No. 129227

IN THE SUPREME COURT OF ILLINOIS

Project44, Inc., Plaintiff-Appellee, v. FourKites, Inc., Defendant-Appellant.	On Appeal from the Appellate Court of Illinois, First Judicial District No. 1-21-0575 Circuit Court of Cook County, Illinois, County Department, Law Division Case No. 2020-L-4183 The Honorable James E. Snyder, Judge Presiding

BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLANT FOURKITES, INC.

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Oral Argument Requested

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POINTS AND AUTHORITIES

INTRODUCTORY PARAGRAPH 1

ISSUE PRESENTED FOR REVIEW 1

JURISDICTION 1

Illinois Supreme Court Rule 315 2

STATEMENT OF FACTS 2

STANDARD OF REVIEW 3

Section 2–615 of the Code of Civil Procedure (735 ILCS 5/2-615) 3

Vernon v. Schuster, 179 Ill. 2d 338, 344, 688 N.E.2d 1172 (1997) 3

ARGUMENT 3

A. The Tort of Defamation is Solely Focused on Preventing Reputational Harm 5

Restatement (Second) of Torts § 577 ..... 5, 6

Stone v. Paddock Publications, Inc., 2011 IL App (1st) 093386, 961 N.E.2d 380 5

Emery v. Ne. Ill. Reg'l Commuter R.R. Corp., 377 Ill.App.3d 1013, 800 N.E.2d 1002 (1st Dist. 2007) 6

B. The Appellate Court's Holding is Overly Broad Because it Applies Regardless of What Role the Recipient Plays at the Company 6

C. The Corporate Form Must be Considered in Applying the Publication Rule 8

Small v. Sussman, 306 Ill.App.3d 639, 713 N.E.2d 1216 (1st Dist. 1999) 8

Manufacturers' Exhibition Bldg. Co. v. Landay, 219 Ill. 168, 76 N.E. 146 (1905) 9

TABFG, LLC v. Pfeil, 746 F.3d 820 (7th Cir. 2014) 9

Bryson v. News Am. Publications, Inc., 174 Ill.2d 77, 672 N.E.2d 1207 (1996) 10

D. This is Not an Intracompany Communication Case 11

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

Fausett v. American Resolution Management Corp.,
542 F. Supp. 1234 (D. Utah 1982)... 12, 13

Sleepy's LLC v. Select Comfort Wholesale Corp.,
909 F.3d 519 (2d Cir. 2018)... 12, 13

Restatement (Second) of Torts § 577..12, 13, 15

W. Prosser & W. Keeton, Torts §113 (5th Ed. 1984)......................... 12, 16

Popko v. Continental Casualty Company,
355 Ill.App.3d 257, 823 N.E.2d 186 (1st Dist. 2005)......................... 14, 15

805 ILCS 5/8.05... 16

E. Privilege Cannot Perform the Function of the Publication Requirement..17

Emery v. Ne. Illinois Reg'l Commuter R.R. Corp.,
377 Ill.App.3d 1013, 880 N.E.2d 1002 (2007)... 17

Cweklinsky v. Mobil Chemical Co.,
267 Conn. 210, 837 A.2d 759 (2004) 17, 18

F. This Court Should Prevent an Unnecessary Expansion of Defamation Law for the Benefit of Corporate Plaintiffs 18

Van Horne v. Muller,
185 Ill.2d 299, 705 N.E.2d 898 (1998)... 18

Emery v. Ne. Illinois Reg'l Commuter R.R. Corp.,
377 Ill.App.3d 1013, 880 N.E.2d 1002 (2007)... 19

Cweklinsky v. Mobil Chemical Co.,
267 Conn. 210, 837 A.2d 759 (2004) 19

CONCLUSION...20

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

INTRODUCTORY PARAGRAPH

This is a defamation case hinging on the threshold issue of what constitutes a publication when the plaintiff is a corporate entity. The underlying Complaint in this matter alleges that the Plaintiff-Appellee, project44, Inc. ("Plaintiff" or "p44"), was defamed by two anonymous emails received by a few members of its executive leadership team. As in any defamation claim, an initial threshold issue is whether the allegedly defamatory statements were published to a third party. Defendant-Appellant, FourKites, Inc. ("Defendant" or "FourKites") filed a Motion to Dismiss arguing that no such publication occurred because the recipients of the emails – two members of Plaintiff's Board of Directors and its Chief Revenue Officer – were the human embodiment of the Plaintiff. The Circuit Court agreed and dismissed the Complaint. The Appellate Court reversed the Circuit Court's decision and this appeal followed.

ISSUE PRESENTED FOR REVIEW

Who qualifies as a third party for purposes of publication when a defamation claim is brought by a corporate plaintiff, and whether the appellate court erred in holding that any statement made to a corporate representative, regardless of that representative's role with the corporation, has been published for purposes of a defamation claim.

JURISDICTION

The Circuit Court entered an order granting Defendant's Motion to Dismiss on April 26, 2021. (Appx. at 173-174.)[1] Plaintiff filed a timely notice of appeal on May 20, 2021. The First District Court of Appeals entered its judgment on November 22, 2022,

[1] Citations herein to "Appx." are to materials contained in the Appendix to this Brief.

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SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

and no petition for rehearing was filed. (Appx. At 566-583.) Defendant timely filed its petition for leave to appeal under Illinois Supreme Court Rule 315(b) on December 23, 2022. This Court granted the petition on March 29, 2023, and has jurisdiction over this matter pursuant to Rule 315.

STATEMENT OF FACTS

The underlying litigation arises out of two anonymous emails that were sent to three members of Plaintiff's leadership regarding Plaintiff's business practices. The first was sent to two members of Plaintiff's Board of Directors from the email address "kenadams8558@gmail.com" on May 19, 2019 ("Adams Email"). (Appx. at 135.) The second was sent to Plaintiff's Chief Revenue Officer ("CRO") from the email address "jshort5584@gmail.com" on May 27, 2019 ("Short Email" and collectively with the Adams Email, the "Emails"). (Appx. at 253.) Plaintiff initially filed a Verified Petition for Discovery (the "Discovery Petition") in the Circuit Court of Cook County on May 30, 2019, to subpoena AT&T and Google to disclose information regarding the identity of the individual(s) who sent the Emails.

While the Discovery Petition was pending, and with the applicable statute of limitations close to expiring, Plaintiff filed the underlying action against Defendant and unknown individuals in the Circuit Court of Cook County (the "Complaint"). (Appx. at 473-612.) The Complaint consisted of three counts: Counts I and II – Defamation Per Se, and Count III – Civil Conspiracy. (Appx. at 487-491.) Defendant filed a Motion to Dismiss pursuant to 735 ILCS 5/2-615 on January 20, 2021 (the "Motion"). (Appx. at 412-443.) The Motion argued that Plaintiff's defamation claims failed because (i) the statements at issue were not published and (ii) the statements were not defamatory. (Appx. 414-420.) The Motion also argued that Plaintiff's civil conspiracy claim failed because

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

(i) there was no evidence of a conspiratorial act, (ii) a company cannot conspire with itself, and (iii) there was no underlying tortious act because the defamation claims failed. (Appx. at 420-422.)

Although Defendant has challenged, and continues to challenge, whether the underlying statements were defamatory and its alleged involvement in any conspiratorial activity, those issues became moot for purposes of appeal because the Circuit Court ultimately agreed that the statements at issue were not published to a third party, and therefore could not support a claim for defamation. Without any underlying tortious act, the civil conspiracy claim also failed. Based on those conclusions, the Circuit Court granted the Motion on April 26, 2021, and Plaintiff's appeal followed (Appx. at 19-357.) The Appellate Court issued its opinion on November 22, 2022. Defendant timely filed its Petition for Leave to Appeal on December 23, 2022, which this Court granted on March 29, 2023.

STANDARD OF REVIEW

This case is before the Court following the dismissal of Plaintiff's claims pursuant to Section 2–615 of the Code of Civil Procedure (735 ILCS 5/2-615) . Since ruling on a motion to dismiss does not require a court to weigh facts or determine credibility, the standard of review in this matter is *de novo*. *Vernon v. Schuster*, 179 Ill. 2d 338, 344, 688 N.E.2d 1172, 1175 (1997) .

