COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss. **SUPERIOR COURT**
CA NO: 12-01138

CLAY CORPORATION et al.

Plaintiffs

v.

ADAM BROOK COLTER, JONATHON COLTER AND JAMES LAFLAMME.

Defendants

DEFENDANTS ADAM BROOK COLTER AND JONATHON COLTER'S MEMORANDUM IN SUPPORT OF THEIR PETITION FOR INTERLOCUTORY REVIEW

INTRODUCTION

The defendants request that the Court review the trial court's order awarding the plaintiffs a pre-judgment attachment in a case where the plaintiffs are claiming the defendants defamed them by organizing an online boycott of their car dealerships. The trial judge committed numerous procedural and legal errors in fashioning *sua sponte* an unconstitutional remedy to silence the defendants' in their exercise of their First Amendment and Article 16 right to organize this boycott. Rather than simply denying the plaintiffs' motion for a preliminary injunction enjoining the

defendants' allegedly defamatory speech, as she was required to do under the doctrine of prior restraint, the judge took it upon herself to award the plaintiffs a 1.5 million dollar pre-judgment attachment. For the reasons below, the defendants request that this Court vacate the trial court's order of attachment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Jill Colter, forty seven years old, was fired from her position as a service advisor at Clay Nissan in Norwood, Massachusetts on June 5, 2012 after returning from leave for cancer treatment.[1] On or about June 21, 2012, Defendants Jonathan and Adam Colter, Jill's brothers, created a "Boycott Clay Nissan" Facebook page in support of their sister, claiming that Clay Nissan terminated Jill because she had cancer.[2] On July 10, 2012, the plaintiffs filed a Verified Complaint in Norfolk Superior Court against Jonathon and Adam Colter ("The Colters") and another individual, James LaFlamme.[3] The five corporate plaintiffs "own and operate five new vehicle

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[1] R. App. 19-20.

[2] Id.

[3] LaFlamme, an individual unknown to the Colters, has not appeared in this action and is not a party to this petition.

automobile dealerships in Newton and Norwood, Massachusetts under the 'Clay' name",individual plaintiff Scott Clay is "president and an owner of Clay Corporation, and an owner and an owner of various 'Clay entities.'"[4]

Count I of Verified Complaint seeks a declaration that "Adam and John [sic] Colter have published false and defamatory statements about Clay." Count II alleges that the defendants "interfered with the prospective advantages of their [the plaintiffs'] respective franchise agreements and their relationship (or potential relationships) with existing and prospective customers through improper motive and means." Count III seeks to enjoin the defendants "from continuing their patter [sic] of on-going publication of defamatory statements and promotion of a boycott based on false statements." Count IV alleges the defendants "published false and defamatory statements" concerning the plaintiffs on Facebook, Twitter and other electronic media."[5]

The plaintiffs also moved for a preliminary injunction enjoining the Colters from publishing

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[4] R. App. 18-19.

[5] R. App. 14-17.

allegedly defamatory statements including any statement asserting that: "Clay [Nissan] terminated Jill Colter because she has cancer; Clay has an employment policy that is discriminatory against cancer patients; Clay is unethical or immoral; and, Clay violated the law by terminating an employee without cause.[6]

The plaintiffs' motion for a preliminary injunction was heard on July 12, 2012. The trial court judge (Dupuis, J.) declined to rule on the plaintiffs' request for an injunction, and instead asked the parties to brief the issue of whether the First Amendment guarantee of free speech barred the preliminary relief requested by the plaintiffs. The parties appeared before the trial court for a second time on July 17, 2012. The court again made no ruling on the plaintiffs' motion for a preliminary injunction, but instead ordered the defendants, *sua sponte*, "not to alienate, sell, transfer, assign, encumber or otherwise dispose of any personal or real property other than in the ordinary course."[7] On August 13 and 14, 2012 the court held a hearing to

[6] R. App. 34-35.

[7] R. App. 49.

determine whether the plaintiffs should be granted a pre-judgment attachment of the defendants' assets, despite the fact that the plaintiffs had not filed a request for pre-judgment attachment with their Verified Complaint, in contravention of the requirements of Mass. R. Civ. P. 4.1(c).[8]

The court heard testimony from defendant Adam Colter, Christine White (Jill Colter's supervisor at Clay Nissan), William Ebben (chief executive officer of the Ebben Zall Group, the plaintiffs' public relations firm) and James Sarno (chief financial officer of the Clay dealerships).

On September 6, 2012, the defendants filed a timely special motion to dismiss, pursuant to G.L. c. 231, § 59H, the "anti-SLAPP"[9] statute.[10] As of the date of this filing, the trial court has not ruled on the motion or set it down for a hearing.

