DANIEL F. BLACKERT, ESQ., CSB No. 255021
LISA J. BORODKIN, ESQ., CSB No. 196412
Asia Economic Institute
11766 Wilshire Blvd., Suite 260
Los Angeles, CA 90025
Telephone (310) 806-3000
Facsimile (310) 826-4448
Daniel@asiaecon.org
Blackertesq@yahoo.com
lisa@asiaecon.org
lisa_borodkin@post.harvard.edu

Attorneys for Plaintiffs,
Asia Economic Institute, LLC
Raymond Mobrez, and
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

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN FURTHER SUPPORT OF MOTION UNDER RULE 56(f) TO DENY OR TO CONTINUE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT TO CONDUCT FURTHER DISCOVERY

Judge: The Hon. Stephen V. Wilson
Date: November 29, 2010
Time: 1:30 p.m.
Place: 312 North Spring Street
Los Angeles, California 90012
Courtroom: 6

Dockets.Justia.com

I. Preliminary Statement

Defendants keep trying to make this a complicated, obscure case, but it is not. Defendants continue to equivocate, play both sides of the fence, "hide the ball" and in general attempt to "run out the clock." In brief, Defendants' Opposition fails to overcome the strong presumption that Plaintiffs are entitled to take discovery before the Court grants a premature motion for summary judgment.

II. Argument

A. Plaintiffs Could Not Have Obtained the Discovery Sooner.

Defendants argue that Plaintiffs should not be entitled to take the requested discovery because they could have obtained it sooner. See Opp. at 7-9. Plaintiffs could not. On June 24, 2010, Plaintiffs properly obtained an order bifurcating discovery to match the bifurcated trial. See Order of July 19, 2010 [DN-94] at 2:24-26. Plaintiffs did this both because it was logical and to avoid burdensome, bad-faith, intrusive discovery as to the truth or falsity of the statements about the Plaintiffs. The stay on discovery on other claims in this case has never been lifted. See DN-94 at 53:15-20. Defendants' own written discovery responses assert that stay. See Borodkin Dec. Ex. 2.

Defendants state that "Plaintiffs could have (and, in fact did) seek relief from that stay in the past." Opp. at 8:11. That is not true. The only discovery previously sought by Plaintiffs was in furtherance of the RICO extortion claims.

Defendants also state that "Defendants have always been willing to voluntarily permit discovery as to any *relevant* matters." Opp. 8:13. That is manifestly untrue. Defendants refused to permit discovery on many admittedly relevant matters under the pretext of not having a protective order, and in fact instructed witness Ed Magedson not to answer rather than simply making objections as to relevance, requiring a motion to compel [DN-82], and a further motion to enforce the order to compel his deposition [DN-87]. Defendants have historically not agreed with Plaintiffs on the scope of relevance.

Defendants also argue that Plaintiffs should have deposed Ben Smith in the extortion phase of this action. Opp. at 8-9. Plaintiffs did not previously take Mr. Smith's deposition because they had no reason to think Mr. Smith knew anything about extortion. This phase of the action includes state law claims involving computer coding, revisions to meta tags and SEO practices, of which Mr. Smith would be expected to have knowledge or identify witnesses who did.

Second, Plaintiffs could not have obtained the requested discovery because Defendants failed to identify James Rogers and other witnesses in earlier discovery. Defendants fully admit that they failed to disclose Mr. Rogers as a witness. See Opp. at 9:22-24. They explain that it was "for appropriate reasons explained herein," see Opp. at 9:23, but never do. Defendants offer no explanation for why they did not disclose Scott Cates, Eric Skelling or Stephen at Lavige, or why their testimony would not be relevant.

