IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
LAW DIVISION, COUNTY OF DUPAGE

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

NOTICE OF FILING

To: **ATTORNEYS FOR DEFENDANT**
DEFENDANT MR. JOHN DOE
Mr. Charles Lee Mudd, Jr.
Law Offices of Charles Lee Mudd, Jr.
4710 North Virginia Avenue
Chicago, Illinois 60625
773-271-7600 Telephone
773-989-4441 Facsimile

Please take notice that I have this 22nd day of September 2003 sent via overnight delivery for filing with the Clerk of the 18th Judicial Circuit, DuPage County, Illinois, **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AT LAW**, a copy of which is hereby served upon you.

Edward K. Runyan
Illinois Bar No. 6272971
DuPage Attorney No. 175831
McDonnell Boehnen Hulbert & Berghoff
300 South Wacker Drive, 32nd Floor
Chicago, Illinois 60606
(312) 913-0001 (tel)
(312) 913-0002 (fax)

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PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AT LAW

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INTRODUCTION

Stripped of all of its bluster, John Doe's Motion to Dismiss reduces to a single premise: E. Van Cullens's ("Mr. Cullens") defamation and false light claims against John Doe ("Mr. Doe") cannot survive a motion to dismiss because the statements at issue referred to Mr. Cullens's predecessors in the management at Westell Technologies, Inc. ("Westell"), not Mr. Cullens. Although Mr. Doe may now wish he had chosen to accuse only Westell's former managers of being corrupt, that is not what he did. Instead, fully able to express a distinction between the former managers and Mr. Cullens's management group, Mr. Doe chose to tar both the former managers and Mr. Cullens's management group with the same brush. He did so by separately, falsely accusing both the former managers and the current managers of corrupt management. In these circumstances, Mr. Cullens can state – and has stated – claims for false light and defamation *per se* for the harm that Mr. Doe's false accusations of corruption have caused to Mr. Cullens's reputation. Therefore, Mr. Doe's Motion to Dismiss should be denied.

FACTUAL BACKGROUND

I. Facts Relevant to 2-615 Motion[1]

Mr. Cullens is the President, Chief Executive Officer, and Director of Westell, an Illinois-based broadband network equipment manufacturing company with annual revenues of more than $200 million over the past three years, and with over 800 employees as of March 31, 2003. Amended Complaint, ¶¶ 2, 7. He held all of those positions as of January 15, 2003, when Mr. Doe made his defamatory statements. Amended Complaint, ¶¶ 14-17. Marc Zionts,

[1] As Mr. Doe admits in his Memorandum, this Court must consider only the well-pleaded allegations of the First Amended Complaint and draw all inferences from those allegations in Mr. Cullens's favor. Def. Memo. at 3; *see also Brandt v. Boston Sci. Corp.*, 204 Ill. 2d 640, 645, 792 N.E.2d 296, 299 (Ill. 2003)("In reviewing a motion to dismiss under section 2-615, we accept as true all well-pleaded facts and reasonable inferences therefrom... considering all allegations in a light most favorable to plaintiff."). Despite that recognition, Mr. Doe improperly and repeatedly refers to facts outside the scope of the Amended Complaint in his 2-615 arguments. *See* Def. Memo. at 8, 10, 12.

Mr. Cullens's predecessor as Westell's Chief Executive Officer, had been gone from Westell for about one and one-half years as of the time of the defamatory statements. Amended Complaint, ¶ 17.

On January 15, 2003, Mr. Doe, using the screen name "need_girl_2_suck_me," wrote two messages on investment-related Internet message boards. Amended Complaint, ¶¶ 9-16. In the first message, posted on the Yahoo! message board related to Westell under the title "Westell Management is Crooked," Mr. Doe stated:

> Re: Westell Management is Crooked: You guys are dreaming... Have you forgotten the multi-million dollar lawsuits that are still pending aginst [sic] WSTL when former CEO Zionts 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.