On September 12, 2012, the trial court (Dupuis, J.) entered an order granting the plaintiffs a one

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[8] "An action in which attachment of property is sought may be commenced only by filing the complaint with the court, together with a motion for approval of the attachment." Mass. R. Civ. P. 4.1(c).

[9] SLAPP is an acronym for "strategic lawsuit against public participation."

[10] R. App. 14.

million five hundred thousand dollar ($1,500,000.00) attachment against the Colters' property and further ordering them to produce to the plaintiffs a "verified list of any bank or savings intuition with which they maintain accounts" within 7 business days.[11] The order of attachment attributed seven hundred fifty thousand dollars ($750,000.00) to the plaintiffs' defamation claim and seven hundred fifty thousand dollars ($750,000.00) to their claim for intentional interference with advantageous business relationships.

On September 13, 2012, the defendants filed an emergency motion in the trial court to stay the order of attachment, which is currently pending.[12]

ARGUMENT

I. AN ATTACHMENT OF THE COLTERS' PROPERTY BEFORE A TRIAL ON THE MERITS CONSTITUTES A PRIOR RESTRAINT ON SPEECH FORBIDDEN BY THE FIRST AMENDMENT AND ARTICLE 16 OF THE MASSACHUSETTS DECLARATION OF RIGHTS.

It was an error of law for the trial court judge to order a pre-judgment attachment because such a seizure of property before a trial on merits is an unlawful prior restraint on the Colters' freedom of speech and expression. The United States Supreme

[11] See decision and order in Addendum to petition.

[12] R. App. 15.

Court has consistently held that even allegedly defamatory speech or expression cannot be restrained prior to a trial on the merits, holding that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). It was error for the judge to rule on the "truth or validity" of the defendants statements prior to a trial on the merits. *Organization for a Better Austin v. Keefe*, 402 U.S. at 418-419 (1971); *Krezbiozen Research Foundation v. Beacon Press*, 334 Mass. 86, 93 (1956).

A pre-judgment seizure of the defendants' property will chill the speech of the defendants, and other members of the public, just as surely as a direct restraint on what they are allowed to say. *Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) ("[T]he special vice of prior restraint is suppression of speech, either directly or indirectly by inducing caution in the speaker, prior to the determination that the targeted speech is protected by the First Amendment."). The Court should therefore view the attachment as a form of prohibited prior restraint.

The defendants raised the issue of unconstitutional prior restraint at the July 17, 2012 preliminary injunction hearing. Rather than simply denying the plaintiffs' motion to enjoin the defendants' allegedly defamatory speech, which was the only motion before the court, the trial court judge suddenly raised the issue of a pre-judgment attachment *sua sponte*, ordered an evidentiary hearing on the pre-judgment attachment, and issued a temporary restraining order restraining the defendants' property. This thinly veiled attempt to avoid the clear prohibition against prior restraints by way of injunction is no more constitutional than directly enjoining their speech. This attempt was also an abuse of the trial judge's discretion in that the trial judge utterly ignored the requirements of Mass. R. Civ. P. 4.1(c), which requires a plaintiff to request a pre-judgment attachment at the time they file their complaint.

The defendants' attorneys have not uncovered a single Massachusetts case where a plaintiff was granted a pre-judgment attachment in connection with a defamation claim. In defamation cases, plaintiffs must typically wait until trial to prove damages; they

cannot raise the issue before trial, for example in requesting a pre-judgment attachment. In fact, our rules of civil procedure prohibit attachment by trustee process in defamation cases. Mass. R. Civ. P. 4.2. The trial court's order appeared to recognize this prohibition by allocating seven hundred fifty thousand dollars to the trusteeable intentional interference claim, a claim which was not supported by any evidence at all, as discussed in detail below. The judge's decision elided the elements required to prove each claim by suggesting that the allegedly defamatory statements made in connection with the defendants' boycott could also support an intentional interference claim without any evidence of damage to the plaintiffs' current or expected business relationships. *See* Decision and Order, page 9. Just as the trial court judge ignored our rules of civil procedure by granting a prejudgment attachment where none was requested, she skirted the trustee process rule to award the attachment.

A pre-judgment attachment as to either claim is therefore constitutionally impermissible.

II. THE TRIAL COURT JUDGE HAD NO LEGAL OR FACTUAL SUPPORT FOR HER RULING THAT THE PLAINTIFFS ARE

LIKELY TO RECOVER DAMAGES IN THE AMOUNT OF $1.5 MILLION.

The trial court's order must be vacated because the judge abused her discretion in granting an attachment in the amount of 1.5 million dollars because none of her findings support a likelihood that the plaintiffs will recover damages of 1.5 million dollars. To be granted a pre-judgment attachment a plaintiff must show they are likely to prevail on the merits and obtain damages in the necessary amount. J.L. Shapiro, M.G. Perlin, & J.M. Connors, Collection Law, § 4:71 (3d ed. 2000).

