UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ALAN S. NOONAN, Plaintiff,	)	
v.	)	CIVIL ACTION NO. 06-CV-10716-WGY
STAPLES, INC., Defendant.	)	

STAPLES, INC.'S OBJECTIONS TO PLAINTIFF'S REQUESTED JURY INSTRUCTIONS

Staples, Inc. ("Staples") files these Objections to Plaintiff's Requested Jury Instructions. While Staples will reserve detailed objections to the charge conference, there are so many grave misstatements of law and fact in the Requests for Instructions to the Jury filed by Plaintiff Alan Noonan (Docket No. 176) that Staples is compelled to file this preliminary written objection.

I. Objections to Noonan's Proposed Instructions on "Actual Malice."

A. Objection to Noonan's Requested Instruction No. 3:

Most critically, Noonan's proposed instruction on the meaning of "actual malice" under G.L. c. 231 §92 (the "Statute") is *rife* with serious misstatements of law.

The First Circuit was very clear that "actual malice" under the Statute has a narrow and distinct meaning: actual malevolent intent, hatred, or ill will toward the plaintiff. *Noonan v. Staples, Inc.*, 556 F.3d 20, 28-31 (1st Cir. 2009); *Noonan* v. *Staples, Inc.*, 539 F.3d 1, 9 n. 7 (1st Cir. 2008) *withdrawn and substituted op. at*, 556 F.3d 20 (1st Cir. 2009). This is what the Court should instruct the jury, true to the First Circuit's mandate.

Noonan's instruction improperly attempts to broaden this definition by importing into this case the *different* definition of "malice" from the conditional privilege context. The First Circuit recognized that the two definitions are separate and distinct, and that in the conditional privilege context, "malice" has the *distinct* meaning of "intent to injure another" or "base ulterior motive." *Noonan v. Staples, Inc.*, 556 F.3d at 31. While the First Circuit suggested that a showing of "actual malice" under the Statute – defined as hatred, ill will or malevolent intent -- would also be sufficient to show "malice" in the conditional privilege context, because it would show "intent to injure another," the First Circuit *never* stated or implied that a showing of "base ulterior motive" would be sufficient to establish "actual malice" under the Statute. *Id.*

The concept of "base ulterior motive" is unique to the conditional privilege context. Under the conditional privilege doctrine, the employer has a conditional privilege to publish even false and defamatory statements that were made in furtherance of a legitimate business interest. *Id.* at 31. The employer can lose the privilege if "malice" is shown, in the form of "base ulterior motive" or "intent to injure," because in that event, the employer is no longer acting within the legitimate business interest that provides the privilege. These concepts have no place in this case which concerns a *true* statement which the defendant is free to make, for *any reason*, as long as it does not act with actual malice. It is simply incorrect as a matter of law, and as a matter of logic, to say that a mere "ulterior motive" is sufficient to show actual malevolent intent, ill will or hatred toward Alan Noonan. Therefore, the Court should reject Noonan's proposal to instruct the jury that "base ulterior motive" and "intent to injure another" can constitute "actual malice" under the Statute, and should decline to instruct the jury *at all* about the conditional privilege.

Similarly, Noonan's proposed instruction that "Staples was entitled to send the e-mail naming Mr. Noonan . . . to a narrow group within Staples who shared an interest in the

communication" is utterly wrong. Again, Noonan is relying improperly on a concept from the irrelevant conditional privilege arena. The instant case concerns a *true* statement, and Staples is free to make any true statements it would like, to *as many people as it chooses,* as long as it does not do so with actual malice in violation of the Statute.

Noonan's proposed instruction that jurors "should consider excessive publication of the e-mail as constituting malice" is also wrong. The First Circuit's opinion said only that "whether that distribution was so wide as to show malice will be a question for the jury." *Id.* at 31 n. 12. Therefore, the jury instruction should go no further than to say that the jury *may* (not "should") consider how widely, or narrowly, the e-mail was distributed in deciding whether the e-mail was sent with actual malice toward Noonan. For example, the jury could consider the fact that Mr. Baitler sent the e-mail *only* to his group, rather than the company at large, as evidence weighing *against* a finding of malice.

The Court should maintain the narrow definition of "actual malice" under the Statute endorsed by the First Circuit and the SJC decisions interpreting the Statute itself, by defining it to mean "actual malevolent intent, hatred or ill will." A narrow definition of "actual malice" is particularly critical given the grave constitutional problems, and infringement on free speech, imposed by the Statute. If this Court were to broaden the scope of "actual malice" under the Statute, so as to impose liability for true statements not made with hatred, ill will or malevolent intent, but merely made for an "ulterior purpose," or to what is deemed too large a group of recipients, the constitutional implications would be severe.

