

1 Jennifer Stisa Granick, Esq., CA Bar No. 168423
2 STANFORD LAW SCHOOL
3 CENTER FOR INTERNET AND SOCIETY
4 559 Nathan Abbott Way
5 Stanford, CA 94305
6 Telephone: (650) 724-0014
7 Facsimile: (650) 723-4426

8 Attorneys for: SCOTT CARGLE
9 (AKA: J. DOE 1 "EXAMPEX" ON YAHOO!)

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 CONTRA COSTA COUNTY

12 AMPEX CORPORATION, EDWARD J.
13 BRAMSON,

14 Plaintiff,

15 v.

16 J. DOE 1, AKA "EXAMPEX" ON
17 YAHOO!, ET AL

18 Defendants.

) Case No. C01-03627
)
)

) **DEFENDANT'S SUPPLEMENTAL**
) **BRIEF RE: DAMAGES**

) Date: January 27, 2004 [**To be heard on**
) **February 3, 2004**]

) Time: 9:00 a.m.

) Dept.: Dept. 2/Hon. Barbara Zuniga
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28 **DEFENDANT'S SUPPLEMENTAL BRIEF RE: DAMAGES**

1 **INTRODUCTION**

2 Plaintiffs must plead and provide evidence of special damages unless Mr. Cargle’s
3 statements are libelous per se. Even if these statements are libelous per se, the court can not
4 presume damages unless Plaintiffs show that Mr. Cargle made the statements with knowledge of
5 their falsity or with reckless disregard for the truth (“constitutional malice”). Only if this Court finds
6 both that Plaintiffs are private figures and the statements concern purely private matters may
7 damages be presumed. Here, Plaintiffs are public figures, the statements are about matters of public
8 concern and Plaintiffs have not shown constitutional malice. Therefore, this Court should grant Mr.
9 Cargle’s motion for attorneys’ fees and costs.
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13 **I. PLAINTIFFS CANNOT PRESUME DAMAGES BECAUSE SCOTT CARGLE’S**
14 **STATEMENTS ARE NON-ACTIONABLE OPINIONS**

15 This Court must first find Mr. Cargle’s statements were libelous per se in order to presume
16 damages. Cal. Civ. Code §45a. Statements are libelous per se if “defamatory of the plaintiff
17 without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic
18 fact.” *Id.* If allegedly defamatory statements are not libelous per se, plaintiffs must plead and prove
19 special damages, defined as “all damages which plaintiff alleges and proves that he has suffered in
20 respect to his property, business, trade, profession or occupation, including such amounts of money
21 as the plaintiff alleges and proves he has expended as a result of the alleged libel.” Cal. Civ. Code
22 §48a.
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1 Here, Mr. Cargle’s statements about Plaintiffs were non-actionable opinions. For example,
2 the opinion that Ampex’s equipment was “cheap” and the Web site content was “boring” are not
3 libelous on their face. “If the statement reflects merely upon the quality of what the plaintiff has to
4 sell or solely on the character of his business,” it cannot constitute libel per se. Restat. 2d Torts
5 §623A. Because Mr. Cargle’s non-actionable opinions are not libel per se, Plaintiffs are not
6 entitled to presume damages.
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9 **II. AS PUBLIC FIGURES, PLAINTIFFS CANNOT PRESUME DAMAGES IN THE**
10 **ABSENCE OF CONSTITUTIONAL MALICE**

11 Furthermore, Plaintiffs’ public-figure status precludes this Court from presuming damages
12 unless Mr. Cargle acted with constitutional malice.¹ Reader’s Digest Ass’n v. Superior Court
13 (1984) 37 Cal.3d 244, 257-58. To the extent Mr. Cargle’s message board posts contain any
14 factual assertions, Plaintiffs have offered no evidence that Mr. Cargle doubted the veracity of those
15 statements, while Mr. Cargle has offered two fact-filled declarations indicating why he held the
16 opinions he expressed. Plaintiffs show that Mr. Cargle had a negative attitude toward his former
17 employer, but never provide any evidence that Mr. Cargle doubted the truth of his statements. See
18 Declarations of Scott Cargle and Jim Fleming in Support of Defendant’s Reply Memorandum in
19 Support of Motion to Strike Complaint. “The [constitutional malice test] directs attention to the
20 defendant’s attitude toward the truth or falsity of the material published, not the defendant’s attitude
21 toward the plaintiff. Ill will toward the plaintiff, or bad motives, are not elements of the
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27 ¹ See, Defendant’s Reply to Opposition to Motion to Strike Complaint Pursuant to Cal. Code Civ. Pro. § 425.16.

