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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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ASIA ECONOMIC INSTITUTE, LLC, *et al.*, **Plaintiffs,** **vs.** **XCENTRIC VENTURES, LLC, *et al.*** **Defendants.**	Case No: 2:10-cv-01360-RSWL-PJW **RESPONSE TO PLAINTIFFS' EVIDENTIARY OBJECTIONS TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT** Hearing Date: June 28, 2010 Time: 1:30 PM Courtroom: 6 (Hon. Stephen Wilson)

Plaintiffs' objections to Defendants' Motion for Summary Judgment (which is also styled as a Motion to Strike) are entirely lacking in merit. The primary objection relates to the admissibility of six audio recordings of conversations between Plaintiff Raymond Mobrez and Defendant Ed Magedson. Citing Cal. Penal Code § 632, Plaintiffs argue these recordings are inadmissible. These arguments (which have previously been discussed at length between counsel) are groundless and should be rejected.

1. California Eavesdropping Law Should Not Apply At All

The admissibility of the recordings raises interesting choice-of-law problems because, as noted in Plaintiffs' objections, Arizona is a one-party state which expressly permits one side to record a conversation without the knowledge or consent of the other party. On the other hand, California is a two-party state which requires dual consent if, but only if, the communication is "confidential" within the meaning of Cal. Penal Code § 623.

While Plaintiffs argue that California rather than Arizona law should apply, they ignore other authority which suggests that *neither* law applies. Specifically, in *Roberts v. Americable Int'l, Inc.*, 883 F.Supp. 499 (E.D.Cal. 1995), the district court explained that the evidentiary exclusion rules of California's eavesdropping law should not be applied at all to matters involving federal claims litigated in federal court:

> Although Roberts apparently obtained the tapes in violation of California state law, as discussed above, the Ninth Circuit has consistently held that such evidence is admissible in federal court proceedings when obtained in conformance with federal law and without regard to state law … . Although the Ninth Circuit's holding was made in the context of a criminal proceeding, it is equally applicable to civil proceedings. Sweatman's argument has consistently been that his state law "privacy privilege" has been invaded by Roberts' actions. However, as previously noted, this present action is based on federal law as well as state law. It is well settled that federal law applies to privilege claims brought in actions based in whole or in part on federal law.

Roberts, 883 F.Supp. at 503–04 (internal citations omitted) (emphasis added) (rejecting the application of Cal. Penal Code § 623 to matter pending in federal court and explaining that pursuant to federal law, specifically 18 U.S.C. § 2511(2)(d), "is not unlawful under this chapter [for one party to secretly record a conversation] where a party to the conversation is either the one who has intercepted the conversation or who has consented to the interception, and the interception is not for the purpose of committing any criminal or tortious act.")

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As was true in *Roberts*, there is no evidence that Xcentric made the recordings at issue for any unlawful purpose nor have these recordings been used in any unlawful manner. On the contrary, these recordings play a key role in advancing the paramount goal of the civil justice system—determining the truth. Because they were lawfully created under both Arizona law and federal law, the recordings are admissible without regard to any California evidentiary privileges.

However, for the reasons explained below, it is not necessary to reach this issue nor is it necessary for the court to make a determination regarding whether to apply California, Arizona, or federal law. This is so because even assuming *arguendo* that Plaintiffs are correct and California's eavesdropping law is applied, the recordings are fully admissible in this case because five of the six recordings are entirely outside the scope of Cal. Penal Code § 623, and the lone remaining recording is admissible for impeachment even if it was unlawfully obtained (which it was not). Each of these points are explained below.

2. California's Eavesdropping Law Does Not Apply To Voicemails

By definition, California's eavesdropping statute only applies to "confidential communications" which are defined in Penal Code § 623(c) as follows:

> (c) The term "confidential communication" includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication … in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.

According to the plain language of the statute, if a caller knows or reasonably expects that his voice is being recorded, the conversation does not qualify as a "confidential communication" within the meaning of Penal Code § 623(c). This is important because as reflected in the table of all recordings shown on the following page, of the six recordings at issue, two of them (calls 3 & 6) were voicemails left on Xcentric's phone system by Mr. Mobrez.

