IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT

DUPAGE COUNTY, ILLINOIS

E. VAN CULLENS	)	
	)	
Plaintiff,	)	Case No. 2003 L 000111
	)	
v.	)	
	)	Judge John T. Elsner
JOHN DOE,	)	
	)	
Defendant.	)	

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18TH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

NOTICE OF FILING

To: ATTORNEYS FOR PLAINTIFF
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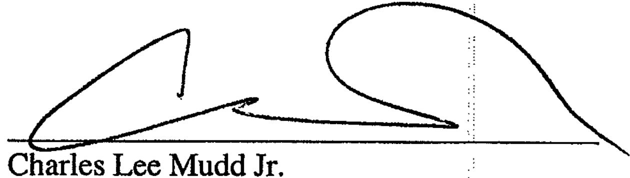
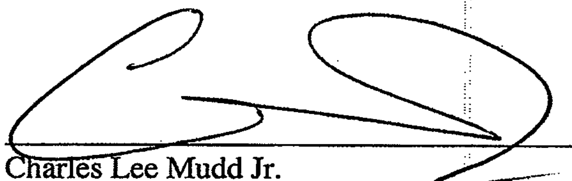
Please take notice that I have this 27th day of August 2003 sent via overnight delivery for filing with the Clerk of the 18th Judicial Circuit, DuPage County, Illinois, **DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AT LAW**, a copy of which is herewith served upon you.



Charles Lee Mudd Jr.

CERTIFICATE OF SERVICE

I do hereby certify that a copy of this **DEFENDANT'S MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AT LAW** was sent by facsimile and First Class Mail, postage pre-paid, to the above-referenced persons at the above-referenced facsimile number and address, on this 25th day of July 2003.



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Defendant.	)	

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MEMORANDUM IN SUPPORT OF DEFENDANT'S

MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AT LAW

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MEMORANDUM IN SUPPORT OF DEFENDANT'S

MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AT LAW

NOW COMES defendant, JOHN DOE, ("Defendant") pursuant to Sections 2-615 and 2-619 of the Illinois Code of Civil Procedure and respectfully submits this Memorandum in Support of his Motion to Dismiss Plaintiff's Amended Complaint at Law ("Motion to Dismiss"). In support of his Motion to Dismiss, Defendant states as follows:

OPENING STATEMENT

The Plaintiff has sought to harass and pursue unnecessarily in bad faith meritless claims against the Defendant for comments made by the Defendant about the Plaintiff's employer, Westell Technologies, Inc. ("Westell"). The statements made did not identify Plaintiff by name and cannot be construed to reference Plaintiff. Moreover, the Defendant made the statements in the context of discussing litigation that had been filed against Westell alleging securities violations and improper insider trading. Numerous lawsuits had been filed against Westell and various officers and directors of Westell. Some of these same individuals remain associated with Westell as officers and/or directors. Consequently, the statements made were substantially true or opinion or both. With this Motion to Dismiss, the Defendant seeks to dismiss the Plaintiff's action in its entirety. Moreover, the Defendant seeks sanctions against the Plaintiff for its oppressive and bad faith conduct in pursuing the baseless claims against the Defendant.

BACKGROUND

In 2000, several individuals filed class action lawsuits against Westell and several members of its management, including officers and directors, alleging securities fraud and insider trading ("Securities Fraud Litigation").[1] See *infra*, note 6. On January 15, 2003, the

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[1] Although the Plaintiff fails to mention this in his First Amended Complaint, this fact serves as

Defendant made one statement in each of two forums with respect to Westell and its management in the context of discussing the Securities Fraud Litigation ("Statements"). See Am. Compl., Ex. A. These Statements form the basis of the Plaintiff's claims.

On January 29, 2003, the Plaintiff filed this action in the 18th Judicial Circuit of Illinois. See Compl. Soon thereafter, the Plaintiff sought to subpoena the Defendant's identity from Yahoo!, Inc. The Defendant, through counsel on his behalf, moved to quash the subpoena in the Superior Court of the State of California in the County of Santa Clara. See Def. Mot. Stay Proceedings Pending California Proceedings. At the same time, Defendant sought to stay proceedings in this court pending an outcome on the motion to quash in California. See id. The Court granted Defendant's motion to stay.[2] See Order of March 17, 2003. Soon thereafter, the Plaintiff opted not to defend the subpoena but yet has continued to proceed with this litigation against the Defendant as John Doe. Additionally, the Plaintiff has since amended his Complaint. See Am. Compl.

ARGUMENT

The Defendant seeks to dismiss Plaintiff's First Amended Complaint in its entirety.[3] The Defendant contends that the Plaintiff's two claims, defamation *per se* and false light, can be dismissed pursuant to Section 2-615 of the Illinois Code of Civil Procedure because the claims are legally insufficient. Alternatively, should the Court choose not to dismiss the claims on this

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a significant basis of Defendant's argument that truth is an appropriate defense to dismiss the claims. For, truth is a defense to a defamation action that may be raised by a motion to dismiss. See Emery v. Kimball Hill, Inc.,112 Ill.App.3d 109, 112, 445 N.E.2d 59; American Int'l Hosp. v. Chicago Tribune Co., 136 Ill.App.3d 1019, 1022-23, 483 N.E.2d 965, 968 (Ill. App. 1985). The term Securities Fraud Litigation also includes the derivative action filed in the same court.

[2] The Court also instructed Plaintiff to provide some substantiation as to his basis for damages. The Plaintiff has failed to do so.

[3] The Plaintiff has filed but one Amended Complaint. Consequently, the terms "Amended

basis alone, the Defendant contends that the claims should be dismissed pursuant to Section 2-619 because the Defendant has valid affirmative defenses.