The declarations provided by Justin Crossman and Ben Smith are too circumscribed and limited (e.g., "as these claims pertain to me, they are groundless") to be definitive without pointed follow-up questions. See, e.g., Crossman Dec. [DN-180] at ¶5; Smith Dec. [DN-177] at ¶6. Moreover, declarations so not serve the same purpose as depositions. Defendants have previously offered declarations in lieu of depositions in this case. Magistrate Walsh has noted that declarations are not the same thing as allowing counsel to probe:

> "MS SPETH: Your Honor, can I suggest maybe perhaps a good resolution to this. If Ms. Borodkin wants to send us that list, and if it hasn't really been answered, the other thing we would be willing to do is we'd be willing to have Mr. Magedson, you know, within a couple of days of her request provide a declaration or an affidavit under oath of exactly the answers to those questions. That might be a little bit more efficient.
>
> THE COURT: It might be more efficient, but you know better than I do that you don't want -- you didn't want a declaration from the other side. In fact, you got declarations from the other side that you believe were inaccurate. So, i'll consider that. And if Ms. Borodkin wants to go along with

that, that's fine. But the value of having the lawyers in this case is they can follow up on these answers and they can probe further."

Transcript of June 24, 2010 [DN-91-11] at 24:24-25:11 (emphasis added).

Third, Plaintiffs could not have obtained this discovery earlier because Defendant Magedson's previous testimony has been inconsistent, incomplete, misleading, or Defendants' counsel instructed him not to answer. It is telling that in this Oppositon there is no declaration from Defendant Ed Magedson. This is probably because his previous deposition testimony is wildly inconsistent with the suggestion that Defendants do not engage in SEO practices to magnify the negative effect of Ripoff Reports, that they do not give preferential treatment to Google, or that he never taken down or redacted reports by Court order.

Magedson has, in fact, testified inconsistently with the information provided by Mr. Rogers about whether Defendants sell the CAP program or Verified Safe endorsements. Whereas Mr. Rogers asserts that Defendants were trying to make money by marketing the CAP and Verified Safe. Even if Mr. Rogers changes his testimony, there must be an explanation for the Powerpoint presentation that was created by Mr. Rogers and emailed to Plaintiffs' counsel on October 12, 2010. See Reply Borodkin Dec. Ex.6. Thus, there is a genuine issue of fact that can only be resolved through discovery.

B. Discovery is Essential to Oppose the Motion for Summary Judgment Because There Is a Triable Issue of Fact on Whether Defendants Fraudulently Misrepresent Their Efforts to Improve Google Rankings.

Defendants seem to argue that this motion for discovery under Rule 56(f) should not be granted because Plaintiffs cannot allege that the statement "Defendants misrepresent that 'Ripoff Report has never, ever done . . . anything to cause Google to rank higher in search engines than other sites'" actually and proximately caused any damage to them. Opp. at 6:10-7:14. However, this is exactly what Plaintiffs allege. Specifically, the FAC alleges at Paragraph 252:

> "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. Furthermore, Defendants place these misleading statements on the "Want to Sue Us" page of their website. This strategic placement allows them to take advantage of those victimized because it discourages them from asserting their rights."

FAC ¶252 [DN-96].

To further explain the importance of the public's impression, Plaintiffs filed the Declaration of a Search Engine Optimization (SEO) expert, Anthony Howard, as Exhibit 24 to the First Amended Complaint. He states:

> "Google is many people's point of entry for the Internet. Many Internet users do not navigate to specific web sites when searching for online content. Rather, Google's search results become the first, and most influential, resource Internet users rely on to discover and access Internet content. The power and influence of search results is the principle reason SEO has become a booming industry."

Declaration of Anthony Howard at ¶6 [DN-96-24]; see also FAC ¶71 (citing Bihari v. Gross, 119 F. Supp. 2d 309, 312 (S.D.N.Y. 2000)); ¶¶72-74, 86-90.

Magedson is very aware of the value of SEO, and also of presenting the appearance that he does not deliberately engage in SEO. See Reply Borodkin Dec. ¶15 and Ex. 8. Magedson specifically testified that certain SEO practices are "frowned upon by search engines" and that people are willing to pay thousands of dollars to push down Ripoff Reports in Google rankings. See id.