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TABLE OF RECORDINGS			
Call #	**Date**	**Type**	**Overheard?[1]**
1	4/27/2009	Live Conversation	No
2	4/27/2009	Not Recorded	n/a
3	4/27/2009	***Voicemail***	n/a
4	5/5/2009	Live Conversation	***YES***
5	5/5/2009	Live Conversation	***YES***
6	5/9/2009	***Voicemail***	n/a
7	5/12/2009	Live Conversation	***YES***

By definition and as a matter of pure common sense, a person who leaves a voicemail message knows that the call is being recorded; *a fortiori* Penal Code § 623 does not apply to these two voicemails because they were not confidential communications as defined by the statute. As such, the exclusionary sanction of Penal Code § 623(d) does not bar their admission.

3. Penal Code § 623 Does Not Apply To Non-Private Conversations

In addition to excluding voicemails which the caller knows are being recorded, it is equally clear that Cal. Penal Code § 623(c) excludes recordings made in "any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." On page 6 of their objection, Plaintiffs concede that the eavesdropping law does not apply where the conversation at issue is being overheard by a non-party. However, Plaintiffs suggest "Ms. Llaneras only overheard one of the calls. Therefore, it is undisputed that an expectation of confidentiality existed with respect to all other calls." Obj. at 6:18–20 (emphasis added).

As has become a serious recurring problem with other aspects of Plaintiffs' case, this representation is simply false. As explained in the declaration of Iliana Llaneras filed with the court on May 3, 2010 (Doc. #27), she testified that she was secretly listening to three of the four calls made by Mr. Mobrez to Mr. Magedson in which a live conversation occurred: "I witnessed the conversations that took place between Mr. Mobrez and Mr.

[1] As discussed *infra*, of the four calls which involved a live conversation, Mr. Mobrez's wife, Ms. Llaneras, was secretly listening to three of them.

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Magedson on May 5th and May 12th 2009." Llaneras Decl. (Doc. #27) ¶ 4. In fact, Ms. Llaneras's declaration specifically describes the contents of the two calls which took place on May 5th; one at 11:30 AM and the other around 1:00 PM. In his declaration filed with the court on May 3, 2010 (Doc. #28), Mr. Mobrez also confirms that Ms. Llaneras was listening in on the first May 5, 2009 call (Mobrez Decl. ¶ 10 at 4:15), the second May 5, 2009 call (Mobrez Decl. ¶ 13 at 5:12–13), and finally the May 12, 2009 call (Mobrez Decl. ¶ 14 at 5:24–25).

Given this testimony from both Mr. Mobrez and Ms. Llaneras, it is simply false for Plaintiffs to claim that only *one* of the calls was overheard by Ms. Llaneras and is therefore outside the scope of Section 632. Rather, Plaintiffs' own testimony shows Ms. Llaneras was secretly listening to three of the four recordings which involved a live conversation (calls 4, 5 & 7). Because Mr. Mobrez knew those conversations were being overheard, they were not "confidential communications" within the meaning of Penal Code § 632(c) and the exclusionary sanction of that law does not apply to those three calls.

4. Spousal Privilege Does Not Apply To Third Party Conversations

Plaintiffs next argue that the existence of the marital/spousal communication privilege somehow means that Ms. Llaneras's secret presence on the three calls can be overlooked. This argument has no application because "the privilege does not extend to statements which are made before, or likely to be overheard by, third parties." *U.S. v. Marashi*, 913 F.2d 724, 730 (9th Cir. 1990) (citing *Pereira v. United States*, 347 U.S. 1, 6, 74 S.Ct. 358, 361-62, 98 L.Ed. 435 (1954)). Indeed, the authority cited by Plaintiffs—*U.S. v. Strobehn*, 421 F.3d 1017 (9th Cir. 2005)—stands for the opposite premise advanced by Plaintiffs. In *Strobehn*, the court rejected the application of the marital privilege to a letter that was sent from one spouse to the other because the letter was also addressed to numerous third parties. *See Strobehn*, 421 F.3d at 1023. Because conversations between Mr. Mobrez and Mr. Magedson were not privileged, the spousal privilege does not apply at all to those conversations.

