

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT
CIVIL ACTION
NO. 00-3893

WILLIAM SILVERSTEIN,)
Plaintiff)
)
v.)
)
MICROSYSTEMS SOFTWARE, INC.,)
THE LEARNING COMPANY, INC., and)
MATTEL, INC.,)
Defendants)

**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS/MOTION FOR SUMMARY JUDGMENT**

The plaintiff, William Silverstein, hereby submits his memorandum of law in opposition to the January 11, 2001 motion to dismiss submitted by the defendants, Microsystems Software, Inc. ("MSI"), The Learning Company, Inc. ("TLC"), and Mattel, Inc. ("Mattel").

The plaintiff will start by responding to the arguments presented in the defendants' motion to dismiss, and will then, pursuant to Judge Zobel's statement that he would treat the motion as one for summary judgment, show that the plaintiff's case should not be dismissed for lack of evidence supporting a material fact.

Response to The Defendants' Arguments

I. The Defendants' Communications on September 20 and 21, 1999 (Exhibits 1 and 2) Are Evidence of Their Intent to Abuse the Legal Process by Trying to Use a Libel Claim to Coerce the Plaintiff into Silence, and Are Not Excludable as "Offers of Compromise."

The first section of the defendants' motion to dismiss makes two mistaken arguments: that the plaintiff is suing them over statements made in what they call a settlement offer and that nothing said in something presented in the form of a settlement offer can ever be admissible in court. Neither is true. The plaintiff is suing the defendants over their *conduct* in bringing and continuing a lawsuit that constituted an abuse of process and also retaliation under the statutes involved. The statements the plaintiff points to are not, by themselves, the sole basis of the lawsuit—*the statements are evidence of the goal sought by the defendants* in filing the libel counterclaim and in continuing with it even after giving the plaintiff judgment in the first lawsuit—on all of the allegations claimed to be libellous.

Exhibit 1 to the *Second Amended Complaint* consists of an e-mailed draft of a proposed agreement to settle the libel counterclaim, sent a week after entry of the Rule 68 judgment by Tracey Spruce, an attorney representing the defendants at the time. It would have restrained Silverstein from speaking about his case, his employment by MSI, and the employment practices of MSI, TLC or Mattel, with a penalty of \$50,000 per violation. (See ¶¶ 1, 2, 3, & 10 of Exhibit 1.)

Exhibit 2, a letter faxed to Silverstein's counsel the next day by Spruce in response to the immediate rejection of that offer, contained an explicit agreement by Spruce with the characterization as "a penalty."

The law does indeed create a privilege to make offers of compromise without those offers being treated as admissions. There is no dispute between the parties on that score. However, that privilege is not applicable to the uses being made here of the communications the plaintiff is pointing to—or, in fact (as shown below), to those communications at all, as they exceeded that privilege.

First of all, the defendants' messages in Exhibits 1 and 2 to the *Second Amended Complaint* are not being submitted as admissions on the *merits* of the original libel claim but as evidence of the defendants' goal in bringing it, which is a material element of a claim for abuse of process.

As noted in *Liacos*, *Evidence*, at § 4.6 (text accompanying n.1), while both the Federal Rules of Evidence 408, and the *never-adopted* proposed Massachusetts Rules of Evidence 408, exclude admissions of fact in offers in compromise from being used as evidence, Massachusetts common law does not.¹

1. Even as worded, Proposed Massachusetts Rule of Evidence 408 states that “This rule does not require exclusion when the evidence is offered for another purpose . . .”—and the settlement demand here is being advanced as evidence of the reason for in bringing the libel claim, not as an admission about the merits of that claim.

The other cases cited by the defendants do not support the broad exclusion they seek. *Anonik v. Ominsky*, 261 Mass. 65 (1927) is the classic pattern: exclusion of an offer of settlement by a defendant to buy peace, with no other justification advanced for its use other than as an admission of liability on the original claim. *Chase v. Chase*, 271 Mass. 485, 491 (1930) excluded a letter between counsel which was not put before the reviewing court, while pointing out that in some cases things contained in settlement correspondence *can* be admissible as admissions of fact.

Hunt v. Rice, 25 Mass. App. Ct. 622 (1988) excluded a letter from counsel for a plaintiff who had won a competitive bidding for real property and was seeking specific performance, offering to meet a higher bid submitted later and improperly accepted. The sellers had sought to offer that letter from plaintiff's counsel as

(continued...)

The law of abuse of process differs from the law of malicious prosecution.