ARGUMENT

The Appellate Court's decision below upends the tort of defamation in Illinois by eliminating the critical gatekeeping function served by the publication requirement in cases brought by corporate plaintiffs. The issue presented by this case – who qualifies as a third

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

party for purposes of publication when the plaintiff is a corporate entity – is a matter of first impression. As a result, it offers this Court the opportunity to preserve the publication requirement and apply it in a meaningful way by holding that statements about a company are not published when such statements are made to the human embodiment of the company, such as to members of its Board of Directors or C-Suite leadership. Such a holding would effectively serve the underlying basis for the tort of defamation, which is solely focused on protecting one's reputation in the community, while preventing a dangerous expansion of the tort to cover statements that are upsetting or hurtful but do not cause reputational harm because they are made directly to the subject of the statement. Of course, such a holding would not prevent aggrieved individuals from seeking redress under defamation theories, nor would it prevent aggrieved companies from seeking redress for actual damages under other available legal theories.

The Complaint in this matter alleges that p44 was defamed by two anonymous emails received by a few members of its executive leadership team. Neither party takes issue with the underlying principle that a statement cannot be defamatory if it is made exclusively to the subject of the statement. Therefore, the threshold issue is whether the allegedly defamatory statements were published to a third party. The Appellate Court's ruling forecloses consideration of the issue where the plaintiff is a legal entity rather than an individual by holding that any statement about a company has been published regardless of to whom it was made.

There is almost no opinion from any jurisdiction in the Country that carefully analyzes this issue. As a result, the Court is presented with a unique opportunity to clarify Illinois law on a critical issue and ensure that the publication requirement is not casually

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

discarded. Importantly, the Court's holding can be narrowly tailored to serve this end, and need not create an exception that swallows the rule. Despite Plaintiff's protestations to the contrary, Defendant has never argued that communications about a corporation to *any* employee of that corporation are not published. Rather, it seeks a meaningful application of the publication requirement that accounts for the legal status of corporate entities and properly considers the role of a corporation's executive leadership in relation to the issue of reputational harm. Applying a blanket rule like the one employed by the Appellate Court ignores the harm the tort is designed to protect against and provides corporate plaintiffs with an unnecessary advantage in bringing defamation claims by allowing such claims to proceed even where there is no meaningful risk of reputational harm. This Court should reverse the Appellate Court and hold that publication does not occur where the statements at issue are made to those leaders who serve as the human embodiment of the Company about which the allegedly defamatory statements were made.

A. The Tort of Defamation is Solely Focused on Preventing Reputational Harm

The tort of defamation is intended to protect against reputational harm caused by false statements. *See* Restatement (Second) of Torts (the "Restatement") § 577, Comment b (1977) ("The law of defamation primarily protects only the interest in reputation."). As Illinois courts have explained, a statement is defamatory only if it harms an individual's reputation by lowering the individual in the eyes of his community or deterring the community from associating with him. *Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 093386, ¶ 24, 961 N.E.2d 380, 391. It is publication that creates the possibility of reputational harm.

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

Consequently, publication to a third-party is essential to liability. *See* Restatement § 577, Comment a. It can be no other way because "unless the defamatory matter is communicated to a third person there has been no loss of reputation, since reputation is the estimation in which one's character is held by his neighbors or associates." *Id.*, Comment b; *Emery v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 377 Ill.App.3d 1013, 1022, 800 N.E.2d 1002 (1st Dist. 2007) ("The publication requirement is not satisfied, however, when the communication is made to the person defamed.").

The fundamental element of third-party publication means that no matter how hurtful or upsetting a statement about an individual may be when they hear it, the statement is not defamatory if it is made solely to that individual. This is all black letter law in Illinois, and not disputed by the parties. If the allegedly defamatory statements are not published to a third party, no reputational harm has occurred and there is no basis for relief. With those bedrock principles in mind, it is clear that the Appellate Court erred in discarding the publication requirement for corporate plaintiffs.

B. The Appellate Court's Holding is Overly Broad Because it Applies Regardless of What Role the Recipient Plays at the Company

Applying the publication requirement is straightforward when the subject of the statements is an individual, but much less so when the subject is a legal entity, like a corporation in this instance. In such cases, analysis of the issue should be nuanced. It should allow the publication requirement to continue playing its important gatekeeping function. This is necessary to prevent the tort of defamation from expanding to allow for redress for upsetting or offensive statements generally; rather, than serving it's only intended purpose – protecting a party's reputation with others.

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

The Appellate Court's opinion leaves no room for careful analysis of whether publication occurred. Rather, it creates an across-the-board rule that a statement concerning a corporation made to any corporate agent, including a Chief Executive Officer or Chairman of the Board, constitutes a publication for purposes of defamation. The breadth of the ruling eliminates the publication requirement entirely in defamation cases brought by corporate plaintiffs and eliminates any initial consideration by a trial court as to whether the facts presented actually allow for reputational harm. As a result, the Appellate Court's holding dramatically changes the required showing for a defamation claim by creating a bright line rule that effectively eliminates the publication requirement for corporate plaintiffs.

No one has challenged that the publication rule applies, even in cases like this one involving a corporate plaintiff. That was not the issue before the Appellate Court. Instead, it was being asked to consider who qualifies as a "third party" for purposes of satisfying the publication requirement in a defamation claim brought by a corporation. The Appellate Court's answer to that question was an unqualified "anyone," even a company's officers, directors, and executive leadership. If that bright line rule is allowed to stand, the publication requirement will be rendered meaningless in defamation claims brought by corporate plaintiffs.

While the Appellate Court properly recognized the "publication rule is a cornerstone of defamation law" (Appx. at 2, ¶2), its ruling effectively removes that cornerstone and destabilizes the foundation of the tort. By holding that all directors, executives, and officers of a corporation are third parties for purposes of the publication

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SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

requirement, the *sine qua non* of the tort – reputational harm – is no longer required in defamation claims brought by corporate plaintiffs.

Ultimately, the Appellate Court's ruling goes well beyond answering the question presented to it. The issue on appeal was not whether *all* employees of a company constitute third parties for purposes of publication; it was simply whether the few members of Plaintiff's executive leadership team who received the Emails are third parties. The question may become more difficult to answer the farther down the corporate ladder one goes, but at the highest levels of a corporation, the officers and board of directors effectively are the company. By holding that all corporate representatives are third parties – including even a corporation's CEO or Chairman of the Board – the Appellate Court's holding erodes the foundation of the tort and creates an entirely different standard for corporate plaintiffs.

C. The Corporate Form Must be Considered in Applying the Publication Rule

The nature of the corporate form must be considered to properly evaluate the issue of publication where the allegedly defamed party is a corporation rather than an individual. As Illinois courts have long recognized: "It is axiomatic that a corporation can act only through its agents." *See Small v. Sussman*, 306 Ill.App.3d 639, 647, 713 N.E.2d 1216 (1st Dist. 1999). Under the Appellate Court's holding, if this case involved a single-member limited liability company and the Emails were sent to the lone member of that LLC, a publication would still be deemed to have occurred even though there could be no reputational harm. The Appellate Court's opinion cannot be correct because it fails to account for such circumstances or give any meaningful consideration to the relationship between people and the entities they represent.

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

The legal standing of a corporation dictates that this Court craft an application of the law that preserves the publication requirement. In Illinois, a corporation acts through its managing principals and governing board. *See*, *e.g.*, *Manufacturers' Exhibition Bldg. Co. v. Landay*, 219 Ill. 168, 174 75, 76 N.E. 146 (1905) (a corporation is an "artificial being," which "can act only through its board of directors and officers"); *TABFG, LLC v. Pfeil*, 746 F.3d 820, 825 (7th Cir. 2014) (only managers, directors, and officers of a corporation are authorized to act on the corporation's behalf). If an "artificial being" like a corporation can have concern about its reputation, as the Appellate Court held, then it must equally be true that the ultimate leaders of the entity are too closely aligned with that concern to be considered third parties for purposes of publication. The executive leadership of a corporation is like a puppeteer and the corporate entity the puppet. It would be absurd to assert that a statement to the puppeteer about the puppet is distinct from a statement to the puppet. For this same reason, a communication to whomever is ultimately responsible for pulling the company's strings should be viewed as a communication to the company itself.

