

17 **THE COURT:** You can pay it. If you want to call up
18 Ms. Speth and work on -- you write a check, you can pay for it,
19 okay? If you want a second copy, it's your dime. And,
20 Ms. Speth, if Ms. Borodkin calls you and sends you a check, you
21 can preserve two copies of it. Okay, Ms. Borodkin?

22 **MS. BORODKIN:** There's another issue I wanted to
23 raise that we --

24 **THE COURT:** Well, let's get back to the first issue.
25 You want two copies; you need to pay for it if you want two

1 copies.

2 **MS. BORODKIN:** If they are saying they're preserving
3 it with respect to the 58 web pages that are at issue right now
4 and relevant and that they are already preserving it, then we
5 will rely on that.

6 **THE COURT:** Okay. Next issue.

7 **MS. BORODKIN:** The next issue has to do with our
8 concerns about the server directory structure. Our expert
9 witness has described that the URL, which is basically the
10 address --

11 **THE COURT:** Yeah.

12 **MS. BORODKIN:** -- that goes along with each
13 individual web page of the -- you know, over 600,000; each one
14 has a different address. And what goes into determine what
15 makes up that address has changed over time. It used to be a
16 much more sort of bland vanilla URL address consisting of the
17 website's name; then there was a folder that just said "report"
18 and then a report number.

19 And then some time between January of 2009 and
20 May 2010 they changed -- the Defendants changed the way that
21 structure was set up. And that has to do with, according to
22 our expert, the way that the directories and subdirectories on
23 their server are organized and how those are named. And what
24 they're talking about with preserving the data in the database
25 just doesn't address that change. What I'm trying to

1 understand from the declaration of Justin Crossman that they
2 put in -- because they didn't say anything about it in their
3 brief at all -- is that in August of 2009 they just migrated
4 the whole server somewhere else. And it sounds to me like
5 she's saying, well that's when they changed their system to
6 program different names into the URL.

7 Now, your Honor, what happens under the current
8 system is it looks like whereas before there was a domain name,
9 it just said report, a report number; it now has key words that
10 are the names of the subject of the report, repeatedly; and
11 that enhances some of the search algorithms behavior to sort of
12 prefer that search result because the URL or domain name
13 address is one of the factors that's known to influence search
14 results. And we'd kind of like to know when they took that
15 proactive step to actually purposely enhance the URL --

16 **THE COURT:** You're going to be able to do that. When
17 discovery is re-ignited you can depose the 30(b)(6) person.
18 You can ask all these questions, okay? You can learn
19 everything you want to learn about their computer system and
20 when they changed and how they changed it.

21 What we're looking at right now is a protective order
22 in which you want to maintain the status quo on certain things.
23 This is not open discovery, okay? And I don't know if it's
24 ever going to get to open discovery, because the Court may rule
25 against you and the case may be dismissed. But I'm not going

1 to deal with the minutia of when may change certain things and
2 how they changed the URL address, all right?

3 **MS. BORODKIN:** Okay, your Honor. There's only one
4 more discrete issue. I just want to get clarity because we've
5 asked for this in the past. Your Honor, we've noted incidents
6 where Defendants have told us that, unfortunately, they have
7 been subject to hacking attacks or denial of service attacks.
8 And it seems that in other cases they've been unable to
9 retrieve emails.

10 And so this case I would just suggest maybe as a way
11 to give us some comfort, if we were to provide some search
12 terms and provide, you know, a very limited set of what pages
13 to just say: Hey, would the Defendants be willing to just back
14 up what they have now on, you know, something like a disk; just
15 something simple, inexpensive, and just put that aside for now
16 just in case they have some system-wide crash so it doesn't
17 become this, you know, complex disaster recovery procedure.

18 **THE COURT:** I just don't think that's what this is
19 for. Ms. Speth, what do you have to say?

20 **MS. SPETH:** I'm confused. I don't know if she --
21 Ms. Borodkin seems to be mixing up emails with the server. She
22 put in a declaration about something that Mr. Hutcherson
23 provided to her about an email problem that we had a couple of
24 years ago with Mr. Magedson losing some emails. Nothing
25 whatsoever to do with the sequel server; very, very misleading

1 to present it to this Court as if it had something to do with
2 the database because it didn't.

