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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_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

PLAINTIFFS' *EX PARTE* MOTION (1) UNDER RULE 56(f) TO DENY OR CONTINUE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT TO CONDUCT FURTHER DISCOVERY AND (2) COMPELLING DEFENDANT ED MAGEDSON TO APPEAR FOR DEPOSITION WITH DOCUMENTS AND (3) FOR SANCTIONS UNDER LOCAL CIVIL RULES 37-4 AND 83-7; DECLARATION OF LISA J. BORODKIN AND CERTIFICATION OF COMPLIANCE WITH LOCAL CIVIL RULES 7-3 AND 7-19

[PROPOSED ORDER LODGED CONCURRENTLY HEREWITH]

Judge: The Hon. Stephen V. Wilson

Date: July 9, 2010 or t.b.a.
Place: 312 North Spring Street
Los Angeles, California 90012
Courtroom: 6

Summary Judgment Hearing Date: July 12, 2010
Pretrial Conference: August 2, 2010
Trial Date: August 3, 2010

Dockets.Justia.com

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on July 9, 2010 or at any other time as this Honorable Court may deem proper, Plaintiffs will and hereby do move *ex parte* pursuant to Local Civil Rule 7-19 for an Order (1) under Federal Rule of Civil Procedure 56(f) denying Defendants' Motion for Summary Judgment ("MSJ") or, in the alternative, continuing Defendant's pending Motion for Summary Judgment ("MSJ") to allow Plaintiffs to conduct necessary discovery, including continuing the deposition of Defendant Edward Magedson as ordered by this Court on June 24, 2010 ("Order of June 24, 2010") [DN-81[1]], (2) compelling Defendant Magedson to appear for a Court-supervised continuance of his deposition with documents on July 14, 2010, the date of the mandatory settlement conference, or otherwise as soon as is just, and (3) if the Court finds that Defendants' conduct has been in bad faith, awarding Plaintiffs sanctions under Local Rule 37-4, 83-7 and its inherent authority for Defendants' refusal to cooperate in discovery and other disobedience of this Court's Orders and Rules, including the Order of June 24, 2010.

The grounds for relief under Rule 56(f) are that Plaintiffs have identified the existence of specific, relevant information on which Plaintiffs need to conduct additional discovery to oppose Defendants' MSJ and for trial. The information is (1) the "Second Questionnaire" and testimony about how it is used in the multi-step process for enrolling members in Defendants' Corporate Advocacy Program ("CAP"), (2) the "CAP Agreement" and testimony about it and the extrinsic circumstances of how CAP members contract with Defendants to enroll in CAP, (3) alleged positive reports that users are permitted to post on Defendants' website, ripoffreport.com, without enrolling in CAP, and (4) newly-discovered rebuttal material that contradicts Defendants' prior testimony that

[1] References to "DN-__" are to this Court's civil docket in this action.

"Ripoff Reports" are "never removed," creating a genuine issue for trial. The newly-discovered material includes a January 15, 2010 email from Defendants' counsel claiming that Defendants took down a "Ripoff Report," for a 16-year old girl, contrary to previous declarations and testimony.

The grounds for the request for an Order compelling Defendant Magedson to appear for a Court-supervised deposition on July 14, 2010 or for deposition on any other terms that the Court finds just are that (1) there is a Mandatory Settlement Conference in this action on July 14, 2010 at 11:00 a.m. before Magistrate Patrick J. Walsh, and parties are ordinarily expected to attend in person under Local Rule 16-15.2(b), (2) it would serve efficiency and the interests of justice to have the Court supervise the remaining 1.5 hours of Defendant Magedson's deposition, given the extensive disputes over relevance and objections and Defendants' bad-faith position that the deposition should not continue at all, and (3) permitting Plaintiffs to conclude the deposition at the Courthouse in Los Angeles would be a just remedy for Defendants' bad-faith, dilatory and vexatious discovery tactics, saving Plaintiffs from unnecessary costs and delays in traveling to obtain discovery necessary for trial.

The grounds for the request for sanctions (in any amount deemed appropriate by this Court) are (1) Defendants have disobeyed this Court's June 24, 2010 Order ("Order") by refusing to schedule the continuance of Defendant Magedson's deposition and refusing to cooperate in resolving the dispute, refusing to call the Court unless Plaintiff meets Defendants' preconditions that are unreasonable and were not ordered; (2) Defendants have refused to meet and confer under Rule 7-3 for a Rule 56(f) motion and a Motion to Strike, purporting to demand an advance written outline for the conference, when Defendants did not themselves provide such an outline for their April 28, 2010 conference on MSJ; (3) Defendants unreasonably refused to stipulate to a Bench Trial or to file a Notice of Non-Opposition to Plaintiffs' Motion for a Bench Trial; (4) Defendants

engaged in a pattern of disobeying and misrepresenting this Court's Local Rules and Orders, and interposing groundless threats and veiled threats to Plaintiffs' counsel personally, prejudicing Plaintiffs from preparing for trial.

The grounds for making this Motion *ex parte* are that the Magistrate Judge assigned to the case, Honorable Patrick J. Walsh, is unavailable the week of July 5 to July 12, 2010, and Plaintiffs cannot otherwise obtain an order continuing the MSJ or obtaining additional discovery to oppose the MSJ in advance of the July 12, 2010 hearing.

This Motion is based on Federal Rule of Procedure 56(f), Local Civil Rules 37-4 and 83-7, this Court's inherent authority, the attached Memorandum of Points and Authorities and Declaration of Lisa J. Borodkin, the pleadings, papers and proceedings in this action, and such other matters as the Court deems proper.

This Motion is made following the counsel's efforts to conduct a conference of counsel by contacting Defendants' counsel pursuant to L.R. 7-3 on June 28, 2010 and July 7, 2010 and notice of this *ex parte* application pursuant to L.R. 7-19 on July 7, 2010.

The undersigned counsel has advised counsel for Defendants that such an *ex parte* motion will be made to this Court. Defendants' counsel are David S. Gingras, Xcentric Ventures, LLC, P.O. Box 310, Tempe, AZ 85280, (480) 668-3623, david@ripoffreport.com, and Mari Crimi Speth, Jaburg & Wilk, P.C. 3200 N. Central Ave., Suite 2000, Phoenix, AZ 85012, (602) 248-1089, mcs@jaburgwilk.com; and Paul S. Berra, 1404 Third Street Promenade, Suite 205, Santa Monica, CA 90401 (310) 394-9700, paul@berra.org.

Defendants' counsel have indicated that they will oppose the motion and request to be present at any hearing on the motion. Plaintiffs have not sought or obtained any previous continuation of time. This request for continuation is timely and necessary to allow Plaintiffs to oppose Defendants' Motion for

Summary Judgment, currently scheduled for Monday, July 12, 2010 and/or to prepare for trial commencing August 3, 2010.

DATED: July 8, 2010

Respectfully submitted,

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

MEMORANDUM OF POINTS AND AUTHORITIES

1. Preliminary Statement

Plaintiffs hereby move *ex parte* under Federal Rule 56(f) for an order denying Defendants' pending Motion for Summary Judgment ("MSJ") [DN-40[2]] currently set for July 12, 2010 or, in the alternative, continuing the MSJ so that Plaintiffs can take discovery that is likely to raise a genuine issue of fact for the August 3, 2010 trial. If the continuance of the MSJ lasts until the August 3, 2010 trial date, then the trial should go forth first.

