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Iliana Llaneras

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ASIA ECONOMIC INSTITUTE, a California LLC; RAYMOND MOBREZ an individual; and ILIANA LLANERAS, an individual,

Plaintiffs,

vs.

XCENTRIC VENTURES, LLC, an Arizona LLC, d/b/a as BADBUSINESS BUREAU and/or BADBUSINESSBUREAU.COM and/or RIP OFF REPORT and/or RIPOFFREPORT.COM; BAD BUSINESS BUREAU, LLC, organized and existing under the laws of St. Kitts/Nevis, West Indies; EDWARD MAGEDSON an individual, and DOES 1 through 100, inclusive,

Defendants.

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

NOTICE OF MOTION AND MOTION UNDER RULE 56(f) TO DENY OR TO CONTINUE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT TO CONDUCT FURTHER DISCOVERY; DECLARATION OF LISA J. BORODKIN AND CERTIFICATION OF COMPLIANCE WITH LOCAL CIVIL RULE 7-3

Judge: The Hon. Stephen V. Wilson

Date: November 29, 2010
Place: 312 North Spring Street
Los Angeles, California 90012
Courtroom: 6

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on November 29, 2010 at 1:30 p.m. or at any other time as this Honorable Court may deem proper, Plaintiffs will and hereby do move this Honorable Court for an Order under Federal Rule of Civil Procedure 56(f) (1) denying Defendants' Motion for Summary Judgment on all claims in this case or, in the alternative, (2) continuing Defendants' Motion for Summary Judgment to allow Plaintiffs to conduct necessary discovery to oppose Defendants' Motion for Summary Judgment.

The Motion for denial or continuance of Defendants' Motion for Summary Judgment under Rule 56(f) is based on the grounds that:

- Plaintiffs have identified a likelihood that controverting evidence exists as to material facts in Defendants' motion for summary judgment, specifically material facts 18-20 and 22-25 in Defendants' Separate Statement [DN-146].
- "Good cause" exists as to why such evidence was not discovered or obtained earlier in the proceedings, because discovery was bifurcated and stayed as to the non-RICO causes of action and has not been reopened on the state law claims, and Defendants rely on the declarations of witnesses such as Ben Smith, Amy Thompson, Kim Jordan and Lydia Craven whom Plaintiffs had not had an opportunity to cross-examine.
- Plaintiffs propose to obtain evidence sufficient to defeat Defendants' motion for summary judgment through the Declaration of James P. Rogers, written discovery and/or depositions of Justin Crossman, Scott Cates, Ben Smith and/or the Lavidge Company, the continued deposition of Edward Magedson and Xcentric, cross-examination of Ben Smith, Amy Thompson, Kim Jordan and/or Lydia Craven, and/or voluntary statements from third-party witnesses with first-

hand knowledge of facts involving the Defendants' use and offers to sell custom written computer code and meta tags to make subjects of Reports appear in a more favorable light on Google searches;

- The facts expected to be gained from such discovery will suffice to defeat the pending motion for summary judgment because they would controvert the assertions in Defendants' statement of material facts 5, 7, 18-19 and 22-25, 28-31 and 33 showing that Defendants actively play a large role in determining what appears on Google search results about subjects of Reports such as Plaintiffs, that servers do not "automatically" and "generically" generate the HTML computer code and meta tags that determine how subjects of Reports appear on Google searches in accordance with generally accepted search engine optimization practices, that Defendants falsely or misleadingly advertise themselves to be a neutral consumer complaint forum when they are in fact a for-profit business seeking to make money from paid endorsements and advertising, and that Defendants mislead the public regarding the degree to which Defendants are willing to alter or suppress Reports, which has a harmful effect on Plaintiffs.

No discovery has been taken on the state law causes of action that remain in this action. Previously, Defendant Magedson refused to answer questions regarding (1) how the Corporate Advocacy Program and Verified Safe programs work; and (2) failed to identify witnesses, employees of Defendant Xcentric, and computer coding contractors and consultants with knowledge of Defendants' advertising, computer coding and business practices of selling paid meta tags that influence Google search results and the circumstances under which Reports may be deactivated, suppressed, delayed, redacted or disclaimed.