Here, the two Emails were sent to Plaintiff's Chief Revenue Officer and two members of its Board of Directors. If members of a company's C-Suite and Board of Directors are not the company, then who is? They are neither the company's neighbor nor its associate. They are not outside members of the community. They are the company itself. Under the rule established by the Appellate Court, however, even comments about a company made to its most senior leadership constitute publication, and the publication requirement is eliminated altogether in defamation claims brought by legal entities. This cannot be the law.

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

Such a bright line rule that takes no consideration of the role played by the recipient of the allegedly defamatory statements is not the correct result because it would render meaningless the fundamental issue at the core of a defamation claim – whether reputational harm occurred. That is the crux of the question presented to this Court – whether communications to any corporate representative, regardless of title or responsibility, will result in reputational harm to the corporation. The answer to that question cannot possibly be "yes" in every factual scenario, and so the publication requirement must be preserved. If the publication requirement is to have any meaning in defamation claims by corporate plaintiffs, a working framework must be established that allows the requirement to continue serving its gatekeeping function.

The need for such a framework is even more acute in this case because the underlying claims are for defamation *per se*, meaning reputational harm is presumed and there is no need to plead or prove actual damage. *Bryson v. News Am. Publications, Inc.*, 174 Ill.2d 77, 87, 672 N.E.2d 1207, 1214 (1996). As a result, the publication analysis in cases involving corporate plaintiffs is critical – without it, any *per se* defamation claim by a corporate plaintiff will slingshot past the fundamental issue of reputational harm straight to damages. It is circular logic to assert that reputational harm is a given in *per se* claims because that presumption makes little sense absent the guardrails of the publication requirement.

Think again of the single-member LLC. Imagine that a frustrated customer tells the sole member of the LLC that it applies fraudulent charges and cheats its customers. Because the statement was made exclusively to the sole member of the LLC, no reputational harm could possibly have occurred. Without the publication requirement,

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

however, the question of liability would fall away, and the case would proceed directly to the issue of damages. As a result, the tort of defamation would no longer protect corporate plaintiffs from comments that damage their reputation; it would protect them from any negative comments.

Similarly, consider how the Appellate Court's holding would apply to a case involving a service provider who is doing business as an individual rather than through some corporate entity. Under the Appellate Court's rule, statements made to that individual about his business practices would not be published, but the same statements made to his competitor working through a single-member LLC would be. In this context, the rule makes little sense because it fails to account for the primary focus of the tort – protection against reputational harm.

This outcome is not purely hypothetical. The Court need look no further than the allegations in the underlying Complaint to see this is in fact the case. In Paragraph 54 of the Complaint, Plaintiff alleges that it was damaged in the community based on "information and belief". (Appx. at 129, ¶54.) More than eleven months had passed between when the Emails were sent and when Plaintiff filed its complaint, and it could allege no facts supporting actual reputational harm. Given the role played by those to whom the Emails were directed, this is not surprising. More importantly, it underscores precisely why the publication requirement must remain as a gatekeeper in corporate defamation claims.

D. <u>This is Not an Intracompany Communication Case</u>

As acknowledged by the parties and the Appellate Court, this is a case of first impression in Illinois. (Appx. at 7, ¶25.) Several courts in other jurisdictions have held

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

that publication does not occur in this scenario, and one has held the opposite. For purposes of this Court's analysis, the primary authorities for review are *Fausett v. American Resolution Management Corp.*, 542 F. Supp. 1234 (D. Utah 1982). and *Sleepy's LLC v. Select Comfort Wholesale Corp.*, 909 F.3d 519 (2d Cir. 2018).

The issue was well-articulated by the court in *Fausett*. There, the alleged defamation related to actions of the plaintiff corporation's management and was communicated to two of its chief principals. The *Fausett* opinion correctly recognized that distinctions must be made in the application of the principles of defamation between individuals and corporations "growing largely out of the differences between natural and artificial persons." *Id.* at 1241. In holding that there was no publication, the court reasoned:

> The law of defamation protects against the impugning of one's reputation or causing his alienation from his peers. There simply exists no potential for [plaintiff]'s reputation to be reduced or for [plaintiff] to be alienated from its managers, customers, shareholders, institutional lenders, etc., when the defamatory statements are made to its management. In essence the management is the corporation for purposes of communication. *Id.*

In reaching that conclusion, the *Fausett* court considered both Comment *e* to § 577 of the Restatement (Second) of Torts (the "Restatement"), on which the Plaintiff focuses, and § 113 of Prosser's treatise on defamation. It did not, as Plaintiff contends, reject Prosser or Comment *e*; rather it found them to be inapplicable and explained why.

Specifically, the court found that Prosser's statement that publication "may be made to the defendant's own agent, employee or officer, even where the defendant is a corporation" to be inapposite because the cases cited in support of this statement relate to corporate defendants where there has been intra-corporation communication. *Id.* at 1242. Likewise, it recognized that cases cited by or relying on Comment *e* of the Restatement and holding that communications to servants or agents of the defamed person or

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

corporation constitute publication were inapplicable because these cases discuss the issue of whether statements *from one corporate employee to another employee of the same corporation* constitute publication. Neither of those scenarios were at issue in *Fausett* and they are not at issue here.

The Second Circuit's opinion in *Sleepy's LLC v. Select Comfort Wholesale Corp.*, 909 F.3d 519 (2d Cir. 2018), arguably reaches the opposite conclusion; however, upon review it is evident that the court there was not evaluating as clear an issue as presented here. There, the statements at issue were made to regional and district managers, not members of the company's C-Suite or Board of Directors. *Id.* at 523. More importantly, the Second Circuit did not analyze whether the district manager position was of such a nature as to be the legal equivalent of the plaintiff corporation, but instead took issue with the district court's more sweeping conclusion that statements "made only to Sleepy's representatives" were not published. *Id.* at 528.

There is room for the logic of *Fausset* and *Sleepy's* to coexist, and both are consistent with the Restatement. Ultimately, it is a question of where on the corporate ladder to draw the line. Perhaps not at regional managers, as was the issue in *Sleepy's*, but to say *no* line exists is not the correct outcome either. It is possible that some cases will require the trial court to evaluate the issue through an initial evidentiary hearing to determine the scope of an individual's role within the plaintiff corporation, but even that is not necessary here given the role played by those who received the Emails. In any respect, eliminating the rule entirely goes well beyond what is needed to answer the question before this Court.

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

Contrary to Plaintiff's argument before the Appellate Court, the Circuit Court did not rule that statements made to *any* executive or managerial employee of the Plaintiff would fail to meet the publication standard. Rather, Judge Snyder held that these specific Emails, which were sent to Plaintiff's CRO and two members of its Board of Directors, were not published. Again, while there may be situations where the position of the employee to whom the statement was made require that it be deemed a publication, this is not that case.

In analyzing this issue, the Appellate Court focused much of its discussion on what it referred to as the "Intracorporate Publication Rule" emanating from its decision in *Popko v. Continental Casualty Company*, 355 Ill.App.3d 257, 823 N.E.2d 186 (1st Dist. 2005). That focus, however, is misplaced because neither *Popko* nor the Intracorporate Publication Rule address the specific issue presented here. *Popko* addressed whether a supervisor's comments to another supervisor in the workplace about a subordinate can amount to publication. *Popko*, 355 Ill.App.3d at 259, 823 N.E.2d at 186. As a result, although *Popko* arose in a corporate context, the question it resolved was materially different than that presented here.

Popko did not address whether comments about a company made to an officer of the company constitute a publication. Comments about an individual present an entirely different situation from the case at bar because, in that instance, there is no question that the comments were made to someone other than the party who was allegedly defamed. To rule otherwise in that scenario would create an immunity arising out of the mere fact that the parties to the communication worked for the same company, regardless of who the comments were about. Such a rule would make little sense, as the Appellate Court

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

recognized. (Appx. at. 8-9, ¶30.) However, whether such a rule is appropriate has never been at issue in this case.