In addition, Plaintiffs move for an Order compelling Defendant Magedson to appear for a Court-supervised deposition for the remaining 1.5 hours of his deposition on July 14, 2010, the date of the Mandatory Settlement Conference before Magistrate Patrick J. Walsh.

Plaintiffs also request sanctions under Local Rules 37-4 and 83-7 for Defendants' bad-faith, vexatious, dilatory conduct and violation of this Court's Orders and Rules.

Plaintiffs believe they have already submitted enough evidence opposing the MSJ showing a genuine issue of fact for the August 3, 2010 trial. However, to avoid all doubt, Plaintiffs need to complete the deposition of Defendant Magedson. Plaintiffs even obtained an Order on June 24, 2010 from this Court ordering that "Plaintiffs may continue the deposition of Defendant Magedson, as discussed at the hearing." DN-82. However, Defendants refuse to schedule that deposition. The specific information needed to oppose the MSJ is supported by affidavit. See Declaration of Lisa J. Borodkin. Therefore, relief under Rule 56(f) is warranted.

The specific discovery that Plaintiffs seek could easily be completed in a matter of days with Defendants' cooperation. However, Defendants have

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[2] References to "DN-__" are to this Court's civil docket in this action.

shown, time and time again, that they will ignore oral rulings and will respond to nothing short of a written Order from the Court.

Defendants will do anything to avoid the August 3, 2010 trial date. To that end, they have:

- Filed a Motion for Summary Judgment ("MSJ") as to all claims in the action, based on an absence of evidence before discovery had even begun [DN-4]
- Refused to stipulate to bifurcation of discovery to match the trial
- Resisted producing discovery directly relevant to the few issues in the August 3, 2010 trial
- Unreasonably refused to file a Notice of Non-Opposition to Plaintiffs' pending Motion for a Bench Trial, despite Plaintiffs' request
- Refused to schedule a date to continue the deposition of the key witness, Edward Magedson, despite this Court's Order of June 24, 2010 [DN-82]
- Disobeyed this Court's Order of June 24, 2010 ordering them to state the topics as to which they oppose the continued deposition of Defendants Magedson by July 1, 2010
- Refused to meet and confer with Plaintiffs on a motion under Rule 56(f), even though they argued in their Reply on the MSJ that Plaintiffs must make such a motion [DN-74]
- With escalating frequency, disobey and misrepresent this Court's Orders and Rules, and dictating procedural rules of their own making
- Harass Defendants' counsel with veiled threats of administrative proceedings and explicit threats of Rule 11 sanctions without basis.

In short, Plaintiffs want a trial on August 3, 2010. Defendants do not. Defendants should not be rewarded for this conduct by granting their wish – to postpone the day of reckoning and drive up costs for Plaintiffs. This Court should

deny the MSJ, order that the continued deposition of Defendant Magedson take place under Court supervision on July 14, 2010, and award Plaintiffs sanctions, if the Court finds it appropriate.

2. Relevant Background

A. Facts Relevant to the Rule 56(f) Motion to Deny or Stay Defendants' Motion for Summary Judgment.

On January 27, 2010, Plaintiffs commenced this action by filing the Complaint in Los Angeles Superior Court. DN-1 at Ex. A. Plaintiffs claim violations of the federal Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C § 1962(c) and (d) ("RICO"), extortion, common law defamation, unfair business practices, civil conspiracy, defamation per se, false light, intentional and negligent interference with prospective economic relations, and inducing breach of contract. DN-1. On or about February 24, 2010, Defendants Xcentric Ventures, LLC and Edward Magedson removed the action to this Court. DN-1.

On April 28, 2010, Defendants requested to meet and confer regarding a motion for summary judgment, specifically stating, "I don't think it makes sense to send you a long written outline of my arguments since I have already explained most of the points in previous emails." See Borodkin Dec. ¶6, Ex. 3. Plaintiffs obliged the request. Id.

On May 24, 2010, before Plaintiffs had taken the deposition of either Defendant, Defendants filed their Motion for Summary Judgment. DN-40.

1. Plaintiffs Have Identified the Existence of a Second Questionnaire and a CAP Agreement on Which Discovery Must Be Taken

On June 2, 2010, Plaintiffs took the Rule 30(b)(6) deposition of Xcentric Ventures, LLC ("Xcentric"). Borodkin Dec. ¶23, Ex. 16. Xcentric designated Defendant Magedson to testify on the Rule 30(b)(6) topics.

At the June 2, 2010 deposition, Xcentric identified the existence of a second questionnaire besides the initial intake form on Defendants' website

("Second Questionnaire") that applicants must fill out in order to be approved fro CAP:

> Q If the individual or business wants to go forward with the CAP program --
> A Okay.
> Q -- what's your next contact with them?
> A They want to go next?
> Q Yes.
> A If they say they want to join the program, I send them a more detailed questionnaire about the company.
> Q Is that questionnaire different from the questionnaire on your website, on Ripoff Report's website?
> A Yes.
> Q It is different. Okay. And you said it's more detailed?
> A Yes.
> Q How is it more detailed?
> A It gets into -- and this is still – they haven't been approved yet.
> Q Right.
> A So it depends on how they answer the questions to these -- to this e-mail, but there is questions like, why did you get complaints? What was the cause of the complaints? What improvements? I want -- I want information right now, you know. How are you going to make -- what improvements have you made? What was -- what were the problems and what are you doing to avoid those problems in the future? The name of the person who will be signing the agreement. What's the name of the company that the agreement's gonna be in? Why do you feel -- I think it's, why do you feel -- I forget. I can't.
> Q That's fine.
> A I can't remember. I can't remember."

Borodkin Dec. ¶23, Ex. 16 (June 2, 2010 Transcript at 123:17-124:25).

On June 8, 2010, Plaintiffs commenced the deposition of Defendant Magedson. Borodkin Dec. ¶24. The deposition was suspended after approximately five hours due to an impasse over whether Mr. Magedson would answer questions on topics that might be covered by a potential protective order. Borodkin Dec. ¶ 24.

On June 24, 2010, the Honorable Patrick J. Walsh held a hearing and issued an Order providing in part:

> Plaintiffs ask the Court to compel the deposition of Defendant Magedson. Plaintiffs may continue the deposition of Defendant Magedson, as discussed at the hearing.

Order of June 24, 2010 at 2 (emphasis added). [DN-82] Borodkin Dec. ¶ 24; Ex. 24.

2. Plaintiffs Have Identified Impeachment Material Contradicting Defendants' Statements that they Never Remove Reports

Plaintiffs' counsel recently became aware of potential impeachment material going to the credibility of Defendants prior statements regarding that they "never' remove or take down reports. See Borodkin Dec. ¶¶40-43, Exs. 32-35

Defendants' website and emails state copiously that they never remove reports, which has been repeated in Defendants' depositions and affidavit in support on Defendants' motion to strike. See Borodkin De. ¶¶41-43, Ex. 33-35.

This assertion appears to be contradicted in a January 15, 2010 email that appears to have been written by Defendants' counsel, which states in part:

> "I wanted to prove to you that I really am ROR's lawyer, so I pulled your email address from a report that you filed. Who else would have that access?
>
> However, I want you to know that as inhumane as you think Ripoff Report is, we do have a heart. In fact, just last month I received a request from a lawyer in your neck of the woods asking us to remove a report...not because it was false, but because the guy named in the report had died, and he had a 16 year-old daughter who shared his unusual last name. When people were searching for her on Google, they found the report about her dead father which had lots of embarrassing details about him being a criminal, etc., and it was devastating to her.