B. Objection to Noonan's Requested Instruction No. 4:

Similarly, Noonan's convoluted and erroneous instruction on witness credibility and malice wrongly implies that Mr. Noonan can show "actual malice" merely by showing pretext.

While Noonan cites to the First Circuit's opinion, he misinterprets what the Court actually said. The First Circuit said only that *if* the jury were to find that Mr. Baitler's explanation for sending the e-mail – that he wanted to educate his department on the consequences of violating policy and the seriousness of those policies – were pretextual, "such conclusion *might* lend further support to an inference of malicious intent." *Noonan* v. *Staples*, 556 F.3d at 30 (emphasis added). The Court certainly did not say that a finding that the explanation was pretextual would be *sufficient* to show actual malice. Rather, Noonan must prove that hatred, ill will or malevolent intent, by Mr. Baitler *toward* Alan Noonan. If Noonan showed only that Mr. Baitler had a reason different from his stated reason, but still not reflecting hatred or malevolent intent *toward* Alan Noonan, his claim under the Statute would fail as a matter of law.

Further, the instruction is overbroad, in that it suggests that inconsistencies in *any* witness' testimony "may lend support to an inference of malicious intent," when the only issue in this case is *Mr. Baitler's* state of mind at the time he sent the e-mail. In fact, Mr. Noonan has the burden to prove that *Mr. Baitler* sent the e-mail with actual malice toward Mr. Noonan.

II. Objection to Noonan's Requested Instruction on Deletion of Electronic Version of E-Mail.

A. Objection to Noonan's Requested Instruction No. 5:

Staples vehemently objects to any evidence, or instruction, regarding deletion of the electronic version of the e-mail, which is frankly irrelevant to this case, a distraction for the jury, and severely prejudicial to Staples. Noonan's entire proposed instruction on is worded as if the jury is to decide whether Staples is liable for the *tort* of spoliation, which is not recognized in Massachusetts as an independent tort and has not been plead as a count in this case, or as if the jury is to decide whether Staples has engaged in sanctionable conduct, which is not a jury question and which has already been definitively *rejected* by this Court. These questions have

no place in an instruction to the jury in this case. In addition, Noonan's requested instruction on deletion of the electronic version of the e-mail, which consumes three out of the eight pages of his jury instructions, is misguided in numerous ways.

1. There Is No Threshold Showing that the Electronic Version of the 3:19 p.m. Email Contained any Relevant Information Beyond What is Available in the Paper and Other Electronic Copies.

Noonan's instruction fails to advise the jury that the jury has before it paper copies of the Baitler e-mail, both as it was originally sent at 3:19 p.m. on January 20, 2006, and as it was forwarded to seven individuals at 3:21 p.m. on January 20, 2006. The proposed instruction fails to acknowledge that the paper copies show the date and time the e-mail was sent, from whom it was sent, to whom it was sent, and the text of the e-mail. The proposed instruction fails to note the undisputed fact that Staples maintained an electronic copy of the forwarded 3:21 p.m. e-mail, which Staples offered to allow Noonan's counsel to inspect (but which Noonan's counsel declined). The proposed instruction fails to provide that crucial context that *only* the electronic version of the 3:19 p.m. e-mail was deleted.

In fact, Noonan has never made any threshold showing that the electronic version of the 3:19 p.m. Bailer e-mail would have any additional information not readily available from the paper version of the 3:19 e-mail and the paper and electronic versions of the 3:21 p.m. e-mail, all of which were available to him. *Dahl* v. *Bain Capital Partners, LLC*, 2009 U.S. Dist. LEXIS 52551, at *7, 9 n.1 (D. Mass. 2009) (Harrington, J.) (observing that "case law shows wariness about metadata's value in litigation. Many courts have expressed reservations about the utility of metadata, explaining that it does not lead to admissible evidence and that it can waste parties' time and money" and "the court is not convinced that metadata is an integral element of a given e-mail"); *Sampson* v. *City of Cambridge*, 251 F.R.D. 172 (D. Md. 2008) (in case seeking

sanctions for alleged spoliation, burden is on party alleging spoliation to establish a reasonable possibility based on "concrete evidence rather than fertile imagination, that access to the lost material would have produced evidence favorable this cause"); *McNally Tunneling Corp* v. *City of Evanston*, No. 00-C-6979, 2001 WL 1568879, at *4 (N.D. Ill. Dec. 10, 2001) (A party requesting production of electronic copies of computer files has the burden to show that hard copies of the identical files are insufficient; this burden was not met when requesting party only made vague assertions supporting need for the electronic version). Given that Noonan has not made this threshold showing, there should be no evidence of deletion of the e-mail, and no instruction to the jury on this subject

