

Def. Ex. 1—Eric Miller’s Affidavit Given for Def. Mtn. to Dismiss

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

Arline Paul, James A. Bellanca and Mark Paul, individuals,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	13-cv-7746
	)	
Eric L. Miller, an individual, and Wicker Park Press, Ltd.,	)	Hon. Matthew F. Kennelly
	)	
Defendants	)	Hon. Arlander Keys, Magistrate Judge
	)	
	)	
	)	

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**AFFIDAVIT OF ERIC MILLER IN SUPPORT OF DEFENDANTS' MOTION TO  
DISMISS THE PLAINTIFFS' VERIFIED COMPLAINT FOR COPYRIGHT  
INFRINGEMENT AND VIOLATIONS OF FEDERAL AND STATE UNFAIR  
COMPETITION LAW FOR LACK OF SUBJECT MATTER JURISDICTION AND  
FAILURE TO STATE A CLAIM ON WHICH RELIEF CAN BE GRANTED**

Eric L. Miller, being duly sworn, deposes and says:

1. My name is Eric L. Miller and I am President of Wicker Park Press, Ltd, an Illinois corporation founded in 2002.
2. I am a defendant in this lawsuit and I am an Illinois resident and over 18 years of age. I have personal knowledge of the facts described in this affidavit and if called I am able to testify in court concerning the facts described in this affidavit and to other facts related to this case.
3. Wicker Park Press Ltd is a cutting edge independent publisher of thought-provoking books. Over the course of 12 years we have published and distributed over 25 original books on a wide range of subjects including fiction, poetry, history, biography, photography, art, and regional studies.
4. Two of our books have won awards: *Taking Risks: A Jewish Youth in the Soviet Partisans and His Unlikely Life in California* by Joseph Pell and Fred Rosenbaum won a bronze medal in the 2004 Foreword Book of the Year Awards, and *Out on a Ledge:*

*Surviving the Lodz Ghetto, Auschwitz and Beyond* by Eva Libitzky and Fred Rosenbaum was a runner up for the 2010 Benjamin Franklin Awards.

5. Books published by Wicker Park Press Ltd have been reviewed in such places as Publishers Weekly, New York Review of Books, Booklist, Chicago Sun-Times, Chicago Tribune Magazine, and USA Today.
6. On May 25, 2012 Wicker Park Press was approached by James A. Bellanca, Arline Paul, and Mark Paul, the plaintiffs in this lawsuit, to publish a collection of student and teacher memoirs from a school-within-a-school called The Center for Self-Directed Learning, which existed at New Trier East High School in Winnetka, Illinois in the years 1972 - 1982.
7. The working title for the book was *Memories from the Center for Self-Directed Learning, 1972 - 1982*
8. I was a student in the Center from 1975 - 1976, and Bellanca and Arline Paul were my former teachers, or facilitators as we called them in our program. The program was predicated on the philosophy of free-style learning with no grades, no tests. Students took control of their own learning curriculums, and this made for some fascinating personal histories and inspiring success stories to be included in the proposed book.
9. Mark Paul, the third editor, was Arline Paul's adult son. He had no experience in the Center and was purportedly brought on board to assist his mother, who was elderly, with computer skills. He lived in the same house as his mother and he had a previous career in advertising.
10. Between June and November of 2012 there were a series of back-and-forth contract negotiations between Wicker Park Press and Bellanca and the Pauls.
11. On November 12, 2012 we signed a publishing agreement for this work.
12. By signing the publishing agreement, the editors granted Wicker Park Press the rights that comprise the copyright to the work.
13. The signed agreement called for Bellanca and the Pauls, as editors of the collection, to deliver to Wicker Park Press a unified manuscript on a computer disk, to quote the agreement "acceptable to the publisher in form and content for publication." This was to be done within 30 days of signing the agreement.
14. 30 days passed with no single manuscript being delivered.