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To restate the facts, of the six recorded calls, two (calls 3 & 6) were voicemails outside the scope of Penal Code § 623. Of the remaining four calls, Ms. Llaneras was eavesdropping on three of them (calls 4, 5 & 7), so those calls were also outside the scope of § 623. As such, other than the first call (which is admissible for other reasons), all of the recordings are *per se* outside the scope of Penal Code § 623 and are thus admissible.

5. The Eavesdropping Law Does Not Prevent Impeachment

As to the first recorded call on April 27, 2009, Defendants concede the call may arguably fall within the scope of the eavesdropping law if it applies at all to Defendants' actions in Arizona. This point is irrelevant, however, because even when an audio recording is made in violation of Penal Code § 623, the recording can still be used for impeachment; "the evidentiary sanction of section 632, subdivision (d), cannot be construed so as to confer upon a testifying witness the right to commit perjury." *Frio v. Superior Court*, 203 Cal.App.3d 1480, 1497, 250 Cal.Rptr. 819, 829 (2nd Dist. 1988) (finding recording in violation of Penal Code § 623 may still be used for impeachment). If Plaintiffs decline to testify in this case at all, Defendants agree the recording of call #1 would not be necessary to impeach them. However, because Plaintiffs have previously submitted false testimony in this case, the recordings may be used for impeachment.

6. Plaintiffs' Disclosure Arguments Are Groundless

On pages 7–10 of their objections, Plaintiffs argue at length that the audio recordings must be excluded pursuant to Fed. R. Civ. P. 37(c)(1) because Defendants failed to disclose them in conjunction with their initial disclosures under Rule 26. This argument is groundless for two reasons.

First, Rule 26(a)(a)(A)(ii) expressly exempts from disclosure any evidence which is to be used "solely for impeachment". Clearly, the audio recordings are squarely within this description and are therefore outside the scope of the mandatory disclosure rules. The fact that the recordings form one of several bases for Defendants' Motion for Summary Judgment does not alter this fact. In that context, the sole use of the recordings is to impeach Plaintiffs by showing that they perjured themselves by fabricating phony

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allegations of extortion. The recordings serve no other purpose beyond impeachment and are clearly admissible for that purpose.

Second, Plaintiffs fail to acknowledge that the recordings *have* been timely disclosed, and they further ignore the role they played in the sequence of events which led to the disclosure. As the court is aware, on April 19, 2010, the court denied Defendants' anti-SLAPP motion. Prior to that order, all discovery in the case was stayed pursuant to Cal. Code of Civ. P. § 425.16(g) (staying discovery while anti-SLAPP motion is pending). Literally two days after the April 19th hearing, Defendants served their initial disclosures on April 21, 2010. At that time, Plaintiffs had not yet disclosed the factual basis for their extortion claims as the court ordered them to do within two weeks at the April 19th hearing, so it was not yet known whether the extortion was based on emails, phone calls, in-person conversations or something else.

On the final day to do so—Monday, May 3, 2010—Plaintiffs filed two declarations (Doc. #27 and 28) which finally explained the basis for their extortion claims. In these declarations, Plaintiffs explained for the first time that they claimed the extortion occurred in a series of phone calls from Mr. Mobrez to Mr. Magedson which took place in April and May 2009. Prior to May 3, Plaintiffs had never disclosed these specific dates or alleged substance of the calls in their Complaint or anywhere else.

Prior to receiving this information, Defendants had no reason to believe that the audio recordings between Mr. Mobrez and Mr. Magedson would be relevant to this case. Obviously, the recordings themselves reveal no extortion or any other tortious action on the part of Defendants, so after reviewing them Defendants believed they had no bearing on any part of this case. Indeed, if Mr. Mobrez and Ms. Llaneras had testified truthfully about those calls, the recordings would be irrelevant and unnecessary.