C. **Discovery is Essential to Oppose the Motion for Summary Judgment Because A Triable Issue of Fact Is Whether Defendants Misrepresent CAP and Verified Safe As Objective Consumer Endorsements.**

Defendants claim that none of the witnesses or documents identified by the testimony of James Rogers "essential" to oppose Defendants' motion for summary judgment because Plaintiffs, they claim, lack standing under Business and

1 Professions Code § 17200. Opp. 14-15. Defendants did not even attempt to
2 distinguish the cases of Morgan v. AT&T Wireless Services, Inc., 177 Cal. App.
3 4th 1235 (Cal. App. 2d Dist. 2009) or McKell v. Washington Mutual, Inc., 142 Cal.
4 App. 4th 1457 (Cal. App. 2006) providing only that the plaintiff had to have
5 suffered injury as a result of unfair competition.

6 The relevance of Mr. Roger's testimony or the documents provided by him
7 regarding Defendants' efforts to market the CAP or Verified Safe program are that
8 they influence the public's impression that the Ripoff Report is primarily a
9 consumer-driven forum. Magedson used the work "consumers trust" in his
10 deposition regarding the effect of a verification or certification. See Reply
11 Borodkin Dec. ¶16 and Ex. 9. Therefore it is relevant that the CAP and Verified
12 Safe are for-profit services, not neutral endorsements, and it is relevant that Mr.
13 Rogers created a Powerpoint in an effort to market them, contrary to Magedson's
14 previous testimony that he does not sell these programs but only wants interested
15 parties to approach him. Id.

16 There is a material issue of fact regarding whether consumers are misled as
17 to whether Defendants' site is "For Consumers By Consumers" as advertised, or
18 whether it is a for-profit business. Defendants admit that "consumers trust"
19 verifications and certifications, and that Defendants want to create the impression
20 that they do not sell the CAP program but rather want members to come to them:

21 > "We are an advertising agency like no other could be. . . . WE CAN
22 > BRING YOU TO THE TOP OF THE SEARCH ENGINES LIKE NO ONE
23 > ELSE CAN. BY VERIFYING YOUR BUSINESS AS A SAFE AND
> SECURE BUSINESS, TO DO BUSINESS WITH."

24

25 See Borodkin Dec. Ex. 3 at p. 3; reply Borodkin Dec. ¶5 and Ex. 6.

26 **D. There Is A Triable Issue of Fact As to Whether Defendants Are**
27 **Responsible for Developing Illegal Content By Deliberately Ignoring**
28 **Terms of Service Violations and Refusing to Enforce Them.**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Defendants keep raising the "Communications Decency Act," see Opp. at 2:18, 15:16 while utterly failing to distinguish between the exclusion created under 17 U.S.C. § 230(c)(1) for "interactive service provider" as defined under subsection (f)(2) and (2) "**information content provider**" as defined in subsection (f)(3). Subsection 230(c)(1) of 17 U.S.C. states that "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). However, websites can be liable as "information content providers" if they are responsible in whole or in part for the "creation" or "development" of the illegal content. The pertinent point is that the site has to be responsible for creating or developing the ***illegal*** aspect of the user's contribution.

The 10th, 9th and 7th Circuits have recently issued decisions in which exclusion from liability applies only if the "interactive service provider" is not *also* an "information content provider." In Fair Housing Council v. Roommates, 521 F.3d 1157, 1162 (9th Cir. 2008), the site was "responsible for" violations of equal housing rights because they allowed users to specify sex, race and other prohibited criteria in their housing requests. In F.T.C. v. Accusearch Inc., 570 F.3d 1187, 1198 (10th Cir. 2009), the website was liable as an "information content provider" because it paid researchers to retrieve protected private telephone records and then turned a deliberate blind eye to violations of the law. ("was it responsible for the development of the specific content that was the source of the alleged liability? The answer is "yes."). Accuserach is particularly on point in this case, because there was a similar "blissful ignorance" of contract violation there as here. Accusearch's defense was that its contract with its third party researchers required them to promise they would not obtain telephone records in violation of any law. The Court found this claim ludicrous, in light of the fact that obtaining private telephone records would invariably violate the Telecommunications Act and that Section 230(c)(1) provided no defense:

