Asia Economic Institute et al v. Xcentric Ventures LLC et al Doc. 87 Att. 15

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Re: Asia Economic Institute, LLC, *et al.*, v. Xcentric Ventures, LLC, et al.,
U.S. District Court, Central District of California Case No. 10-cv-01360

Lisa and Dan:

This letter is a follow-up to several discussions we have had relating to the events which transpired during the deposition of your client, Raymond Mobrez, on Friday, May 7, 2010. As Dan knows (because he was there), and as Lisa knows (by virtue of my email to her on May 8, 2010), both of your clients have committed perjury in this case by manufacturing and presenting sworn false testimony accusing Mr. Magedson of demanding $5,000 in order to make negative information disappear from the Ripoff Report website, among other things. The testimony given by both of your clients could not have been more material to the claims in this case. Their false testimony literally constitutes the heart of their extortion/RICO claims. The false testimony also bears on all of the other claims in the case insofar as your clients apparently were attempting to argue that the Communications Decency Act immunity should be denied to my clients because of these acts of extortion.

Based on these events, I am writing to explain my position on several issues and to demand that you provide me with your position on several issues.

I. SUMMARY OF XCENTRIC'S POSITION

Our position is very simple – your clients have lied under oath and have commenced and continued an action which they knew was factually groundless. They clearly did this to maliciously harm Xcentric, harass Mr. Magedson, and to lend unjustified credibility to the lies of others who dislike the Ripoff Report's efforts to foster and promote free speech.

By their actions, your clients have violated Fed. R. Civ. P. 11 and they have exposed themselves to significant civil liability under Section 674 of the Restatement (Second) of

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Torts which Arizona applies as our common law. Assuming the present federal case in Los Angeles is resolved in favor of Xcentric, a new lawsuit will immediately be filed against your clients in Arizona seeking to recover all damages caused by their illegal conduct.

II. OPTIONS FOR PROCEEDING

a. Mandatory Withdrawal

As we have already discussed, these events give rise to serious ethical and legal concerns. Among these are your duties to the State Bar of California and to the Court. To be clear – while I am not threatening to report you to the bar or to make any reports of criminal conduct to law enforcement in order to gain any advantage in this case, at the same time I believe it is appropriate for me to stop and make note of your ethical and other obligations and to insist that you act lawfully in this case.

In that regard, I note that Rule 3–700 of the California Rules of Professional Conduct appears to make it mandatory for you to withdraw from this case immediately. Specifically, the Rule states in pertinent part:

> Rule 3-700. Termination of Employment
>
> * * *
>
> (B) Mandatory Withdrawal.
>
> A member representing a client before a tribunal shall withdraw from employment with the permission of the tribunal, if required by its rules, and a member representing a client in other matters shall withdraw from employment, if:
>
> (1) The member knows or should know that the client is bringing an action, conducting a defense, asserting a position in litigation, or taking an appeal, without probable cause and for the purpose of harassing or maliciously injuring any person;

Clearly, at least with respect to the RICO/extortion allegations, you both know that your client has taken a position that is manifestly without probable cause and which serves no purpose other than to injure and harass Xcentric. As I already stated, I understand that I cannot force to you comply with your ethical obligations, but I believe it is appropriate for me to remind you of what those obligations are and to demand that you comply with them.

Of course, the events of this case give rise to other serious ethical concerns, among these are California Rules of Professional Conduct: 3-200 (prohibiting a lawyer from bringing an action or asserting any position in litigation without probable cause and for the purpose of harassing or maliciously injuring any person); 3-210 (prohibiting a lawyer

from advising a client to violate the law); and 5-200(B) (prohibiting a lawyer from misleading a court by making a false statement of fact). Furthermore significant case law exists for the principle that "an attorney should make a motion to withdraw from representation when the representation will result in a violation of law or rules of professional conduct." *People v. Johnson*, 62 Cal.App.4th 608, 622, 72 Cal.Rptr.2d 805, 812 (4 DCA 1998) (citing Cal. Rules of Prof. Conduct, rule 3-700(B)(2), (C)(1)(b) & (c)); *People v. Brown*, 203 Cal.App.3d 1335, 1339–1340, footnote 1, 250 Cal.Rptr. 762 (1988) (same).