2. Consciousness of Guilt.

Even if the Court were nonetheless to allow evidence of the deletion of the electronic version of the e-mail on a "consciousness of guilt" theory, over Staples' vigorous objection, its relevance would be exceedingly narrow. The question before the jury is only whether Mr. Baitler acted with actual malice at the time he sent the e-mail. Therefore, only if the jury were to find that Mr. Baitler intentionally deleted or caused to be deleted the electronic version of the 3:19 p.m. e-mail dated January 20, 2006, after receipt of the litigation hold, and outside of the normal course of business, and out of "consciousness of guilt," could the jury even arguably be permitted (but not required) to weigh that evidence in deciding whether Mr. Baitler sent the e-mail with actual malice.

Noonan's proposed instruction on "consciousness of guilt" is wrong on many levels. Noonan requests that the Court instruct the jury: "If you find that Staples did not take reasonable measures to retain the electronic versions of the e-mail published about Mr. Noonan, you are entitled to infer that the destruction of the electronic versions of the e-mail constitutes evidence

of Staples' consciousness of guilt." This statement illogically and wrongly suggests that even *negligent* deletion of the e-mail could show consciousness of guilt. *But see Vick* v. *Texas Employment Comm'n*, 514 F.2d 734 (5th Cir. 1975) ("mere negligence is not enough, for it does not sustain an inference of consciousness of a weak case"); *Bashir* v. *Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (same). The statement also wrongly suggests that failure of *any* Staples employee to preserve records could show consciousness of guilt, even though it is only Mr. Baitler's motive that is at issue in this case. The statement also wrongly implies that Staples was required to preserve multiple electronic copies of the same e-mail. *See also* Comments to Fed. R. Civ. P. 34 and Comment 12.d to Sedona Conference Principle 12 (Parties need not produce the same electronically stored information in more than one format); *Zubulake* v. *UBS Warbug LLC*, 220 F.R.D. 212, 216 (S.D. N.Y. 2003) ("A party or anticipated party must retain all relevant documents (but not multiple identical copies) in existence at the time the duty to preserve attaches and any relevant documents created thereafter.") Further, consciousness of guilt is *not* premised on notions of a duty to preserve evidence in the first place, but rather involves the act of an individual to destroy something that indicates he or she has something to hide.

Noonan also requests this language: "In other words you may conclude that Staples deleted the electronic versions of the e-mail because they contained electronically stored information which Staples believed would support Mr. Noonan's claim that he was defamed by Staples." Again, this statement is wrong on multiple levels. There is no evidence, and never has been in this case, that the electronic version of the e-mail sent on 1/20/06 at 3:19 p.m. contained *any* unique and relevant information not available from the existing paper and electronic versions of the e-mail. There is certainly no evidence that Jay Baitler believed there was any more

information available on the electronic version of the document. Finally, Noonan cites no authority for his suggestion that the jury can infer from the deletion of the e-mail by individual employees who are not Jay Baitler and in many cases are not even managers some sort of corporate consciousness of guilt by the corporation as a whole. The Court should refuse to give this erroneous instruction.

3. Noonan's Instruction Attempts to Put Before the Jury "Facts" that Are Not in Evidence and That Are Frankly Wrong.

Noonan's instruction also improperly seeks to put before the jury "facts" about "metadata" that are not in evidence, and that are just factually wrong. To name just a few examples:

- It is inaccurate to say that certain pieces of "metadata" would be available in an electronic copy of the e-mail that are missing from the printed copy and the electronic copy forwarded to Staples legal department.

- It is inaccurate to imply that "metadata" of who sent the e-mail is unavailable. The sender information of the e-mail appears in both the printed copy Staples has produced and forwarded electronic copy Staples has offered to produce.

- It is inaccurate to imply that "metadata" of who received the e-mail is unavailable or would exist in the sent version of the e-mail. The to: and cc: information of the e-mail appears in both the printed copy Staples has produced and forwarded electronic copy Staples has offered to produce. Any other "metadata" about the receipt of the message would not exist in the sent version of the e-mail.

- It is inaccurate to imply that "metadata" of when the e-mail was sent is unavailable. The time and date sent information of the e-mail appears in both the printed copy Staples has produced and forwarded electronic copy Staples has offered to produce.

- It is inaccurate to imply that "metadata" of when the e-mail message was received would exist in the sent version of the e-mail. The "metadata" related to when the e-mail received would only exist in a received version of the e-mail.

- It is inaccurate to imply that "metadata" of the electronic route the e-mail traveled from the sender to the recipient's computer would exist in the sent version of the e-mail. The "metadata" related to the electronic route the e-mail traveled would only exist in the received version of the e-mail.