I. SECTION 2-615

The Defendant seeks to dismiss Count One and Count Two because the Plaintiff has failed to sufficiently plead the claims as a matter of law.

Section 2-615 Standard

A Section 2-615 motion to dismiss tests the legal sufficiency of the plaintiff's complaint. Lykowski v. Bergman, 299 Ill.App.3d 157, 162, 700 N.E.2d 1064 (Ill. App. 1998). "In determining the legal sufficiency of a complaint, all well-pleaded facts are taken as being true and all reasonable inferences from those facts are drawn in favor of the plaintiff." Lykowski, 299 Ill.App.3d at 162, 700 N.E.2d 1064. A section 2-615 motion "does not raise affirmative factual defenses but alleges only defects on the face of the complaint." Bryson v. News America Publications, Inc., 174 Ill.2d 77, 86, 672 N.E.2d 1207 (Ill. App. 1996). "[F]or purposes of a section 2-615 motion, a court may not consider 'affidavits, affirmative factual defenses or other supporting materials.'" Kirchner v. Greene, 294 Ill.App.3d 672, 677, 691 N.E.2d 107 (Ill. App. 1998) (citations omitted). "Illinois is a fact pleading jurisdiction and a plaintiff must allege facts sufficient to bring his or her claim within the scope of the cause of action asserted." Vernon v. Schuster, 179 Ill.2d 338, 344 (Ill. 1997).

A. DEFAMATION

In Illinois, a "statement is defamatory if it impeaches a person's reputation and thereby lowers that person in the estimation of the community or deters third parties from associating

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Complaint" and "First Amended Complaint" refer to the same document.

with that person." Schivarelli v. CBS, Inc., et al., 333 Ill.App.3d 755, 759, 776 N.E.2d 693, 696 (Ill. App. 2002). Defamatory statements may be classified as either defamatory *per se* or defamatory *per quod*. See id. In Count Two of his First Amended Complaint, the Plaintiff has alleged the Defendant made statements that are defamatory *per se*. Arguing below, Defendant demonstrates that the statements at issue cannot be defamatory *per se*. Consequently, Plaintiff's claim for defamation *per se* should be dismissed. Additionally, Defendant further demonstrates that the statements at issue cannot be considered defamatory *per quod* either. Thus, even if the Plaintiff contends that his claim should be considered defamation *per quod*, the claim should be dismissed. Therefore, the Court should dismiss Count Two under either theory.

1. Defamation *Per Se*

Plaintiff claims that the Statements constitute defamatory *per se* statements. To constitute a statement that is defamatory *per se*, a statement must fit into one of five categories that Illinois recognizes as being "so obviously and naturally harmful to the person to whom it refers that injury to his reputation may be presumed." Id. These five categories include those statements (1) imputing the commission of a criminal offense; (2) imputing infection with a loathsome communicable disease; (3) imputing an inability to perform or want of integrity in the discharge of duties of office or employment; (4) imputing a lack of ability or prejudicing a party in one's trade, profession, or business; and (5) imputing adultery or fornication. See id.

In his Amended Complaint, the Plaintiff contends that the Statements are defamatory *per se* because the statements impute a criminal offense, impute a want of integrity on the discharge of plaintiff's duties of employment, and impute a lack of ability in his profession and business. See Am. Compl. at ¶¶ 63, 61, 62, respectively. The Plaintiff alleges that the Statements refer to him, "Cullens." Defendant disputes these allegations.

a. *The Statements Do Not Refer to Cullens*

The claim for defamation *per se* should be dismissed because the statements cannot be reasonably interpreted as referring to Cullens. A statement "will not be actionable per se if the statement 'may reasonably be innocently interpreted or reasonably be interpreted as referring to someone other than the plaintiff.'" Muzikowski v. Paramount Pictures Corporation, et al., 322 F.3d 918, 924 (7th Cir. 2003). Illinois courts consider this determination a question of law. See id. Consequently, the Court must determine whether the Statements may reasonably be interpreted as referring to someone other than Cullens. See id. If the Court concludes that the Statements may reasonably be interpreted as referring to someone other than Cullens, the Court must dismiss the claim as the Statements may not be considered defamatory *per se*. See id.

Here, the Statements do not refer to Cullens. The first statement at issue reads:

> You guys are dreaming...Have you forgotten the multi-million dollar lawsuits that are still pending against WSTL when former CEO [redacted] orchestrated a cook-the-book scheme? Obviously, you guys weren't on board then. You simply can't trust the management of this company. Put your money in ADCT and you'll do okay.

See Am. Compl., Ex. A. The second statement at issue reads:

> WSTL sucks. Their management is crooked. Multi-million dollar lawsuits pending from Enron-like management of [redacted] STAY AWAY from this loser.

See id. Clearly, neither statement refers to Cullens. In fact, the Statements make efforts to clearly identify an individual other than Cullens. See id. Indeed, the only individual to whom the Statements specifically refer and name is "former CEO" [redacted] See id. Because the statements on their face may reasonably be interpreted as referring to someone other than Cullens (specifically, [redacted]; the Statements are not defamatory *per se*. Muzikowski, 322 F.3d at 924 (citing Chapski v. Copley Press, 92 Ill.2d 344, 442 N.E.2d 195, 199 (Ill. App. 1992)).

