David S. Gingras, CSB #218793
Gingras Law Office, PLLC
3941 E. Chandler Blvd., #106-243
Phoenix, AZ 85048
Tel.: (480) 668-3623
Fax: (480) 248-3196
David@GingrasLaw.com

Maria Crimi Speth, (Admitted *Pro Hac Vice*)
Jaburg & Wilk, P.C.
3200 N. Central Ave., Suite 2000
Phoenix, AZ 85012
Tel: (602) 248-1000
Fax: (602) 248-0522
mcs@jaburgwilk.com

Attorneys for Defendants
Xcentric Ventures, LLC and
Edward Magedson

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ASIA ECONOMIC INSTITUTE, LLC, *et al.*, **Plaintiffs,** **vs.** **XCENTRIC VENTURES, LLC, *et al.*** **Defendants.**	Case No: 2:10-cv-01360-SVW-PJW **DEFENDANTS' OPPOSITION TO PLAINTIFFS' 2nd RULE 56(f) MOTION AND DEFENDANTS' CROSS-MOTION FOR SANCTIONS** Hearing Date: Nov. 29, 2010 Time: 1:30 PM Courtroom: 6 (Hon. Stephen Wilson)

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3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

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3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

I. INTRODUCTION

Plaintiffs' request for Rule 56(f) relief is entirely redundant; it raises *exactly* the same arguments Plaintiffs made four months ago in their *first* Rule 56(f) motion—Docket #87 (filed July 8, 2010). On July 19, 2010, this court denied Plaintiffs' first Rule 56(f) motion in its entirety, finding it did not contain a single legitimate argument justifying the requested relief. *See* Doc. #94 at 40:19–49:10.

In keeping with their well-established pattern of needlessly expanding and multiplying these proceedings, Plaintiffs are back again requesting *exactly* the same relief which this court has already denied. As explained herein, Plaintiffs' second Rule 56(f) motion is equally lacking in merit as their first one was and it should be denied for the same reasons.

Furthermore, Plaintiffs' new Rule 56(f) is apparently intended to support additional future briefing from Plaintiffs in opposition to Defendants' Motion for Summary Judgment even though this court has ordered that no such briefing will be permitted. *See* October 25, 2010 Order (Doc. #172) at 5:1–2 (rejecting Plaintiffs' request for additional time to oppose Defendants' summary judgment motion and stating: "The Court will not grant an enlargement, nor will it accept additional untimely filings in opposition.") (emphasis added).

Given Plaintiffs' clear pattern of misconduct in this case, merely denying their motion is inadequate. Plaintiffs brought their second Rule 56(f) motion (which was filed literally two hours before the last hearing) in bad faith and for the singular purpose of causing Defendants' counsel to waste an entire day traveling from Phoenix to Los Angeles for a hearing that Plaintiffs knew would be entirely useless. For that reason and because Plaintiffs' motion is predicated on knowingly false representations of fact made by Plaintiffs' counsel Lisa Borodkin, Defendants respectfully request that the court issue an order pursuant to 28 U.S.C. § 1927 requiring Ms. Borodkin to pay for the attorney's fees and costs incurred by Defendants in traveling to Los Angeles on November 1, 2010 and for the fees incurred in opposing the present motion.

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

II. SUMMARY OF PROCEEDINGS TO DATE

Understanding why Plaintiffs' current motion is meritless and why counsel's conduct rises to a level justifying sanctions requires a review of the unfortunately complex procedural history of this case. This review will be as brief as possible, but each point explained below is necessary to fully understand this motion.

As the court may recall, many months ago on May 24, 2010, Defendants filed a motion (Doc. #40) requesting summary judgment as to this entire case. This motion was predicated on two primary arguments. First, the motion explained that Plaintiffs Raymond Mobrez and Iliana Llaneras perjured themselves when they alleged, under oath, that they had been victims of "extortion" committed by Defendants. As clearly demonstrated by the series of recorded telephone conversations between the parties, Mr. Mobrez and Ms. Llaneras fabricated their extortion claims in their entirety; not one word of their stories was true. Plaintiffs eventually conceded this point, resulting in the court granting partial summary judgment in favor of Defendants as to Plaintiffs' fabricated extortion claims. *See* Doc. #94; order dated July 19, 2010.

The second part of Defendants' first Motion for Summary Judgment was based on a much less dramatic issue—Plaintiffs' remaining tort claims were barred by the Communications Decency Act, 47 U.S.C. § 230(c)(1). *See* Doc. #40; Defendants' Motion for Summary Judgment dated May 24, 2010 at 19:21–23:5. Defendants also argued that Plaintiffs had no evidence on various mandatory elements of their other tort claims. *See id*. at 23:6–25:10. In support of their motion, Defendants supplied affidavits from several employees, contractors, and other witnesses including Ed Magedson (Doc. #42), Ben Smith (Doc. #43), Amy Thompson, (Doc. #44), Kim Jordan (Doc. #45), and Lynda Craven (Doc. #46).

As they do now, in an effort to avoid summary judgment Plaintiffs filed an extremely late request for relief under Rule 56(f). Specifically, one day before the July 9, 2010 hearing on Defendants' first Motion for Summary Judgment, on July 8, 2010 Plaintiffs brought an *ex parte* Rule 56(f) motion (Doc. #87) claiming they needed

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

additional time to conduct discovery in order to fully respond to the motion for summary judgment. In terms of relief, Plaintiffs asked for additional time to depose Mr. Magedson (notwithstanding the fact they had already deposed Mr. Magedson for two full days), and they requested additional time to conduct discovery relating to a "Second Questionnaire" used by Defendants even though it was undisputed that Plaintiffs never received or were even aware of this document. Notably, Plaintiffs did not claim any need to depose Defendants' technical witness, Ben Smith, nor did Plaintiffs seek leave to depose any of the other witnesses submitting declarations in support of Defendants' motion.