> Accusearch contended that it was entitled to this immunity because the FTC's claim treated it as the publisher of telephone records that were provided by others (that is, telephone companies and independent researchers) and traded over Abika.com. The district court granted the FTC's motion and rejected Accusearch's assertion of immunity. The court ruled that the FTC had established each element of its unfair-practice claim. And it concluded that Accusearch was not entitled to statutory immunity because it had "participated in the creation or development" of the information delivered to customers, *Accusearch,* . . . and because the FTC's claim did not "treat" Accusearch as a mere publisher of those records, *id.* at *5 (internal quotation marks omitted). <u>It found that Accusearch's "claim of blissful ignorance [of its researchers' misconduct] is simply not plausible in light of the facts of this case,"</u> *id.* at *7, explaining that "[e]ven if [Accusearch was] unaware at the outset how these records were obtained, emails documenting the ordering process between Accusearch and its vendors clearly indicated that underhanded means were used to obtain the records," *id.*

<u>F.T.C. v. Accusearch Inc.</u>, 570 F.3d 1187, 1193 (10th Cir. 2009) (emphasis added).

Recently, in <u>Chicago v. StubHub</u>, the Seventh Circuit clarified bluntly that Setion 230(c)(1) defenses only apply to claims seeking to treat the website as the "speaker" or publisher of content; there is no blanket "immunity" just because conduct is done through the Internet:

> As earlier decisions in this circuit establish, subsection (c)(1) does not create an "immunity" of any kind. See *Doe v. GTE Corp.,* 347 F.3d 655, 660 (7th Cir.2003); *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.,* 519 F.3d 666, 669-71 (7th Cir.2008). It limits who may be called the publisher of information that appears online. That might matter to liability for defamation, obscenity, or copyright infringement. But Chicago's amusement tax does not depend on who "publishes" any information or is a "speaker". Section 230(c) is irrelevant.

<u>City of Chicago, Ill. v. StubHubA, Inc.</u>, 09-3432, 2010 WL 3768072 (7th Cir. Sept. 29, 2010).

Most recently, in <u>Swift v. Zynga</u>, 09-cv-05443(N.D.Cal. Nov. 3, 2010) (attached to Reply Borodkin Dec. as Exhibit "10"), the Northern District of California denied a motion to dismiss a class action under the Unfair Competition

Law on Section 230(c)(1) grounds because there was an issue of fact as to whether the Defendant, maker of social games like "Farmville" and "Mafia Wars" was responsible in whole or in part for the creation of deceptive communications that lured consumers into subscribing to services. The complaint in Zynga essentially alleged that Zynga was partially responsible because of Zynga;s role in designing its games to create dmand in the player for the "virtual currency" that was offered by third-party offer aggregator :

> Plaintiff has alleged Zynga's "material contribution" to the alleged unlawful activity by asserting that Zynga designed its games to intentionally create the demand for the virtual currency offered in those games, and then used this demand to lure consumers into the allegedly fraudulent transactions. Id. ¶¶ 4-6, 8-9. . . [.]
> Plaintiff has not alleged that Zynga is a "neutral" website that merely allows third parties to post advertisements. Instead, Plaintiff asserts that Zynga is a direct participant in the fraudulent transactions that are the subject of this case, as outlined above. Therefore, at this stage, Zynga's motion to dismiss based on CDA immunity is denied.

See Swift v. Zynga, 09-cv-5433 (N.D. Cal. Nov. 3, 2010). Borodkin Dec. Ex. 10 at 8-9.