Indeed, an individual cannot be defamed or cast in a false light unless the statements are "of and concerning" that individual. See Barry Harlem Corp. v. Kraff, 273 Ill.App.3d 388, 390, 652 N.E.2d 1077, 1080 (Ill. App. 1995); see also John v. Tribune Co., 181 N.E.2d 105, 108 (Ill. 1962) (holding that a reference to an "alias" used by the subject of an article is not "of and concerning" plaintiff despite the fact that plaintiff happened to have same name as "alias" and happened to reside in same building as subject of the article). Therefore, the Court must dismiss the Plaintiff's claim for defamation *per se*.[4]

b. *Reliance on Extrinsic Evidence Defeats Defamation Per Se*

Plaintiff next suggests that the Statements somehow refer to Cullen's management of Westell. Yet, the Statements do not mention Cullens by name in any form. See Am. Compl., Ex. A. Although the Statements do state the opinions that "You simply can't trust the management of this company" and "[t]heir management is crooked," these sentences do not mention or suggest that Westell's current management includes Cullens or that the opinions refer to *Cullen's* management of Westell. See id. Moreover, the Statements' context clearly focuses on Westell's former CEO [redacted] whom the Statements specifically name. While Westell's management may have included Cullens at the time Defendant made the Statements, the

[4] It has been held that an allegedly defamatory statement may be considered defamatory per se so long as it appears on the face of the complaint that persons other than the plaintiff and the defendant must have reasonably understood that the article was about the plaintiff and that the allegedly libelous expression related to him. See Bryson v. News America Publications, Inc., 174 Ill.2d 77, 96-97, 672 N.E.2d 1207 (Ill. 1996) (citing 33A Ill.L. & Prac. *Slander & Libel* §§ 93, 13, at 97, 28-29 (1970); Coffey v. MacKay, 2 Ill.App.3d 802, 807, 277 N.E.2d 748 (1972)). However, such a permissive interpretation is not applicable here. Although the Plaintiff has alleged that third persons "would understand the statements as referring to Cullens," this allegation does not suffice. See id.; see also Coffey, 2 Ill.App.3d at 807 (holding that "the conclusionary [sic] allegations by the plaintiff that the articles were understood by other funeral directors to refer to plaintiff are not sufficient to raise a question of fact on the face of the pleadings" and that "[t]his became a defect of law and could not have been cured by other proof").

Statements themselves do not provide any indication of this fact whatsoever. Indeed, "third persons familiar with both Cullens and the statements" could only possibly "understand the statements as referring to Cullens" by employing extrinsic knowledge that Westell management included Cullens at the time the Statements were made.[5] See Am. Compl. at ¶ 63.

In his Complaint, Plaintiff surrounds his allegations with references to extrinsic evidence that would *allegedly* cause the Statements to be highly offensive and "of and about" Cullens. Specifically, the Plaintiff refers to a January 2, 2003 Chicago Tribune article that quoted Cullens. See Am. Compl. at ¶ 18. The Plaintiff makes broad generalizations that the "public generally equates Cullens with Westell management." See Am. Compl. at ¶ 19. The Plaintiff makes reference to the fact that Westell management "is a small group consisting of less than 20 members, and Cullens is the most prominent member of the group."[6] The Plaintiff makes reference to the fact that reporters happen to quote Cullens. See Am. Compl. at ¶ 20. The Plaintiff makes reference to a national broadcast of a movie relating to Enron and its scandal. See Am. Compl. at ¶ 24. Thus, the Amended Complaint clearly demonstrates that the Plaintiff acknowledges an individual would require a significant amount of extrinsic information to *allegedly* equate the Statements with Cullens.

By relying upon the extrinsic knowledge of third persons to support his claim for defamation *per se*, Plaintiff has defeated his very claim for *per se* defamation. Indeed, as

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[5] Defendant does not concede and specifically denies that any third persons could possibly conclude that the Statements referred in any way to Cullens.

[6] This fact actually supports Defendant's argument that, in fact, the Statements did not refer to Cullens. To the extent that the Defendant referred generally to Westell management, he referred to a group consisting of less than twenty (20) individuals. That Cullens finds himself to be "the most prominent member of the group" and equated with "Westell management" cannot save the fact that the Statements do not refer to him.

previously stated, a statement that is defamatory *per se* must be on its face "so obviously and naturally harmful *to the person to whom it refers* that injury to his reputation may be presumed." Schivarelli, 333 Ill.App.3d at 759. The Statements do not refer to Cullens. Consequently, even were the Statements defamatory (which the Defendant denies), the Statements are not so obviously and naturally harmful to *Cullens*. Even should one entertain Plaintiff's incorporation of extrinsic evidence, the Statements do not rationally refer to Cullens. A hypothetical individual with knowledge of Cullen's involvement with Westell would no doubt also know that (a) Securities Litigation had been filed against Westell and individual members of its management, (b) Cullens came to Westell after the Securities Fraud Litigation had been filed, and (c) Westell's management still retained certain of the individual defendants who had been named in the Securities Fraud Litigation as Directors. See Westell Technologies, Inc. July 2002 10-K Report, p. 38 (available at http://www.nasdaq.com/asp/quotes_sec.asp?symbol=WSTL&selected =WSTL&page=filings) (last visited August 25, 2003).. Consequently, any individual with extrinsic knowledge of Westell reading the Statements would more rationally conclude that the reference to "Westell management" would either refer to Westell generally (the subject of the Securities Fraud Litigation), Westell's management generally (that retained individual defendants named in the Securities Fraud Litigation)[7], or the specific individuals that remained Directors of Westell despite having been named as individual defendants in the Securities Fraud Litigation. Thus, as much as Cullens would like to be associated with "Westell management" in

[7] Even if the reference to Westell management includes Cullens by inference only (which the Defendant disputes), Cullens chose to become associated with a corporation that was the subject of a number of lawsuits alleging securities fraud and insider trading. Moreover, Cullens chose to be involved with a corporation's management team that included (at least as Directors) many of the individuals named in the lawsuits as individual defendants. Consequently, the Plaintiff chose to place himself in a situation where people might legitimately comment negatively about Westell management in a general manner. He cannot play the innocent.

every instance, the Statements do not refer to Cullens under any rational construction (with or without extrinsic information). By his own allegations, an individual would require knowledge of extrinsic facts and evidence to even possibly believe the Statements referred to Cullens. As such, the Statements cannot be defamatory per se as relating to Cullens. Therefore, the Plaintiff's claim for defamation *per se* should be dismissed. See id.