Amended Complaint, ¶ 15. The reference to ADCT in that message was to ADC Telecommunications, one of Westell's competitors. Amended Complaint, ¶¶ 7, 8, 9, 11. In the second message, posted on the Yahoo! Message board related to ADC Telecommunications, Mr. Doe stated:

> Re: Look at Westell: WSTL sucks. Their management is crooked. Multi-million dollar lawsuits pending from Enron-like management of Marc Zionts. STAY AWAY from this loser.

Amended Complaint, ¶ 16.

Mr. Doe's accusations of crooked management were especially egregious because Mr. Cullens was hired to manage Westell because of his reputation of competence and integrity. Amended Complaint, ¶¶ 25-28. His integrity was especially important because, as one newspaper writer stated, "After a year full of cooked books, shady deals and bankruptcies, the telecom industry desperately seeks to turn to stability, respectability and, most of all, profitability." Amended Complaint, ¶ 18. Prior to Mr. Doe's comments, Mr. Cullens was well

regarded, both for his earlier management of Harris Corporation and that of Westell. Amended Complaint, ¶¶ 25-28.

II. Additional Facts Relevant to 2-619(b)(9) Motion[2]

Prior to Mr. Doe's comments, several derivative suits had been filed against Westell and its former managers and directors. *See* Def. Memo. at 14 n.10. In none of those suits was Mr. Cullens named as a defendant, alleged to have committed misdeeds, or alleged to have otherwise mismanaged Westell. *Id.* That is, not only has Mr. Cullens's management been beyond reproach, he has not even been alleged to have been deficient in any way in his management of Westell. But even in the derivative suits that were brought against Westell and its former management, no mismanagement was ever found; the asserted claims were either dismissed or settled with no finding of liability. *See* Def. Memo. at 15.

ARGUMENT

Despite Mr. Doe's miscasting of the relevant facts, the simple truth is that Mr. Doe falsely and maliciously accused Mr. Cullens's management of Westell of being "crooked" and attempted to lump Mr. Cullens in with allegations of a "cook-the-book scheme" and "Enron-like management." Given the circumstances and the content of Mr. Doe's statements, there can be no doubt that the statements include comments "of and concerning" Mr. Cullens and that those comments are false statements of fact. That is, while Mr. Doe's statements may include minor statements of opinion and accurate fact, his central points are false statements of fact that besmirch Mr. Cullens's business reputation.

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[2] Mr. Cullens incorporates by reference all of the facts set forth above, as well as all of the other allegations of the Amended Complaint. This Court must regard them as true for purposes of Mr. Doe's motion. *Myers v. The Telegraph*, 332 Ill. App. 3d 917, 921-22, 773 N.E.2d 192, 197 (Ill. App. Ct. 2002)("For purposes of a section 2-619 motion, the court must treat as true all well-pleaded facts and reasonable inferences that can be drawn from the complaint.").

I. Mr. Cullens States Claims Against Mr. Doe for Defamation *Per Se* and False Light[3]

Mr. Doe attacks Mr. Cullens's claims under 2-615 for one reason, but from two different directions. He now asserts that his statements would not be read as relating to Mr. Cullens, both because he believes that third parties would reasonably interpret them as relating to someone else and because he believes that extrinsic evidence is needed to tie Mr. Cullens to the defamatory statements. Neither is true. Key portions of Mr. Doe's defamatory comments were directed at the current management of Westell, and no other evidence is needed to identify Mr. Cullens as the target of the comments because Mr. Cullens is the central figure in the current management of Westell. That is, based solely on the statements Mr. Doe made and the context in which he made them, any third party would reasonably draw false conclusions of dishonest management of Westell by Mr. Cullens.

A. Mr. Doe's Defamatory Statements Are "Of and Concerning" Mr. Cullens

Mr. Doe first argues that his defamatory statements are not "of and concerning" Mr. Cullens because they do not name Mr. Cullens personally and because they discuss another individual. The first point is of little moment; Illinois courts have made it clear that a statement need not name a plaintiff specifically to be "of and concerning" that plaintiff. A "defamatory statement may be actionable even though the individual was not mentioned by name as long as it appears that some third party reasonably understood the statement to have referred to the individual." *Aroonsakul v. Shannon*, 279 Ill. App. 3d 345, 350, 644 N.E.2d 1094, 1098 (Ill. App. Ct. 1996); *see also Bryson v. News Am. Publ'ns, Inc.*, 174 Ill.2d 77, 96-97, 672 N.E.2d 1207, 1218 (Ill. 1996); *Brown & Williamson Tobacco Corp. v. Jacobson*, 713 F.2d 262, 267 (7th Cir.