3 So I don't know if she's asking about emails right
4 now or the server. But we talked about the server at length,
5 and that's already being completely preserved. As far as
6 emails, emails are also being preserved. The idea that we
7 would just sort of put them on a disk and give them to her it's
8 ludicrous in light of the fact that she's asked that discovery
9 be stayed and there is no discovery right now.

10 My client has thousands, probably tens of thousands
11 if not hundreds of thousands, of emails. And so it's not a
12 little disk he would be putting it on. It would be a major
13 thing. And, of course, there's no discovery right now so it's
14 just not worth it.

15 **MS. BORODKIN:** Your Honor, we are not asking for her
16 to give us those emails. And I will clarify so that nobody is
17 confused. This is a TRO regarding preservation of ESI.
18 ESI includes emails. We discovered and in March of 2009
19 Defendants had trouble producing emails. We are just pointing
20 that out so that this problem producing emails should discovery
21 reopen doesn't occur.

22 **THE COURT:** Ms. Speth, she wants you to preserve
23 emails, make another copy of them. Can you do that?

24 **MS. SPETH:** Yes, your Honor.

25 **THE COURT:** And how much is it going to cost you?

1 **MS. SPETH:** No, it happens automatically. My client
2 preserves all emails all the time. My client is on a constant
3 litigation hold because he's constantly in litigation.

4 **THE COURT:** Okay.

5 **MS. SPETH:** So it's already happening.

6 **THE COURT:** All right. Ms. Borodkin --

7 **MS. SPETH:** You know, I can't say the system won't
8 crash. What happened in 2009 is he went to search for an email
9 and he couldn't find it. We didn't know if it was a search
10 function issue, one that he knew existed; we didn't know if it
11 was a search function issue or if it was that some emails had
12 gotten lost. We never did find out, by the way, which one it
13 was. But absent something that goes wrong everything is always
14 preserved.

15 **THE COURT:** Okay. Ms. Borodkin?

16 **MS. BORODKIN:** Well, the two things that are still
17 sort of outstanding today are that, you know, there isn't
18 100 percent complete history that can be guaranteed. We know
19 that now.

20 **THE COURT:** Nothing is -- Ms. Borodkin, that's not
21 possible.

22 **MS. BORODKIN:** Right.

23 **THE COURT:** And you don't do it either. So that's
24 not what we're searching for; that's not our goal. One hundred
25 percent guarantee you don't get that in anything in life and

1 you're not going to get that in discovery. They're doing the
2 best they can. They're taking steps that other companies don't
3 do, and I just don't think that they're out there shredding
4 documents or destroying data. So when you say, "Well,
5 nothing's a 100 percent guarantee," you can't get that from me.

6 **MS. BORODKIN:** Oh, your Honor --

7 **THE COURT:** You're shooting too high.

8 **MS. BORODKIN:** I misspoke, your Honor. What I meant
9 was we've narrowed it down to the fact that we do see that
10 they're not saving the static web pages but they are going
11 forward and that they have had email problems in the past.
12 And, you know, that's very helpful for us to clarify that. And
13 we'll do the best we can, and I appreciate that.

14 **THE COURT:** All right. So the statement under oath
15 as to what steps they've taken to preserve their -- again, go
16 with the 30(b)(6) -- discovery starts up again.

17 The last thing that I think you're searching for is
18 you want them to change the meta tags, the metadata so your
19 name won't show up so quickly, it won't show up at all when
20 someone does a Google search; am I right?

21 **MS. BORODKIN:** Your Honor, yes. The reason is, as we
22 were talking about earlier, they changed the URLs in the past
23 in a way that optimizes search. If they're going to change it
24 again, you know, to further optimize the search, that's going
25 to change things for our client. They're going to continue to

1 suffer harm. They've demonstrated they're able to manually
2 change -- they claim that they're able to manually change HTML
3 and that --

4 **THE COURT:** This is the whole point of your lawsuit
5 isn't it, to get off of the Google search so when someone puts
6 in your client's name and searches in Google, this Ripoff
7 Report doesn't show up? You would have to win your lawsuit to
8 get this done. You can't do this is a protective order and
9 discovery.