Because the Statements may quite easily be interpreted as referring to someone other than Cullens and because any possible interpretation of the Statements as referring to Cullens would require extrinsic facts and evidence, the Statements cannot be defamatory per se with respect to Cullens. Therefore, the Plaintiff's claim for defamation *per se* should be dismissed. See id.; Muzikowski, 322 F.3d at 924 (7th Cir. 2003).

2. Defamation *Per Quod*

Even under the theory of defamation per quod, Plaintiff's defamation claim should be dismissed. To succeed on a defamation claim, a plaintiff must demonstrate that a defendant "made a false statement concerning [the] plaintiff, that there was an unprivileged publication of the defamatory statement to a third party by [the] defendant, and that [the] plaintiff was damaged" from the publication. Cianci v. Pettibone Corp., 298 Ill.App.3d 419, 424, 698 N.E.2d 674 (Ill. App. 1998). As demonstrated above, the Statements were not made about the plaintiff. Consequently, the Plaintiff cannot succeed on a claim for defamation *per quod*. See id.

In addition, the Plaintiff cannot demonstrate that he was damaged from publication of the Statements. Indeed, Plaintiff has failed to plead specific damages resulting from the Statements. Failure to plead specific damages is a fatal deficiency to any defamation *per quod* claim. See Muzikowski, 322 F.3d at 927; Schivarelli, 333 Ill.App.3d at 759. Rather, Plaintiff has made

general allegations with respect to damages he suffered. In his First Amended Complaint, Plaintiff alleges that Defendant's attacks on "Cullen's reputation hurt Cullen's ability to perform his job, which in turn hurt the price of Westell stock, of which Cullens owns a substantial amount." [8] Am. Compl. at ¶ 26. In fact, Westell stock began to climb significantly after Defendant made the Statements. Indeed, Westell stock closed at $1.53 on January 14, 2003, the day prior to the date on which Defendant made the Statements. See Ex. B1. On January 15, 2003, Westell stock closed at $1.67. See Ex. B2. On January 29, 2003, the date the Plaintiff filed his Complaint, the stock closed at $2.10. See Ex. B3. On July 8, 2003, the date Defendant's counsel received the First Amended Complaint, the stock closed at $10.96. See Ex. B4. On July 15, 2003, six months since the Statements were made, the Stock closed at $11.53.[9] See Ex. B5. Consequently, in the six month period following the Statements, Cullens' stock multiplied by a factor of approximately seven (7) times (eg 700%). See Exs. B1-B5. Further, the Plaintiff will no doubt be hard pressed to find any individuals who (1) believed the Statements specifically referred to Cullens and (2) gave much weight to the statements of an individual using the username "need_girl_2_suck_me." Considering this and the fact that Westell stock rose significantly after the Statements were published, it comes as no surprise that the Plaintiff intentionally omitted a claim that requires one to plead specific damages. The failure to plead specific damages warrants dismissal of a defamation claim. See Muzikowski,

[8] Should Plaintiff's allegation be true that at the time he became CEO of Westell he was "a 28-year telecommunications industry veteran with a wealth of business, strategic marketing and operating experience, and had recently been the President and Chief Operating Officer of Harris Corporation, a $1.7 billion company," one would presume that such a veteran would not be so troubled by the statements of an individual John Doe using the username "need_girl_2_suck_me" that his ability to perform would be so affected as to affect the price of Westell stock. Am. Compl. at ¶ 27.

[9] All stock quotes were obtained from the web site www.marketwatch.com.

322 F.3d at 927. Therefore, the Court should not entertain the Plaintiff's defamation claim as one of defamation *per quod*.

Because the Plaintiff cannot demonstrate that the Statements were concerning him and because Plaintiff cannot demonstrate damages caused by the Publication, the Plaintiff would not succeed on claim for defamation *per quod*. At the very minimum, the First Amended Complaint fails to sufficiently allege specific damages. Consequently, the First Amended Complaint remains deficient and the claim cannot be saved. Therefore, the Court should dismiss Plaintiff's claim for defamation entirely. See id.; Cianci, 298 Ill.App.3d at 424.

B. False Light

For many of the same reasons articulated above, the Court must also dismiss the Plaintiff's claim for false light. In Illinois, a claim for false light invasion of privacy must allege that "the defendant's actions placed the plaintiff in a false light before the public, that the false light would be highly offensive to the reasonable person, and that the defendant acted with actual malice." Schivarelli v. CBS, Inc., 776 N.E.2d 693, 700-701, 333 Ill.App.3d 755, 764 (Ill. App. 2002). Because of the similarities between defamation and false light claims, "certain restrictions and limitations on actions for defamation may be equally applicable to claims for false-light invasion of privacy." Aroonsakul v. Shannon, 279 Ill.App.3d 345, 350, 664 N.E.2d 1094, 1098 (Ill. App. 1996). Specifically, the requirement that a statement be "of and concerning the plaintiff" in a defamation claim is equally applicable to a false-light claim. See id. (citing Weinstein v. Bullick, 827 F.Supp. 1193, 1202 (E.D. Pa.1993); Schaffer v. Zekman, 196 Ill.App.3d 727, 734, 554 N.E.2d 988 (Ill. App. 1990)). Indeed, "the publicity forming the basis for the false-light claim must be reasonably capable of being understood as singling out, or

pointing to, the plaintiff." See id. (citing Michigan United Conservation Clubs v. CBS News, 485 F. Supp. 893, 904 (W.D. Mich.1980)).