[3] In addition to arguing that Mr. Cullens has not stated a claim for defamation *per se* or false light, Mr. Doe mysteriously argues that Mr. Cullens has not stated a claim for defamation *per quod*. Def. Memo. at 9-11. Mr. Cullens has not even attempted to state a claim for defamation *per quod*, as demonstrated by the lack of any count for defamation *per quod* in the Amended Complaint. Thus, Mr. Doe's argument is moot.

1983); *cf. Rosenblatt v. Baer*, 383 U.S. 75, 81, 86 S.Ct. 669, 673-74 (1966)(explaining that "[w]ere the statement at issue in this case an explicit charge that [the plaintiff] or the entire Area management were corrupt, we assume without deciding that any member of the identified group might recover."). Similarly, it is not (and could not be) the law that a tortfeasor can avoid responsibility for his defamation of one party by also defaming another party. *Rosenblatt*, 383 U.S. at 81-82, 86 S.Ct. at 673-74 (regardless of whether defamatory statements are implicit or explicit, "it would be no defense to a suit by one member of an identifiable group engaged in governmental activity that another was also so attacked.") Thus, the only question is whether a third party could reasonably understand Mr. Doe's statements as referring to Mr. Cullens. That is, just because Mr. Doe wrote falsehoods about Marc Zionts and Westell's former management, that does not absolve him from his concurrent defamation of Westell's current management.

The nature and content of Mr. Doe's comments make it clear that his remarks were directed to the then-current management of Westell, which was (and is) headed by Mr. Cullens. *See Bryson*, 174 Ill. 2d at 90, 93, 672 N.E.2d at 1215, 1217 (allegedly defamatory statements are to be considered "in context, giving the words, and their implications, their natural and obvious meaning"); *see also Chapski v. Copley Press*, 92 Ill. 2d 344, 352, 442 N.E.2d 195, 199 (Ill. 1982). Mr. Doe made his remarks on two different Yahoo! message boards, both of which are directed to the investment community. Amended Complaint, ¶¶ 9-16. Neither message board relates to historical analysis; instead, they are directed to current issues of management, competition, strategy, and other aspects of the companies that are the subject of the message boards. Amended Complaint, ¶ 9. In that context, Mr. Doe made remarks on why fellow investors should avoid investing in Westell as of January 15, 2003. His key point, repeated in both messages on both message boards, was that Westell management "is crooked." Amended

Complaint, ¶¶ 15, 16. He did not say that Westell management had been crooked or was previously crooked; he said that Westell management, as of January 15, 2003, *is* crooked. Furthermore, he expressly mentioned Marc Zionts as someone who was separate from the current Westell management, referring to him as "former CEO Zionts." Amended Complaint, ¶ 15.

Under these circumstances, if Mr. Doe's comments regarding Westell management do not relate to Mr. Cullens, they could not be construed as relating to anyone. Mr. Cullens, as President, CEO, and a member of the board of directors, was personally responsible for the propriety of Westell's management at the time of Mr. Doe's allegations that Westell management "is crooked" and can not be trusted. Amended Complaint, ¶¶ 2, 15, 16. Given the forward-looking nature of the forum in which Mr. Doe chose to express himself and the content of the statements themselves, it would be unreasonable to suggest that Mr. Doe was addressing only past management – if that were the situation, the message would have no relevance to his attempt to discourage current investment in Westell. Indeed, Mr. Doe now attempts to avoid liability by attempting to draw attention away from his actual statements by compressing each statement's litany of allegations into a single thought, and that only about Marc Zionts. Def. Memo. at 5-6. However, online he easily distinguished past and present when, on one hand, he said that Westell management "is crooked" and that "[y]ou simply can't trust the management of this company" and, on the other hand, he said that there were "multi-million dollar lawsuits that are still pending aginst [sic] WSTL when former CEO Zionts orchestrated a cook-the-book scheme" and "[m]ulti-million dollar lawsuits pending from Enron-like management of Marc Zionts." Amended Complaint, ¶¶ 15, 16. Mr. Doe cannot now recast the several separate

thoughts in his messages as a single point. Because he cannot do so, it is clear that his remarks about Westell management are "of and concerning" Mr. Cullens.