Thus, Section 230(c)(1) cannot save Defendants from claims of false advertising, or failing to disclose that they sell the chance to manipulate Google search results for tens of thousands of dollars. Even for the claims as to which the CDA might apply, there is at least a triable issue of fact as to whether Defendants develop or contribute in whole or in part to developing the illegal content by deliberately turning a blind eye to terms of service violations.

In this case, Defendants tout as always that their Terms of Service prohibit the contribution of defamatory content. See DSOF ¶17. But these Terms of Service are, by logic, a total sham if Defendants insist profusely that they NEVER remove reports. Defendant Magedson has testified that some Reports have come down by Court Order but may have been put back up. See Reply Borodkin

Dec.¶18, Ex. 11. This seems to be at variance with representations made to the Northern District of Illinois in Blockowicz v. Williams, 09-cv-3955 (N.D. Ill. Nov. 10, 2009) [DN-159-1] and on appeal.

The reason these details matter is that subjects of Ripoff Report want to know what their best strategy is and are willing to spend money to repair the damage if they just knew how – sue the authors as John Does? Add Ripoff Report as a co-defendant? Write a rebuttal? Join the CAP program? Do nothing and pay an SEO consultant to seed the Internet with positive content? Defendants do not want subjects to know whether they will obey a Court Order and encourage subjects to file a "free" rebuttal. For reasons explained by Plaintiffs' expert Anthony Howard, rebuttals tend to raise the Reports in Google Rankings. See DN-24 at ¶¶13-16 and he advises against it. These misrepresentations harm Plaintiffs.

E. Defendants' Procedural Objections to Discovery Have No Merit.

Defendants argue that the current Rule 56(f) motion seeks the same relief as the previous Rule 56(f) motion. Opp. at 1:8-9. It does not. The operative pleadings are not the same. At the time of the previous Rule 56(f) motion, the original Complaint was the operative pleading. Discovery and trial had been bifurcated to RICO extortion only. Plaintiffs filed the First Amended Complaint to allege the fraud claims with greater detail. This Rule 56(f) motion seeks discovery relevant to those more detailed allegations.

Defendants argue that this Court has not ruled on the previous motion to dismiss the First Amended Complaint. Plaintiffs disagree. They have proceeded on the understanding that the Court resolved the motion to dismiss as well as the motion for leave to amend by on September 20, 2010 by striking the RICO claim and denying the motion to dismiss as to the rest:

> "THE COURT: Why don't we just do this – I mean all the skirmishing about the complaint – I mean you know the complaint is – no one sees the complaint. The jury doesn't see the complaint. So why don't we just agree to strike the RICO claim from the first amended complaint and let that stand?

*   *   *   *

> . . . Let me make it simple: The motion for reconsideration is denied. The motion to strike the RICO claim from the first amended complaint is granted. That is the operative complaint.
>
> So then file your summary judgment motion with that as the pleading and file it by next Monday."

Borodkin Dec. Ex. 1 (Transcript of Sept. 20, 2010 at 12:8-12, 17-22)(emphasis added). Plaintiffs understood "and let that stand" to mean that the motion to dismiss was denied in all other respects. This is the only reasonable conclusion to draw from the Court's colloquy with Defendants' counsel on September 20, 2010:

> "THE COURT: But let me – well, how do you intend to address these state law claims? Do you think they're susceptible to summary judgment?
>
> MS. SPETH: Yes, Your Honor, under the Communications Decency Act and everyone is – perhaps as to the fraud claims, and the fraud claims they lack both reliance and they lack any causation to their damages –
>
> THE COURT: Forgetting for the moment the first amendment type of defense, why would that type of defense necessarily control if what the plaintiff says is true, that you're manipulating the code the emphasize the negative information posted on your website? Wouldn't you have to deal with that by way of attempting to establish that the code writing argument that plaintiff is offering has no substance?"

