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MASSCHUSETTS APPEALS COURT -- No. 2009-P-1838

SUPREME JUDICIAL COURT -- No. SJC-10722

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PSY-ED CORPORATION d/b/a EXCEPTIONAL PARENT and  
JOSEPH VALENZANO, JR.,  
Plaintiffs

v.

STANLEY KLEIN and KIMBERLY SCHIVE,  
Defendants

STANLEY KLEIN,  
Defendant/Plaintiff in  
Counterclaim/Appellee

v.

PSY-ED CORPORATION d/b/a EXCEPTIONAL PARENT and  
JOSEPH VALENZANO, JR.,  
Plaintiffs/Defendants in  
Counterclaim/Appellants,  
KENNETH ROSSANO, DAVID HIRSCH, ROBERT STRIANO, DONALD  
S. CHADWICK, C. KENNETH MEHLING, and ROBERT K.  
HOPKINS, JR.,  
Third-Party Defendants/  
Appellants

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ON APPEAL FROM JUDGMENTS OF THE SUPERIOR COURT

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REPLY BRIEF OF THIRD-PARTY DEFENDANT/APPELLANT  
C. KENNETH MEHLING

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### ISSUES PRESENTED IN REPLY

1. Whether C. Kenneth Mehrling ("Mehrling") acted with actual malice, which is necessary to support the judgment of tortious interference with contractual relations against him and in favor of Stanley Klein ("Klein"), when the record does not contain any evidence of actual malice, the Superior Court failed to make any findings of actual malice, and Klein inferred such a finding without any support in the record or law.

2. Whether the Superior Court erred by failing to hold an evidentiary hearing concerning damages when it explicitly ordered such a hearing.

3. Whether, as argued by Klein on cross-appeal, Mehrling is liable under M.G.L. c. 93A, § 11 when (1) he did not participate in the acts at issue and (2) the Superior Court properly found that the dispute arose out of a private employment relationship, thereby not falling within c. 93A protections.

### DISAGREEMENT WITH STATEMENT OF FACTS

There are two significant inaccuracies in Klein's Brief.<sup>1</sup> First, throughout Klein's description of the

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<sup>1</sup> "Klein Brief" refers to the Brief of Appellee and Cross-Appellant Stanley D. Klein. "Mehrling Brief" refers to the Brief of Third-Party Defendant/Appellant

underlying facts and proceedings, he misleadingly includes Mehrling in his references to "Appellants." See Klein Brief, p. 6 n.3. For instance, "Appellants' Revisionist History" (id. at 5); "Appellants were the parties relentlessly pushing the litigation for years" (id. at 8); "Appellants were sanctioned for their misconduct not just once, but four times" (id.); "Appellants stunningly 'waived' nearly all claims against Schive and Klein, admitting that they have no evidence of damages" (id. at 8-9); and "Appellants' sweeping case against Klein was reduced . . . to one or two allegedly defamatory statements. . . but still they relentlessly pressed to trial" (id. at 9). None of these statements are true with respect to Mehrling.

Many of the prior proceedings, including those mentioned above, that Klein highlights occurred before Mehrling became a third-party defendant on April 13, 2005. See A001281. Mehrling was not named as a third-party defendant until after discovery had closed and nearly five years after Klein filed his third-party complaint. See A001177, 1281; Mehrling Brief, p. 5 n.3. Though the record contains evidence of

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C. Kenneth Mehrling. "A\_\_" refers to record citations, "Tr. volume/page:line" refers to the trial transcript, and "EX\_\_" refers to trial exhibits.

Valenzano's ill will towards Klein, there is no evidence, in the record or otherwise, that Mehrling acted out of actual malice towards Klein. See infra pp. 6-10. Mehrling was never sanctioned, as Klein implies, and Mehrling never brought any claims against Klein. See A000001-51, 281-289. Accordingly, Klein's attempt to generally sweep Mehrling in with other Defendants is unjustified.

The second significant inaccuracy in Klein's Brief is that he suggests Mehrling advocated "litigating aggressively" against him. See Klein Brief, pp. 10, 18, 56 n.30. This is simply not true. During a Board meeting, Mehrling moved to pull out of the arbitration regarding Kimberly Schive's discrimination case, given the Board's view that it lacked merit and his concern to protect the investment of the Company. See EX0059; TR. II/73:3-23. This had nothing to do with litigating against Klein.