Plaintiffs have a reasonable basis for believing the information sought exists. Defendants provided Plaintiffs with the so-called "Second Questionnaire" on which Plaintiffs seek to examine Defendants. Plaintiffs also believe relevant documents and testimony exists based on voluntary interviews with Magedson's former personal assistant, James Rogers, describing Defendants' efforts to market and sell the Corporate Advocacy program and Verified Safe program. Plaintiffs are also aware that Defendants have represented to the Seventh Circuit Court of Appeals that they do in some cases comply with court orders to take down Reports, but Defendants have refused to describe such circumstances to Plaintiffs absent formal discovery.

Plaintiffs have made diligent efforts to avoid the delay in hearing Defendants' motion for summary judgment by (a) requesting that Defendants voluntarily describe their policies as to when they are willing to remove, deactivate or redact names from Reports so as to avoid negative inferences from the public regarding the significance of a Report; (b) propounding written requests for production of document on June 22, 2010 narrowly tailored to address Defendants' meta tag practices, which Defendants reused to respond to based on the discovery stay entered in this case on June 24, 2010; (c) requesting that Defendants voluntarily agree to consolidate the hearing on the motion for summary judgment with this motion under Rule56(f) ; and (d) attempting to arrange an in-person meeting with James Rogers on three occasions – October 23, 25 an 28, 2010; (e) requesting Defendants' attorneys to stipulate to the accuracy of the oral statements made in argument to the Seventh Circuit Court of Appeals on September 29, 2010 that Defendants have complied with Court orders; and (f) otherwise attempting to mitigate the harm caused by Defendants by requesting voluntary disclosures to the public or to suspend Defendants from engaging in further search engine optimization practices affects Plaintiffs pending the resolution of this case.

Plaintiffs are amendable to the Court hearing on November 1, 2010 in light of the Court's order stating that such a hearing would be useful. However, Plaintiffs simultaneously request consolidation of additional hearings on Defendants' motion for summary judgment with the proposed November 29, 2010 hearing on this motion to continue a determination on summary judgment pending Plaintiffs' request to take discovery. Plaintiffs believe this Rule 56(f) motion is timely under Ashton-Tate Corp. v. Ross, 916 F.2d 516, 520 (9th Cir.

This Motion is based on Federal Rule of Procedure 56(f), this Court's inherent authority, the attached Memorandum of Points and Authorities and Declaration of Lisa J. Borodkin, the pleadings, papers and proceedings in this action, and such other matters as the Court deems proper. This motion is made following the conferences of counsel on October 7, 2010, October 22, 2010.

DATED: November 1, 2010

Respectfully submitted,

By: /s/ Lisa J. Borodkin
DANIEL F. BLACKERT
LISA J. BORODKIN
Attorneys for Plaintiffs
Asia Economic Institute LLC, Raymond Mobrez, and Iliana Llaneras

MEMORANDUM OF POINTS AND AUTHORITIES

1. Preliminary Statement

This may seem seems like a complicated case, but it is not. There is no real dispute about the technology itself. Defendants admit that the declaration of Plaintiffs' computer coding expert, Joe Reed, is accurate. See Ex. 25 to the First Amended Complaint [DN-100-6 at 24-50, DN-100-7 at 1-11); Declaration of Lisa J. Borodkin ("Borodkin Dec."), at ¶3, Ex. 1 Transcript of Sept. 20, 2010 at 9:11-14 ("the way he describes the process is accurate."); ("the way Plaintiffs' expert describes it, that's the way it actually happens."); id. at 9:19-20.

There, however, a dispute over what Defendants do. Defendants claim everything happens "automatically" or that every act complained of was committed by users or by Google. Defendants have argued that even if they did take the actions or made the misrepresentations alleged, that these actions and misrepresentations could not have caused Plaintiffs' injuries.

Plaintiffs have not had an opportunity to take discovery to prove that Defendants deliberately and consciously committed the acts complained of, rather than these acts happening "automatically" or by the users, or Google. No discovery has been taken on the state law claims in this case. Discovery has been stayed since the order bifurcating discovery on June 24, 2010. Plaintiffs are entitled to take such discovery before Defendants are granted summary judgment. Good cause exists for Plaintiffs to believe that discovery would yield relevant evidence sufficient to defeat Defendants' motion for summary judgment. Therefore, this motion should be granted.

