

**IN THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS**

E. VAN CULLENS)

Plaintiff,)

v.)

JOHN DOE,)

Defendant.)

Case No. 2003 L 000111

Judge John T. Elsner

NOTICE OF FILING

**To: ATTORNEYS FOR PLAINTIFF
PLAINTIFF E. VAN CULLENS**
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Please take notice that I have this 25th 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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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

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

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

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").