This is not a case about intra-company communications. Rather, it is a case about whether communications regarding a corporation made to those individuals who serve as the human embodiment of that corporation have been published for purposes of a defamation claim. As a result, the Appellate Court recognized that when comparing this case to *Popko*, "the analogy is not perfect," but held the Rule applied to even the highest ranks of corporate leadership nevertheless because "the corporation cares about its reputation among its own employees." (Appx. at 9, ¶ ¶ 31 – 32.) That assertion is no doubt true, but it should not be applied as a blanket statement to extend publication even to members of a company's executive leadership. As noted above, Illinois law has long recognized that a corporation acts through its managing principals and governing board. Therefore, at some point along the corporate ladder, members of executive leadership stop being independent third parties and are more appropriately viewed as the company itself.

At that point, the Appellate Court's concerns are firmly resolved by Comment *b* to the Restatement, which provides:

> The communication of disparaging matter only to the person to whom it refers is not actionable defamation, irrespective of the vile or scandalous character of the communication and its effects upon the feelings of that person. Restatement (Second) of Torts § 577, Comment *b* (1977).

The Appellate Court expressed concern over corporate sabotage and created an avenue for redress by eliminating the gatekeeping function of the publication requirement entirely. That effort forces a square peg into a round hole. As Comment *b* makes plain, the tort of defamation cannot be stretched beyond its limits even if it is alleged that the conduct was intended to cause harm. In cases where some actual damage has occurred, other avenues

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

of relief may be available; however, without reputational harm, the tort of defamation does not apply.

A thoughtful context-specific application of the publication requirement is also supported by Prosser's comment on the issue, which provides that publication extends to an "agent, employee *or officer*" of a defendant, but only the agent or employee of a plaintiff. W. Page Keeton et al., Prosser and Keeton on the Law of Torts (§113, p. 798) (W. Page Keeton, 5th Ed. 1984). The failure to refer to a plaintiff's officers reflects a recognition that an officer of the company *is* the company for purposes of publication. This conclusion is further supported by Illinois corporate law, which provides that the "business and affairs of the corporation shall be managed by or under the direction of the board of directors." 805 ILCS 5/8.05

Emails sent solely to a corporation's executive leadership do not create a risk of lowering the company's esteem in the eyes of its community, certainly not to such an extent that the publication requirement should be thrown out entirely, as is the practical effect of the Appellate Court's holding. Ultimately, the question before this Court comes down to the issue of reputational harm. At some level of corporate leadership, that simply cannot occur, and the proper rung on the corporate later at least includes C-Suites and Boards of Directors. Again, one need only look to the "information and belief" allegation in Paragraph 54 of the underlying complaint to see that there is no indication of actual reputational harm in this matter.

More importantly, even if the Court questions whether all members of a company's executive leadership should be viewed as the company for purposes of this analysis, the Appellate Court's opinion encompasses the whole lot, including the CEO and Chairman of

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

the Board, as well as the sole member of a single member LLC. A more nuanced rule is needed, and the proper place to start is with a company's C-Suite and Board of Directors, as these are the people running the Company.

E. Privilege Cannot Perform the Function of the Publication Requirement

The Appellate Court's opinion implies that existing privilege defenses will mitigate the impact of eliminating the publication requirement for corporate plaintiffs. Such a solution fails, however, because the two concepts do different work. Privilege acknowledges that the statements were defamatory but excuses them based on some need that outweighs the plaintiff's interest in its reputation. Publication determines whether defamation even occurred as a threshold issue. Replacing one with the other is not a viable solution.

Even though true statements cannot be defamatory, that distinction "is no protection against the incredibly high cost of litigation and the distraction from business that accompanies that cost." *Emery v. Ne. Illinois Reg'l Commuter R.R. Corp.*, 377 Ill.App.3d 1013, 1030, 880 N.E.2d 1002, 1015 (2007). In illustrating this point, the *Emery* Court quoted the Supreme Court of Connecticut, which recognized:

> As a defense, truth provides protection against liability, but not against the expense and inconvenience of being sued. A successful defense is small comfort to an employer that must pay attorney's fees to defend a defamation claim and have the employer's attention diverted from its business to the defense of the suit. We are persuaded that most employers will likely choose a 'culture of silence.'" *Emery*, 377 Ill.App.3d at 1030, 880 N.E.2d at 1015 (2007); *citing Cweklinsky v. Mobil Chemical Co.*, 267 Conn. 210, 229, 837 A.2d 759, 770 (2004).

While *Emery* and *Cweklinsky* were addressing the issue of self-publication, the underlying concerns are equally applicable here. If *any* communication about a corporation constitutes a publication regardless of to whom it is made, as the Appellate Court's holding

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

requires, better to err on the side of caution and not raise concerns regarding a corporation's conduct than to incur the financial and emotional costs of litigation. As this Court recognized in *Cweklinsky*, the defenses of truth or privilege are "small comfort" when staring down the costs of protracted litigation.

The likely harm of providing corporations with such unnecessary insulation grossly outweighs the potential harm posed by holding that communications about a corporation to its officers and directors is not a publication. This is because, as noted throughout this brief, there is no reputational harm in this instance.

F. <u>This Court Should Prevent an Unnecessary Expansion of Defamation Law for the Benefit of Corporate Plaintiffs</u>

Moreover, such a rule would unnecessarily shackle free speech. As this Court has recognized, "[t]he law of defamation must not only protect the individual's interest in vindicating his good name and reputation, but also allow the first amendment guarantees the 'breathing space essential to their fruitful exercise.'" *Van Horne v. Muller*, 185 Ill.2d 299, 315–16, 705 N.E.2d 898, 907 (1998). The balance of these concerns tips heavily in favor of upholding Judge Snyder's decision in this instance due to the utter lack of reputational harm the tort is intended to protect against.

Appellant has argued that upholding Judge Snyder's decision would "lead to policies inconsistent with the rationale of the First District." (Appx. at 48.). In reality, neither the First District nor any other district of the Illinois Appellate Court has spoken on this issue. More importantly, accepting Appellant's position could lead to policies inconsistent with the underlying rationale of the tort of defamation. Cases involving corporate plaintiffs would no longer bother with protecting reputational harm and, as a result, any complaint directed to a corporation could serve as a basis for a defamation claim,

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

regardless of the position held by the recipient of the complaint. Of course, the impact of such a rule would not stop with corporations; it would march on all the way to the sole member of a single member LLC.

The absurdity of that extension would crescendo in *per se* defamation cases like this one, where harm to reputation is assumed as a matter of law. Without a publication requirement to check whether reputational harm occurred in reality rather than merely in theory, such a case slingshots immediately to the issue of damages. Of course, even if there are no damages in such an instance, as noted by the courts in *Emery* and *Cweklinsky*, that is cold comfort given the extensive costs of litigation. As a result, defendants in such cases will be pressed to settle, and corporations can bludgeon their detractors into submission or, more likely, silence them entirely. The Court should avoid this result, and instead hold that statements made to the executive leadership of a corporation constitute statements to the corporation itself, and have therefore not been published for purposes of defamation.

The Appellate Court's opinion is sweeping in scope, as demonstrated by returning once again to the example of a single-member LLC. Presuming publication in that context is inconsistent with the bedrock principal served by the tort of defamation – protection against reputational harm. However, unless this Court reverses the Appellate Court's holding, that will be the law in Illinois. The Appellate Court's holding is unlimited in scope, requiring reversal by this Court to ensure that application of the publication requirement to corporate plaintiffs is properly tailored to fit the shape of the tort it serves.

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

CONCLUSION

The tort of defamation serves a single purpose – protecting against reputational harm. Reputational harm relates to one's standing in the community. As a result, the tort pays no mind to statements that may be deeply hurtful or upsetting but do not otherwise impugn one's reputation. Well-developed case law has established the third-party publication requirement as an effective gatekeeper to ensure that a true risk of reputational harm exists. The Appellate Court's opinion jettisons that requirement in toto for claims brought by legal entities. In so doing, it has upended the tort of defamation by ignoring the very damage it is designed to prevent – reputational harm.