As stated above, the Statements cannot be construed as being "of and concerning the plaintiff." See *supra*. The Statements do not mention Cullens by name, specifically refer to the former CEO of Westell, and speak in the context of the Securities Fraud Litigation initiated prior to Cullens arrival at Westell. See Am. Compl., Ex. A. As has been stated above, "a defamatory statement may be actionable even though the individual was not mentioned by name so long as it appears that some third party reasonably understood the statement to have referred to the individual." See id. (citing Beresky v. Teschner, 64 Ill.App.3d 848, 851, 381 N.E.2d 979 (Ill. App. 1978). Nonetheless, the Court must make the preliminary determination of whether the statement is capable of being so understood as such a determination remains a question of law. See id. For all of the reasons stated above as to why the Statements cannot be reasonably construed as referring to Cullens and, in fact, can more rationally be construed as referring to individuals other than Cullens, the Court must conclude that a third party could not reasonably have understood the Statements to have referred to Cullens. Therefore, the Court should dismiss the Plaintiff's claim for false light as having failed to meet an essential element of such a claim under Illinois law. See id.; Schaffer v. Zekman, 196 Ill.App.3d 727, 734, 554 N.E.2d 988 (Ill. App. 1990).

C. Section 2-615 Conclusion

Because the Plaintiff has insufficiently pled his claims for defamation per se and false light, these claims should be dismissed in their entirety.

II. SECTION 2-619(a)(9)

Without waiving the arguments in support of dismissing the Plaintiff's Amended Complaint pursuant to Section 2-615, the Defendant moves to dismiss both Counts of Plaintiff's Amended Complaint pursuant to Section 2-619(a)(9) of the Illinois Code of Civil Procedure. Specifically, the Defendant contends that the affirmatives defenses of truth, opinion, and innocent construction warrant dismissal of the Plaintiff's complaint in its entirety.

Section 2-619(a)(9) Standard

A motion to dismiss filed pursuant to Section 2- 619 "admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that appear on the face of the complaint or are established by external submissions that act to defeat the claim[s]." Krilich v. American Nat. Bank and Trust Co. of Chicago, 334 Ill.App.3d 563, 570, 778 N.E.2d 1153, (Ill. App. 2002) (citing Neppl v. Murphy, 316 Ill.App.3d 581, 583, 736 N.E.2d 1174 (Ill. App. 2000)). Specifically, Section 2-619(a)(9) allows dismissal when "the claim asserted . . . is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619(a)(9). As used in Section 2-619(a)(9), "affirmative matter" refers to "a type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint." Krilich, 334 Ill.App.3d at 570. A trial court may dismiss a complaint pursuant to Section 2-619 after it has considered issues of law or easily proved issues of fact. See id. In ruling upon a 2-619(a)(9) motion to dismiss, a trial court may consider pleadings, depositions, and affidavits. See id.

A. Substantial Truth

Truth is a defense to a defamation action that may be raised by a motion to dismiss. See

Emery v. Kimball Hill, Inc.,112 Ill.App.3d 109, 112, 445 N.E.2d 59; American International Hospital v. Chicago Tribune Co., 136 Ill.App.3d 1019, 1022-23, 483 N.E.2d 965, 968 (Ill. App. 1985). While ordinarily the determination of whether substantial truth exists remains a question for a jury to decide, the question becomes one of law where no reasonable jury could find that substantial truth had not been established. See Parker v. House O'Lite Corp., 324 Ill.App.3d 1014, 1026, 756 N.E.2d 286 (Ill. App. 2001). In raising truth as a defense, a defendant need only demonstrate the "substantial truth" of the allegedly defamatory material. See Lemons v. Chronicle Publishing Co., 253 Ill.App.3d 888, 890, 625 N.E.2d 789 (Ill. App. 1993); Farnsworth v. Tribune Co., 43 Ill.2d 286, 293-94, 253 N.E.2d 408 (Ill. 1969). "Substantial truth" requires only that a defendant demonstrate the truth of the "gist" or "sting" of the defamatory material. See Kilbane v. Sabonjian, 38 Ill.App.3d 172, 175, 347 N.E.2d 757 (Ill. App. 1976); American International Hospital v. Chicago Tribune Co., 136 Ill.App.3d 1019, 1022, 483 N.E.2d 965 (Ill. App. 1985). Further, allegedly defamatory statements need not be technically accurate in every detail to avoid being actionable. See Parker v. House O'Lite Corp., 324 Ill.App.3d 1014, 1026, 756 N.E.2d 286 (Ill. App. 2001).