1. (...continued)

evidence of the *defendants'* intent. No improper conduct on the part of the plaintiff was suggested that would destroy privilege, nor is it clear how a letter from the *plaintiff* could serve as evidence of the *defendants'* intent.

LePage v. Bumila, 407 Mass. 163, 166 (1990) does not stand for the broad principle it is cited for by the defendants—after all, other cases *do* allow the use admissions of guilt in criminal cases as evidence in civil cases. See *Department of Revenue v. W.Z. Jr.*, 412 Mass 718 (1992) and *Aetna Casualty v. Niziolek*, 395 Mass. 737 (1985). What *LePage* stands for is the principle that one should not be forced to appeal a small fine for a traffic violation to avoid that being used as an admission in a later case. It's hard to see how failure to appeal an adverse ruling can be taken to be an admission anyway. It is more likely that what was meant was that it should not become collateral estoppel, and one should not be forced to appeal to avoid that result.

The defendants' quote from *Deisenroth v. Numonics Corporation, et al*, 997 F. Supp. 153, 157 (D.Mass. 1998), ignores the rest of the paragraph from which it came—which makes it clear that no misrepresentation or inducement to delay was to be found in the disputed statements (a key dispute was about whether the statute of limitations should be tolled due to settlement negotiations)—and that if there had been, the result would have been different. The reference to c.93A related to the claim that the defendant had defrauded the plaintiff—not just delayed him from suing—by what was said in negotiations:

“The allegations that the assurances by Dumler and Seidman were themselves the basis for the 93A claim will not suffice as fraudulent misrepresentations. The most they agreed to do was “to bring this matter before the board of directors of Numonics.” There is no allegation they did not do so or intentionally made false representations regarding settlement. In any event, “evidence of conduct or statements made in compromise negotiations” is inadmissible, except where negating a contention of undue delay. Fed. R. Evid. 408. Exposing a party to Chapter 93A liability for statements made in failed settlement discussions would hardly further the public policy in favor of compromise and settlement of disputes. See Fed. R. Evid. 408 advisory committee's notes.”

In fact, ¶ 3 of § 9 of chapter 93A makes a defendant's failure to make a reasonable offer to make a party whole, after notice and demand, a material consideration on multiple damages, suggesting that *Deisenroth* (which has not been cited by any subsequent reported state or federal decision) was not entirely correct on the point for which it was quoted by the defendants here: failed negotiations *can* form the basis for multiple damages under chapter 93A.

Abuse of process focuses not on the merits of a lawsuit but on the goal sought in bringing it. A lawsuit—even if meritorious—that is brought to achieve ends that are not the legitimate ends of such causes of action gives rise to a claim of abuse of process against the party that brought it.² It is not necessary to show that the claim was groundless to find it to be an abuse of process, but such groundlessness is relevant to showing the ulterior motive,³ although here that ulterior motive was communicated explicitly—which is precisely what the defendants wish to exclude!

The use of a lawsuit to attempt to obtain a form of relief that is not an available remedy under the law constitutes abuse of process. The demand for illegal relief exceeds the privilege for legitimate settlement negotiations, and is instead admissible as proof of abuse of process, in the manner described by the Supreme Judicial Court in *Ladd vs. Polidoro*, 424 Mass. 196 (1997):

2. See *Carroll v. Gillespie*, 14 Mass.App.Ct. 12, 26 (1982), quoting *Jones v. Brockton Pub Markets, Inc.*, 369 Mass. 387, 389 (1975) (discussed at length, *infra*), itself quoting from *Quaranto v. Silverman*, 345 Mass. 423, 426 (1963). See also *Gabriel v. Borowy*, 324 Mass. 231, 236 (1949).

The quote from *Gabriel* on page 9 of the defendants' motion is from *Gabriel's* discussion of the claim of malicious prosecution, not abuse of process—both were brought and dismissed, but for different reasons. *Gabriel* was an action brought by a tenant who had moved out rather than contest an eviction, on the basis that the landlord's eviction had not been to recover possession for its own use but to rent the property to others.

Gabriel struck down the abuse of process claim not for the reason the defendants quote, lack of a judgment in the prior action (which is a required element of malicious prosecution), but for failure to plead the use of process—*Gabriel* was decided before the 1974 adoption of the Massachusetts Rules of Civil Procedure—or even that its use constituted abuse. Possession of the premises *is*, after all, the relief an eviction action is designed to provide.