15. On September 24, 2012, in the course of the negotiations, Bellanca had emailed to me as attachments several of the contributor biographies to go in the book, along with a limited selection of essays for the proposed book. He wrote to me, "I will be sending you the complete MS (maybe in three files)."
16. In another email later that same day, September 24, 2012, Bellanca wrote to me, "Do you want me to print out the rest of the MS and mail or just email in sections?" To which, I replied in kind "Can you get all the selections in MS Word on a CD and mail to me? That would represent great progress."Bellanca did not reply to this request.
17. Over the course of December 2013 we corresponded several times, and met at Bellanca's house in Glencoe on December 14, 2012 to discuss progress with the book. No unified manuscript had been sent to the publisher as of this date
18. In response to requests to provide a complete version of the manuscript, in his email to me dated January 17, 2013, Mark Paul wrote, "I've said this before, I think: I do not have the final copies of any material. If you have the material as e-mail attachments, I don't know why you can't create the disk [file] from material that is already on your hard drive and why this is hanging up the process."
19. On January 18, 2013, in response to another email request I sent, asking the editors to carry out their contractual duty and assemble the manuscript, Mark Paul again responded: "It seems to matter not at all how many times I've told Eric that I do not have a final copy of the manuscript. He keeps asking me to provide what I do not have."
20. Separate submissions for the manuscript were emailed to me as attachments over the course of December 2012, January and February 2013. For example, on January 8, 2013 Bellanca emailed me more contributor biographies. And on February 26, 2013 Arline Paul sent her submission to me. Material for the book kept coming in as email attachments at random times. Repeated requests for a unified manuscript on a CD were either rejected outright or ignored by the editors.
21. Bellanca and the Pauls did not cooperate with the publisher to fulfill their responsibilities as editors, and our publishing contract specifically states that if the editors (plaintiffs in this case) fail to perform tasks assigned to them then the publisher will perform them and be compensated for its work.
22. The pieces sent by the editors were in several different formats and the writing quality was uneven. Bellanca and the Pauls made no attempt in any way to edit the 40 essays. Editing was done in-house at Wicker Park Press, and the manuscript was quite messy and needed copious editing.

23. The title of the book was an initial source of contention among Bellanca and the Pauls themselves, and with me. The title "No Grades, No Tests" was a title idea that Bellanca and I came up with. In an email on January 3, 2013 Arline Paul wrote in an email, "I feel we aren't listening to their voices with *No Tests, No Grades*." Mark Paul backed up his mother, and when the Pauls were asked to come up with an alternative title so we could proceed with the book, Mark Paul wrote in an email to me on January 4, 2013, "It's really pointless to offer alternatives if you and Jim continue to insist that this book is about the freedom from grades and tests."
24. In a meeting on January 8, 2013 at Bellanca's house in Glencoe, we came up with this title in consensus, *On Becoming a Self-Directed Learner: Memories of an Experimenting High School – Deeper Learning Transformations Lasting a Lifetime*.
25. On January 22, 2013, Center graduate Ted Lowitz sent in a series of book cover designs for us to consider. On February 5, 2013 we approved a cover design from Ted Lowitz. "Works for me," Mark Paul wrote in an email on the same day.
26. Once the cover design was decided upon the editors later rejected it in a stunning mid-course reversal. In an email sent on March 29, 2013, Bellanca writes, "Hi. Hate to be wet blanket at this point. However, for the sake of the notion that everyone buys books by the cover, I looked at this final final and find it dull with a very self-published look. No eye catch."
27. This sent us back to the drawing board to try and find a cover design. It should be noted that Bellanca and the Pauls had no authority under the publishing agreement to determine the cover design. They were overstepping their roles.
28. On March 30, 2013, I sent the editors an email with the complete manuscript of the work.
29. Starting in April, 2013, the editors began to level a series of unreasonable demands against the publisher. On April 13, 2013 they demanded a marketing plan (something the contract does not call for), and they insisted the publisher advertise the book in the New Yorker magazine. They became very upset when this was rejected as too expensive.
30. On April 16, 2013, Bellanca sent an email where he advocated for using a Madison Avenue style designer named Jamie Keenan, and would not even consider any other designers. They sent an email to Keenan where they told him the book would make only about \$3,000 in total earnings.
31. On April 18, 2013, Bellanca sent an email where he writes, "Now that we have heard a publishing date for the first time (October) we have to reject it."