As stated above, in its order dated July 19, 2010 this court denied Plaintiffs' first Rule 56(f) request in its entirety. The court discussed Plaintiffs' arguments at length and in detail (nine pages of the 53-page order were devoted exclusively to the 56(f) issue). As to Plaintiffs' request to conduct a *third* deposition of Mr. Magedson, this court denied the request, finding, "Plaintiffs have not offered any explanation as to why this discovery is relevant to Defendants' summary judgment motion, and the Court can find none." Doc. #94 at 47:22–24. The court also denied Plaintiffs' request for additional discovery relating to the "Second Questionnaire", finding this document was irrelevant because it was never sent to Plaintiffs and therefore had no bearing on whether Plaintiffs were somehow threatened by Defendants. *See id*. at 43:5–27. All of Plaintiffs' other arguments in their first Rule 56(f) motion were likewise rejected and their motion was denied.

After denying Plaintiffs' first Rule 56(f) motion, the court's July 19, 2010 order granted partial summary judgment in favor of Defendants as to Plaintiffs' extortion claims. However, the court neither granted nor denied summary judgment as to the other claims in the case; those matters were simply not addressed. Instead, because one of Plaintiffs' original claims (RICO/wire fraud) was dismissed for failure to comply with Fed. R. Civ. P. 9(b), the court granted Plaintiffs leave to amend their complaint. *See* Doc. #94 at 53:7–13. In that same order, the court also permitted Defendants to move for dismissal of any amended complaint that was filed.

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

As ordered, Plaintiffs' filed an 84-page First Amended Complaint (Doc. #96) on July 27, 2010 and Defendants filed a Motion to Dismiss (Doc. #110) on August 6, 2010. In their motion, Defendants argued that even taking all of the allegations as true, Plaintiffs had failed to plead viable claims due in large part to their failure to allege either damages or causation in support of their various tort claims. Somewhat surprisingly, Plaintiffs did not oppose the Motion to Dismiss. *See* Doc. #115.

Despite this, to date the court has neither granted nor denied Defendants' Motion to Dismiss. Instead, on the date that motion was set for hearing (Sept. 20, 2010), the court took no action on the motion. Instead, the court ordered Defendants to re-file their Motion for Summary Judgment within seven days. Defendants did so as ordered. *See* Doc. #145 (Defendants' MSJ #2, filed Sept. 27, 2010).

In addition to ordering Defendants' to re-file their summary judgment motion, the court also ordered Plaintiffs' to file their opposition by October 4, 2010. *See* Doc. #144 (minutes of hearing). Rather than complying with this order, Plaintiffs took no action and filed no memorandum in opposition to Defendants' second summary judgment motion (Plaintiffs did file various other pleadings some of which were timely but most of which were not). Because no substantive opposition was filed, on October 6, 2010, Defendants filed a Request for Waiver of Oral Argument (Doc. #164) pursuant to Local Rule 7–15 asking the court to vacate the oral argument which had been set for Nov. 1, 2010. Based in part on Plaintiffs' objection to vacating the hearing, this request was denied on Oct. 25, 2010 (Doc. #172) leaving the Nov. 1, 2010 hearing on calendar for 1:30 PM.

Less than two hours prior to the hearing, on Nov. 1, 2010 Plaintiffs filed their *second* Rule 56(f) motion (Doc. #173). As a result of this tactical maneuver, the court determined that it could not resolve Defendants' second Motion for Summary Judgment and it continued the hearing on that motion until such time as Plaintiffs' second Rule 56(f) motion could be heard on November 29, 2010.

As explained herein, Plaintiffs' new 56(f) motion is groundless, was brought in bad faith solely for the sole purpose of needless delay and with a goal of causing

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

Defendants' counsel to waste an entire day traveling to a hearing that Plaintiffs knew would serve no purpose. The misconduct of Plaintiffs' counsel is beyond sanctionable. As such, Defendants respectfully request that this court deny Plaintiffs' second Rule 56(f) motion and grant one or all of Defendants' numerous unresolved dispositive motions including their first Motion for Summary Judgment (Doc. #40), their Motion to Dismiss (Doc. #110), their Motion to Strike (Doc. #154) and/or their second Motion for Summary Judgment (Doc. #145). In addition, Defendants respectfully request an order requiring Plaintiffs' counsel to pay for the costs and fees associated with her conduct.

III. ARGUMENT

As explained above, this case is in an unfortunately complex and unwieldy procedural posture. This is partly due to the fact that when the court granted partial summary judgment in July 2010 and allowed Plaintiffs' leave to amend, the court clearly anticipated that a dispositive motion under Rule 12(b)(6) would be necessary in order to test the legal sufficiency of Plaintiffs' re-pleaded claims before the case could proceed any further and before Plaintiffs would be allowed to seek additional discovery.

In fact, the court's July 19, 2010 order expressly stated this. The final page of that order explained that Defendants were permitted to challenge the legal sufficiency of Plaintiffs' amended pleading before any additional discovery would be permitted:

> Defendants' Motion to Dismiss Plaintiffs' third and fourth causes of action under RICO for failing to plead the alleged predicate acts of wire fraud with particularity is GRANTED WITH LEAVE TO AMEND. Plaintiffs shall file any amended complaint no later than July 27, 2010. Thereafter, Defendants are granted until Friday, August 6, 2010 to file a motion to dismiss the amended complaint, if they believe such a motion is warranted … . If Plaintiffs decide to amend the complaint so as to re-plead the predicate acts of wire fraud, *the Court will revisit the issue of further discovery (including the continued deposition of Magedson) after any motions to dismiss are resolved or the time for filing such motions has expired*.