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.

b. Continuation Of Case On Modified Factual Theory

Assuming that you do not withdraw, I believe that you may be exposing yourself to significant liability if you continue to rely on and pursue your clients' existing factual allegations regarding extortion/RICO knowing, as you now do, that those allegations are entirely false. However, based on our conversation yesterday, I understand that you have indicated that your clients will be filing new declarations/affidavits which seek to "correct" their previous testimony.

It is unclear to me how these corrections would allow you to proceed with the extortion/RICO claims. Your clients brought those claims based entirely on specific factual allegations that you now know are untrue.

However, it may be possible that you believe the case, or some part thereof, may still be salvageable based on the disclosure of new or different factual theories of some kind. While I disagree this is even a possibility, if you intend to continue with this case on a *modified* and previously undisclosed theory, please let me know immediately, bearing in mind that the Court ordered your clients to disclose their factual theory as to the extortion claims no later than last Monday, May 3rd. To the extent you attempt to assert any new or different factual theories, this plainly violates the Court's order and I will object to any modified theory on that basis.

Furthermore, the deposition confirmed and in some cases revealed serious deficiencies in your evidence related to essential elements of the claims brought. It is exceedingly clear that your client can not satisfy the elements of extortion or RICO including a lack of damages and a lack of causation. The remaining claims are barred by the CDA, so the entire case has no possible hope of succeeding.

c. General Settlement Points

As Maria and I explained to you on the phone, Xcentric has successfully sued parties and their lawyers for knowingly commencing and continuing litigation that they knew was factually groundless. Xcentric intends to bring such claims against your clients for their wrongful actions and we will not hesitate to include claims against either or both of you individually if you continue to prosecute any claims in this case which you know are factually untrue or if the evidence demonstrates that you brought this case knowing that the allegations contained in it were factually untrue.

That fact notwithstanding, although the settlement window will be closing very soon, this case is actually in a good posture to be resolved without years of additional litigation. That is so because at present, Xcentric's attorney's fees and costs are relatively low (probably less than $25,000), and based on my discussions with Mr. Mobrez during his deposition, we believe it is likely that he has information that may be of substantial value to Xcentric. In a nutshell, I think our clients may be in a position where they can each receive something of value from an immediate resolution of this case.

Thus, as Maria explained to you on the phone, we may be willing to agree to a settlement of this case based on several simple points.

The first point is that your clients would need to retract their prior testimony and admit that they were never asked for money, etc., and immediately agree to the dismissal of their lawsuit with prejudice.

The second point is that your clients would agree to pay all of the attorney's fees and costs incurred by Xcentric to date which we believe are probably less than $25,000 (though this number is increasing with each passing day).

The third point is that your clients would provide a full, complete, and truthful explanation of each and every third party who aided, solicited, and/or encouraged them to make their false extortion claims in this case. Ultimately, even though Xcentric has suffered damage as a result of your clients' actions, we have a larger goal of ferreting out and stopping third parties who have helped or directed this type of fraudulent litigation. As such, Xcentric may be willing to reduce or even completely waive the amount of damages and fees your clients would have to pay depending upon how useful the information they are willing to provide is. Of course, further false testimony is of no interest to us, so we would only be willing to discuss this option in the event your clients can provide solid, verifiable evidence (preferably in the form of documents) which show what role was played by any third parties in the initiation of this case. Again, the opportunity to discuss settlement on these terms presumes that your clients will immediately end this case and immediately stop causing Xcentric to incur additional fees, so each day that passes makes this proposal less likely to be acceptable to Xcentric.

III. RESPONSE TO SPECIFIC POINTS

Having stated Xcentric's general position, I also wanted to respond to some of the specific comments/remarks made in Lisa's email to me from this past Sunday.

a. CRPC 5–100

Lisa noted that some of my prior comments referred to your clients' criminal actions and to my decision to contact the State Bar of California. Lisa cited California Rule of Professional Conduct 5-100 which provides, in part, "A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute."

To be clear—at no time in the past have I threatened anyone with criminal or administrative charges of any kind, nor should this letter be construed as such a threat. Obviously, because this case contained allegations of extortion, I am well-aware that it would be patently illegal and unethical for me to state or imply that I would report your clients' criminal actions to any law enforcement agency, or your actions to the State Bar of California in order to gain any advantage in this case.