Here, Defendant commented on litigation that had been pending against Westell since 2000. Westell, and other members of Westell management had been named in numerous actions filed in the United States District Court, Northern District of Illinois since late 2000.[10] In

[10] In particular, please reference In re: Westell Tech (Bergh v. Westell Tech, Inc.), 1:00-CV-6735 (naming Westell Technologies, Inc., , William J. Nelson, Thomas A. Reynolds, Howard L. Kirby, Jr., Bruce Albelda, and Nicholas Hindman); Lefkowitz v. Westell Tech., Inc., 1:00-CV-6881 (naming Westell Technologies, Inc., , William J. Nelson, Thomas A. Reynolds, Howard L. Kirby, Jr., and Bruce Albelda); Greif v. Westell Tech., Inc., 1:00-CV-7046 (naming Westell Technologies, Inc., , William J. Nelson, Thomas A. Reynolds, Howard L. Kirby, Jr., and Bruce Albelda); Feinstein v. Westell Tech., Inc., 1:00-CV-7247 (naming Westell Technologies, Inc., William J. Nelson, Thomas A. Reynolds, Howard L. Kirby, Jr., Bruce Albelda and Nicholas Hindman); Abdelnour v. Westell Tech., Inc.,

early 2001, these actions became consolidated in one action In re: Westell Tech. See In re: Westell Tech, 1:00-CV-6735, Minute Order of January 10, 2001 (#12). The Northern District of Illinois only recently dismissed the consolidated action on June 24, 2003. See id., Minute Order of June 24, 2003 (#69). The nature of the Securities Fraud Litigation remains well known. On Stanford Law School's "Securities Class Action Clearinghouse," an article brief printed as of February 20, 2003 summarizes the settlement of the Securities Fraud Litigation:

> Westell Technologies, Inc. (NASDAQ: WSTL) announced today an agreement to settle the consolidated securities class action lawsuit In re Westell Technologies, Inc. Securities Litigation (No. 00C6735) filed against the Company and certain executive officers and directors of the Company in the United States District Court for the Northern District of Illinois. In addition, Westell announced an agreement to settle the related consolidated derivative action Dollens and Vukovich v. [redacted], et al. (No. 01C2826), filed in the United States District Court for the Northern District of Illinois. The actions generally alleged that the defendants violated the antifraud provisions of the federal securities laws or state common laws by making false and misleading statements in 2000 regarding forecasts for the second quarter of Westell's fiscal 2001. Under the terms of the settlement agreement, all claims will be dismissed without any admission of liability or wrongdoing by any defendant.

See Stanford Law School, Securities Class Action Clearinghouse (http://securities.stanford.edu/news-archive/2003/20030220_Settlement03_Staff.htm) (last visited August 25, 2003). The Stanford web site provides additional information:

1:00-CV-7308 (naming Westell Technologies, Inc., [redacted] William J. Nelson, Thomas A. Reynolds, Howard L. Kirby, Jr., Bruce Albelda and Nicholas Hindman); PAS Mgt. and Consulting Serv., Inc. v. Westell Tech., Inc., 1:00-CV-7605 (naming Westell Technologies, Inc., [redacted] William J. Nelson, Thomas A. Reynolds, Howard L. Kirby, Jr., and Nicholas Hindman); Hoffmann v. Westell Tech., Inc., et al., 1:00-CV-7624 (naming Westell Technologies, Inc., [redacted] William J. Nelson, Thomas A. Reynolds, Howard L. Kirby, Jr., and Bruce Albelda); Barton v. Westell Tech., Inc., et al., 1:00-CV-7765 (naming Westell Technologies, Inc., [redacted] William J. Nelson, Bruce Albelda, Thomas A. Reynolds, and Howard L. Kirby, Jr.); and Shumaster v. Westell Tech., Inc., et al., 1:00-CV-7991 (naming Westell Technologies, Inc., [redacted], and William J. Nelson). There also was a derivative suit filed in Delaware. See Dollens, et al. v. Zoints, et al., Civil Action No. 18533 NC.

Under the terms of the settlement, Westell's and its directors' and officers' liability insurers will pay a total of $3.95 million to the plaintiffs and their counsel. Westell does not expect to pay anything in connection with the settlement. The shareholder class will receive $3.35 million out of which the Court will be asked to award attorneys' fees and expenses to class counsel. Counsel to plaintiffs in the derivative action will receive the remaining $600,000 to settle the derivative claim. Beyond the financial settlement, Westell agreed to adopt certain corporate governance and communications procedures. The agreement is subject [sic] court approval. The parties expect that the Court will first consider the settlement at a preliminary approval hearing that they anticipate will occur in March 2003.
The original complaint alleged that Westell and certain of its officers and directors violated federal securities laws by making a series of materially false and misleading statements. Specifically, shareholders asserted that Westell misrepresented the level of demand for its products from SBC Communications when they knew since June of 2000 that SBC would be purchasing significantly fewer modems from the Company. In addition, certain officers and directors sold over $11 million of Westell shares in alleged illegal insider trades at peak prices near $30 per share, just before an analyst began reporting that the customer would be scaling back its modem purchases. As a result of these false and misleading statements, the complaint charges, Westell's stock price was artificially inflated throughout the Class Period, causing plaintiffs and the other members of the Class to suffer damages.

See id. In its own 10-Q Report filed with the Securities and Exchange Commission, in February 2003, Westell decribed the litigation as:

Westell Technologies, Inc. and certain of its officers and directors have been named in In re Westell Technologies, Inc. Securities Litigation, No 00 C 6735 (cons. complaint filed February 1, 2001), filed in the United States District Court for the Northern District of Illinois. This case is a consolidation of eleven cases filed against Westell and certain of its officers and directors in the United States District Court of the Northern District of Illinois in 2000. The case alleges generally that the defendants violated the antifraud provisions of the federal securities laws by allegedly issuing material false and misleading statements and/or allegedly omitting material facts necessary to make the statements made not misleading, thereby allegedly inflating the price of Westell stock for certain time periods. The case claims that, in 2001, certain officers of Westell allegedly reassured analysts that Westell's sales were on track to meet forecasts for the second quarter of fiscal 2001, when they knew that Westell was experiencing a substantial shortfall in second quarter modem sales due to decreased orders from a major customer, SBC Communications, Inc. The case seeks damages allegedly sustained by plaintiffs and the class by reason of the acts and transactions alleged in the complaints as well as interest on any damage award, reasonable attorneys'