#### REPLY ARGUMENT

**I KLEIN FAILS TO CITE A SINGLE ACTION BY MEHRLING TO SUPPORT THE JUDGMENT OF TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS.**

**A Klein Confuses the Legal Standard Necessary to Prove the Element of Improper Motive or Means.**

Klein confuses the legal standard necessary to prove the element of improper motive or means in the

context of a corporate director or officer. See Klein Brief, pp. 31-33. Specifically, Klein argues that Appellants wrongly relied on the "actual malice" standard discussed in Blackstone v. Cashman, 448 Mass. 255 (2007), a case decided five months after the Superior Court's liability decision. Id. at 32, n.18.

Massachusetts courts, however, applied the "actual malice" standard long before the Blackstone decision. See e.g. King v. Driscoll, 418 Mass. 576, 587 (1994) (citations omitted) (reversing judgment against directors because motivation of personal gain and personal dislike do not constitute actual malice); Gram v. Liberty Mut. Ins. Co., 384 Mass. 659, 663 (1981) (citing Steranko v. Inforex) (discussing actual malice standard in context of corporate officials and reversing judgment); Steranko v. Inforex, Inc., 5 Mass. App. Ct. 253, 272-273 (1977) ("Because Horgan's behavior toward Steranko occurred in the course of his duties as a corporate officer of Inforex, he enjoyed a qualified privilege against liability for interference with Steranko's contractual relationship with the corporation, subject, however, to defeasance if his conduct emanated from actual malevolence or malice").

The Court's application of the "actual malice" requirement is entirely proper.

**B Klein Cites only to Valenzano's Ill Will and Personal Animus Towards Klein.**

Throughout Klein's argument concerning tortious interference with contractual relations, he provides record citations only to Valenzano's ill will and personal animus towards Klein. See Klein Brief, pp. 20 ("motivated by the vindictive personal animus of Valenzano"), 28 n.11 ("Elsewhere in the trial court's decision . . . Valenzano was found to be acting from personal animus against Klein"), 30 ("It was motivated by personal animus on the part of Valenzano."), 32 ("the court expressly found that Valenzano's personal animus against Klein, brought into the Board meetings by Valenzano as a director, motivated the Board's decision."), 34 ("Valenzano's vindictiveness and anger at Klein . . . Valenzano's angrily papering Klein's Psy-Ed personnel file with accusations"), and 35 ("Valenzano's falsely writing to the Psy-Ed Board that Klein was making 'inaccurate and misleading' statements . . . Valenzano's consistent pattern of misrepresentations and damaging insinuations of wrongdoing about Klein").

**C Klein Fails to Cite Any Page in the Record Showing that Mehrling Acted with Actual Malice Towards Klein.**

Without any support in the record, Klein attempts to create inferences of Mehrling's actual malice out of thin air. For example, Klein states:

The trial court found that Valenzano's and the Director's decision was based on improper motives rather than a legitimate business decision. [A001434]. It was motivated by personal animus on the part of Valenzano. [Id.] The resulting hostility and 'ill will' by Valenzano and the Directors could not be a legally satisfactory motive for interfering with a binding contract.

See Klein Brief, p. 30 (emphasis added). However, that cited portion of the decision discusses only Valenzano – not any other Directors:

On January 6, 2000, the Board voted to stop payments on Klein's note. Klein has presented sufficient evidence to show the decision to suspend payment on the Note was based on improper motives rather than a legitimate business decision. The testimony at trial indicated that the decision to suspend payments was motivated by personal animus on the part of Valenzano. Such hostility cannot provide a legally satisfactory basis for interference with binding contractual relations. Draghetti v. Chmielewski, 416 Mass. 808, 817 (1994) (evidence sufficient to demonstrate 'ill will' is sufficient to demonstrate improper motive). Valenzano had recently learned of Klein's second affidavit in Schive's MCAD matter, providing the impetus for him to propose a cessation of payments.

See A001434. Klein's statement that the Superior Court found that the Directors (such as Mehrling) harbored the same "ill will" as Valenzano is pure fabrication. See Klein Brief, p. 30. Without any supporting citation to the record, Klein makes the same flatly untrue statement on page 32: "[t]he trial court also found indications of hostility and 'ill will' by the Directors." Id. at 32.