Doc. #94 at 53:7–20 (emphasis added).

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

As the court anticipated, Defendants believed that Plaintiffs' First Amended Complaint contained numerous defects of law which rendered that pleading unable to withstand a Motion to Dismiss under Rule 12(b)(6) and/or Rule 9(b). For that reason and as the court expressly invited them to do, Defendants brought a timely (and unopposed) Motion to Dismiss (Doc. #110) challenging the legal sufficiency of Plaintiffs' amended Complaint. However, because Defendants' Motion to Dismiss has never been resolved, this has left the parties in a state of limbo, unable to ascertain the viability of Plaintiffs' claims and unclear as to the relevance of a wide variety of facts including all of the facts and discovery encompassed by Plaintiffs' new Rule 56(f) motion.

For example, Plaintiffs' present motion requests leave to take discovery including a *third* deposition of Mr. Magedson and depositions of various other third party witnesses which Plaintiffs claim would support their allegation that "Defendants misrepresent to the public that 'Ripoff Report has never, ever … done anything to cause Google to rank higher in search engine results than other sites." Plaintiffs' 2nd Rule 56(f) motion at 5:9–13 (quoting FAC ¶ 123). Plaintiffs contend this representation is false and they offer this allegation as support for their claims of fraud and deceit under California law.

However, as explained on page 10 of Defendants' unresolved Motion to Dismiss (Doc. #110) *even assuming this allegation is true* it cannot support a cause of action for fraud because Plaintiffs have not alleged that the statement actually and proximately caused any specific damage to them. Similarly, Defendants' second Motion for Summary Judgment also argued that this statement cannot support a fraud claim even assuming it is factually false. *See* Doc. #145 at 14:4–15:15.

If these arguments are correct, Plaintiffs do not need additional discovery as to the truth or falsity of this statement because even if it was false, it cannot support a claim for fraud for *other* reasons; e.g., a lack of alleged damages/causation. This point is further underscored by the fact that as noted above, Plaintiffs have not filed any opposition to Defendants' Motion to Dismiss nor have they filed any substantive memorandum opposing Defendants' second Motion for Summary Judgment.

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

Despite this, Plaintiffs now ask for Rule 56(f) relief to permit them to pursue discovery that they hope will show that Defendants have lied about past favoritism towards Google. This request must be denied because as explained in both Defendants' unresolved Motion to Dismiss and their second Motion for Summary Judgment, the allegation that Defendants committed "fraud" by falsely *denying* any act of favoritism toward Google simply cannot state a viable claim for fraud as a matter of law, *even assuming Plaintiffs' allegation is true*. This is fatal to Plaintiffs' new Rule 56(f) motion because as this court noted in its prior order, "to justify a continuance under Rule 56(f), the discovery sought must be 'essential' to Plaintiffs' opposition." Doc. #94 at 41:24–25.

Here, none of the discovery currently sought by Plaintiffs meets that standard because none of the requested discovery would cure any of the *legal* defects in Plaintiffs' claims, nor would the discovery cure the lack of proper allegations and/or evidence on *other* dispositive elements such as damages and causation. This is true as to each specific area of relief sought in Plaintiffs' second Rule 56(f) motion.

A. Plaintiffs Are Not Entitled To Relief Under Rule 56(f) Because They Could Have Obtained All The Requested Discovery Sooner

Before addressing the specific arguments in their motion, it is important to recognize that relief under Rule 56(f) is not warranted "if the movant has failed diligently to pursue discovery in the past." *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912 (9th Cir. 1996) (quoting *Conkle v. Jeong*, 73 F.3d 909, 914 (9th Cir. 1995); *Stucky v. Department of Educ.*, 337 Fed.Appx. 611, 613 (9th Cir. 2009) (denial of Rule 56(f) relief to take a deposition was proper where the moving party "presented no evidence indicating that the deposition could not have been taken sooner.")

This rule is fatal to Plaintiffs' entire motion for one simple reason—Plaintiffs could have pursued all the discovery they are now seeking *months ago*. Indeed, as noted above, Plaintiffs already deposed Mr. Magedson twice over a period of two full days, and to the extent they requested a *third* deposition in their first Rule 56(f) motion filed in early July (a request they repeat again here), that request was appropriately denied on the

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

basis that Plaintiffs did not and could not identify any reason why a third deposition would produce any additional useful information. Nothing has materially changed since then that would justify any different result.[1]

In addition, Plaintiffs have offered no valid explanation justifying their failure to take the deposition of Ben Smith, Amy Thompson, Kim Jordan, and/or Lynda Craven which could (and therefore should) have been done months ago. As noted above, each of these witnesses supplied affidavits in support of Defendants' *first* Motion for Summary Judgment filed nearly six months ago in May 2010.

Although Plaintiffs may claim that they were unable to pursue discovery earlier due to the bifurcation and stay which *they requested* over Defendants' objection, this is irrelevant and untrue because Plaintiffs could have (and, in fact did) seek relief from that stay in the past. In any case, Defendants have always been willing to voluntarily permit discovery as to any *relevant* matters. Specifically, in advance of the first round of summary judgment briefing last summer, Plaintiffs deposed Mr. Magedson for two full days and Defendants agreed to permit Plaintiffs to depose Defendants' technical witness, Ben Smith. Despite initially requesting Mr. Smith's deposition, Plaintiffs later changed their minds and on June 4, 2010 Plaintiffs' counsel sent an email stating: "**At this time we're going to hold off on deposing Ben Smith. Thanks very much for offering to make him available.**" June 4, 2010 email from Lisa Borodkin attached as **Exhibit A** to Affidavit of David Gingras submitted herewith. Over the last five months, Plaintiffs have made no further efforts to obtain Mr. Smith's deposition (or any other deposition) until their new 56(f) motion was filed two hours prior to the last hearing date.