Borodkin Dec. Ex. 1 (Transcript of Sept. 20, 2010 at 8:21-9:10) (emphasis added).

F. Defendants Are Not Entitled to Sanctions.

Defendants' claim of waste of time is disingenuous. Plaintiffs attempted to meet and confer regarding consolidating the motions for over a month. See Reply Borodkin Dec. ¶2, Ex. 5. Moreover, Defendants obtained a statement under oath from James Rogers on October 20, 2010. Any waste is of Defendants' own doing. If Defendants thought it could avert this motion through the October 20, 2010 sworn testimony of James Rogers, *Defendants could simply have told Plaintiffs about Mr. Rogers' statement* and saved everyone a lot of time.

III. CONCLUSION

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

DATED: November 15, 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

REPLY DECLARATION OF LISA J. BORODKIN

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. Attached hereto as **Exhibit "5"** are emails between Defendants' counsel and me showing that I had been engaged in efforts to meet and confer with them on this second Rule 56(f) motion since at least September 21, 2010. Defendants counsel have at all times been adamant that they will not stipulate to move or consolidate the November 1, 2010 hearing date on the motion for summary judgment with the contemplated motion for relief under Rule 56(f).

3. On Wednesday, September 22, 2010 from approximately 12 p.m. to 1 p.m., I held discussions with Defendants' counsel, Ms. Speth and Mr. Gingras on their contemplated motion for summary judgment and Plaintiffs' contemplated motion under Rule 56(f). Ms. Speth requested my consent to record the September 22, 2010 conversation, and it is my belief that she did.

4. James Rogers provided information to Plaintiffs relevant to this case voluntarily. Plaintiffs did not pay Mr. Rogers or give him anything of value, except for three airline tickets from Phoenix to Los Angeles, for October 23, 2010, October 25, 2010 and October 28, 2010, none of which were used.

5. Attached hereto as **Exhibit "6"** is the email dated October 12, 2010 in which Mr. Rogers sent me the Corporate Advocacy Program and Verified Safe Program Powerpoint presentations that I filed as **Exhibit "3"** to my moving declaration. Mr. Rogers provided this to me of his free accord.

6. Attached hereto as **Exhibit "7"** is a true and correct copy of an email to me from James Rogers dated October 17, 2010 in which Mr. Rogers identifies the existence of other documents relevant to Defendants' efforts to market the Corporate Advocacy Program and/or the Verified Safe Program. In part, Mr. Rogers' October 17, 2010 email states:

> "I am not sure which information you will want pertaining to emails amongst myself to the Editor@ripoffreport.com and any other emails I may have been cc'd on as well,(especially pertaining to bitterbuyer, which is, (actually BankCardEmpire), or who ED was using in the beginning to jump start the sales/platform for ROR Verified Safe program.) I was able to gain access to an email which ED had set up over a year and forgot about I think. I was able to remember the passwords and username and Have locked ED out of it and begun making copies of every correspondence."

7. On October 22, 2010, Mr. Gingras telephoned me to "offer" me a chance to make James Rogers available for deposition in Arizona before November 1, 2010. I found this slightly strange because Mr. Rogers does not work for Defendants and I did not believe Defendants had the right or ability to control Mr. Rogers. I did not know at the time that Defendants had already recorded a statement under oath from Mr. Rogers on October 20, 2010, and Mr. Gingras did not tell me about that.

8. In our October 22, 2010 call, I told Mr. Gingras that Plaintiffs were planning to interview Mr. Rogers in Los Angeles on Saturday, October 23, 2010 and that Mr. Gingras was welcome to attend. Mr. Gingras declined to do so.

9. In our October 22, 2010 call, I advised Mr. Gingras that Mr. Rogers' testimony alone was not the sole basis for the Rule 56(f) motion. I explained that making James Rogers available for deposition before November 1, 2010 would not avert the need for discovery. I also told Mr. Gingras that deposing Mr. Rogers would not eliminate the need for the motion because Mr. Rogers is not the only witness of which Plaintiffs would take discovery and witnesses are not the only source of discoverable information.