10 **MS. BORODKIN:** Your Honor, what protection do we have
11 if they decide to reconfigure their database --

12 **THE COURT:** None.

13 **MS. BORODKIN:** Okay.

14 **THE COURT:** None. You don't have protection from --
15 you're not getting protection from me for the Defendants or any
16 other company out there. In fact, the Court is -- the district
17 judge has not looked with favor on your pleading as it is.
18 And, alternately, if your case gets dismissed you're going to
19 have the same protection you're getting now, none.

20 You're saying what they're doing is wrong and they
21 shouldn't be allowed to do it. That's your allegation. And it
22 has not been resolved in your favor. In fact, we're just
23 getting kick started here. Somewhere down the road if this
24 thing goes to trial and you win on appeal years from now, you
25 may be able to prevent companies like Defendants from putting

1 your name -- saying bad things about your company on the web.
2 But right now not only is there anything that says they can't
3 do it, everything says they can do it.

4 **MS. BORODKIN:** Your Honor, I appreciate it and we're
5 very grateful for the time the Court has spent on this. I
6 don't want to create the misimpression we're trying to restrain
7 their speech. I think what it is, is what they're doing --
8 maybe it's wrong; maybe it's right; it's part of the point of
9 the lawsuit -- but to the extent they're saying what they're
10 doing in the HTML it's third-party conduct and they're not
11 responsible for it, that may be the issue what we're going to
12 look into.

13 **THE COURT:** I understand. Ms. Borodkin, I don't know
14 what the answer is. I'm not saying you're wrong and that, you
15 know, I'm not here to tell you that you're not allowed to bring
16 this lawsuit and you're not allowed to stop them from saying
17 bad things about you. But I don't know that now and it's not
18 my decision to make anyway. And right now they get to say bad
19 things about you and people get to type your name in on Google
20 and hear bad things from Ripoff Report on you. Now, if you
21 prevail that may change. But until you do it's going to be
22 that way and I don't think it's appropriate for me to tell the
23 Defendant that you have to stop what you're doing because the
24 Plaintiffs allege that it's improper.

25 **MS. BORODKIN:** I see. Well, thank you for

1 considering, your Honor. We do think it's something that's in
2 the HTML and they put in a declaration they don't have the
3 ability to change that except at tremendous expense to them.
4 And if that's the representation, then we understand better.

5 **THE COURT:** Okay. Is there anything I've overlooked?

6 **MS. BORODKIN:** Daniel, did you want to argue
7 anything?

8 **MR. BLACKERT:** I don't believe so. I think we both
9 pretty much covered everything.

10 **MS. BORODKIN:** One thing I would, your Honor, like to
11 respond to is the Defendants have asked for sanctions for us to
12 even bring this motion. And I would like to just say that some
13 of the information that we're getting about what their actual
14 procedures are in this motion have been tremendously helpful to
15 Plaintiffs. We're only able to get that by bringing this
16 application. It's very useful to Plaintiffs to analyze and
17 evaluate the case for settlement or for further proceedings.
18 And we had asked for many, many times simply the information
19 they have now given us. It is only possible by bringing this
20 application.

21 **THE COURT:** Okay. Ms. Speth, what do you say?

22 **MS. SPETH:** Your Honor, we'll put our Rule 11 motion
23 on the calendar 21 days from when we served it. We served it,
24 I believe, four or five days ago; so I think it's premature to
25 argue it at this point. But we will be filing that Rule 11

1 motion and that's the appropriate time to talk about whether or
2 not their pleading was grounded in good faith and whether or
3 not it was for improper purpose and whether there should be
4 sanction.

5 **THE COURT:** Okay. I'll take a look at that when it
6 comes in, all right? And if I'm going to order sanctions,
7 we'll get everybody on the phone and I'll do a tentative before
8 I do it.

9 **MS. BORODKIN:** Your Honor, I just wanted to make sure
10 we are responding to any questions your Honor has about the
11 purpose of this application or some of the information that
12 we've gotten in it.

13 **THE COURT:** You have responded to the things that I
14 have.

15 **MS. BORODKIN:** All right. Thank you, your Honor.

