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FAX COVER PAGE

TO:	FAX NO.:
Mr. Kris Klein	1-888-314-5997

AND TO:

DATE: 2/11/2009 9:07:50 AM

OUR FILE #: 08-1117

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FROM: James K. McDonald

(Please call Virginia Dennigan at 416-979-6416 if you do not receive the entire transmission)

MESSAGE: Re: CUPE et al. ats Thompson

Please see attached letter and Statement of Defence of the Defendants herein.

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February 10, 2009

Via Facsimile [(416) 539-0565]

Mr. Brian Shell
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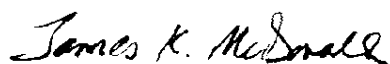
Mr. Kris Klein
Law Office of Kris Klein
15 Northview Road
Ottawa, ON K1E 6A6

Dear Mr. Shell and Mr. Klein:

Re: CUPE et al. ats Thompson

Attached hereto is the Statement of Defence of the Defendants Canadian Union of Public Employees and Paul Moist, which is being served on you pursuant to the *Rules of Civil Procedure*.

Yours very truly,



James K. McDonald

JKM:vd/cope 343

Encl.

c.c. Ms. Nancy Rosenberg (via E-mail nrosenberg@cupe.ca)
Ms. Mona Elhilali (via E-mail melhilali@cupe.ca)
Mr. Humberto Dasilva (via E-mail h.dasilva@accomponent.ca)
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JUST RESULTS

TORONTO • OTTAWA

Sack Goldblatt Mitchell LLP *Lawyers*



Court File No. 08-CV-41455

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

KATHERINE THOMPSON

Plaintiff

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES, PAUL MOIST, LESLEY SWANN

Defendants

**STATEMENT OF DEFENCE OF THE DEFENDANTS
CANADIAN UNION OF PUBLIC EMPLOYEES AND PAUL MOIST**

1. The defendants Canadian Union of Public Employees ("CUPE National") and Paul Moist ("Moist") admit the allegations in paragraphs 2 (second sentence only), 3 (second sentence only), 4, and 5 of the Statement of Claim.
2. CUPE National and Moist deny the allegations in paragraphs 3 (first sentence only), 6 to 8, 10, and 12 to 25 inclusive of the Statement of Claim, except to the extent that such allegations are explicitly admitted below.
3. CUPE National and Moist have no knowledge in respect of the allegations in paragraphs 2 (first sentence only), 9, and 11 of the Statement of Claim.

CUPE National, Moist and the Air Canada Component of CUPE National

4. Moist is the President of CUPE National. At all times, including all material times referred to in the Statement of Claim and in the Plaintiff's Response to these Defendants' Demand for Particulars and in the Statement of Defence of the Defendant Lesley Swann, he was acting in the performance of his duties as President. There is no basis whatsoever for any action to be brought against Moist personally and naming him as a Defendant is scandalous and has been done in bad faith by the Plaintiff.

5. At all material times, the Plaintiff was the elected Secretary-Treasurer and the Defendant was the elected President of the Air Canada Component of CUPE National ("ACC"), which is a separate and distinct legal entity from CUPE National. The ACC is an organization which has been established pursuant to the CUPE National Constitution and the By-laws of the Airline Service Division of CUPE National. The ACC is comprised of all local unions chartered by CUPE National who have members employed by Air Canada.

6. The ACC engages in collective bargaining on behalf of the CUPE locals referred to in paragraph 5 and also engages in lobbying and rallying political and public support in order to improve and protect the employment conditions of its members. It makes representations and submissions to Parliamentary and other legislative Committees with this goal in mind.

7. The ACC has its own Executive (the Air Canada Component Executive, "ACCEX") and its own By-laws which govern the duties and responsibilities and

accountability of the members of the ACCEX, including the Plaintiff and Swann. It has its own budgets and collects its own dues and assessments.

8. Neither Moist nor CUPE National have any control over the day to day operations of the ACC or the ACCEX or the Plaintiff or Swann. Moist is not a member of ACCEX.

9. Neither Moist nor CUPE National are liable at law for any of the actions, obligations, or omissions of the ACC, the ACCEX, the Plaintiff or Swann who are not CUPE National's officers or employees.

The ACC Computer and Email System

10. The ACC has its own computer system to perform the computer work of the ACC. The ACC retains, hires and controls its own technical consultants to support, operate and maintain that computer system. Contrary to the allegations in paragraph 8 of the Statement of Claim, the technical consultant, Axel Weltner, referred to by the Plaintiff in the said paragraph 8 and in paragraph 2 of her Response to these Defendants' Demand for Particulars, was retained by the ACC in a contractual relationship (the particulars of which are not known to these Defendants) and is under the control and direction of the ACC. Neither CUPE National nor Moist have any control or direction over Axel Weltner.

11. As Swann pleads at paragraph 15 of her Statement of Defence, "the ACC's email system is part of the ACC server and is the sole and exclusive property of the ACC". Neither Moist nor CUPE National own, host, operate, or manage any

component of the ACC's server, which includes the email system. Contrary to the allegations at paragraph 6 of the Statement of Claim, the Plaintiff was not assigned an email account by CUPE National but rather by the ACC. In that regard, Moist and CUPE National rely upon the statements in paragraphs 14 and 15 of Swann's Statement of Defence.

12. As Secretary-Treasurer of the ACC and a member of the ACCEX, the Plaintiff was well aware of the ACC's ownership of the ACC computer system and the relationship between Weltner and the ACC. In correspondence related to this matter, the Plaintiff has referred to the "Component's IT (information technology) consultant" or the "Component's computer consultant". In correspondence with Moist, the Plaintiff alleged that it was Swann who instructed a technical consultant to provide her with unauthorized access to the Plaintiff's email account.