2. Legal Argument

A. Plaintiffs Are Entitled to an Order Denying Defendants Summary Judgment under Rule 56(f) In Order to Take Discovery.

Federal Rule of Civil Procedure 56(f) provides in part:

> If a party opposing the [summary judgment] motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:
>
> (1) deny the motion;
>
> (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
>
> (3) issue any other just order.

Fed. R. Civ. Proc. 56(f) (emphasis added).

"Where . . . a summary judgment motion is filed so early in the litigation, before a party has had any realistic opportunity to pursue discovery relating to its theory of the case, district courts should grant any Rule 56(f) motion fairly freely." Burlington N. Santa Fe R.R. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation, 323 F.3d 767, 773-774 (9th Cir. 2003) (reversing district court's denial of discovery under Rule 56(f) where Tribes made showing that it had basis for believing facts to defeat summary judgment existed but had no opportunity to develop the record). This is exactly the case here.

"[T]he Supreme Court has restated the rule as requiring, rather than merely permitting, discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'" See Metabolife Int'l v. Wornick, 264 F.3d 832, 846 (9th Cir. Cal. 2001), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986); see also Burlington N. Santa Fe R.R., 323 F.3d at 773.

This motion is timely because it is made before the hearing on Defendants' motion for summary judgment. The hearing for Defendants' motion for summary judgment is November 1, 2010 at 1:30 p.m. "A Rule 56(f) motion must 'be made prior to the summary judgment hearing.'" Biggs v. Wilson, 1993 U.S. App. LEXIS 20777 (9th Cir. Aug. 12, 1993) at *4, quoting Ashton-Tate Corp. v. Ross, 916 F.2d 516, 520 (9th Cir. 1990). This motion is made prior to that hearing.

Plaintiffs have met their burden under Rule 56(f) entitling them to denial or continuance of Defendants' motion for summary judgment:

> [P]arties opposing a motion for summary judgment must make (a) a timely application which (b) specifically identifies (c) relevant information, (d) where there is some basis for believing that the information sought actually exists.

Blough v. Holland Realty, Inc., 574 F.3d 1084, 1091 (9th Cir. 2009) (internal quotations omitted). Hearsay is acceptable. See Simas v. First Citizens' Fed. Credit Union, 170 F.3d 37, 46 (1st Cir. 1999) ("[R]eliance on hearsay is not, per se, a dispositive defect under Rule 56(f)"). Plaintiffs have met this burden through the attached attorney declaration showing that specific, relevant information exists.

B. It is Likely Discovery Would Yield Evidence to Oppose Defendants' Claim that All HTML Code and Meta Tags Are Generated "Automatically"

In Defendants' summary judgment motion, they contend in three different places that Xcentric's servers "automatically" generate HTML code and meta tags for "every" page on their website. See Defendants' Statement of Facts ("DSOF") [DN-146] ¶¶18, 19, 23. Plaintiffs have good reason to believe this is not true.

Defendants' servers do *not* "automatically" generate HTML code and meta tags for "every" page on their website. Defendants have created an entire business model around selling custom, manually-inserted HTML code and meta tags to those who want to pay under the pretext of the "Corporate Advocacy Program," "Verified Safe Program" or otherwise. See First Amended Complaint, Exhibit 3 at 2 [DN-100-1 at 11] ("[L]ook at the beginning of the reports that are listed on the search engines. You will see about 250 words injected into the beginning of the Report with your stated commitments.").

Plaintiffs have good reason to think that James Rogers, Ben Smith, Justin Crossman, Scott Cates, and others at a company called Lavidge will be able to

describe how the HTML and custom meta tags sold by Defendants are manually inserted into the code for Reports. See Borodkin Dec. at ¶¶5-8.

C. It is Likely Discovery Would Yield Evidence to Refute Defendants' Claim that all Meta Tags Are Generated from Content Contributed by Third-Party Users

In Defendants' summary judgment motion, they contend that "[e]very report page" includes meta tags based on unique keywords "supplied from the author" and other words "used by the author." See DSOF [DN-146] ¶ 22. Defendants have also argued to the Court as that the conduct that Plaintiffs complain of is "a process by which the *use*r inputs the content *not Ripoffreport*," id. at 9:20-21, or that "It's not something that the *[Ripoff Report] website does*, it's something that -- first of all, that *Google does* by searching the website," id. 8:7-9. Plaintiffs have good reason to believe this is not true.