Klein also uses meaningless and unsubstantiated phrases in an attempt to extend Valenzano's personal animus to the other Directors. He describes the Directors' actions, for example, as "indulging the personal animus of" Valenzano (id. at 1, emphasis added). He writes that "[Valenzano's] ill will and spite, extended to Psy-Ed and the Directors" (id. at 28, emphasis added), and "[t]hat the Directors adopted and participated in Valenzano's vengeful campaign cannot be denied" (id. at 35, emphasis added). Klein fails, however, to cite to any page in the record supporting these false characterizations or providing any evidence that Mehrling acted with actual malice.

**D To Infer Mehrling's Actual Malice, Klein Mischaracterizes Tangential Facts and Fails to Cite Any Supporting Case Law.**

The one full paragraph in Klein's brief that discusses the Directors states, in its entirety:

That the Directors adopted and participated in Valenzano's wrongful campaign cannot be denied. They failed to manifest any of the requisite objectivity or independence of thought. (Rossano testified that the Board was 'adamant.' [Tr. II, p. 66] They flouted the advice (and vote) of their experienced chairman, Rossano, that Klein's promissory note was legally binding and should be honored. [Tr. II, p. 79]. Each of them voted to dishonor the Company's note, in the face of Rossano's contrary advice. No 'legitimate corporate interest' in such actions was advanced at trial. The trial court made no error.

See Id. at 35-36. Klein, however, does not cite to the record or any legal authority to support his contention that Mehrling could somehow "adopt and participate in" another Board member's "wrongful campaign," especially without any evidence that Mehrling himself acted with actual malice.

No legal authority exists that equates failure to demonstrate "requisite objectivity or independence of thought" (even if there were evidence of such failure) with "actual malice" in a claim for tortious interference with contractual relations. Klein cites to Rossano's trial testimony that the Board was "adamant." Id., citing Tr. II, p. 66. But Rossano's trial testimony had nothing to do with the Directors somehow "adopting" Valenzano's actual malice. Rather, it concerned the Board's recognition of Klein's contradictory affidavits in the Schive matter:

Q: And if I understand your answer, then, you were hesitant to bring suit in the end of 1999?

A: Yeah, I probably was. My board was adamant that information surfaced that proved beyond a doubt that Stan Klein had issued conflicting statements about the issue of Ms. Schive and about the company. I was not, frankly, surprised. I've always had difficulty with Stan Klein's veracity. Didn't think then, he wasn't with me, truthful, and I don't think he is now.

See Tr. II/66:10-19 (emphasis added).

Without citing the record, Klein asserts that Mehrling voted "in the face of Rossano's contrary advice." See Klein Brief, p. 36. The only advice contained in the record, however, is that of the Board's legal counsel, who advised the Board to act as it did. See EX0060-61; trial testimony cited in Mehrling Brief, pp. 28-29, n.11.

Lastly, Klein contends that Mehrling and the other Directors could not have acted in Psy-Ed's interest because the amount of legal fees incurred in this lawsuit is now greater than the amount owed under the promissory note itself. See Klein Brief, p. 36 n. 21. This "hindsight" argument is both illogical and irrelevant as to whether Mehrling and/or the other Directors acted with actual malice.

In short, Klein presents no evidence whatsoever to show that Mehrling acted with actual malice. Mehrling had no personal history with Klein and no reason for personal animus against him. Accordingly, the Court should reverse the judgment against Mehrling for tortious interference with contractual relations.

**II KLEIN ALSO FAILS TO CITE ANY ACTIONS BY MEHRLING TO SUPPORT THE AWARD FOR EMOTIONAL DISTRESS DAMAGES.**

Klein's brief states, without citation, that he "testified at trial to the emotional distress caused by Appellants' wrongful conduct." Id. at 42. Klein, however, never testified that Mehrling caused him any emotional distress. See Tr. IV:175-201; V:19-147. Accordingly, the Superior Court erred in assessing Mehrling jointly and severally liable for these additional damages.

**III KLEIN MISCHARACTERIZES MEHRLING'S ARGUMENT THAT THE SUPERIOR COURT ERRED BY FAILING TO HOLD AN INTENDED EVIDENTIARY HEARING CONCERNING DAMAGES.**

Klein misconstrues Mehrling's argument concerning the Superior Court's failure to hold an evidentiary hearing regarding damages, including attorney's fees. This section of Klein's brief begins by stating,

Appellants assert that the award of Klein's attorneys' fees is reversible error because the necessary evidence was not properly presented at trial. . . . It is patently

unfair, therefore, for Appellants now to argue that it was reversible error for the trial court to follow a procedure that they specifically invited and requested.