The Alleged Invasion of Privacy

13. Moist and CUPE National first became aware of the actions of Swann in accessing the Plaintiff's email account when the Plaintiff wrote to Moist on or about November 24, 2007 requesting that Moist investigate Swann for an alleged breach of her privacy in accessing the Plaintiff's ACC email account. Contrary to the allegations in paragraph 10 of the Statement of Claim, the Plaintiff at no time "confronted" Moist or CUPE National regarding their conduct in allegedly invading her privacy.

14. Contrary to allegations in paragraph 32 of Swann's Statement of Defence, neither the CUPE National legal representative, Mona Elhilali ("Elhilali") nor the

CUPE National Servicing Representative, Humberto Dasilva ("Dasilva") gave Swann either legal advice or any other advice regarding the legality of Swann accessing the Plaintiff's ACC email account prior to Swann taking the actions that Swann has admitted taking in paragraph 22 to 24 of her Statement of Defence. Neither Elhilali nor Dasilva had any prior knowledge that Swann intended to access the Plaintiff's ACC email account. They first learned of Swann's actions when the Plaintiff complained of those actions.

15. CUPE National and Moist deny any involvement whatsoever in Swann's accessing and/or reviewing the Plaintiff's email communications.

16. In any event, if the allegations made by Swann in paragraph 16-25 of her Statement of Defence are true, the Plaintiff did not have a reasonable expectation of privacy in respect of her email communications on her ACC account, contrary to the allegations in paragraph 12 of her Statement of Claim. If she subjectively had such an expectation, it was not objectively reasonable.

17. In the alternative, if the Plaintiff did have a reasonable expectation of privacy in the circumstances, which is not admitted but is expressly denied, the Plaintiff waived, or is deemed to have waived, that expectation of privacy if she engaged in the actions that were detrimental to the ACC and/or contrary to the proper performance of her duties and responsibilities as ACC Secretary-Treasurer and as a member of ACCEX that have been alleged by Swann in her Statement of Defence.

18. In that regard, CUPE National and Moist relied solely upon the information and reports received from Swann as to the actions of the Plaintiff, and in that regard rely

upon the allegations in paragraphs 16 to 25 of Swann's Statement of Defence to the extent that those allegations can be established by Swann.

The Alleged Defamation

19. Contrary to the allegations in paragraphs 15 and 17 of the Statement of Claim, CUPE National and Moist did not publish a "Special Report to the Membership" in January 2008 (the "Report"). CUPE National and Moist had no involvement in the publication of the Report. CUPE National and Moist repeat and adopt the admission in paragraph 34 of Swann's Statement of Defence, wherein Swann admits that she drafted and released the ACC publication entitled "Special Report to the Membership" which is the subject matter of the Plaintiff's claim.

20. In that regard, Dasilva had advised Swann not to respond to the Plaintiff's message to the membership referred to in paragraph 36 of Swann's Statement of Defence but Swann refused to follow that advice.

21. The Plaintiff, in her Response to these Defendants' Demand for Particulars with respect to the Statement of Claim, alleged that only Swann was the author of the Report. She also alleged that "CUPE Staff member Cathie Bumbaca was instructed to send it (the Report) to printing for issuance". At all material times Bumbaca was an administrative assistant employed by the ACC, not by CUPE National. CUPE National had no direction or control over Bumbaca.

22. Neither CUPE National nor Moist are in any way whatsoever liable in law for the publication or distribution of the Report.

23. In the alternative, if CUPE National or Moist are found to have published the Report which is not admitted but is expressly denied, CUPE National and Moist deny that the words therein were defamatory of the Plaintiff. CUPE National and Moist rely upon the allegations in paragraphs 34 to 37 and 39 to 41 of Swann's Statement of Defence to the extent that those allegations can be established by Swann.

Moist and CUPE National's Attempt to Mediate

24. Moist and CUPE National plead that the claims advanced by the Plaintiff in her Statement of Claim constitute, in essence, a dispute between two elected members of the ACCEX. This is a dispute that ought properly to have been resolved in a process internal to the ACC so as to cause as little damage as possible to the ACC and its members, and in a manner consistent with the ACC By-laws.

25. Without admitting any liability in any way whatsoever and without in any way whatsoever admitting that the Plaintiff had suffered any damages or that Swann had committed any wrongdoing, Moist and CUPE National have repeatedly offered to mediate this dispute between the two members of the ACCEX.

26. In that regard, Moist and CUPE National plead and rely upon the statements in paragraphs 29 and 30 of Swann's Statement of Defence.

The Plaintiff's Alleged Damages

27. CUPE National and Moist deny that the Plaintiff suffered any losses or damages as claimed in paragraphs 14, 21, and 23 of the Statement of Claim, or any damages at all. In the alternative, the damages sought by the Plaintiff are remote,

- 8 -

excessive, and unforeseeable. Furthermore, the Plaintiff has failed to mitigate her damages and indeed, has aggravated those damages by voluntarily and unnecessarily repeating the alleged defamatory words.

28 CUPE National and Moist deny that, in the circumstances as set out above, the Plaintiff is entitled to any aggravated and punitive damages, from them, or any damages whatsoever as against them.

29. CUPE National and Moist submit that this action should be dismissed as against them with costs assessed on a substantial indemnity basis.

February 11, 2009

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THOMPSON and
Plaintiff
CANADIAN UNION OF PUBLIC
EMPLOYEES et al.
Defendants

Court File No: 08-CV-41455

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at OTTAWA

**STATEMENT OF DEFENCE
OF THE DEFENDANTS CANADIAN UNION OF
PUBLIC EMPLOYEES AND PAUL MOIST**

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