Damages for loss of business revenue cannot be awarded based on a merely speculative connection between the defendants' boycott and the plaintiffs' lost revenue. *Botkin v. Miller*, 190 Mass. 411 (1906). The plaintiffs' chief financial officer ("CFO") testified that Clay Nissan had net losses of $320,000 in 2012, $160,000 of which came in July 2012. Upon further questioning, the CFO admitted that the Clay Nissan dealership had in fact lost money in three of the previous six months preceding the initiation of the Colters' boycott. The CFO also conceded that he could not attribute the loss in July to the

defendants' actions, as new car sales are cyclical and subject to a number of factors, including the poor economy and competition from other dealers.

In other words, there was absolutely no evidence that the Clay dealerships had either a current or expected business relationship that was harmed by the boycott, proof of which is required to make a claim of intentional interference. J.R. Nolan & L.J. Sartorio, Tort Law, § 6.1 (3d ed. 2005). There was no evidence presented that the Colters' activities damaged the plaintiffs' existing relationships with their franchisors, as they alleged in their verified complaint. There was no evidence that the plaintiffs had existing or reasonably expected contractual relations with any of the people who "liked" the Colters' Boycott Clay Nissan Facebook page or posted comments on the page. There was therefore no evidence, by way of affidavit or testimony, to support the judge's finding that "[i]f the defendants continue in their relentless campaign against the plaintiffs, their conduct may very well have its desired effect: the crippling or destruction of the plaintiff's business..." Consequently, the trial court's order must be vacated.

III. THE BROAD GRANT OF IMMUNITY FOR "PETITIONING ACTIVITIES" UNDER THE ANTI-SLAPP STATUE, G.L. C. 231, § 59H, PRECLUDES PRE-JUDGMENT RELIEF AGAINST THE DEFENDANTS UNTIL THE TRIAL COURT RULES ON THEIR SPECIAL MOTION TO DISMISS AND THEY HAVE EXHAUSTED THEIR APPELLATE RIGHTS.

Even if the Court declines to vacate the trial court's order, the defendants request that the Court stay the execution of the order under G.L. c. 231, § 59H. Section 59H functions as a broad grant of immunity to parties who are targets of strategic litigation used to silence their right to petition under the U.S. and state constitutions. *Duracraft Corp. v. Holmes Products Corp.*, 427 Mass. 156, 167 (1998). To effect this broad grant of immunity, the statute provides for a special motion to dismiss and an immediate appeal to the full panel of the Appeals Court of any denial of the special motion. *See* G.L. c. 231, § 59H; *Benoit v. Frederiskson*, 454 Mass. 148, 151-152 (2009). Here, the defendants have filed such a special motion, which is currently pending before the trial court. If the trial court's order for a pre-judgment attachment of 1.5 million dollars is not stayed pending a final determination of this special motion, the broad grant of immunity in § 59H would be negated. Unlike the plaintiffs, whose damages are

speculative, the defendant will suffer irreparable harm to their finances if the stay is not granted and trustee process is executed.

Although the anti-SLAPP statute does not explicitly protect boycotts of private companies, it does protect "any . . . statement falling within constitutional protection of the right to petition government." G.L. c. 231, § 59H. The Supreme Judicial Court, in interpreting this and similar statutes, has mentioned the right to peaceful boycott and picket as actions that the "anti-SLAPP statute seeks to protect." *Duracraft Corp.*, 427 Mass. at 161. Further, our courts have also held that a party seeking the protection of the anti-SLAPP statute need not be the individual actually petitioning the government; rather, the party need only be advocating on behalf of another who is directly petitioning the government. *Plante v. Wylie*, 63 Mass. App. Ct. 151 (2005) (noting that an attorney who is sued for voicing the positions of a petitioning client may bring a special motion to dismiss under the anti-SLAPP statute); *cf. Fustolo v. Holland*, 455 Mass 861, 867 (2010) (holding that a reporter claiming objectivity in a dispute is not entitled to protection). The

anti-SLAPP statute therefore protects the Colters' activities because they were petitioning by boycott and picketing as advocates for their sister Jill, who petitioned the government--namely the MCAD--in connection with her complaint of illegal discrimination.[13] *See Plante*, 63 Mass. App. Ct. at 151. Because the defendants were thereby exercising a protected right, they should receive the protections of the anti-SLAPP statute until at least a final determination is made on their special motion to dismiss.

CONCLUSION

For these reasons, the defendants request that the Court vacate the trial court's order of pre-judgment attachment, or in the alternative that the Court stay the execution of the trial court's order until a final determination is made on the defendant's special motion to dismiss under G.L. c. 231, § 59H.

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[13] R. App. 50-53.

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