> fees, expert fees, and other costs. The parties are engaged in discovery and settlement negotiations. The case is set for trial on November 3, 2003.
>
> Certain of Westell's officers and directors have been named in a derivative action titled Dollens and Vukovich v. , et al., No. 01C2826, filed December 4, 2001 in the United States District Court for the Northern District of Illinois. The case alleges generally that the defendants issued material false and misleading statements and/or allegedly omitted material facts necessary to make the statements made not misleading thereby inflating the price of Westell stock for certain time periods, engaged in insider trading, and misappropriated corporate information. The allegations in support of the claims are identical to the allegations in the Federal case described above. The case seeks damages allegedly sustained by Westell by reason of the acts and transactions alleged in the complaint, a constructive trust for the amount of profits the individual defendants made on insider sales, reasonable attorneys' fees, expert fees and other costs. The case is a consolidation of four cases filed against Westell and certain of its officers and directors in 2000 and 2001. The parties are engaged in discovery and settlement negotiations. The case is set for trial on November 3, 2003.

See Westell Technologies, Inc. 10-Q Report (filed with the Secutities Exchange Commission February 14, 2003) (available at http://www.nasdaq.com/asp/quotes_sec.asp?symbol=WSTL &selected=WSTL&page=filings) (last visited August 25, 2003) ("Westell's 2003 10-Q Report").[11]

Interestingly, Nicholas Hindman and Robert C. Penny III, two of the individuals named in the Securities Fraud Litigation, remain significant shareholders of Westell. Further, Robert C. Penny has served as a Director of Westell since 1998 and remains a principal shareholder. See Westell Technologies, Inc. S-3 Report, p. 13 (filed with the Securities and Exchange Commission October 18, 2002) (available at http://www.nasdaq.com/asp/quotes_sec.asp?symbol =WSTL&selected=WSTL&page=filings) (last visited August 25, 2003).[12] Also, Nicholas Hindman presently serves as Westell's Treasurer, Secretary, Senior Vice-President, and Chief Financial Officer. See Westell's 2003 10-Q Report. Moreover, as of July 16, 2002, it appears

[11] As CEO, Plaintiff signed this document on behalf of Westell.

[12] As CEO, Plaintiff signed this document on behalf of Westell.

that Nicholas C. Hindman, Thomas A. Reynolds , and Robert C. Penny III Penny remained directors of Westell. See Westell Technologies, Inc. July 2002 10-K Report, p. 38 (available at http://www.nasdaq.com/asp/quotes_sec.asp?symbol=WSTL&selected=WSTL&page=filings) (last visited August 25, 2003). Thus, to the extent Defendant implicitly referred to any particular individual(s) by reference to Westell management, it would be more prudent to assume that the Defendant referred to those individuals that both remained in the litigation and involved with Westell. Consequently, any Westell management team that involved the participation of these defendants of the Securities Fraud Litigation quite reasonably falls susceptible to comments regarding the litigation. In light of the above stated information and Westell's own corporate filings, the Statements without question remain "substantially true." Therefore, the claims for both defamation and false light should be dismissed. See Emery,112 Ill.App.3d at 112; American Int'l Hosp., 136 Ill.App.3d at 1022-23; Parker, 324 Ill.App.3d at 1026; Lemons, 253 Ill.App.3d at 890; Farnsworth, 43 Ill.2d at 293-94.

B. Innocent Construction Rule

Should the court find that the Statements do not reflect the substantial truth, the Court should find that the Statements are not actionable because they are reasonably capable of an innocent construction. In Illinois, even where a statement may fall within one of the recognize *per se* categories, courts will not find a communication actionable the statement is reasonably capable of an innocent construction. See Bryson v. News America Publications, Inc., 174 Ill.2d 77, 90, 672 N.E.2d 1207 (Ill. 1996). Indeed, under the innocent construction rule, a court must consider a written statement in the context found by giving both the words and their implications the natural and obvious meaning due them. See id. Whether a communication is reasonably

susceptible to an innocent interpretation is a question of law for the court to decide. Bryson, 174 Ill.2d at 90, 220 Ill.Dec. 195, 672 N.E.2d 1207.

Here, the Defendant made the Statements using the username "need_girl_2_suck_me" about actual pending litigation against Westell and its management. The First Statement read:

> You guys are dreaming...Have you forgotten the multi-million dollar lawsuits that are still pending against WSTL when former CEO [redacted] orchestrated a cook-the-book scheme? Obviously, you guys weren't on board then. You simply can't trust the management of this company. Put your money in ADCT and you'll do okay.

<u>See</u> Am. Compl., Ex. A. Quite clearly, the statements "You guys are dreaming," "Obviously, you guys weren't on board then," and "Put your money in ADCT and you'll do okay" do not reflect any defamatory statements, much less defamatory statements about Cullens. The phrase "Have you forgotten the multi-million dollar lawsuits that are still pending against WSTL when former CEO [redacted] orchestrated a cook-the-book scheme" accurately reflects the fact that litigation remained pending against Westell for conduct alleged to have occurred during the term when [redacted] was CEO of Westell relating to securities violations and insider trading. In the context of the Securities Fraud Litigation, the Defendant's reference to the litigation, the specific reference to conduct that occurred "when CEO [redacted] orchestrated a 'cook-the-book scheme,'" and the fact that at least two of the defendants remain substantially involved in Westell's operations, the First Statement containing the phrase "You simply can't trust the management of this company" can arguably be construed as referring to someone other than Cullens and a valid comment permissible under the innocent construction rule.

The Second Statement reads:

> WSTL Sucks. Their management is crooked. Multi-million dollat lawsuits pending from Enron-like management of [redacted] STAY AWAY from this loser.