The importance of the recordings only became clear after Mr. Mobrez and Ms. Llaneras lied about the content of these calls in their May 3, 2010 declarations. Upon learning this, Defendants disclosed the recordings to Plaintiffs four days later on May 7, 2010. Even if disclosure of the recordings was mandatory under Rule 26(a), which it was

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not, the recordings were disclosed in a "timely manner" which is all that is required under Rule 26(e)(1)(A).

7. Additional Comments Re: Disclosure Of "Original" Recordings

On pages 11–22 of their objections, Plaintiffs repeatedly complain that the "original" audio recordings have "not [been] provided and withheld under claim of confidentiality." This objection misstates the facts and is highly misleading. Plaintiffs also appear confused about who has "authenticated" these recordings (Plaintiffs erroneously assume that counsel has authenticated them). The true facts are as follows.

The manner and process by which Xcentric automatically records incoming calls was fully explained in ¶¶ 25–31 of the May 24, 2010 declaration of Ed Magedson (Doc. #42) filed in support of Defendants' Motion for Summary Judgment. The authenticity of the six audio recordings at issue in this case was affirmed in ¶ 25 of Mr. Magedson's declaration, and the substance of each recording was described in ¶¶ 44–52 of the declaration. To the extent that undersigned counsel referenced these recordings in his declaration (which Plaintiffs argue is improper), this was merely a foundational reference to the disc containing the recordings as one of the exhibits to Mr. Mobrez's deposition.

In terms of their objection that Defendants have somehow failed to disclose the "original" recordings, the truth is as follows. First, somewhat incredibly, until less than 24 hours ago, Plaintiffs have never served any discovery requesting the production of any recordings, original or otherwise. Rather, excluding discovery served late in the day on June 22, 2010 (which does request recordings) to date the only discovery propounded by Plaintiffs was a single set of Requests to Admit served on June 4, 2010 which requested that Defendants admit a series of matters which were essentially all previously undisputed and/or otherwise admitted in the deposition of Mr. Magedson. Until literally yesterday, Plaintiffs had served no production requests under Rule 34, so their argument that Defendants have somehow failed to disclose the "original" recordings is highly misleading because Plaintiffs did not previously request them.

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Furthermore and in all candor—although the full and complete substance of the audio recordings has been disclosed to Plaintiffs, the actual digital audio files provided to Plaintiffs were redacted in one minor respect—the name of Xcentric's third-party vendor who recorded the calls was redacted from the data embedded in each file. In other words, although the audio content was not changed in any way, when each file is played on a computer, the software used would normally display certain text information encoded into the file header itself such as the date/time of the call, the caller ID information including the caller's name and phone number, and so forth. In the files already produced to Plaintiffs, none of this information was redacted or removed.

However, because Xcentric's third-party vendors have been targeted by severe, repeated and unlawful threats and harassment, and because Plaintiffs have admitted that are in contact with individuals who have committed such acts, the name of the third-party vendor who created these recordings was redacted from the files until such time as a protective order could be entered (either by stipulation or on Defendants' motion), after which Defendants would be willing to produce the "original" files showing the vendor's name. This point was fully explained to Plaintiffs in writing on page 7 of the letter dated May 11, 2010 which is attached as **Exhibit C** to the Declaration of David S. Gingras in support of Defendants' Reply Re: Defendants' Motion for Summary Judgment filed concurrently herewith. Despite this offer more than five weeks ago, Plaintiffs never requested the "original" files until yesterday, June 22.

As has already been explained to Plaintiffs, Xcentric has the "original" audio files showing the vendor's name as well as the original emails by which these files were automatically transmitted from the vendor to Xcentric at the time each recording was made. If Plaintiffs had made a timely production request for any of this information, Defendants would have sought a protective order under Rule 26(c) which merely prevents Plaintiffs from disclosing the name of Xcentric's vendor to anyone outside the scope of this litigation. If such a protective order was entered, Defendants have no objection to producing the original digital audio files and emails.

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For each of the above reasons, all of Plaintiffs' evidentiary objections to Defendants' Motion for Summary Judgment are groundless. None of these objections warrant the exclusion of any evidence or the denial of summary judgment.

DATED June 23, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on June 24, 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:

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

/s/David S. Gingras

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