Just as a reasonable person would read portions of Mr. Doe's statements as relating to Mr. Cullens, he or she would not read them as relating to Marc Zionts. In construing Mr. Doe's statements, the Court must give them their "natural and obvious meaning" within their context and should not stretch to find other meaning merely because the unnatural meaning would avoid a finding of liability. *Bryson*, 174 Ill. 2d at 93, 672 N.E.2d at 1217 (holding that "this court will not strain to interpret allegedly defamatory words in their mildest and most inoffensive sense in order to hold them nonlibelous"); *see also Chapski*, 92 Ill. 2d at 352, 442 N.E.2d at 199. Indeed, the "innocent construction rule" was modified by the Illinois Supreme Court in 1982 as a reaction to courts twisting defamatory statements to deny liability. *Chapski*, 92 Ill. 2d at 350-52, 442 N.E.2d at 198-99. Here, the natural and obvious meaning of Mr. Doe's statements is that he was separately accusing Westell's current management and Marc Zionts of misdeeds. He posted his remarks on two separate investment-related Internet boards to discourage investment in Westell. Because of the forward-looking nature of those boards (and of investment in general), allegations of corruption in the current management would be extremely relevant; allegations of past corruption (except to the extent it might give rise to current or future liability) would not be relevant.

Mr. Doe took care of the situation in which past corruption might be relevant through his remarks on the then-pending lawsuits. Of course, Mr. Doe also separately used the present tense in discussing Westell's management, a choice of language inconsistent with any construction that would include Marc Zionts. He also repeated his choice of language twice, clarifying that he had not made a mistake in using the present tense to refer to Westell's management. Mr. Doe

emphasizes the portions of his statements directed to persons other than Mr. Cullens in an attempt to avoid culpability for his remarks about Mr. Cullens's management. It would be improper for this Court to accept that approach. In *Berkos v. National Broadcasting Company, Inc.*, the Court rejected a similar "strained interpretation" offered by the defendants that placed "an undue emphasis upon certain portions of the references . . . without due regard to the remainder of the broadcast's overall context." 161 Ill. App. 3d 476, 486, 515 N.E. 2d 668, 673 (Ill. App. Ct. 1987). Thus, in the context in which Mr. Doe made his statements, the only reasonable and natural construction of the statements is that Mr. Doe was not referring to Marc Zionts when he called Westell's management "crooked."

B. No Extrinsic Evidence Is Needed for Third Persons to Know Mr. Cullens Was A Defamed Westell Manager

Mr. Doe argues that extrinsic evidence would be necessary to determine that Mr. Cullens was the defamed party because he is not named expressly. He does so despite acknowledging that a claim for defamation *per se* is proper, even if the plaintiff is not expressly identified, if it appears on the face of the complaint that third parties would have reasonably understood that the defamatory remarks were about the plaintiff. *See* Def. Memo. at 6 n. 4 (citing *Bryson*, 174 Ill. 2d at 96-97, 672 N.E.2d at 1218). Here, the most basic information that would have led a third party to reasonably understand that Mr. Doe was besmirching Mr. Cullens's reputation appears on the face of the Amended Complaint – at the time Mr. Doe was calling Westell's management "crooked" and untrustworthy, Mr. Cullens was the President and CEO of Westell *and had been so for almost one and one half years*. Amended Complaint, ¶¶ 15-17. While Mr. Doe also suggested that there was a hangover effect of potential liability from the leadership of Marc Zionts, that would not mean that the individuals who were managing Westell were "crooked" or untrustworthy even if Mr. Doe considered Mr. Zionts's prior leadership to be so. It is

unreasonable to believe that a third party would believe that Mr. Doe's statement that "Westell management is crooked" was intended to signify that Westell's prior management was dishonest almost one and one half years earlier. Such a statement would be irrelevant to whether third parties should invest in Westell upon reading Doe's statements, which was one of Mr. Doe's premises. Furthermore, Mr. Doe's statements that Mr. Zionts "orchestrated a cook-the-book scheme" and that his management was "Enron-like" were untrue; Mr. Doe was thus tarring both the "former CEO" and the present management of Westell with the same brush of falsehood. In short, a reasonable person would believe that Mr. Doe was speaking of the current management of Westell – meaning Mr. Cullens – when he called it corrupt and untrustworthy.