> That lawyer did not threaten us and did not sue us. He just asked us to help a 16 year-old girl during the Christmas season. And guess what? We said YES....and in case you're wondering, we did not ask for and did not receive a dime for doing this. We did it simply because it was the right thing to do."

Borodkin Dec. ¶ 40, Ex. 32 (Emphasis added). Plaintiffs would like to take additional discovery on Defendants' explanation for this apparent contradiction of Defendants' statements under oath.

B. Facts Relevant to Plaintiffs' Motion to Compel Deposition of Defendant Magedson and for Sanctions.

On April 19, 2010, proceedings were held before this Court. DN-26. This Court ordered, inter alia, that the parties were to meet and confer on initial disclosures. See Borodkin Dec. ¶4, Ex. 1 at 13, 23-24 ("Order of April 19, 2010"). Despite this Court's Order of April 19, 2010, Defendants on April 21, 2010 sent Plaintiff an email stating that "we don't need to meet and confer re: Rule 26(a) disclosures." See Borodkin Dec. ¶5, Ex. 2.

The rest of the facts are set forth at length in the Borodkin Declaration, which is incorporated herein by this reference.

3. Legal Argument

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

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

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

(3) issue any other just order.

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

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

Although Rule 56(f) facially gives judges the discretion to disallow discovery when the non-moving party cannot yet submit evidence supporting its opposition, "the Supreme Court has restated the rule as requiring, rather than merely permitting, discovery 'where the nonmoving party has not had the opportunity to discover information that is essential to its opposition.'" See Metabolife Int'l v. Wornick, 264 F.3d 832, 846 (9th Cir. Cal. 2001), quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 n.5, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 213 (1986); see also Burlington N. Santa Fe R.R., 323 F.3d at 773.

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

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

Blough v. Holland Realty, Inc., 574 F.3d 1084, 1091 (9th Cir. 2009) (internal quotations omitted). "The burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exists, and that it would

prevent summary judgment." Id. (quoting Chance v. Pac-Tel Teletrac Inc., 242 F.3d 1151, 1161 n.6 (9th Cir. 2001)).

Plaintiffs have met this burden. Plaintiffs cannot present all of the relevant information essential to oppose Defendants' motion or prepare their own cross-motion for Summary Judgment because of Defendants' failure to cooperate in providing such information, including (a) the "Second Questionnaire," which is one of the steps Defendants always follow in soliciting applicants for Defendant Xcentric Ventures LLC ("Xcentric")'s Corporate Advocacy Program ("CAP"), (b) a representative example of the agreement entered into between Xcentric and CAP members ("CAP Agreement"), and (c) testimony by Defendant Magedson regarding how these documents are offered and accepted, as well as testimony on "positive" reports that may be posted on Defendants' website in the absence of enrolling in CAP. See Borodkin Dec. ¶40 and Ex. 29

Plaintiffs have a reasonable basis for believing the information sought exists, including that Defendant Magedson testified under oath at his June 8, 2010 deposition that he has the Second Questionnaire and the CAP Agreement in his email at his office, and that "if my attorneys tell me that I can [access or produce the CAP Agreement], I would," see Borodkin Dec. ¶ 24 and Ex. 17, and email correspondence and interviews with potential witness Jan Smith as to the authenticity of the January 2010 email. See Borodkin Dec. ¶44, Ex. 32.

Plaintiffs have made diligent efforts to avoid the delay in hearing Defendants' motion for summary judgment by (a) diligently attempting to obtain the necessary information in advance of the July 12, 2010, including by obtaining an Order on June 24, 2010 compelling the continuation of Defendant Magedson's deposition under a protective order, (b) requesting to meet and confer with opposing counsel this Rule 56(f) motion and/or to request a stipulated continuation, (c) diligently attempting to schedule the deposition of Defendant Magedson for the week preceding the July 12, 2010 hearing, (d) attempting to

arrange a settlement meeting between the parties for the week preceding the July 12, 2010 hearing, and (e) on July 2, 2010 requesting an Order from Magistrate Patrick J. Walsh to resolve the dispute over the continued deposition of Defendant Magedson.

Plaintiffs will be prejudiced by the denial of a continuation of the July 12, 2010 hearing on Defendants' motion for summary judgment because Plaintiffs are unable to obtain necessary testimony and documents that would assist the trier of fact in determining whether, inter alia, the manner in which Defendants present the "Second Questionnaire" to applicants for CAP and the extrinsic circumstances under which Defendants offer to enter into the CAP Agreements amount to attempted extortion under California law and a pattern of racketeering under the federal civil RICO statutes.

Plaintiffs are aware of specific evidence that would show that the MSJ should be denied and the August 3, 2010 trial should proceed. First, Defendant Magedson himself testified on June 8, 2010 that he has the CAP questionnaire and CAP agreement, "and if my attorneys tell me that I can, I would" produce them to Plaintiffs. Defense counsels' response has been to refuse to produce Defendant Magedson for his continued deposition. See ¶24, Ex. 17. The rest of the evidence that Plaintiffs would seek by way of completing the Deposition of Mr. Magedson and seeking documents relevant to the RICO extortion trial are set forth in Plaintiffs' July 2, 2010 application to the Court. See Borodkin Dec. ¶40, Ex. 29.

Second, Plaintiffs have learned that emails may exist between Defendants' counsel and potential witness Jan Smith that would establish that Defendants falsely testified that they "never" take down reports or "do not have a practice" of taking down reports. See Borodkin Dec. ¶44, Ex. 32.

This Court should Order that discovery can proceed on the subjects of Plaintiffs' July 2, 2010 application to the Court, and regarding the apparent contradictory evidence in emails in the possession of potential witness Jan Smith.

B. Plaintiffs Request that this Court Order that the Deposition of Edward Magedson be Continued with Court Supervision on July 14, 2010, the Date of the Settlement Conference, with Documents.

From the time this Court set a trial date of August 3, 2010, Plaintiffs have diligently pursued only the most essential, best evidence of the facts at issue in this case. As this Court recognized in its Order of April 19, 2010, taking the deposition of Defendant Magedson is the cornerstone of evaluating this case for settlement or trial. See Borodkin Dec. ¶3, Ex. 1 at 20:14-19 ("obviously, you're going to take his deposition"). Plaintiffs have pursued that goal persistently, despite many attempts by Plaintiffs counsel to thwart it.

Now, even Defendant Magedson stated that he'd be willing to answer questions and produce the CAP Agreement and Second Questionnaire if his attorneys would allow him to. See Borodkin Dec. ¶ 24, Ex. 17.

On June 24, 2010, Plaintiffs obtained an Order to Compel the Continued Deposition of Defendant Edward Magedson. [DN- 82]. Now that there is a protective order in place, DN-82, Defendants' counsel should have no more cause to complain about producing Defendant Magedson for deposition.

This Court expressly ordered that "Plaintiffs may continue the deposition of Defendant Magedson, as discussed at the hearing." DN-82 at 2. Still, Defendants' counsel continue to manufacture disputes and reasons why his testimony should not be taken. See Borodkin Dec. ¶¶27-41, Exs. 19-30.

Plaintiffs have ever reason to expect that this game-playing will only escalate when Plaintiffs do attempt to continue the deposition. At the June 8, 2010 deposition, Plaintiff asked for counsel with a question pending and Defendants' counsel interposed a long speaking objection combined with an instruction not to answer based on attorney-privilege on the simple question "Do you remember anything else about Tina Norris?" See Borodkin Dec. ¶ 24, Ex. 17 at 12-14.