[1] Plaintiffs will likely respond by arguing that because their First Amended Complaint contains "new" claims not present in their first pleading (i.e., state law fraud), so this represents good cause for them to depose Mr. Magedson a third time. The flaw in this argument is obvious—Plaintiffs' new state-law fraud claims are legally groundless and are the subject of a pending unresolved Motion to Dismiss. As explained in that motion, Plaintiffs have failed to allege facts sufficient to state a valid claim for fraud. Because Plaintiffs' own factual allegations are insufficient to support their fraud claim *even assuming they are true*, no additional testimony from Mr. Magedson is needed for the court to resolve that issue as a matter of law.

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

Plaintiffs' failure to diligently seek the depositions of Ben Smith, Amy Thompson, Kim Jordan, and/or Lynda Craven over the past five months is a sufficient if not compelling basis to deny relief; "The failure to conduct discovery diligently is grounds for the denial of a Rule 56(f) motion." *Pfingston v. Ronan Engineering Co*., 284 F.3d 999, 1005 (9th Cir. 2001) (Rule 56(f) relief was properly denied where party opposing 56(f) relief objected to depositions and no effort was made to promptly obtain relief from the court) (citing *Landmark Dev. Corp. v. Chambers Corp*., 752 F.2d 369, 372 (9th Cir. 1985) (concluding that court properly denied Rule 56(f) because the "[f]ailure to take further depositions apparently resulted largely from plaintiffs' own delay.")).

1. Plaintiffs' Counsel Lisa Borodkin Lied About Defendants' Refusal To Allow The Deposition of James Rogers

As explained above, Defendants' position is that Plaintiffs should not be allowed to bring a Rule 56(f) motion filed *two hours* before a pending summary judgment hearing in order to take discovery from witnesses who were disclosed nearly six months ago during the first round of summary judgment briefing. This is a classic instance of a party failing to diligently pursue discovery from known sources.

However, Defendants acknowledge that the circumstances are different as to one witness—James Rogers. For the court's information, Mr. Rogers was previously employed as the personal assistant to Mr. Magedson. In addition, Mr. Rogers and Mr. Magedson were previously involved in a personal, intimate relationship lasting approximately one year which ended recently.

Until early October 2010, Mr. Rogers was not previously disclosed as a witness (for appropriate reasons explained herein) and Defendants concede that Plaintiffs could not have deposed Mr. Rogers during the last round of briefing for that reason. However, these facts do not justify granting relief under Rule 56(f) at such a late hour. This is particularly true given the intentional misrepresentations made to the court by Plaintiffs' counsel, Lisa Borodkin, concerning the circumstances surrounding the proposed deposition of Mr. Rogers offered by Defendants. The true facts are as follows.

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

During the time he was intimately involved with Mr. Magedson, Mr. Rogers was a recovering drug addict with a variety of other personal problems which are not relevant to this case. At some time in autumn 2010, Mr. Rogers experienced a relapse and began using drugs again, specifically crystal methamphetamine. Upon learning this, Mr. Magedson informed Mr. Rogers that their relationship could not continue unless Mr. Rogers stopped using drugs.

Sensing that his access to resources needed to purchase drugs was about to end, Mr. Rogers approached several individuals who he knew were interested in obtaining private information about Mr. Magedson such as his home address, bank account details, and other financial information. Eventually, Mr. Rogers made agreements with two of these individuals—John F. Brewington and Shawn Richeson (both of whom are convicted felons and both of whom have spent years engaging in attacks against Mr. Magedson and the Ripoff Report). Mr. Rogers eventually made agreements to sell information to Mr. Brewington and Mr. Richeson (such as Mr. Magedson's home address) in order to obtain money to buy drugs.

According to Mr. Rogers, Mr. Brewington and/or Mr. Richeson have been working with Plaintiffs' counsel, Lisa Borodkin, to obtain and share information that could be used against Mr. Magedson in a variety of unlawful ways. As part of this enterprise, Ms. Borodkin obtained Mr. Rogers' contact information from either Mr. Brewington or Mr. Richeson in early October 2010 and began immediately contacting him to request any information that he may have about Mr. Magedson. Mr. Rogers states that Ms. Borodkin specifically asked Mr. Rogers to provide her with copies of Xcentric's confidential and proprietary business documents which Mr. Rogers knew were subject to a written non-disclosure agreement and which Mr. Rogers told Ms. Borodkin were subject to such an agreement.

Undersigned defense counsel learned of Ms. Borodkin's communications with Mr. Rogers for the first time in early-October 2010. Shortly thereafter, another attorney representing Xcentric, Adam Kunz, obtained a sworn statement from Mr. Rogers in

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

which he provided some additional detail about his contact with Mr. Brewington, Mr. Richeson, and Ms. Borodkin. A true and correct copy of Mr. Rogers's sworn statement is attached as **Exhibit B** to the Affidavit of David Gingras submitted herewith.

Despite serious concerns about the propriety of Ms. Borodkin's conduct, because it was apparent that Plaintiffs would likely attempt to use Mr. Rogers in an effort to avoid the disposition of Defendants' second Motion for Summary Judgment, undersigned counsel contacted Ms. Borodkin by phone on the morning of Friday, October 22, 2010. The intent of this discussion was to facilitate the immediate deposition of Mr. Rogers so that Plaintiffs could confirm that he did not, in fact, possess any information that was relevant or material to the pending summary judgment motion, thereby obviating any need for Plaintiffs to seek relief under Rule 56(f) or to move the summary judgment hearing set for Nov. 1, 2010.

