

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 98-4820

|                              |   |
|------------------------------|---|
| WILLIAM SILVERSTEIN,         | ) |
| Plaintiff                    | ) |
|                              | ) |
| v.                           | ) |
|                              | ) |
| MICROSYSTEMS SOFTWARE, INC., | ) |
| THE LEARNING COMPANY, INC.,  | ) |
| RICHARD GORGENS,             | ) |
| DEBRA GORGENS, and           | ) |
| LARRY MASON,                 | ) |
| Defendants                   | ) |

WILLIAM SILVERSTEIN'S OPPOSITION TO DISMISSAL  
OF LIBEL ACTION "WITHOUT PREJUDICE"

*Hearing Requested*

William Silverstein, the plaintiff in this action, hereby opposes the motion of defendants Microsystems Software, Inc. ("MSI") and The Learning Company, Inc. ("TLC") that their libel counterclaim against William Silverstein be dismissed "without prejudice."<sup>1</sup> William Silverstein states that this qualification renders their voluntary dismissal abusive, as it continues an effort by these companies to use the threat of litigation to intimidate the plaintiff out of speaking about this case.

**Procedural Posture**

1. On December 19, 1996, shortly after the plaintiff had put up his web site, on which he sets forth his grievances against MSI and its the companies that have acquired it, he was sent a letter by defendant Richard Gorgens calling his web site defamatory, and threatening him with legal action if he did not remove from it

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1. That motion was filed on Friday, January 21, 2000, without prior service under Rule 9A. This opposition is being filed directly as a result.

what he was saying about MSI.<sup>2</sup> In response, the plaintiff contacted Gorgens by e-mail and asked him what about the site was inaccurate. When there was no response, he repeated that inquiry, and elicited from Mr. Gorgens the cryptic non-answer (which included a copy of his inquiry) “Received. Regards, Dick Gorgens.” Copies of this correspondence are included as Exhibit S in the *Supporting Exhibits* compilation submitted with the summary judgment motion.

2. Despite the parties' being in contact through the litigation of workers compensation benefits and other agency proceedings, nothing further was explained to the plaintiff about what he said that was going too far until almost two years later—by means of this counterclaim—after the plaintiff had filed this action seeking redress for his treatment by MSI and TLC. (See paragraphs 71-73 of the *Statement of Material Facts* submitted with the summary judgment motion, and the exhibits referenced therein.)

3. MSI and TLC set forth as the basis for their counterclaim the plaintiff's protected statements of opinion. While these conclusions were attacked as defamatory, MSI and TLC have not shown that they—or the underlying facts set forth along with them<sup>3</sup>—were false or otherwise met the standards applicable to a

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2. That letter carried a “cc” to Michael Rosen, the attorney from Foley, Hoag and Eliot who has represented the defendants throughout, including at last Tuesday's hearing on the plaintiff's summary judgment motion. He is also the attorney who submitted the request that the case be dismissed without prejudice.

3. There was no suggestion of undisclosed facts. Instead, there was an exhaustive timeline and documents posted, along with an explicit disclaimer on every page that this was opinion. The counterclaimants ignore the facts and focus on the opinions.

libel action like this. Nor have MSI and TLC shown any harm from the plaintiff's statements. (This is briefed in the plaintiff's *Memorandum In Support Of Summary Judgment*.)

4. On August 31, 1999, after extensive discovery that showed that the plaintiff had a strong chance of prevailing at trial, the defendants served his counsel a Rule 68 offer of judgment for \$125,000 plus interest (which brought it to \$139,547.95). This was by no means a “nuisance” settlement, being full compensatory damages. It was accepted because to have exceeded it (and avoided a potential offset under Rule 68) would have required recovering punitive damages in addition.

5. At that point, because the offer of judgment and judgment itself were worded in terms of giving the plaintiff judgment “in the case”—i.e., not merely on his claims but on the whole case, which included this counterclaim—the plaintiff's counsel made several requests to the defendant's counsel for their agreement that the entire case was over.

6. When this was refused, and further discovery was demanded from the plaintiff, and dismissal conditioned by the defendants on the plaintiff's agreement to stop discussing the case,<sup>4</sup> the plaintiff moved on September 22, 1999 for an order telling the defendants that the case was over.

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4. See Exhibits X and Y in the *Supporting Exhibits* compilation, including a letter from defendants' counsel frankly calling the \$50,000 per violation in the demanded confidentiality agreement “a penalty,” and agreeing that Silverstein “honestly believed” what he was saying.