This game-playing must be put to rest. The best, fairest, and most cost-effective way to ensure that Plaintiffs get a fair chance to depose Defendant Magedson would be to do it under Court supervision. There is a mandatory settlement conference scheduled before Magistrate Walsh on July 14, 2010 at 11:00 a.m. DN-32. That would be the ideal time to complete the remaining 1.5 hours of Defendant Magedson's deposition, under Court supervision, with the documents described in Plaintiffs' July 2, 2010 application to the Court, namely, the Second Questionnaire, the CAP Agreement, and related emails. See Borodkin Dec. ¶37, Ex. 29. Plaintiffs therefore request an Order compelling Defendant Magedson to appear for deposition under Court supervision on July 14, 2010.

C. Plaintiffs Request that this Court Award Sanctions if it Finds Defendants' or Its Counsels' Conduct in Bad Faith

The details of Defendants' conduct in resisting discovery are voluminous and set forth in detail in the Borodkin Declaration. It is now less than 30 days before trial. Plaintiffs still are seeking two key documents (the Second Questionnaire and the CAP Agreement) and 90 more minutes of Defendant Magedson's time under oath. Yet Defendants are working harder than ever to deprive Plaintiffs of this necessary discovery. Defendants have already told Plaintiffs that they intend to seek a continuance of trial.

Defendants have failed to cooperate in discovery and have violated Court Orders and Rules. Defendants refused to meet and confer in this motion, Borodkin Dec. ¶¶47-48, Exs. 36-37, or on a motion to strike. Borodkin Dec, ¶27, Ex. 18. Defendants held up the proper proceedings in this case while causing Plaintiffs' counsel great concern and distress with vague allusions to "criminal conduct," "aiding and abetting," "serious ethical consequences." See Borodkin Dec. ¶¶13-22, Exs. 9-15. Even after Plaintiffs' counsel provided Defendants' counsel with a California MCLE self-study article on threats and civil litigation, Defendants persisted, and misrepresented to this Court that Plaintiffs' counsel had

"ignored" the warnings in Mr. Gingras' May 11, 2010 letter or otherwise failed to address ethical problems. See Borodkin Dec. ¶¶13-22, Exs. 9-15. Moreover, the cover-up is worse than the crime. In his June 24, 2010 Reply Declaration. Mr. Gingras states that he believed his conduct was justified because of a rule in Arizona making it mandatory for a member of the bar "to report any conduct which raises a substantial question about the honesty of another lawyer; and the failure to do so itself is an ethical violation." DN-77 at 6. There has been no reason for Mr. Gingras to doubt the honesty of Mr. Blackert or myself the weekend of May 7, 2010; Mr. Gingras and his client both told us so, in writing and under oath.

This entire constellation of conduct is sanctionable under Local Civil Rules 37-4 and 83-7 and this Court's inherent authority. Plaintiffs request that this Court impose any sanctions that are just, or set a hearing on this motion for sanctions for the conduct described in this application, or make any other order that is just.

4. CONCLUSION

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

DATED: July 8, 2010

Respectfully submitted,

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

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

I, Lisa J. Borodkin, declare:

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

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

3. Attached hereto as **Exhibit "1"** is a true and correct copy of the Reporter's Transcript of the April 19, 2010 proceedings before this Court by Ms. Deborah K. Gackle.

4. On April 19, 2010, this Court ordered the parties to arrange a meeting to exchange initial disclosures under Rule 26(a) in this case:

> MS. BORODKIN: Absolutely, Your Honor. We'd be happy to try as soon as possible. We just want our day in court. We have not exchanged initial disclosures yet. That would definitely hasten our ability.
>
> THE COURT: You have to do that. So I'm going to order you within 10 days of today to arrange a meeting to do that.

Ex. 1 at 13:19-25 (emphasis added).

> MS. BORODKIN: Thank you, Your Honor. And for clarification, you're ordering that the parties meet and confer about initial disclosures?
> THE COURT: I don't clarify. I told you what you have to do.
> MS. BORODKIN: Thank you, Your Honor.
> THE COURT: Thank you.
> THE CLERK: Pretrial conference will be at 3:30, August 2nd.

> THE COURT: And it is true you have to meet and confer within 10 days and don't forget the schedule about the declarations.

Ex. 1 at 23:4-25 (emphasis added).

5. On April 21, 2010, Plaintiffs' counsel contacted David S. Gingras, counsel for Defendants, by email to arrange the meeting regarding the exchange of initial disclosures as ordered by this Court. On April 21, 2010,Mr. Gingras responded by email, stating in part:

> "Thanks, but we don't need to meet and confer re: Rule 26(a) disclosures; these are simply done by both sides as a matter of course without any need to meet and confer. Our initial disclosures are attached and we will supplement them as time goes by."

Copies of Plaintiffs' counsels' April 21, 2010 email requesting to meet and confer on initial disclosures and Mr. Gingras' April 21, 2010 email stating that the parties do not need to meet and confer on initial disclosures are attached as **Exhibit "2."**

6. On April 28, 2010, Defendants' counsel sent an email requesting to meet and confer on Defendants' contemplated motion for summary judgment. A copy of Defendant's April 28, 2010 email is attached as **Exhibit "3."** In the April 28, 2010 email, Defendants' counsel stated:

> "We need to schedule a very quick call to meet and confer re: Xcentric's motion for summary judgment. Unlike my normal practice, I don't think it makes sense to send you a long written outline of my arguments since I have already explained most of the points in previous emails. However, I will say that the MSJ is going to be directed to all claims in the case, not just the RICO ones. I realize that there's likely no chance that you'll agree to drop any of your claims, so I expect the call won't take more than a couple of minutes."

Ex. 3 (emphasis added). Plaintiffs' counsel complied with Defendants' request to meet and confer pursuant to Local Rule 7-3.

7. On Friday, April 30 and Saturday May, 1, 2010, I sent Defense counsel a draft Rule 26(f) discovery plan. On May 2, 2010, Defendants' counsel sent an email on various case management topics. Attached here as **Exhibit "4**" is a copy of Defendant's May 2, 2010 email. Defendants' May 2, 2010 email promised to provide Defendants' input on the draft Rule 26(f) discovery plan by Monday, May 3, 2010 and also stated in part:

> "I still have received no disclosure whatsoever from AEI or Mr. Mobrez or Ms. Llaneras regarding a computation of damages as required by Rule 26(a)(1)(A)(iii). As this disclosure is already overdue, I will repeat our position as stated to Dan – given the expedited nature of this case which occurred entirely at plaintiffs' request, there is simply no excuse for the plaintiffs to miss deadlines on crucial issues. You told the court two weeks ago that you were ready to take this case to trial immediately, so disclosure on basic matters such as damages should be a non-issue.
>
> Normally, when important discovery is missing as is the case here, I would meet and confer with opposing counsel in anticipation of bring a Motion to Compel under Rule 37. Here, there is simply not enough time to go that route given our impending trial date.
>
> As such and as I already indicated to Dan, Xcentric plans to bring a Motion for Summary Judgment as soon as possible; hopefully within no more than 2 weeks. <u>If plaintiffs have still not complied with their disclosure obligations on or before the date that motion is filed, I will ask the court to refuse to consider any non-disclosed evidence as required under Rule 37(c)(1).</u>"

Exhibit 4 (emphasis added).

8. On May 2, 2010, I requested by email that Defendants "please <u>voluntarily dis[c]lose to us all evidence you intend to use in your motion for summary judgment</u> except for evidence to be developed specifically in this case." Attached as **Exhibit "5"** is a copy of my May 2, 2010 email to Defendants' counsel. I also requested:

> "If you are planning to file a motion for summary judgment on all claims, I would request that you give plaintiffs <u>reasonable time to review the</u>

deposition of your client and include discussion of that evidence in your pre-filing meet and confer conversation."