See Klein Brief, pp. 43-44. As laid out in the factual background section of Mehrling's Brief at pages 15-17, counsel for Mehrling, the other Directors, and Psy-Ed agreed to postpone the Superior Court hearing evidence on the reasonableness of attorney's fees until the Superior Court determined whether such fees would be awarded. Id. at 16, citing Tr. II/177:8-23. Subsequently, the Superior Court (Houston, J.) entered an Order stating, "[a] hearing will be held to determine damages for Counterclaims I and II (Klein) and Counterclaims I and II (Schive)." See A001444. Klein admits that the intended evidentiary hearing concerning damages never occurred. See Klein Brief, p. 46 ("and the successor judge properly exercised her discretion in deciding that no evidentiary hearing was necessary").

By arguing that Mehrling complains of evidence "not [being] presented at trial" (id. at 43), Klein mischaracterizes Mehrling's argument entitled, "The Superior Court Erred by Failing to Hold a Hearing Concerning Damages." See Mehrling Brief, pp. 45-50. Mehrling simply argues that the Superior Court ordered

a damages hearing to occur after the trial, and it erred by failing to hold the damages hearing before awarding damages. Id.

Klein also challenges the date on which he filed two affidavits of his expert legal fee witness, Michael C. Gilleran, improperly citing to the affidavits themselves as evidence of the filing date. See Klein Brief, pp. 43 (citing A1378-90, Gilleran's affidavit signed July 26, 2006) and 45 (citing A001378-90 and A001928-1939, affidavit signed July 26, 2006, and A001940-42, supplemental affidavit signed April 26, 2007). Klein contends that he submitted the first affidavit with his Proposed Findings of Fact and Conclusions of Law in July 2006. Id. at 45. That filing, which was not included in the record, occurred on July 26, 2006, but the docket does not reflect that the affidavits were provided. See A000031. Unlike the expert witness in Schive's case, whose affidavit was filed on July 7, 2006 (id.), Gilleran's affidavits never appear on the docket. See A00001-51.

The only place Gilleran's affidavits appear in the record are as exhibits to Klein's Motion for Damages and Fees, and for Entry of Judgment, which was filed on May 2, 2007, after the Superior Court's

August 18, 2006 liability decision. See A001737-2236 specifically as Exhibits D & E at A001928-1942); A001444. See also Mehrling Brief, p. 46. Mehrling, in fact, was never provided an opportunity to contradict the two affidavits. Instead, he relied upon the Superior Court's Order stating it intended to hold a damages hearing, which never occurred.<sup>2</sup>

Further, the filing dates of the Gilleran's affidavits are inconsequential to the Superior Court's error of failing to hold an evidentiary hearing concerning damages. It is undisputed that the trial judge did not make any findings concerning damages (A001418-1444) and intended to hold an evidentiary hearing (A001444), and the successor judge awarded damages based on the affidavits submitted and without holding the intended evidentiary hearing (A002356-2366). As argued in Mehrling's Brief, the failure to hold an evidentiary hearing concerning damages and the reasonableness of attorney's fees constitutes reversible error, and the Superior Court (Hamlin, J.)

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<sup>2</sup> Even if Klein had filed the first affidavit (signed July 26, 2006) before the Superior Court's liability decision (entered August 18, 2006), the Superior Court clearly stated in its decision that it intended to hold a damages hearing. See A001444.

case erroneous findings and conclusions concerning attorney's fees. See Mehrling Brief, pp. 47-50.

**REPLY ARGUMENT CONCERNING CROSS-APPEAL**

I THE SUPERIOR COURT PROPERLY ORDERED JUDGMENT AGAINST KLEIN ON HIS CLAIM OF UNFAIR AND DECEPTIVE TRADE ACTS AND PRACTICES UNDER M.G.L. c. 93A.

**A Standard of Review.**

The standard of review for bench trials provides that "[f]indings of fact shall not be set aside unless clearly erroneous." Anthony's Pier Four, Inc. v. HBC Assoc., 411 Mass. 451, 476 (1991). See Mass. R. Civ. P. 52(a). Appellate courts have defined a "clearly erroneous" finding as one that, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Kendall v. Selvaggio, 413 Mass. 619, 621 (1992).