7. The defendants actively opposed that request, and when that order was denied, the plaintiff was put to the effort and expense of preparing the instant summary judgment motion.

8. When that motion was received by defendants' counsel, it was responded to by a letter faxed by Michael Rosen within hours, which pledged that "Mattel will aggressively pursue the counterclaim, as is its right."<sup>5</sup> (See Exhibit 1 hereto.)

9. Shortly before opposition to the summary judgment motion was due, Rosen told plaintiff's counsel that Mattel would rather dismiss the libel claim, and obtained an extension of time to provide an opposition to the summary judgment motion on the basis that it would be accompanied by a voluntary dismissal—but no such motion was included with their opposition.<sup>6</sup>

10. When reviewed, the opposition was found to consist of affirmative misrepresentations, to the point that the plaintiff felt it necessary to include a reply (time was accorded to the defendants to respond to that reply, and their response was also included).

11. At the summary judgment hearing on Tuesday January 18, 2000, when Judge Sosman inquired of Mr. Rosen as to what were the defamatory statements, he began to quote the opinions set forth in the counterclaim, but then pulled the

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5. TLC was merged into Mattel last summer, and is now merely a division of Mattel, rather than being a separate company.

6. The plaintiff included the untimely opposition in his Rule 9A package, although he might have been within his rights to have treated the extension of time as fraudulently-obtained and thus invalid.

ripcord on the proceeding, telling the Court that his clients would rather dismiss the case and let everyone go on with their lives.

12. However, when faxed to plaintiff's counsel at approximately 4pm on Friday afternoon, January 21, 2000, the promised voluntary dismissal asked that the libel counterclaim be dismissed "without prejudice."

### **Why Dismissal Without Prejudice Would Be Inappropriate**

The libel claim brought against William Silverstein is, in its essence, a SLAPP suit. It was threatened to obtain leverage over him before he sued, brought when he did sue, and kept alive in an attempt to extract an agreement from him to be silent, as no such requirement was attached to the Rule 68 offer or judgment. Dismissal "without prejudice" would allow that tactic to be continued.

The plaintiff is entitled to a conclusive judgment here dismissing the libel claim *with* prejudice. The Supreme Judicial Court has made clear that while in ordinary cases the preference is for trial, the chill on free speech entailed by defamation actions leads to reversing that preference and preferring that such cases be disposed of on summary judgment:

[S]ummary judgment procedures are especially favored in defamation cases. *Godbout v. Cousens*, 396 Mass. 254, 258 (1985). "Allowing a trial to take place in a meritless case 'would put an unjustified and serious damper on freedom of expression.'" *Appleby v. Daily Hampshire Gazette*, 395 Mass. 32, 37 (1985), quoting *National Ass'n of Gov't Employees, Inc. v. Central Broadcasting Corp.*, 379 Mass. 220, 233 (1979), *cert. denied*, 446 U.S. 935 (1980). Even if a defendant in a libel case is ultimately successful at trial, the costs of litigation may induce an unnecessary and undesirable self-censorship. See *New York Times Co. v. Sullivan*, *supra* at 279.

*King v. Globe Newspaper Co.*, 400 Mass. 705, 708 (1987), *cert. denied*, 485 U.S. 940, 99 L. Ed. 2d 281(1988).

This is especially true where the defamation plaintiff cannot make *any* part of the required showing other than that the statements concerned it: no evidence has been presented to show the falsity of any statement that could be taken as defamatory of these companies,<sup>7</sup> nor of any harm suffered by them.

This libel claim would fit under the definition of a SLAPP suit contained in § 59H of chapter 231, as it was based upon William Silverstein's exercise of his right to petition, as defined in the concluding phrases of that section:

As used in this section, the words “a party’s exercise of its right of petition” shall mean any written or oral statement made before or submitted to a legislative, executive, or judicial body, or any other governmental proceeding; any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other governmental proceeding; any statement reasonably likely to encourage consideration or review of an issue by a legislative, executive, or judicial body or any other governmental proceeding; *any statement reasonably likely to enlist public participation in an effort to effect such consideration; or any other statement falling within constitutional protection of the right to petition government.*

*[emphasis added]*

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7. The summary judgment opposition attempts to distort an e-mail to suggest that William Silverstein only had three days of treatment—which was accomplished by omitting half of that e-mail that detailed the same two-week course of treatment as Silverstein had testified to (the entire e-mail is attached as Exhibit 2) and by assigning an unjustifiable inference to what they quoted. However, whether Silverstein had three days or two weeks of treatment at the hospital *after he was fired by MSI* is immaterial to the complained of statement that he was fired “for going to the hospital.” (They do not deny but in fact *allege* in their counterclaim, at ¶ 5, that he was fired for this “unauthorized leave of absence.” The firing took place three days after he left for treatment, on the day after he arrived in China.) Their quibble over the length of his treatment only highlights that they have nothing to show in support of their claim.

