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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ASIA ECONOMIC INSTITUTE, LLC, *et al.*, **Plaintiffs,** **vs.** **XCENTRIC VENTURES, LLC, *et al.*** **Defendants.**	Case No: 2:10-cv-01360-RSWL-PJW **DEFENDANTS' OPPOSITION TO PLAINTIFFS' *EX PARTE* MOTION FOR RULE 56(f) RELIEF** Trial Date: August 3, 2010 Time: 1:30 PM Courtroom: 6 (Hon. Stephen Wilson)

Defendants XCENTRIC VENTURES, LLC and EDWARD MAGEDSON respectfully submit the following opposition to Plaintiff ASIA ECONOMIC INSTITUTE, LLC's *Ex Parte* Motion for Rule 56(f) and related relief. Plaintiffs' motion is without merit and should be denied in its entirety.

I. PREFATORY COMMENTS

As another judge in this district once wisely stated, "filing an *ex parte* motion … is the forensic equivalent of standing in a crowded theater and shouting, 'Fire! There had better be a fire." *Mission Power Engineering Co. v. Continental Cas. Co.,* 883 F.Supp. 488, 492 (C.D.Cal. 1995) (emphasis added).

Here, there is no fire, only artificial smoke and mirrors intended to distract rather than inform the court. Indeed, Plaintiffs' motion contains no explanation whatsoever as to why Plaintiffs could not have requested Rule 56(f) relief more than two months ago when Defendants initially met and conferred about the summary judgment set for hearing just three days from today. Bearing in mind that Plaintiffs' counsel affirmatively represented to this Court on April 19, 2010 that Plaintiffs were ready to try this case "next month", *see* Doc. 87-1 at 13:15–22, Plaintiffs' motion offers no explanation whatsoever as to why the discovery which they claim is needed was not obtained earlier, nor do Plaintiffs explain why the discovery is relevant or material to any of the narrowly-tailored issues in Defendants' Motion for Summary Judgment.

The truth is this—none of the discovery Plaintiffs are seeking has anything to do with any of the arguments set forth in Defendants' summary judgment motion. Rather, Plaintiffs are simply seeking to prolong the inevitable by pointing to *irrelevant* evidence which they have never made a procedurally valid request to obtain and which has no bearing whatsoever on whether summary judgment is appropriate.

For these reasons, Plaintiffs' *ex parte* motion must be denied in its entirety. In addition, because Defendants' counsel have previously-scheduled plans to travel to Los Angeles for the summary judgment hearing on Monday, in the unlikely event the Court grants Plaintiffs' motion after counsel has departed for Los Angles on Monday, Defendants' respectfully request an award of sanctions against Plaintiffs and Plaintiffs' counsel pursuant to 28 U.S.C. § 1927 in the amount of the attorney's fees and travel costs incurred for the unnecessary trip to Los Angeles.

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II. ARGUMENT

a. Plaintiffs Are Not Entitled To Ex Parte Relief

"*Ex parte* applications are not intended to save the day for parties who have failed to present requests when they should have." *Mission Power Engineering Co.*, 883 F.Supp. at 493. Rather, to obtain *ex parte* relief Plaintiffs must show they "will be irreparably prejudiced if the underlying motion is heard according to regular noticed motion procedures. Second, it must be established that the moving party is without fault in creating the crisis that requires ex parte relief, or that the crisis occurred as a result of excusable neglect." *Id*. Plaintiffs have failed to establish either of these requirements.

Taking the second issue first, in terms of diligence, Plaintiffs' motion does not show that Plaintiffs are without fault in creating the alleged urgency here:

> To show that the moving party is without fault, or guilty only of excusable neglect, requires more than a showing that the other party is the sole wrongdoer. It is the creation of the crisis-the necessity for bypassing regular motion procedures-that requires explanation. For example, merely showing that trial is fast approaching and that the opposing party still has not answered crucial interrogatories is insufficient to justify ex parte relief. The moving party must also show that it used the entire discovery period efficiently and could not have, with due diligence, sought to obtain the discovery earlier in the discovery period.

