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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.
19 _____

) Case No. C01-03627

) **DEFENDANT'S SUPPLEMENTAL**
) **REPLY 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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29 **DEFENDANT'S SUPPLEMENTAL REPLY BRIEF RE: DAMAGES**

1 **INTRODUCTION**

2 Plaintiffs may presume damages only if they establish that Mr. Cargle’s statements are
3 libelous per se, *and* that Ampex and Ed Bramson are private figures, *and* that Mr. Cargle’s
4 statements concern purely private matters. Otherwise, they must prove constitutional malice.
5 Ampex Corporation and its CEO are public figures, and the mismanagement of the public company
6 is a matter of public concern, yet Plaintiffs have offered no evidence of constitutional malice or
7 actual damages. If only for this reason, Plaintiffs have failed to show a reasonable probability of
8 success on the merits, and this Court should grant Mr. Cargle’s motion for attorneys’ fees and
9 costs.
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13 **I. THE POOR PERFORMANCE OF A PUBLICLY TRADED COMPANY AND**
14 **THE ON-THE-JOB BEHAVIOR OF ITS CEO ARE MATTERS OF PUBLIC**
15 **CONCERN**

16 Mr. Cargle’s statements addressed matters of public concern. “Whether . . . speech
17 addresses a matter of public concern must be determined by the content, form, and context of a
18 given statement, as revealed by the whole record.” DVD Copy Control Ass’n, Inc. v. Bunner
19 (2003) 31 Cal.4th 864, 884 (quotation omitted). Mr. Cargle posted statements on a message
20 board devoted to discussing Ampex’s performance, the effectiveness of its top executives, and the
21 technologies at the core of Ampex’s business. These statements are nothing like the ones in Varian
22 Medical Sys., Inc. v. Delfino (2003) 113 Cal.App.4th 273, DuCharme v. Int’l Brotherhood of
23 Elec. Workers Local 45 (2003) 110 Cal.App.4th 107, or Rivero v. Am. Fed. Of State, County,
24 and Municipal Employees (2003) 105 Cal.App.4th 913.
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29 **DEFENDANT’S SUPPLEMENTAL REPLY BRIEF RE: DAMAGES**

1 The Varian defendants posted hundreds of “especially vituperative personal attacks.”
2 Varian 113 Cal.App.4th at 289. There was no public controversy prior to the lawsuit about the
3 company. The court recognized that “[i]t is not insignificant that the Varian plaintiffs are publicly
4 traded companies,” and that “some of the defamatory statements could arguably be considered
5 matters of public concern, such as whether a company discriminates against or harasses women in
6 the workplace,” but concluded a “vicious personal vendetta” is not of legitimate public concern. Id.
7 at 298-99. In contrast, Mr. Cargle’s postings were part of ongoing discussions about Ampex’s
8 massive financial losses, Mr. Bramson’s responsibility for those failures, and the future of digital
9 content on the Web.
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13 Unlike Varian, Rivero and DuCharme concern the broad construction of “public interest”
14 under section 425.16. See CCP §425.16(a). In Rivero, the defendants published defamatory
15 fliers accusing a janitorial supervisor of job-related misconduct, even though a hearing had found the
16 charges unsubstantiated. “[T]he Union’s statements concerned the supervision of a staff of eight
17 custodians by Rivero, an individual who had previously received no public attention or media
18 coverage. Moreover, the only individuals directly involved in and affected by the situation were
19 Rivero and the eight custodians.” In contrast, Mr. Bramson has been quoted in at least 100 unique
20 news articles, has appeared on television and at industry conferences, has been quoted in at least 40
21 Ampex press releases, and has issued at least six Chairman letters to the investors holding some 60
22 million outstanding shares of Ampex stock. Defendant Doe1’s Memorandum of Points and
23 Authorities Demonstrating That Plaintiff Edward J. Bramson is a Public Figure, p. 2, filed on
24 December 24, 2001.
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29 **DEFENDANT’S SUPPLEMENTAL REPLY BRIEF RE: DAMAGES**

1 In DuCharme, the defendant posted information on its Web site about the plaintiff's
2 termination—an issue about which there was no public controversy. “DuCharme’s termination was
3 a fait accompli; its propriety was no longer at issue. Members of the local were not being urged to
4 take any position on the matter.” DuCharme, 110 Cal.App.4th at 118. In contrast, here there was
5 a vigorous, ongoing debate about Ampex’s ability to rebound from recent failures, and whether or
6 not Mr. Bramson was an effective leader. Given the very public nature of Ampex and its CEO, as
7 well as the very public controversy surrounding the massive financial losses the company sustained,
8 Mr. Cargle’s statements discussed matters of public concern.

11 **II. PLAINTIFFS CAN NOT PRESUME DAMAGES WITHOUT ESTABLISHING**
12 **CONSTITUTIONAL MALICE, AND THEIR SHOWING OF ACTUAL**
13 **DAMAGES IS INSUFFICIENT AS A MATTER OF LAW**

14 “If the defamation involves an issue of public concern, proof of actual malice is necessary to
15 recover presumed or punitive damages even if the plaintiff is not a public figure.” Varian, 113
16 Cal.App.4th at 296 (quotation, citation omitted). Plaintiffs failed to produce evidence that Cargle
17 doubted the truth of his statements.

18 Plaintiffs also have failed to produce evidence of actual damages. The claim that the “jury in
19 New York will have no trouble awarding actual damages” is insufficient as a matter of law. See
20 Forsher v. Bugliosi (1980) 26 Cal.3d 792, 807. Plaintiffs here produce no evidence of lost
21 business, adverse reaction by friend or associate, nor decline in stock value caused by Mr. Cargle’s
22 opinionated postings. In fact, Plaintiffs’ stock price actually *rose* subsequent to Mr. Cargle’s
23 postings. Plaintiffs’ failed to show actual damages.

24 **CONCLUSION**
25 **DEFENDANT’S SUPPLEMENTAL REPLY BRIEF RE: DAMAGES**

1 We respectfully request the Court grant Mr. Cargle's motion for fees and costs.
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6 Dated: January 22, 2004

Respectfully submitted,

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Jennifer Stisa Granick, Esq.

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29 **DEFENDANT'S SUPPLEMENTAL REPLY BRIEF RE: DAMAGES**

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MOTION FOR ATTORNEYS' FEES ON APPEAL