Mr. Doe focuses on additional facts set forth in the Amended Complaint in contending that extrinsic evidence is needed to tie Mr. Cullens to Mr. Doe's statements. His argument is remarkable, in that he is essentially claiming that Mr. Cullens has pled too extensively to state a claim. But the additional facts pled in the Amended Complaint are not the link that ties Mr. Cullens to Westell's management, they merely buttress the obvious connection due to Mr. Cullens's role as President, CEO, and Director. That is, the additional facts are sufficient, but not necessary, to show that the public links Mr. Cullens to Westell's management. Without them, this Court can still reach the obvious conclusion that the chief executive officer of a company is a member of the management of that company.

C. Mr. Doe's Comments Portray Mr. Cullens in a False Light

Mr. Doe attacks Mr. Cullens's false light claim on only one basis: that the defamatory statements do not relate to Mr. Cullens. As discussed above, the context of Mr. Doe's remarks and use of the present tense to discuss Westell management made it clear that Mr. Doe's

statements related to Mr. Cullens. As a result, the same remarks that defamed Mr. Cullens also portrayed him in a false light.

II. Mr. Doe Has No Affirmative Defense that Shields Him from Mr. Cullens's Defamation *Per Se* and False Light Claims

Mr. Doe raises three arguments as affirmative defenses: first, that his statements were factually accurate; second, that the "innocent construction rule" shields his statements from liability; and, third, that his statements were of opinion. The first and third arguments are wholly inconsistent: either the statements are of purported fact and objectively disprovable (which they are), or they are of opinion and cannot be proved or disproved. But that does not save Mr. Doe from liability, as his statements were not true. Also, the innocent construction rule is the same argument that Mr. Doe urges in relation to 2-615, that his statements should be read as relating to Marc Zionts, not Mr. Cullens. As discussed above, that is not a reasonable position. Therefore, Mr. Doe's 2-619(b)(9) argument must fail and his motion must be denied.

A. Mr. Doe's Statements Were False

Mr. Doe argues that his statements were merely "comments regarding the litigation," but he has the burden of proving that the gist of the entire statements (not just a portion) were "substantially true." *See* Def. Memo. at 18. *Parker v. House O'Lite Corp.*, 324 Ill. App. 3d 1014, 1026; 756 N.E.2d 286, 296 (Ill. App. Ct. 2001) (holding that "a defendant bears the burden of establishing the 'substantial truth' of her assertions"). That is, the issue of "substantial truth" is *not*, as Doe would otherwise have you believe, as simple as whether or not there was "litigation that had been pending against Westell since 2000." Def. Memo. at 14. *Gist v. Macon County Sheriff's Dept.*, 284 Ill. App. 3d 367, 371, 671 N.E. 2d 1154, 1157 (Ill. App. Ct. 1996). Instead, the issues are (1) whether Doe's statement that "Westell management is crooked" is false or substantially true, when read in context surrounding the statement, (2) whether Doe's

statement that "You simply can't trust the management of this company" is false or substantially true; and (3) whether or not the "gist" of each statement, when read in context, amounts to something actionable under false light or defamation *per se*. These statements are decidedly *not* true.

Mr. Doe simply fails to address any of the three relevant issues. He provides no evidence that Westell's management, as of January 15, 2003, was crooked; that one could not trust Westell's management as of January 15, 2003; or that the gist of the statements related to something other than an allegation that Westell's management was corrupt and untrustworthy. All of those comments are false; none of them relate to litigation. Instead, Mr. Doe attempts to focus on his statements' remarks about Marc Zionts. He chooses to ignore the fact, and would like the Court to ignore the fact, that he stated that "Westell management is crooked" in *both* statements. In fact, the statement that "Westell management is crooked" is even more prominent in the Westell message board, because Mr. Doe used that phrase as the title to his statement – a title which people reading the messages on the board would read before they could review any text relating to Marc Zionts. Indeed, it is possible that many people would simply read the title of the message, understand that Mr. Doe was asserting that Westell management is corrupt, and not read the portion of the statements regarding Marc Zionts.