Throughout the First Amended Complaint and in the record are detailed descriptions of the fact that Defendants will write and manually insert 250 to 350 words into HTML code and meta tags themselves or together with the subjects of Reports under certain circumstances. This content may also be supplied by the subjects of Ripoff Reports. See First Amended Complaint ¶¶160-165 and Ex. 25 at ¶¶16-23. An example is the agreement between Defendants and QED Media. See FAC, Ex. 8, DN-100-2 at 22-23 ("Xcentric will update the titles of Reports[s] . . . by injecting the following words into the beginning of the title: "Notice: This report is false and fake . . . the title tags will automatically update") ("Xcentric will insert into the beginning of the body of Report[s] . . . up to 250 words of content provided by QED")

Plaintiffs have good reason to think that James Rogers, Ben Smith, Justin Crossman, Scott Cates, or someone else at a company called Lavidge will be able to describe how the HTML and custom meta tags sold by Defendants are manually inserted into the code for Reports. See Borodkin Dec. at ¶9. In addition, during the

meet and confer process, Defendants' attorney conceded, "We sell meta tags – so what?" See Borodkin Dec. at ¶15.

D. It is Likely Discovery Would Yield Evidence to Refute Defendants' Claim that Mr. Magedson has No Control Over How Google or Any Other Search Engine Decides to Rank Content

In Defendants' summary judgment motion, they contend that Defendant Magedson "has no control over how Google or any other search engine decides to rank content." See DN-145 at 6:15-17; DSOF ¶ 31. It appears that this contention is a response to Plaintiffs' allegations that Defendants misrepresent to the public that:

> "Ripoff Report has never, ever (not now, and not in the past) done anything to cause Google to rank our website higher in search results than other sites."

FAC ¶123, DN-96 at 32.

Plaintiffs alleged two separate ways in which this statement was false – that Defendants have engaged in extensive search engine optimization ("SEO") practices, see FAC at ¶¶100-120, and Defendants' redaction or disclaiming Ripoff Reports about Google, Google AdWords, and Google's founders, see FAC at ¶¶121-137.

The true facts are that Defendants have created and designed their website to make the Google search results as prominent and damaging as possible, because they understand how devastating negative Google search results can be to a business. See, e.g., First Amended Complaint, Exhibit 3 at 2 [DN-100-1 at 11] ("See the listings below and how they look on search engines – you will see Rip-off Report on the first page—See how other Corporate Advocacy Program member listing look on search engines.")

Plaintiffs have good reason to think that James Rogers, Ben Smith, Justin Crossman, Scott Cates, someone at a company called Lavidge will be able to

describe the active steps that Defendants have taken to optimize search results of Reports and make them as prominent and damaging as possible, and that Defendants deliberately designed their business to monetize their ability to change these damaging results and rankings to good ones. See Borodkin Dec. at ¶¶10-13.

E. The Emergent Facts that Would be Yielded in Discovery Would Influence the Outcome of the Summary Judgment Motion

Defendants have argued that Plaintiffs' claims lack legal and factual merit. Briefly, the discovery sought by this motion matters because this case seeks to hold Defendants liable for their own conduct, not the speech of others. This is an unfair business practices and misleading advertising case under California Business and Professions Code §§ 17200-17210, and a business torts case for interference with existing and prospective economic advantage.

The third cause of action in the First Amended Complaint, Unfair competition under California Business and Professions Code §§17200 et seq., gives a remedy to "any person who has suffered injury in fact and has lost money or property as a result of the unfair competition." See Bus. And Prof. Code § 17204. In this case, Plaintiffs do have standing and their have suffered an injury in fact, lost money and property.