There is no doubt that not all corporate representatives are the legal equivalent of the corporation for purposes of defamation. However, there is also no doubt that some corporate representatives are. There may be future cases that present difficult questions as to where on the corporate ladder the line should be drawn. Fortunately, this is not one of those cases. Whatever rung on the corporate ladder might be the proper place to draw such a line, it certainly falls below that on which the executive leaders in this case stand. As a result, this Court can issue a narrowly tailored holding that preserves the publication requirement in cases involving corporate plaintiffs by recognizing that, at a minimum, statements to members of a company's C-Suite and Board of Directors have not been published.

For these reasons, this Court should reverse the Appellate Court's Decision, and affirm the Circuit Court's order dismissing the Complaint with prejudice.

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

Date: May 3, 2023

Respectfully submitted,

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SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Brief and Supplemental Appendix of Defendant-Appellant FourKites, Inc. was electronically filed with the Clerk of the Court using the Odyssey File & Serve System on May 3, 2023 which will send notification of such filings to all attorneys of record, and further certifies that the undersigned will serve a copy of this Brief and Supplemental Appendix of Defendant-Appellant FourKites, Inc. on May 3, 2023, to the following via email:

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Under penalties as provided by law, pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

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SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirement of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 5,812 words.

s/Scott M. Gilbert
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SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

APPENDIX TABLE OF CONTENTS

Appellate Court Opinion (November 22, 2022) .... A 1-18

Circuit Court of Cook County Order of Dismissal (April 26, 2021) .... A 19-20

Brief and Argument of Plaintiff-Appellant (August 25, 2021)............................. A 21-357

Brief and Argument of Defendant-Appellee (October 29, 2021) .... A 358-390

Reply Brief of Plaintiff-Appellant (December 3, 2021) .... A 391-411

Defendant's Motion to Dismiss Plaintiff's Complaint (January 20, 2021) .... A 412-443

Plaintiff's Response in Opposition to Motion to Dismiss (February 22, 2021) .. A 444-459

Defendant's Reply in Support of Motion to Dismiss (March 5, 2021) .... A 460-469

Plaintiff's Sur-Reply to Motion to Dismiss (March 31, 2021) .... A 470-472

Complaint (April 13, 2020)... A 473 -612

Notice of Appeal (May 20, 2021) .... A 613-614

Table of Contents of the Record on Appeal

Table of Contents to Common Law Record .... A 615-619

Table of Contents to Appellate Court Record..A 620

Table of Contents to Supplement to Record .... A 621-623

Table of Contents to Report of Proceedings ....A 624

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

2022 IL App (1st) 210575

SECOND DIVISION
November 22, 2022

No. 1-21-0575

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PROJECT44, INC.,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	20-L-4183
	)	
FOURKITES, INC.,	)	Honorable
	)	James E. Snyder,
Defendant-Appellee.	)	Judge Presiding.
	)	

JUSTICE ELLIS delivered the judgment of the court, with opinion.
Justices Howse and Cobbs concurred in the judgment and opinion.[1]

OPINION

¶ 1 This appeal concerns defamation, the making of a false statement (written or oral) about the plaintiff that injures the plaintiff's reputation. Because defamation is premised on reputational harm, it is not enough that the plaintiff, personally, heard or read the false statement; that statement must be transmitted to at least one other person besides the plaintiff. In legal vernacular, the false statement must be "published" to a "third party," meaning literally anyone else besides the plaintiff. So, for example, if Individual A falsely tells Individual B, and only

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[1] Oral argument was held in this case via Zoom technology. Due to technical difficulties, Justice Cobbs was unable to fully participate in the oral argument but has listened to the full recording of the argument, as well having reviewed the briefs and otherwise participated in deliberations.

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

Individual B, that Individual B does business with terrorists, no defamation has occurred, because only Individual B heard the false statement—it was not "published" to a third party. A private conversation like that would not be actionable defamation. But if another person—even one more person—heard the defamation, the defamation would be deemed "published."

¶ 2 This publication rule is a cornerstone of defamation law. But it becomes more complicated when the one being defamed is not an individual but a corporation—and when the "third parties" to whom the defamatory statement was "published" are officers or employees of that same corporation. Are directors, executives, officers, or employees of a corporation "third parties" when the entity being defamed is the very corporation they serve? Or are these people to be considered so much a part of the corporation as to constitute the corporation itself? That is the question before us here.

¶ 3 The two corporations at the center of this appeal—project44, Inc. (which intentionally styles itself by the lowercase), and FourKites, Inc.—compete against each other in the hotly contested field of shipping logistics, where they both track and monitor packages sent throughout the world. In 2019, two members of project44's board of directors received an email from an anonymous Gmail account that accused project44, among other things, of engaging in accounting fraud and being associated with the Chicago mafia. Shortly thereafter, project44's recently hired chief financial officer received a similar message from a different e-mail address.

¶ 4 Project44 tried to discover who sent the e-mails. Its investigation tied the e-mail accounts to computers associated with FourKites. Believing that its competitor was trying to sabotage its business, project44 sued FourKites and several unknown "Does" for defamation.

¶ 5 In the circuit court, FourKites argued that the defamatory messages were never published to a "third party," as required by defamation law. FourKites claimed that project44's board

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

members and CFO were part and parcel of the corporation and inseparable from it—in other words, the people who received the messages *were* project44. And since you must publish a defamatory message to a third party for it to be harmful, there was no publication. The trial court agreed and dismissed the case on the basis that no publication occurred.

¶ 6 We do not agree. Our law has long recognized that a corporation can have its own reputation and identity, and if that reputation is attacked, it may use defamation actions to defend itself. And because a company's reputation can be separate and distinct from those who run it, even at an executive level, we reject the idea that the corporation is the same as the agents who oversee it. Since the allegedly defamatory messages targeted project44's reputation—not the reputation of the recipients—the defamatory messages were published to a third party. We thus reverse the judgment of dismissal and remand for further proceedings.

¶ 7 BACKGROUND

¶ 8 Because this case was dismissed for failure to state a claim, we accept all well-pleaded facts in the complaint as true and adopt all reasonable inferences in favor of the plaintiff. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill. 2d 1, 8-9 (1992); 735 ILCS 5/2-615 (West 2020).

¶ 9 Project44 and FourKites are shipping logistics companies who directly compete with one another for both customers and employees. Both are incorporated in Delaware but primarily operate out of Chicago.

¶ 10 Jim Baum and Kevin Dietsel are members of project44's board of directors but are not employees. On May 19, 2019, they received an e-mail from "Ken Adams," from a seemingly valid Gmail address. The e-mail's subject line read "Accounting improprieties at P44."

¶ 11 In the e-mail, Adams claimed to be a former project44 employee who recently left. He wrote that project44 used the threat of libel and defamation lawsuits to silence former

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

employees, and that the family of one of project44's employees "used to be the book keeper [*sic*] for the Chicago Mafia and they are using that to silence folks." The message also accused project44 of "rampant accounting improprieties" and encouraged Baum and Dietsel to look at the company's contracts for malfeasance. The e-mail also alleged that "there is widespread discontent brewing and it's just a matter of time before people go public and another Theranos happen [*sic*] in Chicago."

¶ 12 For context, the complaint alleges that the reference to "Theranos" compared project44 to Theranos, Inc., a company that fraudulently claimed to create a revolutionary blood-testing device that later was determined to be bunk. See, *e.g.*, *In re Arizona Theranos, Inc., Litigation*, 308 F. Supp. 3d 1026, 1036-39 (D. Ariz. 2018). The company is now embroiled in extensive and well-publicized litigation, and two of its key leaders, Elizabeth Holmes and Ramesh Balwani, have been convicted of various counts of fraud.

¶ 13 On May 27, 2019, a sender from another Gmail address going by the name "Jason Short" sent Tim Bertrand, project44's chief financial officer (CFO), an e-mail. Jason congratulated Bertrand on joining project44 but added that he wanted to give Bertrand some information so he could "fled [*sic*] ASAP and go find another job." Referring to a social media post Bertrand made, Jason said "you mention people, investors etc. in your [post]. There is one ingredient you missed—a great product. At some point you have to stop selling [expletive] and start delivering."

¶ 14 Jason also claimed project44 was a Ponzi scheme and compared it to Theranos. He invited Bertrand to talk to the company's former CFO, other ex-employees, customers, prospects, and outside investors but said that Bertrand would be making "a mistake" if he forwarded the message to project44's current CEO. "I sincerely wish you the best," Jason said in closing. "You seem like a nice guy, you deserve better."

