

Lisa Borodkin <lborodkin@gmail.com>

AEI et al. v. Xcentric (C.D. Cal. 10-cv-1360) Draft Rule 26f Report

David Gingras <david@ripoffreport.com>

Mon, May 3, 2010 at 10:34 AM

Reply-To: david@ripoffreport.com

To: Lisa Borodkin <lborodkin@gmail.com>

Cc: Lisa Borodkin <lisa_borodkin@post.harvard.edu>, Maria Crimi Speth <mcs@jaburgwilk.com>, Daniel Blackert <blackertesq@yahoo.com>

Lisa,

Thank you for confirming that the date/time/place of Mr. Magedson's deposition will be confidential.

A couple of responses to your points --

As for the damages/disclosure issue, you stated: “We will produce evidence relating to computation of damages” but you did not provide any deadline for WHEN you would complete this (keeping in mind that your disclosures are already overdue). I appreciate your promise to *begin gathering* this information this week, but that’s not acceptable – I need a firm date from you as to when I can expect your full and complete compliance with your disclosure duties under the Rules. Because that date is already past due, I would like to have your disclosures in-hand no later than Wednesday, May 5th. If you do not produce damages information by then, my next step will be to meet and confer with you in preparation for taking the matter up with the court.

As for your request that I reconsider my view on discovery (i.e., you want to limit discovery and my MSJ to “extortion only”) – there is some appeal to this idea...at least as it relates to the MSJ. However, I have been thinking about this and I still do not see how the two things can be separated if for no other reason than this example: 1.) damages are a mandatory element of a RICO claim; 2.) AEI's damages appear to be based solely on reputational harm caused by the publication of allegedly defamatory information; 3.) *ergo*, if the statements at issue are true, then AEI cannot recover any damages for defamation which, in turn, means the RICO claims have no damages which, in turn, means the RICO claims fail. Based on this logic, it makes no sense to limit the MSJ to only your extortion claims since those claims may fail for reasons relating to the defects in other claims. Sure, you might prefer to avoid having to defend a point that you cannot win, but I don't think that's a sufficient reason to split the MSJ into two pleadings.

I realize that you have just informed me for the first time that AEI will be claiming damages based on the “cost of building its business” (rather than lost profits), but I do not believe such damages are available as a matter of law. I will research that issue further when and if you comply with your damages disclosure obligations, but I am fairly comfortable that “business construction costs” are not legally cognizable and will therefore not replace the need for you to prove the existence of actual damages which *are* legally recoverable.

As for severing discovery, unless you agree that all non-RICO matters will be completely stayed, we could not agree

to this. Clearly, Judge Wilson has a tendency to set matters for trial on little or no notice, so Xcentric cannot agree to forego discovery on any part of this case. This is far too risky because after the trial in August, it is possible that the court could set a trial date for all remaining issues on similarly short notice; i.e., another 30, 60, or 90 days. Because of the highly fact-intensive nature of discovery in these cases, we need as much time as possible for discovery, so the only plan Xcentric would agree to would be something like this – discovery on non-RICO claims (but not including damages) would be stayed until after the trial in August. Upon lifting of the stay, the parties would agree that trial on the remaining issues would not occur for at least 12 months after the stay is lifted. This would provide some assurance that we have sufficient time to complete discovery before the second trial. Without that assurance, we just can't agree to do anything that would prejudice our right to defend this case.

As for this comment: "If you are planning to file a motion for summary judgment on all claims, I would request that you give plaintiffs reasonable time to review the deposition of your client and include discussion of that evidence in your pre-filing meet and confer conversation." I have a couple of responses.

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. However, before that occurs, I would appreciate it if you would speak to Dan and find out if there is any likelihood that the plaintiffs may be willing to voluntarily drop one or more claims. If not, then I don't think additional discussions would be useful.

Finally, as to this request – "please voluntarily disclose 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).

This is what we have done in every prior case where summary judgment was entered in our favor, so if you're interested in the arguments we've made in the past, you can see them by reviewing the dockets in those cases. Beyond that, I don't think there's really any defensive "evidence" to disclose to you as to the MSJ. Of course, we'll provide some amount of supporting affidavits (as we normally do), but since these haven't been created yet, I can't disclose them to you.

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From: Lisa Borodkin [mailto:lborodkin@gmail.com]

Sent: Sunday, May 02, 2010 2:22 PM

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Subject: Re: AEI et al. v. Xcentric (C.D. Cal. 10-cv-1360) Draft Rule 26f Report

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