3. *Fishman v. Brooks*, 396 Mass. 643, 652 (1986).

“The ulterior motive may be shown by showing a direct demand for collateral advantage; or it may be inferred from what is said or done about the process.”

[424 Mass. at 198]

A “direct demand for collateral advantage” cannot be kept out of evidence by the transparent device of calling it a proposed “Settlement Agreement.”

Most profoundly, the defendants ignore *Commonwealth v. Kennedy*, 389 Mass. 308, (1983), which shows that one can lose the privilege for offers in compromise by attaching such improper strings to cause it not to qualify as an offer in compromise at all.

In *Kennedy*, a man being prosecuted for nonsupport sought to exclude from evidence his offer to his pregnant girlfriend to pay for an abortion, which was being used as an admission of paternity at trial. The Supreme Judicial Court held that his statement did not qualify to be considered an offer in compromise. It held it instead to be an *effort to coerce* the girlfriend in the exercise of her constitutional right to choose to carry her pregnancy to term, and as such that it was admissible in evidence:

“An offer to pay for an abortion, unaccompanied by an offer to pay the medical expenses for the delivery of the child and to pay for the support of the child, tends to influence the woman’s choice as to whether to have an abortion or to carry the child to term. This court has said that, barring a compelling State interest, the law should take a neutral position on a woman’s exercise of her constitutional right to decide whether to have an abortion. *[citations omitted]* Indeed, it has been contended that the State should do what it can, within reason and within the limits of the Federal Constitution, to advance the State’s interest in the protection of potential life. *[citation omitted]* We see no overriding public policy justification for excluding the concededly relevant evidence of an offer to pay for an abortion.”

(389 Mass. at 312-313)

The analogy to *Kennedy* here is strong. The “proposed settlement agreement” here was actually the defendants’ demand that Silverstein give up the exercise of his constitutional right to freedom of speech. *Near v. Minnesota*, 283 U.S. 697 (1931) prohibits the states from going beyond awarding damages for defamation, prohibiting, as unconstitutional, “restraint upon publication.” 283 U.S. at 723.

Thus the “proposed settlement agreement” was not, under *Kennedy*, qualified for protection as an offer in compromise, being instead part of an effort to coerce Silverstein in the exercise of his right to freedom of speech.

Just as the Commonwealth would not give aid to an effort to coerce the choice on abortion by excluding that effort from evidence, it cannot give aid to an effort to coerce Silverstein in the exercise of his freedom of speech by protecting that effort from exposure in court. If anything, this case is stronger than *Kennedy*:

1. In *Kennedy* the coercion was indirect (I’ll help you if you do what I want), here it was explicit (We’ll sue you until you do what we want).
2. In *Kennedy* the Commonwealth was, as a matter of state policy, *choosing* not to aid the decision to abort—here it is *not allowed*, under the U.S. Constitution, to aid an effort to silence the plaintiff, protecting the defendants by excluding from evidence their illegal demands.

The defendants’ motion seeks to take the shield granted by the law to protect good faith efforts to compromise disputes and seeks to turn it into a sword to strike down actions for abuse of process, asking for unprecedented immunity for the communication of illegal demands.

II. *The Defendants' Effort to Coerce the Plaintiff into Silence about His Opinions about the Legality of Their Treatment of Him Clearly States a Cause of Action for Intentionally Interfering with His Exercise of Rights Protected by the Statutes Involved, a Claim Commonly Known as "Retaliation."*

The second section of the defendants' motion includes a large number of arguments (many of them made in single sentences, often in footnotes), which are here responded to briefly:

- They argue that intent to retaliate has not been shown because the mere time sequence of complaint and counterclaim does not prove intent, which ignores that courts do allow time sequence as proof of retaliation.⁴ Nothing stopped them from suing Silverstein for libel before he sued them—and others who libeled them were not sued. (See affidavit of Silverstein.)
- They also ignore that they are accused of retaliating also against Silverstein's web site, which the counterclaim was *expressly* aimed at. The plaintiff's speaking out about his case on his web site is itself protected activity. Silverstein complained of that explicitly in each count of the *Second Amended Complaint* (see ¶¶ 38-39, 42-43, 45-46, 51-52, and 56-57).⁵ Their reason for ignoring this aspect of the retaliation claim is clear—it

4. *Rzeznik v. Chief of Police of Southampton*, 10 Mass. App. Ct. 335 (1980) allowed the use of time sequence to show retaliation. See also *Oliver v. Digital Equipment Corp.*, 846 F.2d 103, 110 (1st Cir., 1990) ("A showing of [adverse action] soon after an employee engages in [protected activity] is indirect proof of a causal connection between the [adverse action] and the activity because it is strongly suggestive of retaliation."), *Blackie v. Maine*, 75 F.3d 716, 722 (1st Cir. 1996), *Hazel v. U.S. Postmaster General*, 7 F. 3d 1, 3 (1st Cir., 1993). and *Ruffino v. State Street Bank & Trust Co.*, 908 F.Supp. 1019, 1044, 1046 (D. Mass. 1995).