So that there is no misunderstanding, I want to offer some explanation of the actions I have taken along with my reasons for taking such action. Under Arizona's ethical rules (specifically, ER 8.3(a) of the Arizona Rules of Professional Conduct), it is mandatory for a member of the bar to report any conduct by another lawyer which "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects … ." The failure to report another attorney is, itself, an ethical violation under Arizona's rules.

Because I did not know that your clients had perjured themselves until I received their declarations on Monday, May 3, because I did not know (and still do not know) what involvement, if any, you may have had, and because I did not know whether California imposed a similar duty to report ethical violations by another attorney, I contacted the State Bar of California ethics hotline on Tuesday, May 4th, to ask for their guidance in this situation. I did not tell them your names nor did I tell them anything else about this case. I simply inquired about the nature and extent of my duties and obligations upon learning that the opposing party in a civil case had committed perjury.

The person I spoke to at the bar informed me that unlike Arizona, California does not require lawyers to report such events, but she also indicated that reporting any misconduct that may occur is strongly encouraged. Of course, as I have already explained to Dan, my assumption thus far has been that both of you have been unaware of the truth. If true, then you would not have engaged in any unlawful or unethical conduct – at least up until the point where you became aware that your clients had lied under oath. From that point forward, the situation changes because now that you know the truth, you could face serious consequences if you continue representing your clients in this matter.

However, please note that I have never threatened to accuse anyone of a crime or to report any actions of anyone to the State Bar, whether to gain a tactical advantage or otherwise. Instead, because my clients are plainly victims of your clients' criminal actions, I am merely demanding that both you and your clients follow all applicable laws and ethical obligations.

b. Timing & Admissibility of Recordings

As to the issue of timing, obviously the recordings are rebuttal evidence used solely to impeach your clients' testimony. Under Rule 26(a), it is not necessary for any party to automatically disclose this type of evidence, so that's why I did not disclose them to you as part of our original disclosures. I did not intend to suppress evidence, trick you, or withhold anything from you – I simply did not know that the recordings were going to be necessary until your clients claimed that the extortionate acts took place during these calls (Mr. Mobrez could just as easily have claimed they took place in writing, in person, or in some other manner other than by phone).

Furthermore, as you certainly know, the first time that I learned about your clients' specific factual allegations was in their declarations that you filed with the court on Monday, May 3, 2010. Before those declarations, your clients only made generalized allegations as to when/where/how they had been extorted, so until they both accused Mr. Magedson of demanding money over the phone on specific dates, I had no idea whether or not the recordings were going to be necessary at all. As soon as it became clear to me that the recordings were needed, I disclosed them to you, albeit only after asking Mr. Mobrez to confirm the story as contained in these declarations (which I felt I was required to do in order to protect my clients and to prevent Mr. Mobrez from changing his story again).

In addition, and to respond to another of Lisa's questions, until I actually saw your clients' declarations, I did not know whether the recordings were admissible. This is so because although the recordings were made in Arizona, and although Arizona does not require the consent of both parties in order to record a telephone call, the law in California is different. Under Cal. Pen. Code § 623(a), calls recorded without the consent of both parties *may* be inadmissible in a party's case-in-chief if the communication was "confidential". Under § 623(c), the term "confidential" does not include any calls where the speaker knows or reasonably expects he is being recorded, nor does it apply to "any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded."

Until I saw your clients' declarations, I did not know that Ms. Llaneras was listening in to any of the calls. Of course, because Mr. Mobrez knew that she was eavesdropping (which, by itself, may have violated the law), Ms. Llaneras was kind enough to render these recordings admissible because Mr. Mobrez could not have expected that his conversations with Mr. Magedson were confidential when he knew they were being overhead by Ms. Llaneras.

Although I believe there are three calls that Ms. Llaneras did not eavesdrop upon (Call #1, #3, and #6 according to my list) I am confident the court would find the recording of every call to be admissible. This is so because two of these calls were voicemails left by Mr. Mobrez (Call #3 on April 27 and Call #6 on May 6). Obviously, a person who leaves a voicemail knows that the call is being recorded, so the eavesdropping statute would not apply at all.