Exhibit 5 (emphasis added).

9. A copy of Defendants' counsel's May 3, 2010 email response is attached as **Exhibit "6."** Defendants responded in part as follows:

> First, if you believe that additional discovery is needed after the MSJ is filed, you can certainly seek Rule 56(f) relief. Second, I have already met and conferred with Dan regarding the MSJ and he agreed that the parties are at an impasse and that there's no point to discussing the issues any further. As such, I do not believe I am obligated to have a second meet-and-confer session with you, though I am happy to do so briefly[.]
>
> Finally, as to this request – "please voluntarily dis[c]lose to us all evidence you intend to use in your motion for summary judgment except for evidence to be developed specifically in this case" I am not sure what this means. It looks like you asked me for evidence that we intend to use in support of the MSJ in this case, but the second part of the sentence appears to exclude any evidence relating to this case. I do not understand this conflicting request.
>
> Insofar as you asked for evidence relating to the MSJ in this case, please note that under Rule 56(b), Xcentric has no evidentiary obligations on a defensive MSJ. As the plaintiff, you are obligated to demonstrate the existence of a triable issue of fact supported by admissible evidence; it is not Xcentric's job to prove a negative…it's your job to affirmatively prove up your case and to offer evidence supporting every element of every claim you have made. If you fail to do this, Xcentric would be entitled to summary judgment simply by pointing to a lack of any record evidence on matters for which you bear the burden (which is essentially everything).

Ex. 6 (emphasis added).

10. Attached hereto as **Exhibit "7"** is my May 3, 2010 email responding to clarify any confusion about the disclosures requested:

> "My request for evidence on the MSJ meant evidence that you intend to use on your MSJ. I do not think you can move for summary judgment based on

> an absence of evidence in the record to support plaintiffs' claims, without giving plaintiff a chance to do such discovery."

Ex. 7 (emphasis added).

11. On Monday, May 3, 2010, Defendants counsel did not provide their portions of the Rule 26(f) discovery plan as they had promised. I renewed our request, and was told on the morning of Friday, May 7, 2010, by email, that Defendants would provide their portions of the discovery plan "ASAP."

12. On Friday, May 7, 2010, Mr. Gingras advised me that he would send his portions of the Rule 26(f) discovery plan by the end of the weekend. Attached as **Exhibit "8"** is a copy of my confirming email to Mr. Gingras. I did not receive Defendants' portions of the Rule 26(f) discovery plan that weekend.

13. Later the night of May 7, 2010, at approximately 9:50 p.m, I received an email from Mr. Gingras, which is attached as **Exhibit "9."** The email stated in part that Mr. Gingras believed it would be "inappropriate" to discuss any aspects of the case until Plaintiffs' counsel had "met and conferred" with our clients:

> "As for the Rule 26(f) report, for reasons that I am sure Dan has explained to you by now, I believe it is inappropriate to have any further discussions about any substantive aspect of this case unless and until you and Dan have an opportunity to meet and confer with your clients re: their intentions going forward. I also strongly recommend that both you and Dan immediately contact the State Bar of California and/or seek independent legal counsel regarding your personal ethical obligations under the California Rules of Professional Conduct and California Business & Professions Code in light of today's developments.
>
> For now, my intent is to send you and Dan a comprehensive demand letter on Monday which sets forth Defendants' positions as to numerous legal and ethical issues in light of today's developments. Until that letter is sent, and until you have a chance to review and respond to it, I believe it is inappropriate to discuss any further aspects of this case.

> I will forward my letter to you on Monday and we can then discuss where things stand and how this case will be proceeding, if at all."

Ex. 9 (emphasis added). My co-counsel, Daniel Blackert, and defense counsel Marie Crimi Speth were copied on this email.

14. At approximately 11:41 p.m. that evening of May 7, 2010, I asked Mr. Gingras to explain his references to seeking State Bar guidance or retaining counsel:

> I am very concerned by your email. What is it that you think I need to contact the State Bar or consult counsel about immediately? Do you mean before you send a demand letter on Monday, or is this something more urgent?
>
> If you have anything to tell me about my personal ethical obligations, or reason to recommend that I retain counsel, please tell me directly what you are talking about and do not assume that my co-counsel has filled me in. I do not have all the facts. If it concerns the State Bar, be assured that I take any such matters extremely seriously.

My May 7, 2010, 11:41 p.m. email to Mr. Gingras is attached as **Exhibit "10"** (emphasis added). As before, Mr. Blackert and Ms. Speth were copied on this email.

15. I did not know until Defendants filed their June 24, 2010 reply in support of their Motion for Summary Judgment that Mr. Gingras had – thirty minutes after my May 7, 2010 11:41 p.m. email to him -- vigorously advocated to my co-counsel in a private email on which I was not copied, various recommendations as to how to proceed or not to proceed in this action. A copy of Mr. Gingras' May 8, 2010 12:11 a.m. email, which was filed as an exhibit to his Reply Declaration in further support of Defendants' Motion for Summary Judgment, is attached for the Court's ease of reference as **Exhibit "11."** As I just recently discovered, Mr. Gingras advised my co-counsel that "the best advice is to call the state bar ethics hotline and seek their guidance." Mr. Gingras did not

encourage my co-counsel to consult me on this matter, and did not copy me on that email.

16. Several hours later on May 9, 2010, at 11:17 a.m., Mr. Gingras replied to my email, copying the group, a copy of which as attached as **Exhibit "12."** In the May 9, 2010 11:17 a.m. email, Mr. Gingras presented his version of the events at Plaintiff Mobrez's deposition, and stated his opinion that:

> "I do not believe that you can take any further steps to advance this case (including filing the Rule 26(f) report or any other pleadings) without running the risk of serious ethical consequences."

Ex. 12.

17. Attached as **Exhibit "13"** is a copy of my May 9, 2010 email response to Mr. Gingras, as well as the California Bar Journal MCLE self-study article to which my email linked, "No Threats Please: California Joan Explores Liabilities for Threatening to Present Criminal, Disciplinary or Administrative Charges" (2008). I explained in my email, inter alia, that Mr. Blackert and I were mindful of his warnings but that we also needed to balance the concerns identified in his May 9, 2010 email with the need to avoid prejudice to our client:

> Your email raises very serious issues. We are extremely mindful of the Rules of Professional Responsibility and we are immediately looking into all of the issues.
>
> We will of course look at your letter tomorrow and take everything there into consideration. I would request that you be very specific and detailed with your legal authorities in particular. It helps us get a head start on understanding your positions.

Ex. 13 (emphasis added).

18. With regard to threats, my May 9, 2010 email stated:

> "Your references to Title 18, your statement that your clients intend to vigorously pursue our clients for damages resulting from their "criminal

actions," and your comments that you have contacted the State Bar are quite alarming.

I want to remind you of Professional Rule 5-100[3] and be sure that you are not alluding to these things in order to gain an advantage in this civil action.

This MCLE article on the State Bar website might be of help:

http://calbar.ca.gov/state/calbar/calbar_cbj.jsp?sCategoryPath=/Home/Attorney%20Resources/California%20Bar%20Journal/December2007&MONTH=December&YEAR=2007&sCatHtmlTitle=MCLE%20Self-Study&sJournalCategory=YES

Please take a look at that.