- It is inaccurate to imply that "metadata" of revisions to the e-mail content would exist in the sent version of the e-mail. There is simply not revision "metadata" in the context of Staples' e-mail system.

Further, Noonan's proposed instruction misstates and exaggerates Staples' preservation duty, such as by wrongly implying that Staples was required to send a litigation hold to, and personally speak with, all 1,451 recipients of the Baitler E-mail. Not only would such a request be totally unreasonable and unduly burdensome, but it fails to acknowledge the law, cited above, that Staples need only preserve one copy of each record. Noonan's request also relies heavily on his "preservation letter," a lengthy disputed exhibit that also grossly misstated Staples' preservation duty and should not be before the jury as an exhibit, or indirectly through a jury instruction. The Court should reject Noonan's proposed instruction in its entirety.

III. Objection to Noonan's Requested Damages Instruction.

A. Objection to Proposed Instruction No. 6:

Noonan's proposed damages instruction also contains many misstatements of law. Noonan proposes to instruct the jury that "If the e-mail harmed Mr. Noonan's profession or business reputation then he has an action against Staples even if he cannot prove economic loss." This is wrong. In cases alleging libel (written defamation), rather than slander, plaintiffs need not prove financial loss. *N. Shore Pharm., Inc.*, v. *Breslin Assoc. Consulting, LLC*, 491 F. Supp. 2d 111, 128 (D. Mass. 2007). It has nothing to do with Noonan's business reputation. The jury should not be so instructed, lest they be confused that Noonan is somehow seeking lost income or earnings, which he has stipulated he is not.

Staples objects to the statement that the jury "can award damages to Mr. Noonan for his mental suffering even if you were to find that his reputation was not harmed." Even if that proposition were valid in a libel case involving a *false* statement, Noonan has offered no authority for that proposition with regard to a *true* statement such as those in the Baitler E-mail.

Indeed, it is difficult to imagine how someone could recover for emotional distress for a true statement that did not harm his reputation. Noonan is taking what is already an anachronistic and illogical Statute and rendering it completely nonsensical.

Similarly, there is no basis in law for the proposition that "emotional distress is the natural result of libel" when the alleged libel is *true*. It is illogical and erroneous to suggest that it is somehow "natural" for a person to suffer emotional distress when a true statement is said about him. The Court should reject this instruction.

IV. Other Objections to Noonan's Instructions.

A. Objection to Noonan's Requested Instruction No. 1:

Noonan's requested instruction misstates the number of people to whom the e-mail was sent as 1,600. The actual number was 1,451 recipients of the original e-mail, which was then forwarded to an additional seven people. *See* Stipulated Trial Exs. No. 10-13.

Moreover, while it is undisputed that a mere two sentences of the Baitler e-mail were "of and concerning Noonan," Noonan's proposed instruction that the entire e-mail was a written statement of and concerning Noonan is wrong.

B. Objection to Noonan's Requested Instruction No. 2:

Staples does not intend to challenge at trial that the e-mail, which truthfully stated that Noonan had been terminated for policy violations, could be considered defamatory, meaning tending to impair his standing in the relevant community. *Nicholson* v. *Promoters On Line Listing*, 159 F.R.D. 343, 348 (D. Mass. 1994). Therefore, Staples objects to any instruction concerning the meaning of "defamatory," since the issue is not for the jury to decide. Moreover, Noonan's contention that statements "suggesting that a person lacks a necessary professional characteristic are defamatory" has no application here, where it is undisputed that the e-mail

merely said that he violated company policy, not that he lacked any professional characteristic. The requested language will merely confuse the jury.

C. Additional Objection to Noonan's Requested Instruction No. 3.

Noonan's proposal that the jury be told only that he "does not dispute" that a *single* statement in the Baitler E-mail was true is disingenuous. In fact, the jury must *also* be instructed that this Court and the First Circuit Court of Appeals have *held* that *all* statements in the e-mail were true as a matter of law, and that the jury must accept that holding as the law. This instruction is crucial in order to stay true to the First Circuit's mandate.

V. Reservation of Rights

Staples reserves all rights to present additional objections to Noonan's proposed Jury Instructions at the charge conference or otherwise during trial.

Respectfully submitted,

STAPLES, INC.,
By its attorneys,

/s/ Lynn Kappelman

Lynn Kappelman (BBO No. 642017)
Dawn Solowey (BBO No. 567757)
SEYFARTH SHAW LLP
World Trade Center East
Two Seaport Lane
Suite 300
Boston, MA 02210-2028
Telephone: (617) 946-4800
Telecopier: (617) 946-4801
lkappelman@seyfarth.com
dsolowey@seyfarth.com

Dated: October 5, 2009

CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on October 5, 2009.

/s/ Lynn Kappelman