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

¶ 15 Neither a "Ken Adams" or "Jason Short" ever worked at project44. On the assumption that both names were pseudonyms, project44 began investigating the source of the defamatory messages. Using petitions for discovery, project44 traced the Gmail accounts to computers associated with FourKites. Additionally, project44 was able to trace one of the accounts to an unknown internet protocol (IP) address operated by AT&T Mobility. Based on the investigation, project44 determined the messages came from someone associated with FourKites.

¶ 16 Coming up on the one-year limitations period, project44 filed a three-count suit against FourKites and various unknown "Does" who allegedly sent the messages. Counts I and II alleged that the May 19 and 26 e-mails were defamation *per se* against project44's reputation, while count III alleged that the parties engaged in a civil conspiracy to defame project44. Court filings indicate that project44 intended to continue trying to identify the anonymous "Does" and would presumably add them to the suit if their identities were discovered.

¶ 17 FourKites moved to dismiss the complaint, among other reasons, because the alleged defamatory statements were never "published" to a third party. In the eyes of FourKites, since Baum and Dietsel, the directors, and Bertrand, the CFO, were core members of project44's leadership, the defamatory messages were, in essence, communicated to the "person" being defamed. In other words, Baum, Dietsel, and Bertrand *were* project44, not third parties separate and distinct from the corporate entity.

¶ 18 The circuit court agreed and dismissed the case, finding that the messages were not published and, thus, the defamation claim failed as a matter of law. Since the defamation claims failed, the court also dismissed the claim for civil conspiracy to commit defamation.

¶ 19 ANALYSIS

¶ 20 We are presented with a question that might be seem easy, even obvious, if the defendant

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

were a natural person and not a corporate form, but which becomes more complicated when we introduce the corporate entity: When a false statement about a corporation is transmitted only to the people who make up the leadership of that company, has that false statement been "published" to a third party for purposes of defamation law? Are the directors, officers, agents, and employees of a corporation sufficiently separate and distinct from the corporation as to qualify as "third parties" in that context?

¶ 21 We begin with the basics. To establish defamation, the plaintiff must show that (1) the defendant made a false statement about the plaintiff, (2) the defendant published that false statement to a third party, and (3) the published statement damaged the plaintiff's reputation. *Goldberg v. Brooks*, 409 Ill. App. 3d 106, 110 (2011). There is no question that a corporation, just as a natural person, may maintain a defamation action under the same elements. See, *e.g.*, *American International Hospital v. Chicago Tribune Co.*, 136 Ill. App. 3d 1019, 1024-25 (1985); *Audition Division, Ltd. v. Better Business Bureau of Metropolitan Chicago, Inc.*, 120 Ill. App. 3d 254, 256 (1983); *Life Printing & Publishing Co. v. Field*, 327 Ill. App. 486, 488-49 (1946).

¶ 22 This appeal turns on the element of publication to a third person. "Publication" is a term of art in defamation law, but it is an essential element of any defamation claim. *Missner v. Clifford*, 393 Ill. App. 3d 751, 763 (2009). Usually, satisfying the publication element is straightforward; an allegedly defamatory statement is "published" when the defendant communicates that statement to anyone besides the plaintiff. See *Brooks*, 409 Ill. App. 3d at 110; *Emery v. Northeast Illinois Regional Commuter R.R. Corp.*, 377 Ill. App. 3d 1013, 1022 (2007); *Jones v. Britt Airways, Inc.*, 622 F. Supp. 389, 391 (N.D. Ill. 1985) (applying Illinois law).

¶ 23 FourKites, at this pleading stage, does not dispute that the allegedly defamatory e-mail messages were sent to Baum, Dietsel, and Bertrand. But the parties disagree over whether these

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

three individuals constitute "third parties" for purposes of defamation law.

¶ 24 Project44 claims that its directors, Baum and Dietsel, and its CFO, Bertrand, are "third parties" because the corporation has its own separate and distinct reputation. On the other hand, FourKites responds that a corporation can only act through its agents, managing principals, and governing board, which of course is true. See *Small v. Sussman*, 306 Ill. App. 3d 639, 647 (1999). So for all intents and purposes, says FourKites, the directors and CFO *are* the company. FourKites thus believes there was no "publication" here, as the messages were only transmitted to the company itself.

¶ 25 We are aware of no case law from Illinois that addresses this question, and we have been cited none. The parties consider this a question of first impression. For that matter, neither the parties nor our independent research have found more than a small handful of cases dealing with our precise question.

¶ 26 But we are not entirely adrift. We have considered a similar question in the context of defamatory communications made entirely within a corporation. More specifically, we have held that, when one employee defames another employee, and that defamation is transmitted to other coworkers within that same corporate structure, those other coworkers are considered "third parties" for defamation purposes. See, *e.g.*, *Popko v. Continental Casualty Co.*, 355 Ill. App. 3d 257, 260-61 (2005). The defamed employee has a reputational interest separate and apart from that of the corporation. See *id.*

¶ 27 The court in *Popko* referred to this doctrine as the "publication rule" or its converse, the "nonpublication rule" (*id.*), but since that could confuse things in the different context in which we find this appeal, we will refer to that doctrine from *Popko* more specifically as the "intracorporate publication" rule. Under that doctrine, interoffice reports or communications that

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

are circulated among employees within a corporation have been "published" to "third parties" for defamation purposes. *Id.*; see also *Gibson v. Philip Morris, Inc.*, 292 Ill. App. 3d 267, 272 (1997); *Jones*, 622 F. Supp. at 391 (interpreting Illinois law).

¶ 28 This "intracorporate publication" rule often comes into play when employees are terminated based on defamatory comments made by management or coworkers within the corporation. See, *e.g.*, *Popko*, 355 Ill. App. 3d at 259. The aggrieved employee then sues her former employer (and the employee who defamed her) for transmitting those defamatory statements. See *id.* at 259-60; *Gibson*, 292 Ill. App. 3d at 269-72; *Jones*, 622 F. Supp. at 390-91. In Illinois, the corporation that is named as the defendant in such an action cannot claim a lack of publication—it cannot defeat the lawsuit by claiming that the interoffice statements were merely "the corporation talking to itself." *Popko*, 355 Ill. App. 3d at 263; *Gibson*, 292 Ill. App. 3d at 274.

¶ 29 For what it's worth, Illinois is part of a growing majority of jurisdictions that has adopted the "intracorporate publication" rule. See 2 Rodney A. Smolla, Law of Defamation §§ 15:8, 15:9 (2d ed. 2022) (collecting cases; "This now appears to be the majority position and is gaining momentum."); Jane M. Draper, *Defamation: Publication by Intracorporate Communication of Employee's Evaluation*, 47 A.L.R.4th 647 (2022). The Restatement adopts this view as well. See Restatement (Second) of Torts § 577 cmt. i (1977) ("The communication within the scope of his employment by one agent to another agent of the same principal is a publication not only by the first agent but also by the principal and this is true whether the principal is an individual, a partnership or a corporation.").

¶ 30 So we know from our adoption of the "intracorporate publication" rule that an employee of a corporation can be a "third party" when hearing or reading defamatory statements made by

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

one employee about another employee within the company. And that is as it should be. In that context, Employee A has attacked the reputation of Employee B with defamatory matter transmitted to their coworkers. It would make no sense to lump Employee A, Employee B, and those coworkers into one corporate bundle and claim that what transpired was just "the corporation talking to itself." *Popko*, 355 Ill. App. 3d at 263; *Gibson*, 292 Ill. App. 3d at 274. Doing so would deny the reality that Employee B has her own personal reputation within the company deserving of protection, just as she has one outside the company. It is only proper to allow that employee redress.

¶ 31 Project44 submits that, just as the "intracorporate publication" rule respects the distinction between the reputations of an individual employee and that of the corporation, we should likewise recognize that distinction here. That is, in the context here, where it is the *corporation* being defamed, the individual employees or directors to whom the defamation is published likewise should be considered "third parties" to the defamation.