See Am. Compl., Ex. A. One cannot seriously contend that "WSTL Sucks" or "STAY AWAY from this loser" are defamatory statements. Indeed, the statements constitute more of opinion than statement. The statement "Multi-million dollar lawsuits pending from Enron-like management of [redacted] represents a true statement. See *supra*. Under the innocent construction rule, the comment "[t]heir management is crooked" must be examined within the larger context of the Second Statement. See Bryson, 174 Ill.2d at 90. Again, as Plaintiff even points out and the Defendant makes clear, [redacted] was Westell's CEO at the time most of the litigation was filed. In light of the Securities Fraud Litigation and the fact that some of the individual defendants from the Securities Fraud Litigation remain as officer, directors or shareholders of Westell, the Statements should not be actionable under the innocent construction rule. See id. Therefore, the Court should dismiss the claims for defamation *per se* and false light.

C. Opinion Defense

The individual phrases used by Defendant and complained of by Plaintiff constitute protected opinion. Indeed, a statement of opinion that relates to a matter of public concern that does not contain a provably false proposition is not actionable. See Milkovich v. Lorain Journal Co., 497 U.S. 1, 20, 110 S.Ct. 2695, 2706-07 (1990). For a statement to be actionable, it must be clear that the Defendant claims possession of objectively verifiable facts of or concerning the plaintiff. See Wilkow v. Forbes, Inc., 241 F.3d 552, 555 (7th Cir.2001). If the Defendant rather expresses his subjective view, gives an interpretation, or states a theory, conjecture or surmise, the statement is not actionable. See id.; Bryson, 174 Ill.2d at 100; see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 349, 94 S.Ct. 2997, 3011-12 (1974). The Defendant made the Statements in the context of discussing public litigation, including a derivative action, against

Westell. Such a matter constitutes one of public concern. The phrases "WSTL Sucks," "You Simply can't trust the management of this company," and "Their management is crooked" all constitute subjective statements of opinion that relate to a matter of public concern that do not contain a provably false proposition. Consequently, the statements of opinion are not actionable. See id. Therefore, the Court should dismiss both the defamation and false light claims. See id.; see also Schivarelli, 333 Ill.App.3d at 764, 776 N.E.2d at 701 (holding that statements that are expressions of opinion devoid of any factual content are not actionable as false light claims).

D. Section 2-619 Conclusion

The Defendant has moved to dismiss both Counts of Plaintiff's Amended Complaint pursuant to Section 2-619(a)(9) of the Illinois Code of Civil Procedure. Specifically, the affirmatives defenses of truth, opinion, and innocent construction warrant dismissal of the Plaintiff's complaint in its entirety. Therefore, the Court should dismiss both Plaintiff's claims and, by doing so, dismiss his Complaint in its entirety.

III. SANCTIONS

The Defendant moves for sanctions to be imposed against Plaintiff for filing the Complaint and First Amended Complaint in this action because both constitute pleadings not well grounded in fact, not supported in existing law, and that have been interposed for an improper purpose, namely to stifle protected First Amendment speech regarding Plaintiff's company. In Illinois, the Supreme Court rules permit a trial court to impose sanctions against a party or his counsel for filing a pleading that is not well grounded in fact, not supported by existing law, or is interposed for any improper purpose. See Rule 137, Illinois Sup. Ct. Rules; see also Peterson v. Randhava, 313 Ill.App.3d 1, 6-7, 729 N.E.2d 75 (Ill. App. 2000). Rule 137

seeks to prevent the filing of false or frivolous lawsuits. See Peterson, 313 Ill.App.3d at 7. "To this end, the rule is designed to prohibit the abuse of the judicial process by claimants who make vexatious and harassing claims based upon unsupported allegations of fact or law. However, the rule is not intended to penalize litigants and their attorneys merely because they were zealous, yet unsuccessful." Id. Based on the arguments and facts presented above, it must become abundantly clear that the Plaintiff has not simply been a "zealous, yet unsuccessful" litigant. Indeed, Plaintiff has brought this action for purposes of harassing the Defendant and stifling protected free speech by alleging claims that have no support whatsoever, either factually or legally, under these circumstances. This action has been filed for a wholly improper purpose. As such, Defendant moves the Court to award sanctions against the Plaintiff. Based on all of the foregoing, the Court should grant sanctions against Plaintiff. See id.

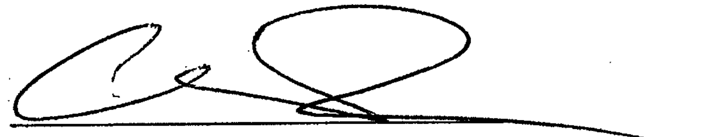
CONCLUSION

For the foregoing reasons, Defendant John Doe respectfully moves this Court to dismiss Plaintiff's claims for defamation *per se* and false light, thereby granting Defendant John Doe's Motion to Dismiss. Defendant John Doe also respectfully requests that the Court issue sanctions against Plaintiff.

Dated: Chicago, Illinois
August 25, 2003

Respectfully submitted,

THE DEFENDANT,
JOHN DOE

By 

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing **MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AT LAW** has been sent by facsimile and mailed, postage prepaid, by U.S. mail this 25 day of August 2003, to all counsel of record for Plaintiff, to wit:

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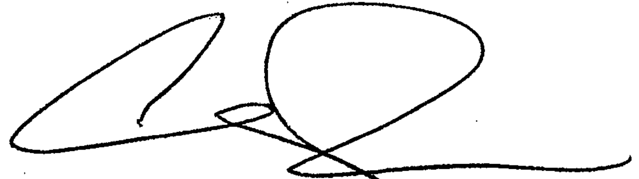

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