In Paragraph 16 of her declaration submitted in support of Plaintiffs' Rule 56(f) motion, Ms. Borodkin acknowledges this conversation with undersigned counsel, but she suggests that Plaintiffs could not agree to depose Mr. Rogers because the only terms offered to her were unworkable; "We again spoke about the possibility of avoiding this motion – but [Gingras's] 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." Borodkin Decl. (Doc. #173) at 14:24–26 (emphasis added).

As has been a frequent problem throughout this litigation, Ms. Borodkin has simply lied to the court about the specific details of Defendants' offer concerning the deposition of Ms. Rogers. This point is clearly shown by the email sent to Ms. Borodkin by undersigned counsel on October 22, 2010 which discusses this issue in detail. A true and correct copy of the email to Ms. Borodkin is attached as **Exhibit C** to the Affidavit of David Gingras submitted herewith.

The message of this email could not be any clearer—Defendants knew that Ms. Borodkin wanted to interview Mr. Rogers informally and then seek Rule 56(f) relief to take his deposition so that Plaintiffs could delay the Nov. 1st summary judgment hearing.

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

In order to avoid this delay and to obviate any need for such a motion, Defendants made an unequivocal, unconditional offer to allow Ms. Borodkin to take Mr. Rogers' deposition at <u>any time</u> and at <u>any place</u> prior to the Nov. 1st hearing date:

> Lisa,
>
> This email is to follow-up and document our phone conversation this morning.
>
> As I told you on the phone, it has come to our attention that you have spoken with James Rogers who was previously employed as Ed Magedson's personal assistant and who, until recently, also was involved in a personal intimate relationship with Ed. I know that you talked with James on the phone and that you have made plans to fly him out to LA tomorrow morning (Saturday, Oct. 23rd) so that he can meet with you and share whatever information he may have.
>
> As we discussed, obviously I cannot prevent you from conducting an informal *ex parte* interview of James even though discovery is stayed. At the same time, if you interview or depose James without me or Maria being present, then whatever information or testimony he provides to you will not be admissible in our case per Fed. R. Civ. P. 32(a)(1).
>
> Based on this, I told you that it was my belief that you intend to interview James tomorrow and then on Nov. 1st (or some other date) ask the court for relief under Rule 56(f) so that you can formalize his testimony in a deposition, thereby delaying the ruling on our summary judgment motion. You basically confirmed that this was your intent, though you indicated that you intend to file an *ex parte* request under Rule 56(f) prior to Nov. 1st. With due respect, I note that you have made similar statements several times in the past without actually filing such a motion.
>
> As I explained to you on the phone, Xcentric believes that James has no relevant or useful information that would affect the pending MSJ in our case. As such, we believe that your proposed Rule 56(f) motion is groundless and would do nothing but needlessly prolong the inevitable disposition of this action.
>
> Having said this and although we believe that your proposed Rule 56(f) motion is untimely and otherwise improper, <u>we are nevertheless willing to obviate your 56(f) motion by agreeing to immediately allow you to take James's deposition.</u> We are willing to do this even though discovery is stayed and even though we believe the deposition will not reveal any relevant information.
>
> <u>We are willing to do this because we want to "cut to the chase" here. By allowing you to obtain James's testimony *now*, you can confirm for yourself that he has nothing relevant or helpful to offer you and in that case there will be no need for you to seek Rule 56(f) relief (at least as to James), nor will it be necessary to move the Nov. 1st hearing date which, as you know, is already a continuation of the last trip we made to LA. As such, my proposal would avoid any further prejudice that Xcentric will incur as a result of further prolonging the disposition of this case such as would occur if your untimely Rule 56(f) motion was granted. At the same time, my proposal would give you the exact same relief you would get under Rule 56(f) notwithstanding my position that you are not entitled to that relief</u>.
>
> Again – <u>to be clear – my offer is to allow you to take the deposition of James Rogers immediately at any time prior to Nov. 1st and at any place</u> (though I told you I felt that Arizona was the far more appropriate place for the deposition to occur).
>
> In response, you indicated to me that you did NOT want to accept my offer at this time, but you also stated that you would speak to your client and let me know if the offer is acceptable.
>
> * * *

Gingras Aff., **<u>Exhibit A</u>** (first emphasis in original; additional emphasis added).

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

Rather than accepting this offer and completing Mr. Rogers' deposition prior to the Nov. 1st hearing, Plaintiffs did nothing. Instead, knowing that undersigned counsel would be traveling from Phoenix to Los Angeles for the hearing on Nov. 1st, Plaintiffs waited until less than two hours before the hearing to bring their Rule 56(f) motion asking for the same relief (a deposition of Mr. Rogers) which Defendants had already offered 10 days earlier but which Plaintiffs refused to accept. Given that this exchange was documented in writing, it is truly astonishing and disturbing that Ms. Borodkin would provide such a deliberately false and misleading explanation of these events in her declaration to the court.

Ms. Borodkin's conduct is outrageous and unconscionable. This is particularly so given that Defendants offered to allow Ms. Borodkin to depose Mr. Rogers anywhere and at any time even though she had no right to do so. Ms. Borodkin refused to accept that offer not because any legitimate basis existed for doing so, but rather she did so because accepting the offer would mean she would not be able to justify a last-minute motion under Rule 56(f). Ms. Borodkin's actions were calculated to cause, and in fact did cause, Defendants' counsel to waste an entire day traveling to Los Angeles for a hearing that Ms. Borodkin knew would serve no purpose (even though Defendants previously asked the court to vacate the hearing, to which Ms. Borodkin objected).