¶ 32 Though the analogy is not perfect, we agree with project44. And it comes down to this: A corporation is not only concerned with its reputation to the outside world. Just as employees care about their reputation within the corporation, the corporation cares about its reputation among its own employees—be they high-ranking executives, lower-level workers, or non-employee directors. Any corporation has an interest in attracting and keeping good employees. Indeed, many people today choose to work for a company based as much on the culture or values of that company as on the job functions they perform. Defamation that threatens the corporation's reputation within the company can be just as damaging as defamation published beyond the corporate walls. It would be odd, indeed, for the law to redress one of those reputational harms but not the other.

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

¶ 33 Perhaps the most fitting illustrations of this point would be those involving corporate sabotage. A competitor might communicate false statements about Corporation A to employees of Corporation A in the hopes of damaging the corporation's reputation among its workforce—whether to generally sow discontent, throw a wrench in its productivity, cause valuable employees to leave, or even steal away those employees.

¶ 34 We need look no further than the allegations of the complaint before us (which we say again are only allegations at this point). If we are to believe the allegations, agents of FourKites sent an e-mail to project44's recently hired CFO, falsely alleging accounting improprieties at project44 and explicitly urging him to leave before a major fraud scandal broke. If true, it requires no imagination to say that the point of this e-mail, if nothing else, was to drive that CFO out of a company he had just joined. The other e-mail was sent to two members of the board of directors, likewise (allegedly falsely) accusing project44 of accounting improprieties and urging them to conduct an internal investigation. It would be reasonable to infer that the sender of this e-mail, at a minimum, was trying to inject chaos into project44's workplace.

¶ 35 Simply put, the complaint alleges that FourKites was sending false, destructive messages to high-ranking officers and directors of project44, obviously intending to cause damage to project44 in various ways. It would be unrealistic, unfair, and contrary to any principle of defamation law we recognize to embrace the artifice that these directors and officers were merely part and parcel of the corporation, that no harm to project44's reputation occurred because nobody besides the corporation itself received these messages. We thus hold that, by alleging the transmission of defamatory messages about project 44 to directors and an officer of project44, the complaint adequately alleges publication.

¶ 36 Our view is in line with those of leading scholars on the subject, as well as the

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

Restatement provision on publication. See 3 Dan B. Dobbs, The Law of Torts § 520 (2d ed. 2011) ("the plaintiff is entitled to her reputation with her agents as well as with others"); Prosser and Keeton on the Law of Torts § 113, at 798 (W. Page Keeton *et al.* eds., 5th ed. 1984) (defamatory message may be published "to any third person. It may be made to a member of the plaintiff's family, including his wife, *or to the plaintiff's agent or employee*." (Emphasis added.)); Restatement (Second) of Torts § 577 cmt. e (1977) ("the communication to a servant or agent of the person defamed is a publication").

¶ 37 As project44 notes, our view is also in line with that of New York, which has addressed this very subject. As a federal court of appeals recently quoted New York law on this subject:

> " 'There are decisions in some States that a communication of defamatory matter to an agent of the person defamed in response to an inquiry does not constitute a publication to a third person ... [b]ut the better view seems to us to be that taken in another line of cases, holding that *the communication to the plaintiff's agent is a publication*, even though the plaintiff's action may ultimately be defeated for other reasons. The agent is, in fact, a different entity from the principal; the communication to the agent is, in fact, a publication to a third person.' " (Emphasis added.) *Sleepy's LLC v. Select Comfort Wholesale Corp.*, 909 F.3d 519, 528 (2d Cir. 2018) (quoting *Teichner v. Bellan*, 181 N.Y.S.2d 842, 845 (App. Div. 1959)).

¶ 38 FourKites raises several arguments why we should find that the CFO and directors were, in fact, part and parcel of the corporation, and thus no publication was alleged here. First, it cites decisions from Utah and Florida where the courts held that transmitting a defamatory message about a corporation to an officer of that corporation is not publication.

¶ 39 We are not persuaded by the Florida decision, *Hoch v. Loren*, 273 So. 3d 56, 57 (Fla.

SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

Dist. Ct. App. 2019), principally because Florida is a jurisdiction that, unlike Illinois, does not recognize the "intracorporate publication" doctrine we discussed earlier. See, *e.g.*, *American Airlines, Inc. v. Geddes*, 960 So. 2d 830, 834 (Fla. Dist. Ct. App. 2007) (communications between executive or managerial employees of the same corporation are "the corporation talking to itself"). Florida courts do not believe that individual employees have reputational interests distinct from their corporation, but Illinois does.

¶ 40 The district court in *Fausett v. American Resources Management Corp.*, 542 F. Supp. 1234, 1241 (D. Utah 1982), noted that this question was one of first impression in Utah. The court reasoned that the individuals there who received the defamatory message, the top management of a company known as ARMCOR, could not be considered distinct from the company:

> "The law of defamation protects against the impugning of one's reputation or causing his alienation from his peers. There simply exists no potential for ARMCOR's reputation to be reduced or for ARMCOR to be alienated from its managers, customers, shareholders, institutional lenders, etc., when the defamatory statements are made to its management." *Id.*

¶ 41 For the reasons we have already stated, we do not accept that there is "no potential" for a corporation's reputation to be impugned to its employees at any level. And again, the allegations at issue here tell the story, if true, of a message sent to the newly hired CFO of project44 that made damaging allegations about project44 and explicitly advised the CFO to *leave the company* before a scandal broke. Taken as true at this stage, is that not the very definition of trying to drive a wedge between a corporation and its employee—to cause the CFO "to be alienated" from project44? *Id.*

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¶ 42 Beyond that, the district court in *Fausett* addressed the passages in Professor Prosser's treatise and the Restatement, which we discussed above and cite again here. See Prosser and Keeton on the Law of Torts § 113, at 798 (W. Page Keeton *et al.* eds., 5th ed. 1984) (defamatory message may be published "to any third person. It may be made to a member of the plaintiff's family, including his wife, *or to the plaintiff's agent or employee*." (Emphasis added.)); Restatement (Second) of Torts § 577 cmt. e (1977) ("the communication to a servant or agent of the person defamed is a publication").

¶ 43 The district court noted that the *cases* that Prosser and the Restatement cited for support did not involve communications to upper management of the corporation. *Fausett*, 542 F. Supp. at 1241-42. But that is more a reflection of the dearth of case law on this subject than anything else. Both sources used the word "agent." We do not see why a CEO or president or director would be considered any less of an "agent" of a corporation than low-level employees. If either Prosser or the Restatement (or, for that matter, Professor Dobbs) had intended to carve out an exception within the corporate realm for "agents" who were higher up on the corporate ladder, one would think it would have warranted at least a brief mention. See 3 Dan B. Dobbs, The Law of Torts § 520 (2d ed. 2011) ("the plaintiff is entitled to her reputation with her agents as well as with others").

¶ 44 FourKites further argues that, if we hold that the transmission of an anticorporate message to the corporation's top executives qualifies as publication, we will be effectively "eviscerating" the publication requirement in the context of commercial defamation. And doing so, says FourKites, will lead to a floodgate of lawsuits in which corporations will bludgeon its critics into silence through defamation claims—even those critics who raise valid concerns in good faith about the practices of that corporation.

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¶ 45 We certainly agree that the law should and does protect those who engage in valid discourse about corporate practices. We likewise agree that the leaders of that corporation are the people to whom those criticisms are best addressed. As FourKites aptly puts it, "If an individual cannot contact the chief executives or board members of a company to express their concerns about the company, who *can* they contact?" (Emphasis in original.)

¶ 46 Our disagreement is not on *whether* defamation law protects sincere, good-faith communications regarding corporate practices but on *how* the law does so. FourKites would have us use the "publication" element of a defamation claim to close the door to these defamation claims. But doing so would go too far—it would not only protect sincere, good-faith communicators from defamation liability; it would also protect those who transmit false messages in bad faith. If we hold, as FourKites urges, that a false statement about a corporation that is transmitted to an officer of that corporation can *never* be deemed published, then we will be insulating from liability not only those who act in good faith but those who act in bad faith, as well.