This leaves only Call #1 on April 27. Even assuming *arguendo* that Mr. Mobrez could have reasonably expected that this call was not being recorded, that point is irrelevant because the exclusionary evidentiary sanction of Penal Code § 632 is not a "shield for perjury" and therefore recordings made in violation of that section can still be used for impeachment of any witness who takes the stand and lies. *See Frio v. Superior Court*, 203 Cal.App.3d 1480, 1497, 250 Cal.Rptr. 819, 829 (2 DCA 1988) (explaining, "the evidentiary sanction of section 632, subdivision (d), cannot be construed so as to confer upon a testifying witness the right to commit perjury.")

What this means is simple – if Mr. Mobrez testifies falsely about the contents of Call #1 (as he has already done) the recording of that call can be used for impeachment. Of course, if Mr. Mobrez chooses to testify truthfully about this call and every other call, then the recording of Call #1 is would be unnecessary.

c. Authenticity of Recordings

As for the authenticity of the recordings, Mr. Mobrez admitted the voice on the tape was his, so I do not think this is an issue. In terms of whether the recordings are genuine and complete, I have a couple of comments.

First, the recordings were NOT made by Mr. Magedson. Rather, they were created by a third-party vendor to Xcentric who recorded the calls and then emailed the audio recordings to Mr. Magedson in the usual course of business. These calls are business records of Xcentric and the original emails from the vendor are kept in the regular course of our business. I also have the original emails with the original audio files attached to them (these vary from the ones I gave you only with respect to the file names which were changed for ease of reference and some of the meta data in the file header which was redacted in order to protect the name of the vendor until such time as a protective order can be entered).

Second, if you wish, I am certainly happy to expend additional fees allowing you to investigate and confirm the authenticity of the recordings. As I already stated, absent a prompt settlement, your clients will be bearing all costs and fees incurred by Xcentric, so any costs we incur will ultimately be their responsibility. Even assuming the vendor does not maintain copies of these recordings beyond a certain date (which I have not yet been able to confirm), I am confident that an expert could review the files and the process by which they were emailed to Mr. Magedson and confirm that tampering with them would have been impossible.

Third, you should note that in many ways, your client's own speech on the recordings confirm that they are an accurate version of the discussions between Mr. Magedson and Mr. Mobrez. For instance, on the final recording (#7 made on May 12), Mr. Mobrez tells Mr. Magedson that he still does not know what the cost of the CAP program is. Of course, this is entirely consistent with the rest of the recordings because Mr. Magedson never told him what the cost was and never asked for any money of any kind. Similarly, in the recording of Call #6 (a voicemail call made from Mr. Mobrez's cell phone), Mr. Mobrez's message states that he has been talking to someone at Xcentric who "keeps hanging up and doesn't seem to want to stay on the phone…." This is completely consistent with what the previous calls show.

As such, while you might think it is prudent to take the position that there could be a small chance that the recordings have been altered, I want you understand that the consequences of taking that position could be substantial—because the facts clearly show that your clients have lied in virtually every material respect, continuing to represent them will make you jointly and severally liable for their actions. Thus, assuming the recordings have not been altered (which is obvious under the facts here), then travelling down that road in the vain hope of finding support for claims which you know to be false will not result in any reduction of your liability. In order for counsel to become personally liable for the tort of wrongful use of civil proceedings, all that is required is to show that they commenced or continued a case or claim after learning that the claim lacked "probable cause"; "one who continues a civil proceeding that has properly been begun or one who takes an active part in its continuation for an improper purpose after he has learned that there is no probable cause for the proceeding becomes liable as if he had then initiated the proceeding." Restatement (Second) of Torts § 674, comment 'c'. Hoping against hope that you might find probable cause in the face of such overwhelming evidence does not mean that you will do so, and if you do not do so, then you will be exposed to complete liability for continuing this case without probable cause.

IV. SUMMARY

In closing, I want to emphasize one obvious fact—your clients have lied about the material facts of this case. As such, just as your clients were, you now stand at a crossroads wherein you have a choice: you can do the right thing and follow the requirements set forth by the law and by your ethical duties, or your can ignore those duties and face the consequences. Although your clients have clearly made the wrong choice, I hope that you display more wisdom and that you decide to make the right choice while it still remains available to you.

VERY TRULY YOURS,

David Gingras