All that is required under California's unfair business practices or misleading advertising claim is that "members of the public are likely to be deceived." See Morgan v. AT&T Wireless Services, Inc., 177 Cal. App. 4th 1235, 1253 (Cal. App. 2d Dist. 2009) ("The UCL outlaws as unfair competition "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising. . .The scope of the UCL is quite broad. . . . a business practice need only meet one of the three criteria to be considered unfair competition.")(citing McKell v. Washington Mutual, Inc., 142 Cal. App. 4th 1457, 1471, 49 Cal. Rptr. 3d 227, 239 (Cal. 2006). Defendants' citation to Birdsong v. Apple, Inc., 590 F.3d 955, 959 (9th Cir. 2009), does not show that Plaintiffs lack

standing. There, the plaintiffs were found to lack standing because they alleged only a potential, theoretical loss of hearing from use of headphones by people other than the actual plaintiffs. Walker v. Geico Gen. Ins. Co., 558 F.3d 1025, 1027 (9th Cir. 2009), is totally inapposite. In Walker, the plaintiff was an auto body shop owner who did not have any out-of-pocket losses and the Court held he was not entitled to an injuction forcing auto insurers to paid higher prices for auto body work.

In this case, there is a real injury in fact and money paid out of pocket. Plaintiffs and others identified in the First Amended Complaint paid money out of pocket to reputation repair specialists as a result of Defendants' false and misleading advertising. See FAC at ¶¶213-218 (Plaintiffs' payments); FAC ¶219 (Tina Norris paid $600); FAC ¶ 220 (Kathy Spano paid $3,000); FAC ¶221 and Ex. 26 (Laura Snoke paid $3,500 upfront and $500 a month).

The reason such people pay this money is that they are harmed by Defendants' passing themselves off as a neutral consumer advocacy business. The Reports and Google results seem legitimate and are very prominent on Google. If the public knew the truth – that Defendants are willing to sell custom meta tags that will make Google search results about subjects of Reports favorable – then the mischief caused by Defendants' indiscriminate refusal to enforce their Terms of Use would be lessened. If the content were posted by the authors at their own websites, they would not have the authority or prominence in Google Rankings that Defendants' website has.

They caused Plaintiffs' injuries because the people who see Google search results about Plaintiffs think they are bad. And they do not tell the full story – that Defendants willfully turn a blind eye to violations of their Terms of Service, that Defendants will sell meta tags that turn Google search results from bad to good.

Defendants' actions are and have been harmful to Plaintiffs. As long as Courts and the public are misled as to the actual facts, the shame of having a

Ripoff Report in Google search results is much worse than it would be if Defendants gave proper and fair disclaimers. The discovery that Plaintiffs seek is therefore relevant to oppose Defendants' motion for summary judgment.

Defendants argue this case is an effort to squash free speech and censor Defendants. It is not. Plaintiffs would love to settle this case and engage in a robust discussion of Defendants' business. The problem is that Defendants have a history of suing anyone who criticizes them in the press – blogger Sarah Bird, the Phoenix New Times, a reporter – even the reporter's source and the source's spouse. Thus, even people who know the truth about Defendants are frightened and intimidated from speaking out, because they cannot afford to get sued.

Defendants say that Plaintiffs should sue the authors, not them. However, Defendants actively seek to hide the identity of authors and will not cooperate with court orders against the authors, anyway. Plaintiffs agree that they have a remedy against the third-party authors of the original Reports about them, and have named such third-parties as John Doe defendants. However, it is necessary to join Defendants on those claims if Plaintiffs want Defendants to be bound by any orders of this Court granting relief. Defendants have taken the position in other cases, notably Blockowicz v. Williams, 09-cv-3955 (N.D.Ill.) (now pending on appeal in the United States Court of Appeals for the Seventh Circuit after the oral argument on September 29, 2010) that if Defendants are not joined as parties in a defamation case, they will not have had notice and an opportunity to be heard, and therefore are not bound by a Court order to take down the defamatory Reports. In other words, it would do no good to sue "John Does" if Defendants will not cooperate with any takedown orders against the John Does.

Plaintiffs have requested Defendants' attorneys to stipulate to the accuracy of the following colloquy with the Honorable Judge Diane P. Wood on September 23, 2010:

> "The Court: And you flout all of these Court orders, I take it? For the 30 orders you're talking about, you have refused to comply with.

> Ms. Speth: Your Honor, we have complied with Court orders against our client. We have not complied with Court orders in cases in which we are not a party. We're not a defendant, had no opportunity to be heard, and were [sic] not applicable to us because we're not aiding and abetting the actual author of the report."