5. See *Bain v. Springfield*, 424 Mass. 758, 760, 765-769 (1997), which upheld the right to recover punitive damages under chapter 151B for retaliation against an individual for having opposing discrimination by complaining of it publicly, even though her belief that she had been discriminated against was wrong. Federal law is in accord. See *Sumner v. U.S. Postal Service*, 899 F.2d 203, 209 (2nd Cir. 1990), which held "good faith" belief protected against retaliation. Section 8 of the *EEOC Manual* (attached) cites cases under all the federal statutes involved and notes that aiding or encouraging others to oppose discrimination is protected "opposition." (Silverstein's web site has become a resource to others embroiled in similar cases. See his attached affidavit and those of several who have read his site, some of whom have exercised self-censorship for fear of being sued for libel as he was.)

was precisely this protected conduct that they were trying to coerce Silverstein into giving up.

- They argue that access to courts and administrative agencies is an absolute right that cannot be penalized by being made the basis for liability⁶—an argument that is the height of hypocrisy coming from Mattel, which is currently suing parties in California—for libel and slander—who had sued it and publicized that suit. Mattel itself brushed off the defense of absolute privilege to sue by pointing out that sham litigation is not protected! A copy of Mattel’s memorandum making that point is enclosed.

Further, as this Court is already aware, from the opposition Silverstein submitted to the defendants’ motion for a more definite statement, the defendants moved before the MCAD to sanction Silverstein for (1) filing his complaint in Superior Court when his case had been pending at the MCAD for 11 months (far more than the required 90 days) and (2) for asking the MCAD to sanction the defendants for their violations of the MCAD rules.

6. Their argument is supported by citation to cases on the *independent tort* of infliction of emotional distress, which misses the point entirely. That tort is so open-ended, containing no definition of what is prohibited, that courts have had no choice other than to limit its scope by speaking in terms of “extreme and outrageous” conduct, focusing on the actor’s disregard of social norms. It is similar to the open-ended nature of chapter 93A, which has produced similar language designed to limit its reach, also by reference to the outrageousness of the conduct involved. Essentially, an showing of wrongful intent has been required by the courts so that otherwise permissible conduct would not be made the basis of liability.

Of course, claims of abuse of process and retaliation already contain the element of wrongful intent. Statutory retaliation claims require a showing of intent to interfere with or punish the exercise of rights protected under the statutes involved. Abuse of process claims require showing intent to obtain a benefit from the use of a lawsuit that is not among the intended forms of relief from that type of lawsuit. A finding of abuse of process or retaliation should supply the needed intent for infliction of emotional distress as well.

Just as there is no dispute by Silverstein that there is a privilege for settlement—which he shows above was exceeded—exactly the same applies to the defendants’ appeal to the first amendment right of petition as a defense, which Silverstein says was also exceeded by their effort to coerce silence with their libel suit. By definition, an action that gives rise to a claim of abuse of process exceeds the protection of the first amendment right of petition, or the tort of abuse of process could not exist.

In fact, these defendants should be estopped from trying to use the first amendment as a shield against a claim that their actions were an attempt to use the courts to help them suppress Silverstein’s own first amendment rights!

The defendants do not appear to believe that the right to petition the government for redress of grievances is truly inviolable.

- They imply—without directly saying it—that retaliation claims can only be brought for employment actions, ignoring that the anti-retaliation provisions of the discrimination laws are considerably broader than that, and are not even limited in their scope to employers, being addressed to “any person.” Since only employers can take employment actions, the prohibition against retaliation by “any person” in c.151B § 4(4) and (4A) cannot be limited to employment actions but must apply to any form of materially adverse treatment that is taken in retaliation—particularly since MSI was not Silverstein’s employer when it brought the libel claim, and Mattel and TLC were *never* his employers. All are thus under the “any person” language.⁷
- They argue that the plaintiff’s retaliation claims are *res judicata* for not having been joined in the original lawsuit, even though they could not have been, under the MCAD presentment requirements of chapter 151B—the libel counterclaim was not asserted until the MCAD had lost jurisdiction over the case by its being filed in court, at which point a claim (as opposed to a defense) of retaliation could not be added.