16 **THE COURT:** Okay? All right. I want to give both
17 sides a chance to tell me anything they want me to hear before
18 I say goodbye. Ms. Borodkin, you go first.

19 **MS. BORODKIN:** Well, we think that under the standard
20 for seeking an order of preservation, which is *Capricorn Power*
21 (phonetic), the three factors: Number one, the level of
22 concern; number two, the irreparable harm; and number three,
23 the capability of the party to preserve it; we reasonably ask
24 for this Court to apply that and issue an order of
25 preservation.

1 It seems to me that after today's argument and after
2 the representations of Defendants' counsel and also the
3 declaration put into the record and the follow-up questions
4 that the Court seems to have determined that that suffices; so
5 that in itself as the representation is going to be the basis
6 for preservation and that the Court is not satisfied.

7 We've requested that they take the modest step of
8 manually backing up emails that are relevant, and Defendants
9 seem to have agreed to that. We wanted some clarity on what
10 might have been lost between January 2008 and August 2009 -- or
11 rather, sorry, August 2010. And there was some equivocation
12 where they don't want to be 100 percent; but going forward, in
13 any event, they're going to be more complete and systematic in
14 taking backups; and they feel that their own preservation
15 procedures are sufficient even though they're constantly, you
16 know, in pretty frequent litigation they feel it's appropriate
17 for the vendor to continue to recycle. And Plaintiffs don't
18 have the wherewithal to, you know, write a check to make two
19 copies, so you know that's just going to be what we rely on.
20 And that if there are further discovery issues with overwriting
21 in the future, we'll just proceed by discovery.

22 As far as the protective order, you know, we
23 understand there's a concern. Just as we would respond to any
24 declaration that was put into the Court that was procured, you
25 know, we wanted to see if there was a concern from the Court

1 about what was being asked and what was being demanded. And,
2 you know, as far as that goes I think Daniel had argument on
3 that. But, you know, we're satisfied that it would be within
4 the confines of discovery.

5 **THE COURT:** Okay. Ms. Speth, anything you want to
6 add?

7 **MS. SPETH:** No, your Honor.

8 **THE COURT:** Okay. I'm going to issue a minute order
9 as soon as I can. And, basically, it's going to provide that
10 Plaintiffs brought a motion for a temporary restraining order
11 and protective order. The Court has interpreted it as a motion
12 for a protective order and that the motion was denied for the
13 reasons set forth at the hearing. And if anybody wants to
14 challenge my ruling, you can get a copy of the transcript and
15 go see Judge Wilson and see what he has to say.

16 **MS. BORODKIN:** Your Honor, could I -- if you would
17 bear with me for one minute. You know, there was one argument
18 that I wanted to respond to that they have made in their
19 opposition. They seem to present this as a motion for a
20 temporary restraining order using the standard under
21 preliminary injunction. And to the extent it just sought an
22 order of preservation for electronically stored information,
23 you know, that was based on -- that request was based on the
24 Court's inherent power as articulated in *Trepple* (phonetic) and
25 *Pueblo of Laguna* (phonetic) -- *Laguna versus United States*,

1 which we cited in the application. It was just a suspend
2 policy relating to deleting or destroying files. So
3 technically I would suppose we would have submitted that as a
4 request for a order of preservation under that line of case
5 law.

6 **THE COURT:** Okay. Ms. Speth, anything you want to
7 add?

8 **MS. SPETH:** No, your Honor.

9 **THE COURT:** Okay. All right. And, you know, we'll
10 deal with the sanctions at a later time. They filed a Rule 11
11 motion. All right?

12 **MS. SPETH:** Yes, your Honor. Thank you.

13 **MR. SPEAKER:** Yes, your Honor. Thank you.

14 **MS. BORODKIN:** Yes, your Honor. Thank you.

15 **THE COURT:** All right. Okay, folks. Have a nice
16 weekend. Thanks for your time tonight.

17 **MS. BORODKIN:** Thank you.

18 **MR. SPEAKER:** Thank you, your Honor. We appreciate
19 it. Bye-bye.

20 **THE COURT:** Okay. Bye-bye.

21 **(This proceeding was adjourned at 2:38 p.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.



August 13, 2010

TONI HUDSON, TRANSCRIBER