See Borodkin Dec. ¶18. Plaintiffs requested Defendants to stipulate to the accuracy of that quote and to explain whether Defendants should be kept in this case on the defamation claims or not. Defendants refused to answer. See Borodkin Dec. ¶18 and Ex. 4. Defendants' response was to file an anti-SLAPP motion, DN-154, and two Rule 11 sanctions motions. DN-157, DN-158.

Defendants' refusal to tell people whether they should be sued or not leaves subjects of Reports in an awful predicament. If Plaintiffs don't include Defendants, they will not get any relief, because Defendants do not enforce their Terms of Service – even in the face of Court Orders. If they do include Defendants, Defendants claim that Plaintiffs are suppressing their First Amendment rights, trampling on Section 230 of the Communications Decency Act, and file Rule 11 sanctions motions.

However, all of this is unnecessary. This case can be disposed of without implicating the defamation laws or the Communications Decency Act. All that is needed is for Defendants to make disclosures that describe what their business really is. If the public knows that Defendants compile Reports and rebuttals so they can sell advertising, meta tags, and endorsements, then the victims will have relief.

If the victims knew the truth – that Defendants redact names, "update" or disclaim Reports for money or after litigation (even if Defendants do not "take down" such Reports) – then subjects of Reports might choose to try to persuade Defendants to redact their names so that they do not appear in Google searches. But they rely on Defendants' statements that "Reports never come down" and

therefore file rebuttals, which do not help and only give Defendants' website more authority.

Finally, if victims knew the truth – that filing a rebuttal will not make Google search results more favorable but that it will push the bad Reports about them higher in Google rankings – then they would not follow Defendants' advice to post rebuttals, but they would ignore the bad reports and perhaps use that time and money to work with an online reputation repair specialist to post good things about them on the Internet that will eventually push the bad Reports to the bottom of Google search results over time. Subjects of Reports do not realize that Defendants need fresh content constantly in order to bring traffic to their website and sell advertising.

In light of this known phenomenon, Defendants' insistence that subjects file a rebuttal is the first step in getting Defendants to identify the author of a Report is an unfair business practice. It is not required by Mobilisa and it arguably does the subjects more harm than good.

3. Conclusion

For the foregoing reasons, this motion should be granted in its entirety.

DATED: November 1, 2010

Respectfully submitted,

By: /s/ Lisa J. Borodkin
DANIEL F. BLACKERT
LISA J. BORODKIN
Attorneys for Plaintiffs,
Asia Economic Institute LLC,
Raymond Mobrez, and Iliana Llaneras

DECLARATION OF LISA J. BORODKIN AND CERTIFICATION OF COMPLIANCE WITH LOCAL CIVIL RULE 7-3

I, Lisa J. Borodkin, declare:

1. I am an attorney at law, duly admitted to practice before all the courts of the State of California and this Honorable Court. I am co-counsel of record for Plaintiffs Asia Economic Institute LLC, Raymond Mobrez and Iliana Llaneras ("Plaintiffs") in this action. I have first-hand, personal knowledge of the facts set forth below and, if called as a witness, I could and would testify competently thereto.

2. This Declaration is made in support of Plaintiffs' Motion (1) Under Rule 56(f) To Deny Or To Continue Defendants' Motion For Summary Judgment To Conduct Further Discovery.

3. Attached hereto as **Exhibit "1"** is a true and correct copy of the Reporter's Transcript of the September 20, 2010 proceedings before this Court by Ms. Deborah K. Gackle.

4. Plaintiffs have been diligent in attempting to discovery relevant evidence in this case. On June 22, 2010, Plaintiffs served Requests for Production of Documents relevant to Defendants' meta tagging and HTML coding practices. On July 22, 2010, Defendants served a Response to Plaintiffs' Request for Production, a copy of which is attached as **Exhibit "2,"** which refused to identify or disclose any documents on the grounds of the discovery stay entered on June 24, 2010.

5. On or about October 6, 2010, I spoke for the first time with James Rogers, who said he was the former personal assistant for Defendant Edward Magedson, about some of Defendants' business practices.

6. From October 2, 2010 to the present, I have had several discussions with Mr. Rogers that lead me to believe that there is discoverable evidence relevant to defeat Defendants' pending motion for summary judgment.