More importantly, Silverstein’s factual basis to pierce the defense of right of petition—by showing that the lawsuit was an unprotected abuse of process—was only acquired when the defendants sent their demand for settlement (see fn. 6 *supra*), which was over a week after the plaintiff had already obtained judgment under Rule 68. (A) If the case was no longer pending, not even the libel counterclaim—as the plaintiff believes—he could no longer have asserted any claim in the case. (B) Conversely, if that is not the case, the libel counterclaim has not yet been dismissed with prejudice, barring the application of *res judicata* to it and any counter-counterclaims that could have been asserted about it, as final judgment on the libel claim would be required for the application of *res judicata* to that group of claims,

7. Federal courts have come to the same conclusion, finding retaliation in adverse actions against former employees ranging from the filing of a criminal complaint of forgery against a discrimination claimant, *Berry, et al. v. Stevinson Chevrolet, et al.*, 74 F.3d 980, 986 (10th Cir. 1996), causing a former employee’s customers to make complaints that the employer forwarded to the licensing body, *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 147, 157-158 (3rd Cir. 1999), seeking the revocation of a former employee’s teaching license, *Charlton v. Paramus Board of Education*, 25 F.3d 194, 196-202 (3rd Cir. 1994), and distributing libellous flyers in former employees’ neighborhood accusing them of being suspected prostitutes, child molesters, and/or drug users, *EEOC v. Die Fliedermaus, L.L.C.*, 77 F. Supp. 2d 460, 464, 471-472 (S.D.N.Y. 1999). These federal cases reach this result even without the benefit of the “any person” language in c. 151B.

under the defendants' own case of *Bagley v. Moxley*, 407 Mass. 633, 637 (1990).

- They argue that there can never be an action for abuse of process over a counterclaim since no process server is used to initiate a counterclaim.⁸

8. To state this last argument is to refute it—its obvious absurdity can be seen by the easy formula it lays out for avoiding liability for abuse of process: omit the claim that could give rise to a claim of abuse of process from the original complaint that you serve by process server, and then, once service has been made, immediately add it by filing and mailing an amended complaint!

The absurdity of this focus on the use of a process server is also made clear by *Jones v. Brockton Public Market*, 369 Mass. 387, 389 (1975), which took that focus to its illogical extreme. After rejecting an injunction as “process,” *Jones* refused to accept the service of process of the action itself as the abused “process,” saying that since the process server was used only for the purpose the law intended—to initiate a lawsuit—no claim of abuse of process was stated. That paragraph in *Jones* wasn’t even supported by the case it cited for that principle, *Noyes v. Shanahan*, 325 Mass. 601, 605 (1950), which, like *Gabriel v. Borrowy*, *supra*, had held merely that abuse of process could not be found in using an eviction action to regain possession of the premises. Of course, if consistently followed, *Jones*’ line of analysis would completely abolish the tort of abuse of process. (One could equally argue that an improper attachment was only used for its proper purpose, to prevent alienation of the defendant’s property.)

Not surprisingly, that part of *Jones* has *not* been followed, and has, *sub silentio*, been reversed by *Datacomm Interface, Inc. v. Computerworld, Inc. et al.*, 396 Mass. 760, 775 (1986). *DCI* cited and followed *Jones* in declining to treat an injunction as process, but immediately went on to allow the complaint to meet the requirement of process, even though *Jones* would have refused to. Of the nine cases in which the Supreme Judicial Court and Appeals Court have cited *Jones* since *DCI*, none have cited it for the proposition that service of the complaint can’t count.

In any event, the “process” directed by the rules by which the defendant asserts jurisdiction over the plaintiff on a counterclaim is by serving the counterclaim in the answer, which did occur here. That the rules do not require the use of a deputy sheriff to deliver the answer does not deprive counterclaims of the effect of exerting jurisdiction over the plaintiff.

In *Powers v. Leno*, 24 Mass. App. Ct. 381 (1987), precisely this analysis was used to treat *mailing of a copy of a zoning appeal*—just as one would mail a copy of an answer and counterclaim—as being

“analogous to the “process” defined in *Jones v. Brockton Pub. Mkts., Inc.*, 369 Mass. at 390” (24 Mass. App. Ct. at 383 n.6)

and thus as sufficient to support the element of “process” in a claim of abuse of

And finally,

- They argue that the abuse of process claim is premature since there hasn't been a decision that the prior action was groundless—but as shown in the prior section of this memorandum, that argument is misdirected. That would be a defense against a claim of malicious prosecution, but not against a claim of abuse of process (see pages 4-5 above).