1 [constitutional malice test].” Jackson v. Paramount Pictures Corp. (1998) 68 Cal.App.4th 10, 32
2 (quotations and citations omitted). Because Plaintiffs are public figures and have failed to produce
3 any evidence of Mr. Cargle’s constitutional malice, they cannot presume damages.
4

5 **III. BECAUSE CARGLE’S STATEMENTS INVOLVED MATTERS OF PUBLIC**
6 **CONCERN, PLAINTIFFS CAN NOT PRESUME DAMAGES ABSENT A**
7 **SHOWING OF CONSTITUTIONAL MALICE**

8 Mr. Cargle’s statements address matters of public concern, so Plaintiffs may not presume
9 damages. Regardless of a plaintiff’s public- or private-figure status, the United States Supreme
10 Court in Gertz v. Robert Welch, Inc. (1974) 418 U.S. 323, restricted defamation plaintiffs who fail
11 to prove the defendant acted with constitutional malice to “compensation for actual injury.” Gertz,
12 418 U.S. at 350. “[T]he private defamation plaintiff who establishes liability under a less demanding
13 standard than [constitutional malice] may recover only such damages as are sufficient to compensate
14 him for actual injury.” Id. These private-figure plaintiffs must plead and prove special damages in
15 order to recover.
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18 It is the private or public nature of the *statements*, not the plaintiffs, that determines the
19 necessity of pleading special damages. Plaintiffs err in arguing that if this Court finds they are private
20 figures, they “would be entitled to presumed damages.” Plaintiffs’ Opposition to Scott Cargle’s
21 Motion for Attorneys’ Fees and Costs on Appeal (“Opposition”) at 13. Only private figures suing
22 over per se libelous statements of *private* concern can presume damages.
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25 Here, Mr. Cargle’s statements discussed the operations of a publicly traded company and
26 the on-the-job performance and behavior of its highly visible CEO. Further, Mr. Cargle made his
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1 statements on an Internet chat board specifically devoted to discussing such issues—a board that
2 has to date generated some 130,000 posts. “Whether ... speech addresses a matter of public
3 concern must be determined by the content, form, and context of a given statement, as revealed by
4 the whole record.” DVD Copy Control Assn., Inc. v. Bunner (2003) 31 Cal.4th 864, 884 (quoting
5 Connick v. Myers (1983) 461 U.S. 138, 147-48). Given the content, form, and context of Mr.
6 Cargle’s posts, this Court should find they address matters of public concern.²

9 Because Mr. Cargle’s postings involve matters of public concern, Plaintiffs cannot obtain
10 presumed or punitive damages without showing Mr. Cargle with constitutional malice. Gertz, 418
11 U.S. at 350. As discussed above, Plaintiffs have not met this burden.

13 Nor have Plaintiffs properly pled or produced evidence of special damages. Plaintiffs’ vague
14 allegations that Mr. Cargle’s statements caused them injury do not satisfy Plaintiffs’ burden.
15 Opposition at 13. In Forsher v. Bugliosi, (1980) 26 Cal.3d 792, the California Supreme Court
16 rejected a defamation plaintiff’s claim that he sufficiently established special damages by alleging
17 damage “in an amount, which, as yet, cannot be ascertained and will be proven at trial.” Forsher, 26
18 Cal.3d at 807. The Court held, “Such an allegation is insufficient. Appellant should have been able
19 to plead injury to property, business, trade, profession or occupation, if these interests have been
20 injured even though the monetary extent might not have been ascertainable.” Id. Here, Plaintiffs
21 offer similarly inadequate evidence of special damages, asserting in a single sentence that “the
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27 ² See also Defendant’s Reply To Motion For Attorney’s Fees and Costs on Appeal

1 statements here were actually injurious . . . and such an injury would support an award of actual
2 damages . . . after hearing all the evidence.” Opposition at 13.

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4 Plaintiffs did not plead special damages because they could not. Ampex’s stock price
5 actually *rose* during the time Mr. Cargle made his postings. Notice of and Motion of Defendant
6 Doe 1 to Strike Complaint Pursuant to Cal. Code Civ. Proc. § 425.16 at 10. Nor have Plaintiffs
7 offered any evidence of lost business, lost customers or reputational harm. Given Plaintiffs’
8 failure—and inability—to plead special damages, this Court should find Plaintiffs do not have a
9 reasonable probability of prevailing on their claim, and grant Mr. Cargle’s motion.
10

11 **CONCLUSION**

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13 Without damage, there is no defamation. Plaintiffs here are required to plead and prove
14 special damages because Mr. Cargle’s statements are not libelous per se, and because the
15 statements address matters of public concern. Gertz allows presumed or punitive damages if and
16 only if Plaintiffs establish by clear and convincing evidence that Mr. Cargle acted with constitutional
17 malice. Because Plaintiffs have not produced *any* such evidence, Plaintiffs have not established *any*
18 probability of prevailing on their defamation claim. This Court should grant Mr. Cargle’s motion for
19 attorneys’ fees and costs.
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28 **DEFENDANT’S SUPPLEMENTAL BRIEF RE: DAMAGES**
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1 Dated: January 5, 2004

Respectfully submitted,

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Jennifer Stisa Granick, Esq.

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7 _____
James J. Pastore, Jr., Bar Certified Law Student

8 STANFORD LAW SCHOOL
9 CYBERLAW CLINIC
10 559 Nathan Abbott Way
11 Stanford, California 94305
12 Telephone: (650) 724-0014

13 Attorneys for Scott Cargle (aka: "Exampex")
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MOTION FOR ATTORNEYS' FEES ON APPEAL