7. Mr. Rogers told me that he has extensive knowledge of the Corporate Advocacy program and wrote many of the emails relating to it, sometimes using the email address "rorlegaldirectory@ripoffreport.com"

8. Mr. Rogers told me that there were several computer programmers that are knowledgeable about the overall design of the website than those identified by Defendants earlier. According to Mr. Rogers, the RipoffReport.com website was programmed by Scott Cates, who is a current or former employee or affiliate with a company called Lavige, and who has his own company. Other programmers used by Defendants include Eric Skelling and Stephen at Lavige. According to Mr. Rogers, Scott Cates has knowledge of the specific instructions that Defendants gave every time they changed their website, including the complete reorganization of the server directories in between the time this action was filed and today. These witnesses would have knowledge that would contradict Defendants' evidence on the Motion for Summary Judgment that everything is done "automatically." According to Mr. Rogers, Ben Smith, the declarant used by Defendants on their summary judgment motion, does not do the programming but is an IT salesman and Mr. Magedson refers to Ben Smith as "the salesman."

9. Mr. Rogers told me that Justin Crossman would have knowledge of the Defendants' practice of manually changing HTML code and meta tags, which would contradict Defendants' evidence on their motion for summary judgment. Mr. Rogers told me that he was aware that he and Justin Crossman have information that would contradict Defendants' representation that Mr. Magedson has no control over how Google or other search engines rank content. Mr. Rogers told me that Defendants hired and paid consultants to improve Google rankings according to generally accepted search principles and have taken steps to improve their visibility and ranking on Google. Specifically, Mr. Rogers attended a meeting with a search engine optimization specialist in or about June or July 2010 named Marcus.

10. Mr. Rogers told me he was assigned to be the project manager for the Verified Safe Program. Among other things, he sent me the draft Power Point Presentation attached hereto as **Exhibit "3."** He explained that he prepared this draft Power Point presentation to try to get customers for the Corporate Advocacy Program and Verified Safe Program according to Defendants' instructions. Among other things, the Power Point presentation in Exhibit "2" states, "WE CAN BRING YOU TO THE TOP OF THE SEARCH ENGINES LIKE NO ONE ELSE CAN. BY VERIFYING YOUR BUSINESS AS A SAFE AND SECURE BUSINESS, TO DO BUSINESS WITH," and "THE POSITIVE REPORT ON YOUR COMPANY WILL GO THE TOP OF THE SEARCH ENGINES, WITH LINKS TO YOUR BUSINESS TURNIG[sic], CONVINCING CONSUMERS TO DO BUSINESS WITH YOU." This is all stated under the title "Once a Ripoff Report is filed, it will never, ever disappear . . . "

11. Also among the "Rip-off Report Services" to be offered in the presentation in Exhibit "2" are "Positive Introduction Google Search Page 1.

12. Mr. Rogers has indicated his willingness to sign a declaration and testify to this Court regarding the above. Plaintiffs arranged with Mr. Rogers to have him meet with me for an in-person interview in Los Angeles, and had purchased airline tickets for him from Phoenix to Los Angeles for October 23, 25 and 27, 2010. However, for various reasons, Mr. Rogers was unable to board any of these flights.

13. The evidence that I expect to obtain after the granting of this Rule 56(f) motion would be testimony and documents from Mr. Rogers explaining Defendants' efforts to make money from the Ripoff Report website but also to disguise many things that they were doing.

14. Mr. Rogers told me that Defendant Magedson has failed to keep emails and other evidence relevant to active litigation. Mr. Rogers stated that sometimes Magedson will get a new laptop, lose emails, and say that the loss of

emails was “a good thing and a bad thing.” Mr. Rogers said that when Mr. Magedson gets a new laptop during an active case he will say “good thing that one was damaged in transport.” Mr. Rogers said that Defendants took many extraordinary steps to disguise their business transactions or avoid creating evidence, such as paying programming consultants using aliases, registering cell phones in the names of independent contractors, Mr. Rogers and others; and using email addresses that could not easily be traced to the Defendants, including legaldirectory@ripoffreport.com, rorlegaldirectory@gmail.com, jrhappygolucky20@gmail.com for Mr. Rogers to communicate with Mr. Magedson and vice versa.