As can be seen, the arguments presented in the second section of the defendants' motion do not hold up under scrutiny.

III. The Claims Presented in this Lawsuit Are Not Dependent upon the Outcome of the Case Currently on Appeal, as Abuse of Process—the Core of the Present Claims—Does Not Depend Upon the Lack of Merit of the Complained about Lawsuit—which Is the Basis of the Pending Appeal—but Rather Upon the Improper Motivation for its Being Brought.

The defendants' final argument is that the pendency of William Silverstein's appeal of the dismissal of the libel counterclaim without prejudice instead of ruling on his motion for summary judgment should bar this lawsuit from proceeding.⁹

process. (In fact, under § 17 of c. 40A, which that footnote cited as authorizing that procedure, that mailing is not *called* process but is stated as being “*instead of the usual service of process*” [*emphasis added*].)

9. The defendants' assertion of the defense of prior pending action is actually quite ironic here. The California Mattel lawsuit, from which a memorandum is enclosed here, was squarely vulnerable to exactly that charge:

Mattel was sued in *Christian v. Mattel, Inc., et al.*, U.S. District Court for the Central District of California (Western Division) Civil Action Number 99-CV-2820 by Harry Christian, who was represented by attorney James Hicks and the law firm of Luce, Forward, Hamilton & Scripps, LLP, alleging that Mattel's “Barbie” doll infringed upon the copyrighted design of his “Claudine” doll. (See the January 5, 2000 opinion of Judge Nora M. Manella in that case, enclosed herewith for the description of that claim, and the enclosed certified copy of the docket in that case.)

Mattel counterclaimed in that action for trade libel and trade dress infringement under the Lanham Act, unfair competition under the Lanham Act and § 17200 of the California Business and Professional Code, and civil conspiracy to commit

The defendants argue that the outcome of Silverstein's appeal could be dispositive of this case, or could lead to inconsistent results in the two cases.

The only problem with that argument is that it isn't true. Along with the other materials he is submitting in opposition to this motion, William Silverstein is submitting copies of all the briefs in the pending appeal: his principal brief, the defendants' brief, and his reply brief. Review of those briefs will show that there are no issues before either court that are before the other:

The Appeals Court is being asked to decide whether the motion for summary judgment in the previous case was improperly bypassed and a dismissal

unfair competition. On January 6, 2000, Mattel obtained summary judgment against Harry Christian's claim against it, and also obtained an order for Rule 11 sanctions against attorney Hicks for bringing a frivolous lawsuit, set on June 12, 2000 at \$501,656.00. (*Ibid.*)

On February 28, 2000, however, while *Christian v. Mattel, Inc.* was still pending in federal court (Mattel's counterclaims not having been dealt with yet), Mattel filed an action in California state court: *Mattel v. Luce Forward, Hamilton and Scripps, LLP, James Hicks, Harry Christian, et al.*, Los Angeles County Superior Court Civil Action No. BC225556. A copy of that complaint is enclosed.

By that complaint, Mattel sued Mr. Christian and his attorneys for slander, trade libel under California law, false light, unfair competition under § 17200 of the California Business and Professional Code, and other claims. At the time that action was filed, the trade libel and unfair competition claims against Mr. Christian were still pending in federal court!

The overlapping claims against Harry Christian were not dismissed in federal court until almost half a year later, as the docket in the federal court action shows. The half million dollars in attorneys fees Rule 11 sanctions against James Hicks were still on appeal as of the January 17, 2001 federal court docket sheet.

In response to Mattel's state court lawsuit, James Hicks and Luce Forward filed S.L.A.P.P. motions to strike the Mattel's complaint, arguing that they had been entitled to talk about the lawsuit they were pursuing in federal court. Mattel, in the memorandum of law cited earlier, which it filed on June 30, 2000, opposed that motion, arguing that any privilege that might attach to a lawsuit was barred by it being meritless sham litigation—even though that point is still implicated by Mr. Hick's appeal from the Rule 11 sanctions.

without prejudice granted instead, and asked to either decide the motion for summary judgment itself or remand it to Superior Court for decision. The argument on summary judgment is that the Rule 68 judgment was dispositive or, in the alternative, that the libel counterclaim was subject to summary judgment because the defendants could not show any actionable falsehood, malice, or harm.