Ms. Borodkin's bad faith refusal to accept Defendants' offer to take Mr. Rogers's deposition prior to the Nov. 1st hearing precludes any relief under Rule 56(f). *See Taser Intern., Inc. v. Bestex Co., Inc.*, 314 Fed.Appx. 46, *1 (9th Cir. 2008) (citing *Nidds*, *supra*). In addition, Ms. Borodkin's manifest dishonesty in her misrepresentation of the details of Defendants' offer and her bad faith tactical decision to waste both the court's and counsel's time are more than sufficient to justify an award of sanctions against her pursuant to 28 U.S.C. § 1927 and/or the court's inherent authority in an amount equal to the fees and costs incurred by Defendants in traveling to Los Angeles. *See Lahiri v. Universal Music & Video Dist. Corp*., 606 F.3d 1216, 1218–19 (9th Cir. 2010) (explaining "An attorney who unreasonably and vexatiously 'multiplies the proceedings'

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

may be required to pay the excess fees and costs caused by his conduct. 28 U.S.C. § 1927. Recklessness suffices for § 1927 sanctions, but sanctions imposed under the district court's inherent authority require a bad faith finding.")

Consistent with this authority, Defendants respectfully request that the court make a finding that Ms. Borodkin acted both recklessly and in bad faith, and issue an order requiring her to pay the costs and attorney's fees incurred by Defendants' counsel in travelling to the hearing on Nov. 1, 2010, and the fees incurred in preparing this opposition.

2. Mr. Rogers' Testimony Is Irrelevant To Defendants' Second Motion For Summary Judgment

As noted above, a party cannot obtain relief under Rule 56(f) based on mere speculation or wishful thinking. Rather, as the court has already held, "to justify a continuance under Rule 56(f), the discovery sought must be 'essential' to Plaintiffs' opposition." Doc. #94 at 41:24–25. In addition, "where the discovery sought is irrelevant and could not defeat the motion for summary judgment or where the opposing party fails to identify the specific facts such discovery will likely reveal, denial of the motion is appropriate." *Id*. at 41:15–18.

Based on this logic, denial of Plaintiffs' request to depose Ms. Rogers is appropriate for two reasons. First, the vast majority of the arguments contained in Defendants' Motion to Dismiss and their Motion for Summary Judgment are based on matters for which Mr. Rogers's testimony is not and could not possibly be relevant. For example, on page 24 of Defendants' second MSJ (Doc. #145), Defendants argue that they are entitled to summary judgment as to Plaintiffs' unfair business practices claim under Cal. Bus. & Prof. Code § 17200 because Plaintiffs' lack standing to sue under that section. Plaintiffs do not offer any explanation as to how any part of Mr. Rogers's testimony is relevant to that issue.

Similarly, on pages 9–18 of that same motion, Defendants argue they are entitled to summary judgment as to Plaintiffs' two new state-law fraud claims for a variety of

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

technical legal reasons such as, *inter alia*, "The Statement That 'Reports Never Come Down' Is Not Pleaded With Particularity And Did Not Actually Or Proximately Cause Any Alleged Harm", *id*. at 11, "The Statement That The Subject of A Report Can File a Free Rebuttal and That Rebuttals Can Be Effective Did Not Actually Or Proximately Cause Any Alleged Harm," *id*. at 13, "The Statement That Defendants Have Never Done Anything to Cause Google to Rank Their Website Higher in Search Results Did Not Actually Or Proximately Cause Any Alleged Harm," *id*. at 14, and "Fraud Cannot Be Based On Statements About Future Events". *Id*. at 18.

Plaintiffs' current Rule 56(f) motion does not offer any explanation as to how the testimony of Mr. Rogers could possibly create triable issues of fact on these matters. Clearly, if Plaintiffs are unable to show damages sufficient to establish standing under Bus. & Prof. Code § 17200, then summary judgment on that claim is proper regardless of any testimony Mr. Rogers may have to offer on other unrelated issues.

In all candor and based on lengthy past experience in other cases, Plaintiffs probably hope to obtain testimony from Mr. Rogers showing that Mr. Magedson and Xcentric are not entitled to immunity under the Communications Decency Act because Mr. Magedson (or Mr. Rogers acting at Mr. Magedon's request) created or altered the reports at issue in this case. In fact, Mr. Rogers has testified that Ms. Borodkin requested that he provide testimony to this effect even though such testimony would be false:

> [By Mr. Kunz]
>
> Q. Did Lisa [Borodkin] offer you anything of value to give information about Xcentric Ventures or Ed Magedson?
>
> [By Mr. Rogers]
>
> A. Anything of value? What's your definition of "value"?
>
> Q. Did she offer to give you anything?
>
> A. She's offered to accommodate me in any style that I find comfortable, pretty much.
>
> Q. On what occasion would she accommodate you in style?

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

A. I guess it would be this Saturday [October 23]. And then – she basically said she was going to fly me out there Saturday. We'd spend some time at her office. She'd ask me some questions and put a video camera up or whatever. She wanted me to sign a declaration saying that I had signed reports – I had written reports, Ed [Magedson] had written reports. She wanted me to sign a declaration stating that when you type something into Google and then you click on it repeatedly that it brings it up in the search engines because she somehow believes, from me, that that works.

Q. Have you ever posted reports on Ripoff Report?

A. Absolutely not. I have never posted a report on Ripoff Report.

Q. Have you ever posted a Rippo…

A. No, I have not.

Q. Have you ever changed a report that had already been posted?

A. No, I have not.

* * *

Q. Have you ever seen Ed [Magedson] post Ripoff Reports in someone else's name?

A. Absolutely not. Especially since I've been back, never. He doesn't even have access to the back end anymore. From what I've heard from everybody, he hasn't had it [access] for years.

Q. Have you ever seen him ask anyone else to post Ripoff Reports?

A. No. The only time I've ever witnessed him asking anybody to file a Ripoff Report is in an email when they're asking about what they should do, you know – I mean I got emails like that all the time, and I've sent out the same standard email response: Now or in the future if you ever feel like you've been ripped off, file a report, let others know. But he doesn't tell them to file it or what to say.