15. As soon as I learned of Mr. Rogers, the next day, October 7, 2010, I called Defendants’ attorney, Maria Speth, and asked if Defendants would stipulate to a Rule 56(f) order allowing discovery or stipulate to consolidate hearings on such a motion with Defendants’ pending motion for summary judgment. I also told her that Mr. Rogers had told me that her colleague, Adam Kunz, had visited Mr. Rogers at his house the night before and that Mr. Rogers had conveyed to me that he felt harassed and pressured. Ms. Speth asked me the relevance of his testimony. I explained that if people knew that Defendants sell meta tags, then the harm from having a Report might be lessened. Ms. Speth said “so we sell meta tags – so what?” Ms. Speth did not consent to allow discovery, consolidate the hearing on this Rule 56(f) motion or otherwise to resolve this case.

16. On or about October 22, 2010, I received a telephone call from Defendants’ attorney David Gingras. We again spoke about the possibility of avoiding this motion – but his proposal – that I fly to Phoenix the next day, Saturday, October 23, 2010 to do a joint deposition of Mr. Rogers, did not seem feasible. Plaintiffs had already purchased an airline ticket for Mr. Rogers for October 23, 2010.

17. I had hoped to have interviewed Mr. Rogers and to have his signed declaration in hand by the time Plaintiffs made this motion. Unfortunately, Mr. Rogers did not make it on his flight on Saturday, October 23, 2010, nor on the flights Plaintiffs purchased for Mr. Rogers on Monday, October 25, 2010 or Thursday, October 28, 2010. Each time, I have rearranged my schedule to try to interview Mr. Rogers.

18. In addition to the above, Plaintiffs would also like to have time to obtain a transcript of the September 23, 2010 hearing on oral argument in the appeal in Blockowicz v, Williams before the Seventh Circuit. I asked Defendants' counsel to explain their position on statements in that oral argument suggesting that Defendants should be made parties in defamation cases, and to stipulate to the accuracy of a quote I retrieved from the Seventh Circuit's audio replay. Defendants' counsel refused. Attached as **Exhibit "4"** are emails between me and Defendants' counsel.

19. Later, on October 22, 2010, I again asked Defendants' counsel, David Gingras, whether they have taken down Ripoff Reports pursuant to court orders. Mr. Gingras told me I should look at a case involving George S. May. This is a Northern District of Illinois case, George S. May v. Xcentric, (N.D. Ill. 04-cv-6018), which was settled after two orders finding the Defendants in contempt of a temporary restraining order. I told Mr. Gingras on October 22, 2010 that when I last checked the Ripoff Report website for George S. May, it still had a statement that Ripoff Report planned to appeal the order, and that that statement seemed no longer timely. I also told Mr. Gingras that with the proper disclosures we could probably settle this case.

20. With the Plaintiffs' permission, I am advising this Court that my co-counsel, Daniel F. Blackert, has become completely unresponsive to calls from Plaintiffs and from me for over a month. We have not been able to get a call, email or text message returned from Mr. Blackert since before Labor Day weekend. The

last thing Mr. Blackert did was to file declarations on the Motion for Reconsideration describing the vivid, graphic threats made to him by Defendants' counsel, David Gingras. These described how Defendants wanted their business to be like a castle, and that they would surround it with heads on pikes of those who challenged them. Mr. Blackert told me that he was very deeply disturbed by these remarks. I was present for these remarks.

21. At Plaintiffs' request, I have called the police and looked for Mr. Blackert at his house. I did not find Mr. Blackert, but I found his roommate and landlord, who assured me that he hears from Mr. Blackert every week or so. I had also previously been in contact with Mr. Blackert's girlfriend, but have not received return calls from her for over a month, either. Periodically, I send Mr. Blackert emails that go unreturned. He has not updated his address with the State Bar.

22. The significance of this is that Mr. Blackert was the General Counsel and intended to be lead counsel for Plaintiffs in this case. Mr. Blackert's disappearance has caused all of his work to fall on my shoulders. I apologize for the late timing of this motion and for other papers in this action. I believe some of this is caused by excusable neglect. If this case is set for trial, I anticipate bringing in a special trial counsel to help with the trial. I respectfully request that this Court not punish the clients for attorney neglect.

I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed this 1st day of November, 2010, in Los Angeles, California.

/s/ Lisa J. Borodkin
Lisa J. Borodkin