In summary, I agree that there is much to discuss and decide. There are some serious problems here. While I am fairly certain some swift corrective action may be in order, I am not sure that withdrawing is the right thing to do. I think your clients may be in the same boat you are saying my clients are in, to some extent, based on the recordings and what you have said so far. As you have known of the recordings for much longer than we have, and you have litigated cases on behalf of your client before, we are extremely interested in your thoughts on all of this, including the above."

Ex. 13 (emphasis added).

18. Mr. Gingras did not include my May 9, 2010 email in his June 24, 2010 Declaration to this Court.

19. On May 10, 2010, at Plaintiffs' request, counsel for the parties conferred telephonically on various matters, including finalizing the Rule 26(f) discovery plan and potential discovery motions. Attached as Exhibit "14" is a copy of my May 10, 2010 email to Defendants discussing, inter alia, Plaintiffs' need for essential discovery on topics that Defendants continue to resist to this very day, including whether Defendants know of any other recordings of conversations:

"3. Defendants' Initial Rule 26(a) Disclosures

Yesterday I asked you if there are any more recordings of phone calls. I don't believe I got an answer. We would like a response today.

Our position is any recordings of phone calls are central to your defense. They should be identified in Defendants' Initial Disclosures under Rule 26(a). In general, we request that you disclose and identify, without awaiting specific request, any and all other major pieces of evidence you intend to use in your defense.

Holding back the fact that your client has a regular business practice of recording calls until last Friday afternoon impeded orderly discovery, was overly contentious, and delayed the hasty resolution or settlement of this case. We could have worked with you to identify the dates or recordings you should be focused on and conserved time and valuable court resources had you earlier disclosed those.

In any event, we think the existence of more recordings of conversations is central to the extortion claim. We would like you to identify if you know that any such recordings exist, and also any witnesses that you know of who were party to those or any other evidence of those exchanges. I believe our client testified in the deposition Friday that he recalled having a conversation with a "fast talker." There is also evidence in emails that our client invited Mr. Magedson to a meal. If you know of anything memorializing of these, please disclose it as a supplement to your Rule 26(a) disclosures."

Exhibit 14 (emphasis added).

20. In the May 10, 2010 teleconference, Mr. Gingras said to Mr. Blackert and me, among other things, that we could both be sued personally in the State of Arizona for continuing to litigate this case and "I hope you've enjoyed practicing law in California."

21. A copy of Mr. Gingras' May 11, 2010 letter to Plaintiffs' counsel is attached for the Court's ease of reference as **Exhibit "15."** By its terms, Mr. Gingras' May 11, 2010 letter stated that no response was necessary:

> "For these reasons, I would like you to inform me as soon as possible whether you intend to withdraw in this case. Normally, this decision would not be exceptionally urgent. However, because this case is set for trial on an expedited basis, and because Xcentric will need to take additional steps to protect itself from further harm in the event you refuse to withdraw, I would like to request that you provide me with your position on this issue no later than Wednesday, May 12, 2010. If you do not bring a Motion to Withdraw by that date, I will assume that you have decided not to do so."

Ex. 15 (emphasis added) at 3.

22. It is misleading for Mr. Gingras to state in his June 24, 2010 Repy Declaration that "these warnings have been completely ignored" and that "I have never received any substantive response from Mr. Blackert or Ms. Borodkin to my May 11, 2010 correspondence." DN-77 at 8-9. Plaintiffs' counsel did not "ignore" these warnings and did not fail somehow to "respond" to the May 11, 2010 letter. Each of the "warnings" in the May 11, 2010 letter had already been raised and responded to in email the previous weekend. The decision was made to continue the case. Therefore, no response was necessary to the May 11, 2010 letter.

23. On June 2, 2010, Plaintiffs took the Rule 30(b)(6) deposition of Xcentric Ventures, LLC ("Xcentric"). Xcentric designated Defendant Magedson to testify on the Rule 30(b)(6) topics. Relevant page of the transcript at attached hereto as "**Exhibit 16.**" At the June 2, 2010 deposition, Xcentric identified the existence of a second questionnaire besides the initial intake form on Defendants' website ("Second Questionnaire") that applicants must fill out in order to be approved fro CAP:

> Q If the individual or business wants to go forward with the CAP program --
> A Okay.
> Q -- what's your next contact with them?
> A They want to go next?
> Q Yes.

A If they say they want to join the program, I send them a more detailed questionnaire about the company.

Q Is that questionnaire different from the questionnaire on your website, on Ripoff Report's website?

A Yes.

Q It is different. Okay. And you said it's more detailed?

A Yes.

Q How is it more detailed?

A It gets into -- and this is still – they haven't been approved yet.

Q Right.

A So it depends on how they answer the questions to these -- to this e-mail, but there is questions like, why did you get complaints? What was the cause of the complaints? What improvements? I want -- I want information right now, you know. How are you going to make -- what improvements have you made? What was -- what were the problems and what are you doing to avoid those problems in the future? The name of the person who will be signing the agreement. What's the name of the company that the agreement's gonna be in? Why do you feel -- I think it's, why do you feel -- I forget. I can't.

Q That's fine.

A I can't remember. I can't remember."

(June 2, 2010 Transcript at 123:17-124:25).

24. On June 8, 2010, Plaintiffs took the deposition of Defendants Magedson in Phoenix, Arizona. Attached as "**Exhibit 17"** are selected pages from the June 17, 2010 deposition of Defendant Magedson. As to the "Second Questionnaire," and "CAP Agreement," Defendant Magedson testified on June 8, 2010 as follows:

4 Q Where's the second questionnaire?
5 A I guess it wouldn't be here because -- unless
6 I'm missing it, but I don't think I am. Unless --
7 because -- I don't know. You may know better than I.
8 Unless they asked and they said that they wanted --
9 they wanted an agreement and they are ready to go and

sign up, before they would get the agreement, that questionnaire would be there. So I don't see it here.
Q Is the second questionnaire anywhere in Exhibit 9?
A Exhibit 9, are you sure 9? That's 8.
Q I think it's this.
A Okay. You didn't do a good job in blocking out [REDACTED]'s name.
Q Oh, neither did you.
A I wasn't supposed to block it out.
Q That's okay.
A It kind of looks like a repeat. Maybe she got this sent twice. But, no, I don't see the second questionnaire there.
Q Do you have the second questionnaire somewhere?
A Not -- no. No. I shouldn't be joking. I'm sorry. I can't help it. I'm sorry. I shouldn't do that. Okay, no, I don't. I mean, I don't have it here with me.
Q Do you know where one would be?
A Cyberspace. No, no, actually, there is no way -- no, I wouldn't have any way to get it, because I have no way to access my e-mail.
Q Is it in your e-mail?
A I have it. That's the only way I can get it.
Q Why can't you get to your e-mail?
A Because my e-mail is such that I can't access it. I wouldn't want to be able to have it accessed. For security reasons, it's not accessible.
Q Can Ben Smith access it?
A No, no, he can't even.
Q Who can access it?
A (Indicating.)
Q You?
A Let the record show I raised my hand.
Q So if you were to access it, could you find the second questionnaire?
A Yeah, but I don't have my e-mail with me.
Q Oh, you mean with you today?