10. One of the reasons I thought Mr. Gingras' proposal was unworkable was because discovery was stayed, both by order of this court and by the filing of the Anti-SLAPP motion. In the October 22, 2010 telephone call, I reminded Mr. Gingras that there was an automatic discovery stay in place due to Defendants' filing of the Anti-SLAPP motion. Mr. Gingras said he was unwilling to take his Anti-SLAPP motion off calendar. Therefore, I did not think a formal deposition could properly be started by November 1, 2010, let alone completed.

11. In subsequent conversations with Mr. Rogers, Mr. Rogers advised me that Defendants' counsel were trying to persuade him that he should not come to Los Angeles for a "deposition" because he would just have to come to California to do his "deposition" again with Defendants' counsel present, and that he should not have to do three "depositions." I explained to Mr. Rogers that we wanted to interview him, not depose him, and that if we did depose him it would likely take place in Arizona.

12. In my conversations with Mr. Rogers in October 2010, Mr. Rogers told me that Defendants had paid him in cash, "under the table," clandestinely because Ed Magedson did not want anyone to know that Mr. Rogers worked for Xcentric. According to Mr. Rogers, Defendants did not pay employment or social security taxes for him. Therefore, when Mr. Rogers was terminated in or about October 2010, he was not eligible to make an unemployment claim and was desperate for money.

13. On Friday, November 5, 2010, I spoke to James Rogers on the telephone. Mr. Rogers told me that if I wanted his testimony, I should send him a Notice of Deposition.

14. From what Mr. Rogers told me on November 5, 2010, Mr. Rogers could and would be a competent witness if subpoenaed to testify. Mr. Rogers told me he is newly re-employed selling advertising for the Phoenix New Times.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

15. Attached hereto as **Exhibit "8"** are true and correct copies of pages 145 to 154 of Ed Magedson's Deposition on June 8, 2010. Magedson demonstratese a consistent understanding of SEO principals with Plaintiffs' two experts. Magedson admits that SEO companies make a booming business in claiming they can move Ripoff Reports down in Google rank (145:12-19), and claims that certain types of SEO or "reputation management" is "considered illegal" and "It's frowned upon by search engines" (146:20-21) and otherwise demonstrates understanding that people are willing to pay "thousands of dollars" (151:13-15) hoping to "push down" Ripoff Reports in the Google search listings by posting alternate content (147:2-6).

16. Attached hereto as **Exhibit "9"** are true and correct copies of pages 85-86, 104-105, 113-114, 121-122, 137 and 163 of Ed Magedson's Deposition on June 8, 2010. Magedson describes that he didn't want anyone selling the CAP program (85:19-86:6), that only he has ever sold CAP (113:5-6, 137:14-15) or administered it (121:20-122:5), and demonstrates that the purpose of a "verification" or certification such as CAP or Verified Safe is to retain "consumer trust" (104:21-105:5), and that the Ripoff Report site generates money from advertising (163:16-18).

17. Attached hereto as **Exhibit "10"** is a copy of the November 3, 2010 decision of the District Court for the Northern District of California in Swift v. Zynga, 09-cv-5443 (Nov. 3, 2010), of which this Court is respectfully requested to take judicial notice, denying Defendant Zynga's motion to dismiss on Communications Decency Act grounds.

18. Attached hereto as **Exhibit "11"** are pages 33-42 of Ed Magedson's Deposition on June 8, 2010 in which he testifies thathe thinks Ripoff Reports have been taken down by Court order but he doesn't know which onesfor sure without help from his lawyers (37:1-19).

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 15th day of November, 2010, in Los Angeles, California.

/s/ Lisa J. Borodkin
Lisa J. Borodkin