Mission Power, 883 F.Supp. at 493 (emphasis added).

Plaintiffs' motion contains no discussion of this requirement, and for good reason. This is so because Plaintiffs have not acted with diligence in pursuing discovery. Indeed, Plaintiffs' first set of Rule 34 production requests did not occur until June 22, 2010, nearly a full month after Defendants' MSJ was filed. Plaintiffs' initial production request, attached as Exhibit A to the Declaration of David S. Gingras submitted herewith.

Plaintiffs have offered no explanation as to why they waiting so long to serve this production request. Indeed, on the contrary, Plaintiffs have made every effort to *avoid* engaging in discovery, even refusing to respond to Defendants' discovery requests on the grounds they were served *too early*. *See* Gingras Decl. Exhibit B.

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In terms of prejudice, Plaintiffs suggest they may lose on summary judgment if additional discovery is not permitted, but they do not explain *why* this is so or *how* the missing discovery impacts Defendants' motion. Specifically, Plaintiffs claim they need additional discovery on two points:

1.) A "Second Questionnaire" used by Ed Magedson when communicating with potential customers and a sample of Defendants' CAP Agreement;

2.) Impeachment Material Contradicting Defendants' Statements That They "Never Remove Reports"

The problem with this argument (which goes to both the propriety of *ex parte* relief and to whether Rule 56(f) relief is warranted) is that none of this information is relevant, material or even germane to any part of Defendants' summary judgment motion.

In terms of "impeachment" evidence, Plaintiffs' motion shows they already have obtained this information from a third party, so clearly a Rule 56(f) discovery continuance is not necessary to provide more time to obtain such evidence. Moreover, "impeachment evidence" is wholly immaterial and inappropriate for purposes of summary judgment because the court is already obligated to draw every possible inference in favor of the non-moving party; Plaintiffs. *See Hauk v. JP Morgan Chase Bank USA*, 552 F.3d 1114, 1117–18 (9th Cir.2009) ("When determining whether a genuine issue of material fact remains for trial, we must view the evidence and all inferences therefrom in the light most favorable to the non-moving party … .")

As for the "second questionnaire" and sample CAP agreement, Plaintiffs argue this evidence is necessary to show:

> [T]he 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' Motion at 14:8–12.

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While the evidence at issue may or may not relate to these points, Plaintiffs ignore the fact that Defendants' motion for summary judgment does not argue that Plaintiffs' lack evidence of a "pattern" for purposes of RICO.[1] Rather, the three main issues in the motion are 1.) Plaintiffs' inability to prove that they were extorted due to the audio recordings showing Plaintiffs lied about the discussions between Mr. Mobrez and Mr. Magedson; 2.) Plaintiffs' undisputed lack of damage to their "business or property"; and 3.) Plaintiffs' undisputed lack of evidence showing that the alleged extortion *caused* their damages.

None of the evidence Plaintiffs are seeking is relevant or material to any of these points. Whether or not Defendants may have engaged in extortion as to *other non-parties* does not cure the total and complete lack of evidence showing that Plaintiffs were actually extorted, nor does this evidence show that Plaintiffs have suffered RICO damages, or that the alleged predicate acts caused such damages. For that reason alone, Plaintiffs have not shown that allowing additional discovery on ancillary topics (such as Xcentric's manner of answering questions about the CAP program with parties other than Plaintiffs) will change the outcome on summary judgment. Indeed, even if Defendants were willing to stipulate that they have engaged in a pattern of predicate acts as to parties other than Plaintiffs (which they have not), the arguments in the summary judgment motion and Plaintiffs' opposition would not be affected in any way.

b. Defendants Have Not Interfered With Discovery

In keeping with their usual practice, much of Plaintiffs' brief is devoted to personal attacked accusing Defendants of violating an Order entered by Magistrate Walsh in this case on June 24, 2010. This argument is groundless and it misstates the positions taken by both parties.

[1] To be clear—page 15 of Defendants' MSJ argues that Plaintiffs lack evidence showing that they were *harmed* by a pattern of racketeering. This argument was based on a lack evidence of Plaintiffs' damages, not a lack of evidence showing a pattern as to other third parties.