A Right. I don't have access. I don't have --I didn't bring anything -- I didn't bring a computer with me, and I'd have to be on my computer.
Q It's in your e-mail, you are saying, and not here?
A Yeah.
Q And would you access your e-mail from your office?
A Yes.
Q Okay. Is that where the contract is, too?
A That's where a contract -- yeah, of course. Yeah, uh-huh. But I don't know. Like I said, I thought I was mistaking her for somebody else, but maybe I'm not. So I -- there could be a contract that goes with this. I don't know. Because there is no way for me to -- there's too much going on for me to remember that. Whatever.
Q I don't think you have a contract with her. But my question is, a contract between Xcentric and a CAP member, which can be one of the ones that we talked about last week, do you know where one of those would be?
A (No oral response.)
Q Oh, you nodded.
A Of course. Well, it would be a couple of things. One is, I don't know without a protective order if I want that to be -- to be accessible. And so if there's, you know, proper protective order, I'm told by my attorneys I can --
Q Don't tell me what your attorneys said to you, please.
A No, I didn't say -- I said, and if my attorneys tell me that I can, I would. I wasn't telling you what my attorneys said.
Q Okay. So I'm not asking you about conversations between you and your attorneys, and I'm not asking you what the contract says; I'm just asking you, following up on last week, the type of contract you described today, Ed -- I'm sorry, forgive me -- today, Mr. Magedson, you know where that might be,

15 correct?
16 A Yes."

Ex. 17 (June 8, 2010 Transcript) at 113:7-117:16.

After approximately five and a half hours of testimony, Plaintiffs suspended the deposition due to irreconcilable impasses regarding whether Defendant Magedson would continue to testify without a protective order. On that day, Defendants' counsel advised Mr. Blackert and me to read the "Whitney" case. I understand Whitney to be a case in which Defendants obtained Rule 11 sanctions against Plaintiffs' counsel.

25. On June 10, 2010, I requested to meet and confer with Defendants' counsel regarding a potential Motion to Strike the recordings from evidence on the motion for summary judgment and trial, and to stipulate to a shortened schedule for the hearing. I sent a total of four emails on June 10, 2010 and June 11, 2010 requesting to meet and confer on such a potential Motion to Strike, attached as **Exhibit "18."**

26. Defendants' counsel did not meet and confer on such a motion. However, in responding to my request to meet and confer on a motion to strike, on June 10, 2010, Mr. Gingras alluded to "severe personal and professional consequences" if we aid our clients' "criminal actions" in any way:

> "[A]s I indicated when the recordings were first disclosed, I think that you and Dan may be exposing yourself to severe personal and professional consequences if you attempt to suborn perjury from your clients or to aid their criminal actions in any way. Rules of evidence and procedure aside, no attorney is permitted to make knowingly false statements to the court or to assist a client in offering false testimony, so I expect that you and Dan will strictly comply with those obligations."

Ex. 16 (emphasis added).

27. On June 24, 2010, the Honorable Patrick J. Walsh of this Court held a hearing on discovery matters. The Court issued an order compelling the

deposition of Defendant Magedson and ordering "Plaintiffs may continue the deposition of Defendant Magedson, as discussed at the hearing." A copy of this Court's Order of June 24, 2010 is attached hereto as **Exhibit "19."**

28. At the June 24, 2010 hearing on discovery matters, Magistrate Walsh established a procedure for resolving disputes over the scope of Defendant Magedson's continued deposition. The relevant pages of the transcript of the June 24, 2010 hearing are attached hereto as **Exhibits "20 and 21"**

29. Magistrate Walsh ordered Plaintiffs to serve a letter setting forth the questions that were not answered pending a protective order by Friday, June 25, 2010, and ordered Defendants to serve a statement of why any of these questions were already answered or why they were not relevant by Thursday, July 1, 2010:

> THE COURT: Here's how we're going to resolve this. You are going to make a list of those questions that you want to ask in this continued deposition. And you put page and line number where you believe that they objected and did not answer based on the protective order issue. Okay. send it to the other side. Letter format. I don't need another joint stipulation. I don't need to know what the law is on taking depositions. Okay. you tell them what you want to ask and why you think they didn't answer it. They're going to respond to you. I'll set some deadlines. Then, you can file whatever is left in dispute. You send it to me, and I'll make a ruling. I'll get you on the phone if I need to.
>
> * * *
>
> THE COURT: All right. Let's do it by tomorrow night, by, let's say, five o'clock tomorrow night Los Angeles time. And, Ms. Speth and Mr. Gingras, I want you to respond -- today is the 24th of June. I'm going to give you a week until July 1st. By July 1st, please, you respond and tell them why those questions were answered or why they're not relevant -- because I'm only having discovery on the extortion portion of this claim. Let her respond. And if you cannot resolve it, you can send me the letters from both sides, and I'll get you on the phone and let you argue, and then I'll make a ruling.

Ex. 20 (June 24, 2010 Transcript) at 24-26 (emphasis added).

30. The Court specifically stated elsewhere that Defendants' letter was due Thursday, July 1, 2010:

> THE COURT: all right. What else did you want to talk to me about? So, go get that to them by Friday. They're going to get it back to you by Thursday. You respond to them. Just let's be factual about this. I want the answer to this question. It wasn't answered. And maybe there are some other areas that you didn't ask in that first deposition that you may want to get answers to.

Ex. "21" at 30:12-19.

31. On June 25, 2010, I served a letter on Defendants of questions that we had asked Defendants in prior depositions that were not answered and that were relevant to the RICO and extortion trial. A true and correct copy of my June 25, 2010 letter and covering email is attached as **Exhibit "22."** My June 25, 2010 letter was slightly over 3 pages.

32. Attached hereto as **Exhibit "23"** are true and correct copies of June 25, 2010 email between Defendants' counsel and me.

33. Attached hereto as **Exhibit "24**" are true and correct copies of email between Defendants counsel and me on June 26, 2010.

34. On July 2, 2010 at 12:22 p.m., Defendants served their response to Plaintiffs' letter. Defendants' letter was 16 pages long. That letter for the first time informed Plaintiffs that they did not think a continuation of Defendant Magedson's deposition was necessary. Attached hereto as **Exhibit "25**" are copies of that email and the enclosed letter.

35. Upon receipt of that news, Plaintiffs' counsel telephoned and emailed Defendants' counsel to request an immediate call to Magistrate Walsh before the holiday break. Copies of my July 2, 2010 confirming emails are attached hereto as **Exhibit "26."**

36. In Mr. Gingras' July 2, 2010 1:12 p.m. email, Defendants took the bad-faith position that:

> "[W]e can't agree to call the court with you until you tell us what your position is – specifically, what in my letter do you disagree with?
>
> You know what your position is but we don't, and it's not appropriate for us to hear it for the first time on the phone today. You have our position in writing, and we are entitled to see your position in writing as well."

The email is attached as **Exhibit "27."**

37. In a 1:18 p.m. email. Defendants' counsel took another bad-faith position to argue that the Court was "confused" in ordering Thursday, July 1, 2010 as the date to respond. The email is attached as **Exhibit "28".**

38. At approximately 1:20 p.m., the parties agreed to talk at 2:30 p.m. to try to narrow the issues regarding the scope of discovery. At approximately 2:30 p.m., the parties met and conferred regarding the scope of Mr. Magedson's continued deposition. Defendants took the bad-faith position that no continuation of a deposition whatsoever was necessary.

39. The parties thereafter called Magistrate Walsh's Clerk, who instructed the parties to email the discovery dispute for Magistrate Walsh's consideration.