Gingras Aff., **Exhibit B**, Statement of James P. Rogers at 43:9–45:22 (emphasis added).

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

In light of this testimony and the other reasons for denying the motion notwithstanding, the court should deny Plaintiffs' request to depose Mr. Rogers because the witness has already given a sworn statement denying that he ever posted reports on Ripoff Report, denying that he ever changed reports on Ripoff Report, and denying any knowledge of Mr. Magedson having done so. In light of that testimony, Mr. Rogers clearly cannot aid Plaintiffs in overcoming the immunity granted by the Communications Decency Act. Beyond this, Plaintiffs have not identified any specific expected testimony from Mr. Rogers that would or could impact the disposition of Defendants' second Motion for Summary Judgment. Because Mr. Rogers's testimony would not preclude summary judgment, it is not a sufficient basis for relief under Rule 56(f) even if Plaintiffs had acted diligently, which they have not.

B. Plaintiffs Are Not Entitled To Discovery Relating To The "Automatic" Creation Of Meta Tags" Because This Is Irrelevant To Defendants' Summary Judgment Motion

In addition to Mr. Rogers, Plaintiffs also claim a need to depose numerous witnesses including Ben Smith, Justin Crossman, Scott Cates, and a 30(b)(6) witness (described as "someone else at a company called Lavidge [who] will be able to describe how the HTML and custom meta tags sold by Defendants are manually inserted into the code for reports.") Mot. at 4:25–28. Plaintiffs claim they need this testimony to refute Defendants' assertion that meta tags appearing on the Ripoff Report website are generated "automatically" using text supplied by third party users of the site. This portion of Plaintiffs' motion should be denied for multiple reasons.

First, as explained above, Plaintiffs were aware of Ben Smith as a witness nearly six months ago when Mr. Smith submitted an affidavit (Doc. #43) in support of Defendants' first Motion for Summary Judgment. Mr. Smith's original affidavit was resubmitted (Doc. #148) without any changes in support of Defendants' second Motion for Summary Judgment. In both of these declarations, Mr. Smith clearly explained that "meta tags" (normally invisible portions of HTML code) appearing on the Ripoff Report

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

site are automatically generated by the site using generic terms common to every page on the site and also using unique keywords supplied by the third party author:

> 14. When a report is submitted to the Ripoff Report, Xcentric's servers automatically combine the unique text supplied by the author with various HTML code that is generic to every page on the site. During this process and using keywords supplied by the author (such as the name of the company being reported), Xcentric's servers automatically create "meta tags" which are used by search engines to index the contents of the specific page at issue. The meta tags for each page are not normally visible to viewers, but they can be seen by individuals with basic technical knowledge who choose to view the actual HTML code for a report's webpage.

Affidavit of Ben Smith, Doc. #43 at ¶ 14, Doc. #148 at ¶ 14 (emphasis added).

When this testimony was offered in support of Defendants' first summary judgment motion, Plaintiffs initially asked Defendants to coordinate the scheduling of Mr. Smith's deposition, which Defendants immediately did. Shortly thereafter, on June 4, 2010 Plaintiffs withdrew their request to depose Mr. Smith. *See* Gingras Aff., **Exhibit C**. At no time since June 4th did Plaintiffs renew their request to depose Mr. Smith (until doing so in their 11th hour Rule 56(f) motion).

Because Plaintiffs did not diligently pursue Mr. Smith's deposition when they easily could have done so many months ago, they are precluded from seeking it now via Rule 56(f). However, even if that were not the case, Plaintiffs have failed to show that deposing Mr. Smith will lead to any evidence sufficient to create a triable issue of fact on the question of whether the meta tags on the Ripoff Report are created "automatically" (as Mr. Smith has already testified to, twice), or whether some type of manual process is involved.

In any case, these points are entirely irrelevant to the disposition of Defendants' summary judgment motion. Under the CDA and has already been explained *ad nauseum*, defendants are immune from liability as long as they did not: 1.) create or 2.) materially alter defamatory content that originated with a third party. *See Global Royalties, Ltd. v.*

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

Xcentric Ventures, LLC, 544 F.Supp.2d 929 (D.Ariz. 2008). Mr. Magedson has already denied any involvement in such activity, and his testimony is entirely consistent with that of Mr. Smith and every other witness offered by Defendants.

Likewise, although Plaintiffs were not aware of the specific names of every other individual who has ever provided services to Xcentric in the past, if Plaintiffs wanted to take a 30(b)(6) deposition of a witness other than Mr. Smith with knowledge of the technical operation of the Ripoff Report site, they could and should have done so either with Defendants' agreement or by seeking leave from the court. At no time were any additional 30(b)(6) depositions noticed or requested by Plaintiffs.

C. Plaintiffs Are Not Entitled To Discovery Relating to Defendants' "Search Engine Optimization" Practices Because This Point Is Irrelevant To Defendants' Summary Judgment Motion

On page 5–6 of their motion, Plaintiffs claim a need to perform discovery "to refute Defendants' claim that Mr. Magedson has no control over how Google or any other search engine decides to rank content." Mot. at 5:3–5. This statement is a classic red herring for several reasons.

First, as noted above, this issue relates to Plaintiffs' allegation that Defendants are liable to them for *fraud* because the Ripoff Report website contains statements denying that Defendants have "optimized" the site to make results appear higher in Google than other sites and denying any favoritism toward Google. Plaintiffs claim these statements are false, *ergo* Defendants have committed fraud.