The outcome of the pending appeal might be (1) affirmance, in which case there will be no ruling on the merits of the libel counterclaim, which would remain dismissed without prejudice, or (2) reversal, in which case the Appeals Court will either (a) grant summary judgment against the libel counterclaim or (b) send the motion for summary judgment back to Superior Court for decision.

Even if that case ultimately led to a ruling in favor of the libel counterclaim, it could not preclude the claims in this case:

In the case before this Court, whether the libel counterclaim has merit is not at issue. As shown above, abuse of process does not require the challenged lawsuit to lack merit, and a showing of abuse of process defeats any constitutional privilege that might be asserted against the retaliation claims.

Thus, in no case could the outcome of the case pending in the Appeals Court be dispositive here.¹⁰

10. A dismissal *with* prejudice of the libel counterclaim would be nice to have here, of course, as it could help give a second basis—upon which Silverstein is not presently relying—to defeat the claim of constitutional privilege for the libel counterclaim. After all, conduct giving rise to liability for malicious prosecution would have no more constitutional protection than conduct giving rise to liability for abuse of process!

The Adequacy of The Plaintiff's Case

The statement by Judge Zobel at the January status conference that he was treating the defendants' motion to dismiss as a motion for summary judgment has caused disagreement between the parties as to the effect of that on the scope of the issues before the court and thus what the plaintiff needs to show to avoid allowance of the motion.

The defendants' motion to dismiss does not challenge the adequacy of the plaintiff's factual showing in general, only in a few particulars that are addressed above.

However, a motion for summary judgment can be taken as calling the evidentiary support of every element of the plaintiff's case into question. Pursuant to Judge Zobel's direction at that status conference that he tell the defendants what he needs to respond to the motion (and his direction to the defendants that they provide what he needs)—and to deal with the possibility that Judge Zobel would treat the motion as calling the adequacy of the plaintiff's evidence on all elements of the case into question—the plaintiff asked the defendants to assist him in narrowing the issues by treating the *Second Amended Complaint* as a set of requests for admissions, and to provide documents with respect to any issue which they disputed. He asked them to respond to the outstanding discovery, and he also asked for additional documents in connection with his intended showing on punitive damages: documents showing Mattel's conduct in other lawsuits.

The defendants have declined to provide responses to *any* of the plaintiff's requests, beyond claiming that there is a stay on discovery, the answers or materials requested are not required to respond to their motion, and they will respond, if necessary, after the court rules on their motion to dismiss.

The defendants' position is indefensible, for numerous reasons, and William Silverstein asks this Court to treat all the facts in the case as admitted.

First of all, as pointed out on the first page of William Silverstein's opposition to the defendants motion to stay discovery last fall, defendants did not even move to stay discovery until *after* their time to respond to the initial requests for admissions had expired. (The initial request for admissions was served on October 23, 2000 and the motion for stay was served on November 29, 2000.)

The defendants' motion for stay asked that this Court stay all discovery until it ruled on their motion for a more definite statement. The motion for stay was accompanied by a set of "responses" to the initial request for admissions that refused to admit or deny *anything*—even refusing to admit or deny that:

"8. On September 13, 1999, judgment was entered in William Silverstein's favor on his claims in *Silverstein v. Microsystems Software, Inc. et al.*, Middlesex Superior Civil Action No. 98-4820."

At the status conference on December 4, 2000, the Court took no action on the request for stay and told the defendants that they should have been able to understand the complaint, but asked William Silverstein's counsel to simplify the plaintiff's *pro se* amended complaint, giving him a month to do so.

On December 27, 2000, William Silverstein's counsel served the defendants' counsel in hand with the *Second Amended Complaint*. Even under the terms of the defendants' own request for stay, that should have started the clock running on responses to Silverstein's original discovery requests.

At the January 17, 2001 status conference, after Judge Zobel announced that the defendants' motion to dismiss would be treated as one for summary judgment instead, their counsel asked if the stay on discovery could be continued. William Silverstein's counsel objected that he needed his discovery to oppose summary judgment, and the Court told the defendants to provide the discovery that Silverstein told them he needed.