Even considering Mr. Doe's argument about his allegations of misdeeds by Marc Zionts, one is struck by the irony of his attempted defense of substantial truth. In order to construct his defense to his false statements, Mr. Doe has equated being sued for some misdeed as being the same as being actually guilty of that misdeed. In order for Mr. Doe's argument to succeed, one would have to conclude that by virtue of being a defendant in litigation, an individual would already be considered guilty of the alleged conduct. Applying Mr. Doe's reasoning to this case,

Mr. Doe would already be considered to have defamed Mr. Cullens simply because claims were brought against Mr. Doe. Indeed, Mr. Doe's position is even worse that that of Marc Zionts, as all of the claims brought against Mr. Zionts were either dismissed for failure to state a claim or dismissed pursuant to settlement with no finding of liability. Thus, if it were true that a person would be guilty of a "cook-the-book scheme" merely because he was accused of it, under the same reasoning Mr. Doe is guilty of defamation and false light.

Furthermore, Doe inappropriately asks the Court "to assume that the Defendant referred to those individuals that both remained in the litigation and [sic] involved with Westell" whenever Doe "implicitly referred to any particular individual(s) by reference to Westell management." Def. Memo. at 18. However, under 2-619, Doe bears the burden of *proving* both that it was substantially true that "Westell management is crooked" and that the entire statements, when viewed as a whole, are intended to apply to only "certain members" of Westell management, instead of all of them. *Parker*, 324 Ill. App. 3d at 1026; 756 N.E.2d at 296. But where all members of a relatively small group are defamed, any member of the group may recover. However, in his statements, not only does Doe refer to the current management group as a whole, but Doe also refers to the former CEO of Westell as the representative of the former management, thereby focusing on the current CEO (Mr. Cullens) when referring to the present management.

B. Mr. Doe's Statements Cannot be Reasonably Construed as Innocent

As discussed above in relation to Mr. Doe's 2-615 arguments, there is no reasonable innocent construction of Mr. Doe's statements. In the context in which the statements were made, they cannot be read as relating to Marc Zionts in accusing Westell management of being "crooked." They also cannot be read as failing to defame Mr. Cullens, as they are false

statements of fact regarding his management that impute a want of integrity. Furthermore, the "innocent construction rule" does not apply to false light claims. *Zechman v. Merrill Lynch*, 742 F. Supp. 1359, 1373 & n.14 (N.D.Ill. 1990) (holding that "the innocent construction rule, which can be recast as the 'non-defamatory' construction rule, does not apply to false-light privacy actions."). In short, Mr. Doe's "innocent construction rule" argument must fail for the same reason that his 2-615 arguments must fail.

C. Mr. Doe's Statements Were of Purported Fact, Not Opinion

As a final attempt to avoid liability for his defamatory statements, Mr. Doe contends that they were merely statements of opinion. However, "[a] statement is constitutionally protected under the first amendment only if it cannot be 'reasonably [] interpreted as stating actual facts,'" *Bryson*, 174 Ill. 2d at 99. 672 N.E.2d at 1220 (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20, 110 S.Ct. 2695, 2706 (1990)). Furthermore, "a false assertion of fact can be libelous even though couched in terms of an opinion." *Bryson*, 174 Ill. 2d at 99-100, 672 N.E.2d at 1220 (finding a statement libelous even though it was described as "fiction").

