

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

iXL ENTERPRISES, INC.,)
a Delaware Corporation,)
)
Plaintiff,)
)
v.) Civil Action No. 2000CV30567
)
JOHN DOES 1-10, individuals,)
)
)
Defendants.)

**MEMORANDUM IN SUPPORT OF
MOTION TO STRIKE COMPLAINT**

This is an action in which iXL Enterprises, Incorporated, a corporation that is publicly traded on the NASDAQ stock exchange, seeks to prevent a member of the public from discussing its affairs in a public forum on the World Wide Web, specifically, a message board maintained by Yahoo! Over the past year, iXL has suffered some severe financial reverses, losing more than 95% of its value, laying off more than two-thirds of its workforce, closing many of its offices around the world, and dismissing several of its principal executive officers. At the same time, iXL has been the target of several shareholder class actions, there have been allegations of improper selling of shares by insiders and discussion of documents filed by iXL with the federal Securities and Exchange Commission, and iXL has been threatened with litigation for closing facilities without the advance notice required by the federal laws. These proceedings, and a number of related concerns, have been avidly discussed on Yahoo!'s iXL message board, including several messages posted by the defendant in this case, sued as John Doe but known on the message board by his pseudonym, "wrestlinman_99". As of the time this brief is being submitted, many hundreds of citizens have participated in the discussions on Yahoo! message board about iXL, submitting nearly 10,000

messages; an unknown number of other persons have visited the message board to see what others are saying about iXL.

The complaint in this case alleges that, because Doe is allegedly an employee of plaintiff iXL, his public statements about iXL violated Doe's supposed employment agreement and violated as well the common law duties that an employee owes to his employer. It should have been apparent to the plaintiff that its complaint arises out of acts by Doe that "could reasonably be construed as an act in furtherance of the right of free speech . . . under the Constitution of the United States or the Constitution of the State of Georgia in connection with an issue of public interest or concern." Georgia Code Section 9-11-11.1(b). As a result, both the plaintiff and its attorneys were required to file, contemporaneously with the complaint, a written verification under oath showing, among other things, that they had a reasonable and good faith basis for the action, and that the statements over which the suit has been filed are not privileged under Georgia Code section 51-5-7(4). *Providence Constr. Co. v. Bauer*, 229 Ga. App. 679, 680, 494 S.E.2d 527 (1997). No such verification was filed with the complaint.

Instead, the plaintiff immediately began discovery for the purpose of identifying the defendant, in violation of his rights under the First Amendment and the Georgia Constitution. Accordingly, defendant immediately filed a motion to quash the plaintiff's discovery, accompanied by extensive evidence establishing that the defendant is not one of plaintiff's employees. That motion is pending, and plaintiff's response is due on January 10, 2001.

At the same time that he filed his motion to quash, defendant provided the plaintiff's counsel with statutory notice of its failure to verify the complaint as required by the anti-SLAPP statute. *See* attached letter of December 11, 2000. Plaintiff's counsel received this letter by e-mail and by telecopier on December 11, *see* attached fax journal and email properties printout, and by mail on

December 18, 2000. *See* attached return receipt. Although more than ten days have expired since this notice was received, plaintiff has neither submitted the required verification or offered any explanation for its failure to do so. Under established caselaw, once this ten-day period has expired, the failure to verify the complaint is not an amendable defect. *Davis v. Emmis Pub. Corp.*, 244 Ga. App. 795, 797-798 (2000). Accordingly, the Court should strike the complaint in its entirety, as provided by Georgia Code Section 9-11-11.1(b).

CONCLUSION

The motion to strike the complaint should be granted.¹

Respectfully submitted, this 2^d day of
January, 2001

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¹Defendant will make a claim for attorney fees after this case is decided on the merits. Plaintiff's counsel has previously been advised of our intentions in this regard.