After consideration of the potential need to provide evidentiary support for every material fact in the case—particularly in the absence of the narrowing of issues that an answer to a complaint would normally provide—William Silverstein on January 29, 2001 told the defendants by a hand-delivered letter that:

“If I thought that Judge Zobel's conversion of your motion to dismiss into one for summary judgment was limited to the specific issues you explicitly addressed in your motion, I would be able to narrow our requests to the scope of the specific issues you addressed in your motion.

“Unfortunately, I do not have the luxury of making that assumption. On a motion for summary judgment, unless told otherwise by the Judge, I have to assume that I have the burden of showing either stipulated facts or else genuine issues of material fact as to all aspects of our case.

“In that posture, having to meet a summary judgment motion without the stipulations that would normally be supplied by an answer to a complaint and responses to requests for admission puts me in a difficult spot.

“1. Please now produce the documents requested by the initial document requests.

“2. I intend to treat the initial Requests for Admissions as admitted by your failure to respond within the time allowed. If you intend to challenge this, please provide formal responses to those requests, and produce all documents that reflect

or evidence the facts at issue with respect to any of those requests that you do not fully admit.

“3. I am also enclosing some limited additional discovery requests. Bill won’t like this, but I have not enclosed any notices to depose any of your clients.”

The new discovery requests asked the defendants to treat the *Second Amended Complaint* as a set of requests for admissions, and to produce all documents that refer to or evidence the facts at issue with respect to any Request for Admission or paragraph of the Second Amended Complaint that they did not fully admit. They were also asked to admit the genuineness of some documents from other cases of Mattel’s that the plaintiff had obtained on his own, and to provide other documents from those and other cases of Mattel’s.

Once again, the defendants’ response has been to assert that they are protected by a stay of discovery, although none has been granted. Once again the defendants did not provide a substantive response to *any* of William Silverstein’s discovery requests. A copy of the defendants’ responses is enclosed herewith.

William Silverstein submits that due to the defendants’ repeated refusal to respond to his requests for admissions, under M.R.Civ.P. 36(a), this Court should treat as admitted all allegations in his *Second Amended Complaint* and in his two sets of requests for admissions, and all documents the genuineness of which they drew into issue.

In that posture, the motion for summary judgment must be denied, as the defendants must be held to have admitted to having filed and continued with their libel counterclaim, and to have encouraged or allowed their employees to defame the plaintiff in online forums and encourage others to shun him, all in retaliation

for his having complained publicly and before public agencies and in court of the defendants' violations of numerous laws, and with the intent to use their libel action to coerce him into silence.

In addition, they must be held to have admitted to the applicability to them of all of the laws under which this action is brought, including not only the statutory actions but also the tort claims for abuse of process and infliction of physical and emotional distress, and that William Silverstein has sustained and continues to sustain harm including emotional stress, physical stress, lost salary, travel expenses, research expenses, and legal expenses in defending against the libel counterclaim and the defendants' other retaliatory actions.

(A compressed version of the *Second Amended Complaint*.)

In the alternative, if this Court is not willing to bind the defendants to such admissions by failure to respond, on the basis that the defendants reasonably thought that the only facts at issue on this motion were those they contested, then this Court should accordingly confine its consideration just to those issues, which were confined to (1) the scope of the issues in the prior action and appeal therefrom, and (2) the adequacy of Silverstein's evidence of retaliatory intent. (The defendants' challenge to the showing of adverse action was one of law, not fact, and focused on whether their libel counterclaim could be considered actionable misconduct, which is addressed above, in Part II.)

As to the first issue, the Court now has before it the complaint and notice of appeal in the former action (submitted by the defendants) and all of the briefs in

the appeal from that action (submitted by the plaintiff). Part III of this memorandum, at pages 12-13, shows that the issues in that case do not interfere with this case.

As to the second issue, the question of intent is seldom appropriate for summary judgment. Here, intent to retaliate against the first lawsuit may be inferred by a jury from the time sequence of the filing of the libel claim only after the first case was filed in court, although the defendants had complained to Silverstein of the purported libel two years earlier. Intent to retaliate against Silverstein for his public speech is explicit, however, since (a) the *subject of the libel action* was Silverstein's protected public speech and (b) the *condition demanded for dismissal of the libel action* was that his protected public speech be terminated. The law showing that this conduct gives rise to an action for retaliation is set forth in Part II of this memorandum, at pages 8-9.

WHEREFORE, the defendants' motion should be DENIED.

Respectfully submitted,

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March 14, 2001

Certificate of Service

The undersigned hereby certifies that he today served the original and a true copy of the foregoing by causing it to be causing it to be served in hand upon the office of:

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Date