**B Mehrling Was Not a Board Member at the Time of Klein's Alleged Unfair and Deceptive Acts.**

Klein argues that the Superior Court made erroneous rulings concerning the relationship and transaction between "Appellants" and Klein. See Klein Brief, pp. 68-72. Specifically, Klein contends that the relationship fell within a commercial context because Appellants negotiated and executed the purchase and resale of his twenty-one percent interest

in Psy-Ed and then stopped payments due to him on the promissory note. Id. at 68-69.

Again, however, Klein misleadingly uses the general phrase "Appellants" without excluding Mehrling. Id. at 68-72. Mehrling was not a member of the Board when it negotiated and executed the purchase and resale of Klein's shareholder interest. See Tr. III 53:10-18; 56:5-8; EX252-254. Accordingly, Mehrling did not participate in the actions underlying Klein's 93A claim, and the Superior Court properly granted judgment in favor of Mehrling on this claim.

**C The Superior Court Properly Found that the Transaction Between Psy-Ed and Its Former Employee, Klein, was Private in Nature, Thereby Not Occurring Within Trade or Commerce.**

The Superior Court also accurately granted judgment in favor of Mehrling based on well-established case law holding that disputes arising out of an employment relationship between an employee and employer are not covered by M.G.L. c. 93A. See A001440-1441, citing Manning v. Zuckerman, 388 Mass. 8, 12 (1982).<sup>3</sup> See also Michael C. Gilleran, 52 Mass.

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<sup>3</sup> Additional cases have reaffirmed the Superior Court's finding that M.G.L. c. 93A does not apply to claims arising out of an employment relationship. See Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 564 (2008) (stating "disputes stemming from an employment relationship" are classified as an intra-

Prac., Law of Chapter 93A, § 2.8 (2010). Klein's attempt to distinguish Manning based on him being "neither an employee nor part of the corporate governance of Psy-Ed" at the time of "Appellants' actions" misstates the facts of that case and Massachusetts law. See Klein Brief, pp. 71-72.

Similar to this case, Manning involved a claim against a former employer for its allegedly unfair and deceptive conduct arising out of an employment agreement and failure to pay promised additional retirement benefits. Manning, 388 Mass. at 8-10.

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enterprise" dispute and are thus barred under 93A); Falmouth Ob-Gyn Assoc., Inc. v. Abisla, 417 Mass. 176, 177 n.1 (1994) ("In any case, appeal would have been fruitless. General Laws c. 93A does not apply to claims arising out of an employment relationship [concerning a former employee who had allegedly violated a covenant not to compete contained in his employment contract].").

Massachusetts cases, however, have determined that the bar to 93 claims does not apply in certain situations, which are inapplicable here because Klein's alleged conduct arises directly from his employment relationship. Such exceptions include when the claim arises from the employer's conduct during the hiring process, see Mitchelson v. Aviation Simulation Tech., Inc., 582 F. Supp. 1, 2 (D. Mass. 1983); is brought by an independent contractor, see Schinkel v. Maxi-Holding, Inc., 30 Mass. App. Ct. 41, 49-50 (1991); or is based on conduct "independent of and did not arise from" the employment relationship, see Informix, Inc. v. Rennell, 41 Mass. App. Ct. 161, 163 n.2 (1996); Descartes Sys. Group, Inc. v. Celarix, Inc., No. 00-05042, 2001 WL 721493, at \*2 (Mass. Super. June 20, 2001) (involving disclosure of trade secrets).

Upholding the claim's dismissal, that court recognized that an employee and employer are not engaged in trade or commerce with each other, that their relationship is 'private in nature' and [does] not occur in the ordinary 'conduct of any trade or commerce' as contemplated by the statute." Id. at 14-15.

In addition, Massachusetts courts have generally barred 93A claims based on actions that occurred post-employment. See Informix, Inc. v. Rennell, 41 Mass. App. Ct. 161, 162-163 (1996) (vacating 93A judgment and stating "[i]t is without consequence that [defendant] was no longer [plaintiff's] employee when he acted in disregard of the contract. Manning held simply that any claim arising from the employment relationship was not actionable under c. 93A; it imposed no limitation that the employment relationship be ongoing."). See also Sargent v. Tenaska, Inc., 914 F. Supp. 722, 731 (D. Mass. 1996) (stating appropriate inquiry "is not when the alleged misconduct took place" but whether, as a whole, the allegations arose out of an employment contract); Powderly v. Metrabyte Corp., 866 F. Supp. 39, 44 (D. Mass. 1994) (relying on Manning to bar 93A claim, which was based on denial of bonus more than three years after employment ended).