Furthermore, in the email he attempted to threaten me if he did not get his way with the schedule and designer Kennan, he writes, "Be aware, however, that we have another publisher option. We don't wish to exercise that unless we can't get this plan on the move and have forthright information on its progress."

32. A meeting at Bellanca's house in Glencoe on April 20, 2013 failed to clear the air.
33. On April 25, 2013, an email from Mark Paul came where he writes because of "our profound dissatisfaction" they decided to terminate their agreement with Wicker Park Press. I answered them with an email letting them know that they first had to comply with our agreement's termination clause and pay the Press for its costs and expenses.
34. On April 26, 2013, Mark Paul wrote to me "As per the termination statement, upon receipt of itemized reimbursement of your sunk costs to this date, we will make payments so that we may publish elsewhere."
35. On April 28, 2013 I sent an invoice for publishing termination, as was requested by the editors. I wrote to Mark Paul, "Once payment is received I will return all materials to you, and cancel the book on all channels and we will have no further obligation to each other."
36. Instead of negotiating in good faith with me, on May 2, 2013 I received a phone call and a follow up email from their lawyer, former Center student and book contributor C. Michael Kendall in order not to pay the invoice I supplied.
37. Wicker Park Press has not taken any orders for the book since April 21, 2013. I decided to stop taking any more orders once it became clear that the editors would not settle or negotiate with us in good faith. I applied to register the copyright in June 2013.
38. On July 6, 2013, Bellanca and the Pauls advertised their own edition of the book on the Center for Self-Directed Learning Face Book page under their own imprint called Off Center Press. Arline Paul went on to make a series of misleading statements about our contract being terminated, and admonished readers of the page to "accept no substitutions" of anything other than the book from Off Center Press.
39. In July 2013, the editors applied for a copyright for the book in their names while they still had obligations under the agreement with Wicker Park Press. They also refused to return the manuscript that the Wicker Park Press had prepared. They must have used it in their own edition of the work.

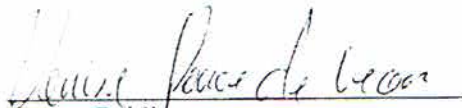
40. I believe the copyright infringement claim and the others are a tactic by the editors to avoid paying Wicker Park Press for its costs and expenses in developing the book in question, and furthermore to allow them to publish a book freely on their own without just compensation to its publisher to whom they assigned all the rights in the work.

Affiant says nothing further



Eric L. Miller

Sworn to before me this 27<sup>th</sup> day of February 2014

  
Notary Public

Def. Ex. 2—Excerpt from Pl. Mtn. to Dismiss Def. state court case





expenses" in the event of termination, and if they do actually owe Plaintiffs anything, how much.

The sole foundation for Plaintiffs' breach of contract counts (Counts I, II, and III) requires them to acknowledge that the contract is terminated and to make out the best case they can for their "costs and expenses" claim. One might at first blush believe this is what they have done in bringing their lawsuit. Certainly, it is what they are required to do. But instead, as the text of the Complaint and many of its numerous exhibits make clear, Plaintiffs maintain that the contract "remains in full force" until Defendants pay them the amount Plaintiffs have demanded and on this basis have continued since termination to offer on their website an incomplete and unauthorized version of Defendants' book in direct competition with Defendants. In doing so, they are using Defendants' names and biographical information in a false and misleading attempt to create the impression that Defendants are involved with and endorse Plaintiffs' impermissible conduct and unauthorized book. This seriously injures Defendants. Nothing in the contract permits Plaintiffs to do this and Defendants are unable to find any legal support for Plaintiffs' position either. Defendants respectfully submit that under these present circumstances Plaintiffs' breach of contract counts cannot survive.

Defendants will not bend to strong-arm tactics. Many of Plaintiffs' own Complaint Exhibits support the legitimacy of Defendants' position that Defendants will ultimately prevail on their anticipated counterclaims if this action moves forward.

Counts IV and V of the Complaint are for "false light invasion of privacy" and "defamation *per se*" respectively. The allegedly actionable statements identified by Plaintiffs were made months after Plaintiffs refused to correct their website and comprise no more than the statements that Defendants had ended their business relationship with Plaintiffs, that