40. That same day, on July 2, 2010, I emailed Plaintiffs' version of the discovery dispute to Magistrate Walsh's clerk. A true and correct copy of my July 2, 2010 email (omitting enclosures) is attached as **Exhibit "29."**

41. Attached hereto as **Exhibit "30"** is a copy of Ms. Seth's July 6, 2010 response.

42. On July 7, 2010, I received an email conveying that Defendants' counsel had left telephone messages seeking Plaintiffs' consent to stipulate to an extension of pre-trial deadlines. I returned calls to Mr. Gingras and Ms. Speth, and sent confirming emails. My emails also gave notice of this ex parte

application. Defendants' counsel continued to refuse to meet and confer with me on this Rule 56(f) motion unless I provided them with a detailed written outline in advance. Time and circumstances simply did not permit me enough time to do so. Copies of my July 7, 2010 emails and Defendants' counsels' response are attached as **"Exhibit 31."**

43. Attached hereto as **Exhibit "32"** is a copy of an email forwarded to me by Jan Smith. Plaintiffs require discovery to authenticate this email and examine Defendants on it. Exhibit 32 appears to be, and based on my investigation to date, appears to be an email in which Defense counsel, David Gingras, has written to Ms. Smith and stated that Defendants have taken down reports, and that they might be inclined to take down the report of Ms. Smith:

> " However, I want you to know that as inhumane as you think Ripoff Report is, we do have a heart. In fact, just last month I received a request from a lawyer in your neck of the woods asking us to remove a report....not because it was false, but because the guy named in the report had died, and he had a 16 year-old daughter who shared his unusual last name. When people were searching for her on Google, they found the report about her dead father which had lots of embarrassing details about him being a criminal, etc., and it was devastating to her.
>
> That lawyer did not threaten us and did not sue us. He just asked us to help a 16 year-old girl during the Christmas season. And guess what? We said YES....and in case you're wondering, we did not ask for and did not receive a dime for doing this. We did it simply because it was the right thing to do.
>
> Of course, we can't really advertise this because once we start saying that we're willing to help some people, it sort of opens the floodgates for everyone to demand the same treatment. I know you'd like it if we would just take down anything/everything when asked, but that's just not something Ed is willing to do at this point. Maybe someday, but not right now."

Ex. 32 (emphasis added).

Ms. Smith has advised me she is planning to attend the hearing on the MSJ on July 12, 2010. Plaintiffs have been disclosed Ms. Smith to Defendants as a potential

witness. Ms. Smith has offered to testify at the hearing on July 12, 2010 and/or the August 3, 2010 trial as to the veracity of **Exhibit 32's** contents, and to submit a declaration to this Court swearing to its authenticity.

44. Attached hereto as **"Exhibit 33"** are pages from Mr. Magedson's March 22, 2010 Affidavit in support of Defendants' Special Motion to Strike [DN-10] in which he swears at Paragraphs 19 and 24 that:

> 19. CAP membership never includes the removal of reports, nor is the text of existing reports changed in any way. The only alteration made is to add an introduction to each report explaining that the company has joined our program and explaining the company's commitment to improved customer satisfaction, and this change is made only after the company has consented in writing to permit Ripoff Report to make the change. Other than adding this new information, existing reports remain visible on the site in their exact original form; they are never removed.

Ex. 33 at ¶19.

> 24. Nothing in my email demands money to change or remove reports. In fact, my email clearly explains that <u>we will NEVER remove reports in exchange for money</u>:
>
> [A]s a matter of policy, we do not remove a submitted Rip-off Report, and we never will. Some people claim that we remove reports for money, but that is just plain false. We have been offered as much as $50,000 to remove just one Rip-off Report, but we declined because doing so is in violation of our policy, and more importantly, goes against what we what we stand for...
>
> Please understand our position.
>
> .

Ex. 33 at ¶24.

45. Attached hereto as "**Exhibit 34"** are pages from Xcentric's June 2, 2010 30(b)(6) deposition in which Mr. Magedson testifies that Defendants do not take down or remove posts:

> Q BY MR. BLACKERT: Okay. And it's your practice not to remove posts?
>
> A: Correct.

Q: Have you ever removed posts in the past?
A: We don't have a practice of removing posts.

Ex. 34 at 98:3-7 (emphasis added).

Q: Okay. Is there any other ways you would take these postings off Ripoff Report?
A: The posting isn't removed.

Ex. 34 at 102:1-3 (emphasis added)

A: You are asking me, is there any other times that -- that we would remove something?

Q: That Ripoff Report would remove some, yes, content part of the posting, not the posting itself?

A: Yeah. I'm not thinking. We remove Social Security numbers, threats of violence. And if somebody -- a monitor misses it, which it could happen, you know, the person contacts us, you know, Social Security numbers, driver's license number, bank account numbers, those kinds of things are redacted. The report is not removed.

Ex. 34 at 102:21-103:6 (emphasis added).

46. Attached hereto as "**Exhibit 35"** are pages from Mr. Magedson's June 8, 2010 deposition in which he testifies that reports are never taken down or removed.

47. On June 28, 2010, I contact Defendants' counsel by email to request a Rule 7-3 conference of counsel to discuss this Motion under Rule 56(f). Defendants' counsel initial stated that he would meet and confer, then asserted alleged inaccuracies in Plaintiffs' opposition papers to the MSJ as grounds for not wishing to confer telephonically in the absence of a written outline. Attached as

"Exhibit 36" are the emails exchanged by counsel on my efforts to meet and confer on June 28, 2010.

48. On July 7, 2010, I again contacted Defendants' counsel by email pursuant to Local Civil Rule 7-3 to attempt to meet and confer on this Motion under Rule 56(f). Defendants' counsel again refused to do so, although they had called our office earlier that day seeking extensions of certain trial deadlines. I advised Defendants' counsel of our intention to apply *ex* parte for the relief. Attached as **"Exhibit 37"** are the emails exchanged by counsel on my efforts to meet and confer on July 7, 2010.

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 8th day of July, 2010, in Los Angeles, California.

/s/ Lisa J. Borodkin
Lisa J. Borodkin

CERTIFICATE OF SERVICE

I certify that on July 8, 2010, I electronically transmitted the document:

"PLAINTIFFS' *EX PARTE* MOTION (1) UNDER RULE 56(f) TO DENY OR CONTINUE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT TO CONDUCT FURTHER DISCOVERY AND (2) COMPELLING DEFENDANT ED MAGEDSON TO APPEAR FOR DEPOSITION WITH DOCUMENTS AND (3) FOR SANCTIONS UNDER LOCAL CIVIL RULES 37-4 AND 83-7; DECLARATION OF LISA J. BORODKIN AND CERTIFICATION OF COMPLIANCE WITH LOCAL CIVIL RULES 7-3 and 7-19"

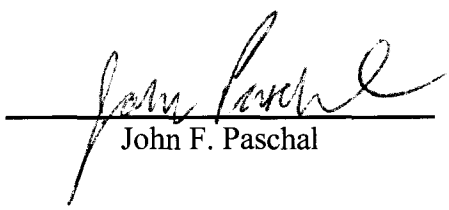
to the Clerk's Office for the United States Court for the Central District of California using the CM/ECF system for filing and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

David S. Gingras
Gingras Law Office, PPLC
4072 E. Mountain Vista Drive
Phoenix, AZ 85048
David@ripoffreport.com
Attorney for Defendants

Maria Crimi Speth
Jaburg & Wilk, P.C.
3200 N. Central Ave., Suite 2000
Phoenix, AZ 85012
msc@jaburgwilk.com
Attorney for Defendants

Paul S. Berra
Law Offices of Paul S. Berra
1404 3rd Street Promenade, Suite 205
Santa Monica, CA 90401
paul@berra.org
Attorney for Defendants

And a courtesy copy of the forgoing delivered to:
Honorable Patrick J. Walsh
U.S. Magistrate Judge



John F. Paschal