But see Peggy Lawton Kitchens, Inc. v. Hogan, 18 Mass. App. Ct. 937, 939 (1984) (affirming 93A judgment based on misappropriated trade secret), *clarified in Informix, Inc.*, 41 Mass. App. Ct. at 163 n.2 (stating trade secret theft in Peggy Lawton "was independent of and did not arise from the former employment relationship").

The Superior Court also properly found that, as a shareholder of Psy-Ed, Klein could not bring a claim involving this private transaction under M.G.L. c. 93A. See A001440-1441, citing Szalla v. Locke, 421 Mass. 448, 451 (1995) and Newton v. Moffie, 13 Mass. App. Ct. 462, 467-469 (1982). Klein's attempt to distinguish Szalla by focusing on the status of that business as a start-up business misses the point. See Klein Brief, p. 71. As the Szalla decision stated:

[i]t is well established that disputes between parties in the same venture do not fall within the scope of G.L. c. 93A, § 11. . . . The development of c. 93A suggests that the unfair or deceptive acts or practices prohibited are those that may arise in dealings between discrete, independent business entities, and not those that may occur within a single company.

Szalla, 421 Mass. at 451 (citations omitted).

In addition, Klein distinguishes the partnership in Moffie based on, he argues, Psy-Ed's change of control and additional third-party investors. See

Klein Brief, p. 71. Without citation, Klein states that "the Court found a pervasive business context," and, he contends, his departure from Psy-Ed occurred during its restructuring with additional investors and another office. Id. at 69-70. This argument belies the fact that the allegedly deceptive acts occurred in a private transaction within a single entity (i.e., Psy-Ed purchasing and reselling his shares of stock and subsequently stopping payment on the promissory note) and, therefore, did not occur "in the ordinary course of a trade or business." Milliken & Co. v. Duro Textiles, LLC, 451 Mass. 547, 563 (2008), citing Linkage Corp. v. Trustees of Boston Univ., 425 Mass. 1, 23 n.33 (1997). See Dorfman v. TDA Indus., Inc., 16 Mass. App. Ct. 714, 720-721 (1983) (upholding dismissal of 93A claim, despite recognizing how employment agreement executed in partial consideration of plaintiff's sale of stock "was undoubtedly an important part of the overall transaction").

Massachusetts courts have "limited the reach of G.L. c. 93A, § 11, to exclude intra-enterprise disputes because they are more similar to purely private disputes and are not 'commercial transaction[s] . . . in the sense required by c. 93A.'"

Linkage Corp., 425 Mass. at 23 n.33 (citing Szalla and Manning). See Milliken & Co., 451 Mass. at 563 (citations omitted); Evans v. Certified Eng'g & Testing Co., 834 F. Supp. 488, 499-500 (D. Mass. 1993) (dismissing 93A claim, which arose from former employer's deprivation of plaintiff's equity interest in employer). Accordingly, the Court should affirm the Superior Court's judgment in favor of Mehrling on Klein's M.G.L. c. 93A claim.

#### **CONCLUSION**

For the foregoing reasons, this Court should (1) vacate the judgment finding Mehrling liable for tortious interference with contractual relations, (2) modify the award of damages to exclude Mehrling as being jointly and severally liable to Klein for damages, (3) vacate the judgment finding Mehrling liable for Klein's attorney's fees, and (4) affirm the judgment in favor of Mehrling on Klein's claim under M.G.L. c. 93A. In the alternative, this Court should remand the case to the Superior Court to properly compute damages.

Respectfully submitted,  
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**CERTIFICATE OF COMPLIANCE (RAP 16K)**

I, A. Hether Cahill, hereby certify that this brief complies with all the rules of court that pertain to the filing of appellate briefs.

*Hether Cahill*

A. Hether Cahill

PROOF OF SERVICE

Under penalties of perjury, I hereby certify that I caused two true copies of the above document to be served by hand upon the below-listed attorneys-of-record on April 28, 2010.

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