As explained on page 10 of Defendants' Motion to Dismiss (Doc. #110) and on page 14 of their second MSJ (Doc. #145), this statement cannot support a claim for fraud even if it is shown to be false because Plaintiffs have not alleged that it *caused any damage to them*; "At best, the FAC alleges the most remote form of causation/damages: 'The public relies on the false statement as true, and gives greater credence to the illusion that Ripoff Report is a legitimate site if it ranks so highly with common search engines like Google.' FAC ¶ 252." Defendants' 2nd MSJ (Doc. #145) at 14:13–16.

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3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

Second, Plaintiffs do not need any discovery to establish whether Defendants have displayed favoritism toward Google by editing a report about one of Google's co-founders, Sergey Brin. Mr. Magedson discussed that issue in his previous deposition(s) and Defendants' MSJ openly acknowledges this event; "Defendants admit that many years ago they changed a name in a single report about one of Google's co-founders based on a determination that the report was obviously false." Defendants' 2nd MSJ (Doc. #145) at 14:26–28.

Third and finally, Plaintiffs are not entitled to perform discovery as to Defendants' efforts to "optimize" their website because this conduct is entirely lawful and *irrelevant* to the question of whether Defendants are immune under the CDA. This is so because "a website operator does not become liable as an 'information content provider' merely by 'augmenting the content [of online material] generally." *Goddard v. Google, Inc.*, 640 F.Supp.2d 1193, 1196 (N.D.Cal. 2009) (emphasis added) (quoting *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1168 (9th Cir. 2008)); *see also Global Royalties*, 544 F.Supp.2d at 933 (noting, "Unless Congress amends the statute, it is legally (although perhaps not ethically) beside the point whether defendants refuse to remove the material, or how they might use it to their advantage."); *Black v. Google, Inc.*, 2010 WL 3222147, *3 (N.D.Cal. 2010) (plaintiff seeking to impose liability on website operator for third party content cannot avoid CDA by recasting their claims as relating to "source code" or "programming"; as long as offending content was created by third party, the CDA still applies). Because Defendants' efforts increase the visibility of the Ripoff Report site are irrelevant, Rule 56(f) relief on this point is unnecessary.

D. Plaintiffs Are Not Entitled To Relief Because They Have Failed To Establish Any Basis For Believing That Helpful Information Exists

Finally, in order to show entitlement to relief under Rule 56(f), Plaintiffs must demonstrate, "some basis for believing that the information sought actually exists." *Visa Int'l Service Ass'n v. Bankcard Holders of America*, 784 F.2d 1472, 1475 (9th Cir. 1986). Plaintiffs have made no such showing here.

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

For example, on page four of their motion, Plaintiffs argue, "it is likely discovery would yield evidence to refute Defendants' claim that all meta tags are generated from content contributed by third parties." Plaintiffs further state, "Plaintiffs have good reason to believe this is not true."

As support for that allegation, Plaintiffs point to an example from a *different* case in which Defendants agreed to post information stating that a specific report was false and that by doing this, "the title tags will automatically update." Mot. at 4:22. However, this information relates to a *different* action involving a different party (a party who Xcentric sued). Although these undisputed facts do show that Defendants agreed to post something about that third party and that by doing so this necessarily would have updated the HTML code relating to that one page, this information does not show that Defendants created or modified any of the allegedly defamatory statements at issue *in this case*. Moreover, to the extent any of this information is helpful to Plaintiffs' position, no Rule 56(f) continuance is needed because Plaintiffs already have this information.

Restated simply, Plaintiffs are not entitled to a Rule 56(f) continuance to pursue evidence on the issue of whether "all meta tags are generated from content contributed by third parties," because this is irrelevant. Specifically, the only question relevant to CDA immunity is not whether Defendants created *some* material (text, meta tags, or something else) about a *third party*. Rather, the dispositive question is whether Defendants are responsible for "the information that [Plaintiffs] claim is false or misleading." *Gentry v. eBay, Inc.*, 99 Cal.App.4th 816, 833 n. 11, 121 Cal.Rptr.2d 703, 717 (Cal. 4th Dist. 2002). None of the information Plaintiffs are seeking relates to that narrow issue.

Lest there be any doubt on this question, in addition to the sworn statement of James Rogers submitted herewith, Defendants also offer additional affidavits of Ben Smith, Justin Crossman, and James Rogers clarifying that none of these witnesses have any further information that would support the relief Plaintiffs seek under Rule 56(f). To the extent that other witnesses (i.e., employees of companies who provided services to Xcentric) were not previously disclosed, Plaintiffs could easily have obtained any needed

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

testimony from such individuals by simply noticing their depositions under Fed. R. Civ. P. 30(b)(6). Because Plaintiffs failed to make diligent (or any) efforts to obtain such testimony, they are not entitled to Rule 56(f) relief on that basis.

IV. CONCLUSION

For the reasons stated herein, Plaintiffs' Rule 56(f) motion should be denied, and the court should enter an order requiring Plaintiffs' counsel Lisa Borodkin to pay the costs and attorney's fees incurred by Defendants in traveling from Phoenix to Los Angeles on Nov. 1, 2010 and the fees incurred in preparing this opposition.

DATED this 8th day of November, 2010.

GINGRAS LAW OFFICE, PLLC

/S/ David S. Gingras
David S. Gingras
Attorneys for Defendants

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623

CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2010 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Mr. Daniel F. Blackert, Esq.
Ms. Lisa Borodkin, Esq.
Asia Economic Institute
11766 Wilshire Blvd., Suite 260
Los Angeles, CA 90025
Attorneys for Plaintiffs

And a courtesy copy of the foregoing delivered to:
Honorable Stephen V. Wilson
U.S. District Judge

/s/David S. Gingras

GINGRAS LAW OFFICE, PLLC
3941 E. CHANDLER BLVD., #106-243
PHOENIX, AZ 85048
(480) 668-3623