This case bears considerable similarity to the case recently won by WCVB, which had a libel suit based on its newscasts dismissed on the basis of California's anti-SLAPP statute. (A copy of that decision, provided to the plaintiff by local counsel for WCVB, is attached as Exhibit 3. That decision does not turn on the language of the SLAPP statute but on First Amendment considerations.)

The subject of this libel lawsuit is William Silverstein's web site that chronicles his lawsuit against the defendants, including not only his filings but also theirs—uncensored. A part of his web site that attracted their particular attention and discovery demands was the feedback section where he invited public participation in the form of mock-jury research. The defendants were particularly interested in this to obtain the feedback, as they had not felt any effect from his web site that they could point to as actual damages.

The SLAPP statute was not used at the outset of this lawsuit because, in the context of a lawsuit by Silverstein that turned on the same facts as the libel counterclaim, it was felt to be unnecessary and subject to criticism as unfair: if he was entitled to discovery on his claims, they should be also.

Now, however, it *is* appropriate, but, absent leave from this court to use it more than 60 days after the filing of the counterclaim (which leave is hereby requested), it is inapplicable.

Even if that statute is not being used, however, the considerations it makes explicit are still instructive here, as they essentially make operational the SJC decisions in cases like *King v. Globe* by putting the burden on the party opposing

dismissal to show both that “the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law” and that “the moving party's acts caused actual injury to the respondent.”

The libel counter-plaintiffs here cannot make either showing, much less both. They cannot by any stretch of the imagination show that Silverstein's exercise of his right to petition was devoid of any reasonable factual support or arguable basis in law, and they have not shown any actual injury.

The remaining question, of course, is why does it matter that the request is for dismissal without prejudice instead of with prejudice?

As the history of this litigation should make clear, MSI *et al.* have sought to use the threat and later the actuality of a libel claim to silence William Silverstein. They held this claim *in terrorem* over him before he sued, and attempted to use it to extract a promise of silence from him even after they confessed judgment.

If this claim is dismissed “without prejudice” they will be free to reassert it against him elsewhere—possibly in Texas where he now lives (and from which he traveled to Cambridge for the summary judgment hearing—he had to relocate there to find work), or anywhere else, given the unsettled state of the law regarding jurisdiction over internet speech and Mattel's worldwide scope. If they do sue him somewhere else, he would have to find new counsel and bring that counsel up to speed on this case.<sup>8</sup>

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8. Unlike present counsel, who is handling this as the windup of a contingency fee case, later counsel elsewhere would have to charge him hourly, which could consume a large portion of his recovery on his claim in chief.

In addition, one of the issues pressed in the summary judgment motion is that the libel counterclaim was *already* dismissed with prejudice by the Rule 68 offer and judgment. Dismissing it without prejudice merely because they decided to short-circuit the summary judgment hearing, depriving Silverstein of full argument on his motion would give them an additional undue benefit by helping them to rob Silverstein of an important argument wherever they revived the case. Their legal brinkmanship should be punished, not rewarded.

Silverstein is entitled to a conclusive judgment of dismissal *with prejudice* in this case to put an end to the strong-arm tactics being used by his former employer—after trial if necessary, if this Court is unwilling to grant him summary judgment, after a full—not truncated—hearing on the motion for summary judgment. He may not be required to accept a dismissal “without prejudice” that would prejudice *him* by leaving him exposed to harm from such continued tactics. He would be forced to appeal from such a disposition.

Respectfully submitted,

WILLIAM SILVERSTEIN  
By his attorney,

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January 24, 2000

**Certificate of Service**

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

Michael L. Rosen, Esq.  
Tracey E. Spruce, Esq.  
**Foley, Hoag & Eliot, LLP**  
One Post Office Square  
Boston, Massachusetts 02109

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Philip R. Olenick

Date