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Specifically, at a hearing which took place on June 24, 2010, Plaintiffs sought an order permitting them to depose Mr. Magedson for a third time (Mr. Magedson was deposed initially as a 30(b)(6) witness for Xcentric on June 2, 2010 and again in his individual capacity on June 8, 2010). Both depositions covered nearly a full day of testimony each. The combined transcripts span 427 pages.

In his tentative ruling, Magistrate Walsh denied Plaintiffs' request for a third deposition. *See* Exhibit B to Gingras Declaration. After further discussion, this ruling was modified slightly based on the discussions of the parties and the court at the hearing.

Specifically, rather than permitting an unrestricted third deposition of Mr. Magedson, Magistrate Walsh ordered Plaintiffs to provide Defendants with a list of questions by Friday, June 25, 2010 which they believed had not been answered in the two previous depositions. Next, Magistrate Walsh ordered Defendants to respond to this list within a week explaining whether Defendants felt the questions had, in fact, already been answered, or whether there were other objections to the questions. Finally, Magistrate Walsh indicated that if the parties were unable to reach an agreement as to whether any legitimate unanswered questions remained, the parties were instructed to make a joint call to the court for resolution of the dispute. Nothing in Magistrate Walsh's ruling stated that Plaintiffs were entitled to Rule 56(f) relief, nor did the court order that Plaintiffs were entitled to conduct the third deposition of Mr. Magedson before the hearing on Defendants' summary judgment motion.

As ordered, Plaintiffs provided Defendants with a lengthy list of questions on Friday, June 25. *See* Doc. #87-22. However, contrary to Magistrate Walsh's instructions, the list contained a wide variety of questions which were irrelevant to the extortion/RICO issues scheduled for trial in August. Based on this, Defendants' counsel Maria Speth immediately sent an email to Ms. Borodkin asking her to narrow the list to only those topics relevant to the August trial. *See* Doc. #87-23. Ms. Borodkin immediately responded by disagreeing with Ms. Speth and demanding to call Magistrate Walsh the following Monday. *See* Doc. #87-24.

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The next day, undersigned defense counsel emailed Ms. Borodkin and stated, "Magistrate Walsh gave us a week to review this and respond, so please don't jump the gun and ask to make a call to the court before we've had a chance to really review this and give you our position. We will look at all of this and give you our position by next Friday." Doc. #87-24. Ms. Borodkin responded by stating, "Taking your week is fine."

On Friday, July 2, 2010, Defendants provided a 16-page letter which responded to Plaintiffs' list of questions. *See* Doc. #87-25. As reflected in the letter, Defendants took the position that many of the questions involved were previously answered, and that most of the remaining questions were subject to the discovery stay which Plaintiffs had asked for and obtained over Defendants' objection.

Upon receiving this letter, Ms. Borodkin took the position (for the first time) that the letter was "late" because despite ordering Defendants to provide the letter within "one week" after Plaintiffs' list of questions, Magistrate Walsh verbally indicated the response was due on July 1 (Thursday), not July 2 (Friday). This issue was raised for the first time in Ms. Borodkin's email on July 2. *See* Doc. #87-26.

In a series of follow-up emails (Docs. #87-27 & 87-28), Defendants explained that the order from Magistrate Walsh was confusing and inconsistent because according to the transcript of the hearing, (which Defendants had not ordered and did not see until Plaintiffs provided a copy), the court ordered Defendants to provide their response within "a week" (which would have meant Friday, July 2). Defendants also noted that Ms. Borodkin apparently shared the same confusion because she expressed no objection to Defendants' email dated January 26, 2010 (Doc. #87-24) which indicated that Defendants' response would be provided by the following Friday.