In Illinois, there is a case on point that establishes that Doe's statements were not statements of opinion. *Berkos v. NBC, Inc.*, 161 Ill.App.3d 476, 515 N.E.2d 668 (Ill. App. Ct. 1987). In *Berkos*, the Illinois Appellate Court reversed the dismissal of a case in which a judge (Berkos) claimed false light and defamation, where the defendant insinuated that the judge had taken a bribe by artfully juxtaposing a reference to the judge with an allegation of judicial bribery, and had "called into question his judicial integrity." *Berkos*, 161 Ill.App.3d at 484, 515 N.E.2d at 672. The Court held that while the defendant's statements "may not affirmatively and explicitly state that Berkos had accepted a bribe... or that federal authorities intended to seek an indictment of Berkos as a 'corrupt judge'... for that reason," the defendant's "references to

Berkos, in their overall context, can be reasonably interpreted by an ordinary viewer of normal intelligence as imputing criminal involvement to Berkos." *Berkos*, 161 Ill.App.3d at 487, 515 N.E. at 674. Indeed, as the Court explained, it is "well established that statements made in the form of insinuation, allusion, irony, or question, may be considered as defamatory as positive and direct assertions of fact." *Id.* Similarly, in *Antonelli v. Field Enterprises, Inc.*, the plaintiff-appellant had brought a defamation claim based on statements including that he was a mobster. 115 Ill. App. 3d 432, 450 N.E.2d 876 (Ill. App. Ct. 1983). The Court noted "The words criminal, felon, crook, law breaker, scofflaw, gangster or mobster all connote the same type of person about whom those meanings may be ascribed: one who breaks or violates the law." *Antonelli*, 115 Ill. App. 3d at 435, 450 N.E. 2d at 878-79. Again, the Court found that the same language that Mr. Doe used was a statement of objectively verifiable fact, not a statement of opinion.[4] Thus, Mr. Doe's statements concerning Mr. Cullens are positive and direct assertions of fact.

III. NO SANCTIONS ARE JUSTIFIABLE

Mr. Doe halfheartedly argues for sanctions in an ineffective effort to bootstrap his argument into something more powerful. Because Mr. Cullens's Amended Complaint is not only well grounded in fact and warranted by existing law,[5] but actually impervious to Mr. Doe's attacks, Mr. Doe's request for sanctions should be denied. Mr. Doe made false public statements about Mr. Cullens's leadership of Westell; Illinois law does not shield him from liability for his statements.

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[4] Although the Court found the terms set forth above could support a claim for defamation under some circumstances, it found they could not in *Antonelli* because "it can hardly be said that any one of the foregoing terms could not truthfully portray and characterize plaintiff's criminal past." *Antonelli v. Field Enterprises, Inc.*, 115 Ill. App. 3d 432, 435, 450 N.E. 2d 876, 879 (Ill. App. Ct. 1983).

[5] In arguing for sanctions, Mr. Doe misstates the test for sanctions under Illinois Supreme Court Rule 137. Ill. Sup. Ct. R. 137 (2003). An argument need not be warranted by existing law if it is warranted by "a good-faith argument for the extension, modification, or reversal of existing law." *Id.* The difference is immaterial in this case, as existing Illinois law supports Mr. Cullens's claims.

CONCLUSION

For the reasons stated herein, Mr. Cullens respectfully requests this Court to deny Mr. Doe's Motion to Dismiss in its entirety.

Respectfully submitted,

E. Van Cullens

By: _____

Edward K. Runyan
Illinois Bar No. 6272971
DuPage Attorney No. 175831
Joshua R. Rich
McDonnell Boehnen Hulbert & Berghoff
300 South Wacker Drive, 32nd Floor
Chicago, Illinois 60606
(312) 913-0001

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JOHN DOE,	)	Judge John T. Elsner
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Defendant.	)	

CERTIFICATE OF SERVICE

The undersigned attorney certifies that he will cause a true and accurate copy of the attached **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT AT LAW** to be sent via United States mail, proper postage prepaid, to:

Charles L. Mudd, Jr.
4710 North Virginia Avenue
Chicago, Illinois 60625

from 300 S. Wacker Drive, Chicago, Illinois, on September 22, 2003.

Edward K. Runyan
Illinois Bar No. 6272971
DuPage Attorney No. 175831
McDonnell Boehnen Hulbert & Berghoff
300 South Wacker Drive, 32nd Floor
Chicago, Illinois 60606
(312) 913-0001 (tel)
(312) 913-0002 (fax)