In any case, these events do not demonstrate that Defendants have interfered with Plaintiffs' ability to obtain necessary discovery. On the contrary, Defendants agreed to permit Plaintiffs to depose Mr. Magedson for two full days. Of course, some of the questions sought private, proprietary, and/or sensitive information which was not appropriate to discuss without a protective order (which Magistrate Walsh subsequently

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entered). However, Plaintiffs were allowed to obtain in excess of 10 hours of testimony on any/all topics relevant to the arguments set forth in Defendants' summary judgment motion. As such, delaying the disposition of the MSJ to allow Plaintiffs to depose Mr. Magedson for a third time in order to ask questions about Defendants' relationship with other third parties is simply not appropriate because the arguments in the summary judgment motion are not dependent on any of those points.

c. Plaintiffs Are Not Entitled To Rule 56(f) Relief

While the relevant inquires overlap, it is also clear that Plaintiffs have failed to show that they are entitled to Rule 56(f) relief; "A Rule 56(f) applicant is entitled to relief only if he or she shows, among other things, that the discovery would uncover specific facts which would preclude summary judgment." *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 939 (9th Cir. 2002).

Here, nothing in Plaintiffs' motion shows that additional discovery could somehow improve their case from the utter sham that it is. For instance, on page 12 of Defendants' Motion for Summary Judgment, Defendants argue that the undisputed evidence shows that Plaintiffs have lied about being extorted. Nothing in their Rule 56(f) motion contradicts this argument.

On pages 15–17 of the MSJ, Defendants argue that Plaintiffs have no evidence of damages to their "business or property" as required for RICO standing. Nothing in their Rule 56(f) motion contradicts this argument.

On pages 19–23 of the MSJ, Defendants argue that they are entitled to immunity under the Communications Decency Act, 47 U.S.C. § 230. Nothing in their Rule 56(f) motion contradicts this argument.

On pages 23–25 of the MSJ, Defendants argue that Plaintiffs have no evidence to support their non-RICO claims; i.e., no evidence that Plaintiffs are entitled to relief under Bus. & Prof. Code § 17200 and no evidence that Defendants' actions caused Plaintiffs' employees to quit. Nothing in their Rule 56(f) motion contradicts this argument.

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Merely pointing to additional discovery that Plaintiffs would like to have is *per se* insufficient to justify relief; "A party requesting a continuance pursuant to Rule 56(f) must identify by affidavit the specific facts that further discovery would reveal, and explain why those facts would preclude summary judgment." *Tatum v. City and County of San Francisco*, 441 F.3d 1090, 1100 (9th Cir. 2006); *California v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998).

Beyond these points, it is also important for the Court to recognize the extreme hypocrisy in Plaintiffs' actions. On the one hand, Plaintiffs have obtained an extremely accelerated trial date and they are vigorously seeking to force Defendants to attend a trial for which Defendants have had virtually no time to prepare. Even worse, Plaintiffs have asserted a wide variety of highly stigmatizing claims accusing Defendants of wrongful conduct, but then Plaintiffs asked for and received an order preventing Defendants from obtaining any discovery to disprove those claims.

It is obvious that if Plaintiffs cannot win this case fairly, they intend to do anything and everything can to win it unfairly. Pursuant to Fed. R. Civ. P. 1 and in the interests of justice, this Court has an obligation to intervene and to promptly stop this abuse.

III. CONCLUSION

For each of these reasons, Plaintiffs' motion should be denied. In the alternative, in the unlikely event the Court grants Plaintiffs' motion after counsel has departed for Los Angles on Monday, Defendants' respectfully request an award of sanctions against Plaintiffs and Plaintiffs' counsel pursuant to 28 U.S.C. § 1927 in the amount of the attorney's fees and travel costs incurred for the unnecessary trip to Los Angeles.

RESPECTFULLY SUBMITTED: July 9, 2010.

/S/David S. Gingras
David S. Gingras

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CERTIFICATE OF SERVICE

I hereby certify that on July 9, 2010 I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing, and for transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

Ms. Lisa Borodkin, Esq.
Mr. Daniel F. Blackert, Esq.
Asia Economic Institute
11766 Wilshire Blvd., Suite 260
Los Angeles, CA 90025
Attorneys for Plaintiffs

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

/s/David S. Gingras

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