¶ 47 The tool the law uses is not the impenetrable wall of "publication" but the filter of "privilege." That is, a published defamatory statement is not necessarily actionable if the defendant can establish either an absolute or qualified privilege for publishing the communication. "A privileged communication is one that might be defamatory and actionable except for the occasion on which, or the circumstances under which, it is made." *Dent v. Constellation NewEnergy, Inc.*, 2022 IL 126795, ¶ 30. "The defense of privilege rests upon the idea 'that conduct which otherwise would be actionable is to escape liability because the defendant is acting in furtherance of some interest of social importance, which is entitled to protection even at the expense of uncompensated harm to the plaintiff's reputation.' " *Edelman,*

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Combs & Latturner v. Hinshaw & Culbertson, 338 Ill. App. 3d 156, 164 (2003) (quoting Prosser and Keeton on the Law of Torts § 114, at 815 (W. Page Keeton *et al.* eds., 5th ed. 1984)).

¶ 48 The circumstances under which a qualified privilege may be found, at least in Illinois, include

> " '(1) situations in which some interest of the person who publishes the defamatory matter is involved[;]
>
> (2) situations in which some interest of the person to whom the matter is published or of some other third person is involved[;] and
>
> (3) situations in which a recognized interest of the public is concerned.' "

(Internal quotation marks omitted.) *Dent*, 2022 IL 126795, ¶ 31 (quoting Fowler V. Harper, Fleming James & Oscar S. Gray, The Law of Torts § 5.25, at 216 (2d ed. 1986)); see also *Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 28-29 (1993).

¶ 49 Courts in Illinois have not hesitated to apply a qualified privilege to insulate defendants from commercial defamation liability. See, *e.g.*, *Dent*, 2022 IL 126795, ¶ 35 (published defamatory statements by investigator of workplace sexual harassment allegations were privileged); *Kamberos v. Schuster*, 132 Ill. App. 2d 392 (1971) (defamatory statements about attorney made by her supervisors in memoranda and job evaluation reports were published but protected by qualified privilege); *Welch v. Chicago Tribune Co.*, 34 Ill. App. 3d 1046 (1975) (defamatory message about employee posted on newsroom bulletin board was published, but defense of qualified privilege might shield defendant from liability).

¶ 50 Indeed, we made this same observation in *Popko*, 355 Ill. App. 3d 265, when discussing the "intracorporate publication" doctrine, in response to a concern by the defendant that an expansive view of the "publication" element would inordinately expose a company to

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defamation claims for communications that served a valid purpose. We found that such communications, when made for a valid reason in good faith, are protected by a qualified privilege. *Id.* We reasoned that using privilege to differentiate between valid and invalid claims of commercial defamation "properly balances competing interests," as opposed to "granting what would amount to an absolute privilege" for defendants if we applied an across-the-board rule that no statement transmitted to corporate executives could ever be deemed "published." *Id.*

¶ 51 Simply put, holding that anti-corporation statements made to an officer of that corporation could *never* be deemed "published" would throw out defamation lawsuits that otherwise had merit—even if the statements were false, even if they were made deliberately in bad faith, even if they damaged the reputation of the corporation in the eyes of those officers. It would go too far. But deeming those statements "published," when received by that corporate officer, would permit meritorious cases to go forward while still allowing for the defense of qualified privilege (or in the rare case, absolute privilege) to insulate those statements deserving of protection.

¶ 52 We are aware that some courts have blurred this distinction between publication and privilege. Indeed, in discussing the split in jurisdictions over the "intracorporate publication" doctrine, one commentator noted that "[t]he conflict of views is, apparently, attributable to a confusion between publication and privilege." Jane M. Draper, *Defamation: Publication by Intracorporate Communication of Employee's Evaluation*, 47 A.L.R.4th 647, § 2[a] (2022). Illinois law, however, firmly respects that distinction.

¶ 53 We have discussed the defense of qualified privilege only to fully explain our reasoning and to respond to concerns raised by FourKites. We express no opinion on the application of qualified privilege to this matter.

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¶ 54 We simply hold here that the two e-mails at issue—one sent to two directors of project44 and the other to project44's CFO, each of which included derogatory statements about project44—were "published" for the purposes of defamation law. The judgment of the circuit court is reversed.

¶ 55 CONCLUSION

¶ 56 The judgment of the circuit court is reversed. The cause is remanded for further proceedings.

¶ 57 Reversed and remanded.

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***Project44, Inc. v. FourKites, Inc.*, 2022 IL App (1st) 210575**

Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 20-L-4183; the Hon. James E. Snyder, Judge, presiding.
Attorneys for Appellant:	Douglas A. Albritton and Peter G. Hawkins, of Actuate Law, LLC, of Chicago, for appellant.
Attorneys for Appellee:	Scott M. Gilbert and Adam Weiss, of Polsinelli PC, of Chicago, for appellee.

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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 2020-L-4183
FOURKITES, INC., et al.,	)	Calendar Y
Defendants.	)	

ORDER

This matter coming to be heard for hearing on: (1) Defendant FourKites, Inc.'s ("FourKites's") 735 ILCS 5/2-615 Motion to Dismiss Plaintiff's Complaint; and (2) Third Party Jane Doe's Petition for Intervention, all parties present by counsel, IT IS HEREBY ORDERED as follows:

Pursuant to 735 ILCS 5/2-615, the Court finds that, while the May 19, 2019 and May 27, 2019 email communications, in totally of circumstance are otherwise actionable, as a matter of law these email communications were not published to a third party.

Parties are in Agreement:

Thus, Counts I and II for defamation *per se* are dismissed with prejudice. For the same reason, project44's Count III Civil Conspiracy claim is dismissed with prejudice.

(1) Jane Doe's Petition for Intervention is DENIED as moot, as project44's Complaint has been dismissed.

(2) project44's subpoena of AT&T Mobility LLC ("AT&T") is hereby DISMISSED as moot. AT&T is hereby ordered to preserve the documents and information sought pursuant to said subpoena, until the latter of: (1) the issuance of a final, non-appealable order by an Appellate

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Court affirming this Order; or (2) project44 has otherwise exhausted all of its opportunities to appeal this Order. project44 will notify AT&T as to pendency of any appeal of this Order.

(3) This is a final judgment of the Circuit Court.

ENTERED: ENTERED

APR 26 2021

JUDGE [signature] /jd

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APPELLATE COURT 1ST DISTRICT

No. 1-21-0575

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PROJECT44, INC.,	)
	) Appeal from the Circuit Court of
Plaintiff-Appellant,	) Cook County, Illinois, County
	) Department, Law Division
v.	)
	) Circuit Court No. 2020-L-004183
FOURKITES, INC.,	)
	) The Honorable James E. Snyder
Defendant-Appellee.	) Judge Presiding
	)
	) Notice of Appeal Filed:
	) May 20, 2021

BRIEF AND ARGUMENT OF PLAINTIFF-APPELLANT PROJECT44, INC.

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ORAL ARGUMENT REQUESTED

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POINTS AND AUTHORITIES

NATURE OF THE CASE 1

ISSUE PRESENTED FOR REVIEW 2

JURISDICTION 2

Ill. S. Ct. R. 301 2

STATUTES INVOLVED 2

STATEMENT OF FACTS 2

The Parties 2

The May 19th Defamatory Communication 3

The May 27th Defamatory Communication 5

FourKites's Involvement with the May 19th and May 27th Defamatory Communications 6

The Circuit Court Defamation Lawsuit and FourKites's Motion to Dismiss 7

STANDARD OF REVIEW 10

Solaia Tech., LLC v. Specialty Pub. Co, 221 Ill.2d 558 (2006) 10

Krueger v. Lewis, 342 Ill.App.3d 467 (1st Dist. 2003) 10

ARGUMENT 10

I. **THE CIRCUIT COURT ERRED IN GRANTING FOURKITES'S MOTION TO DISMISS AND HOLDING THAT, AS A MATTER OF ILLINOIS LAW, COMMUNICATIONS DEFAMING A COMPANY, MADE TO THE COMPANY'S OUTSIDE BOARD MEMBERS AND EXECUTIVE EMPLOYEES, ARE NOT PUBLISHED** 10

II. **THE RESTATEMENT (SECOND) OF TORTS, AS ADOPTED BY THE ILLINOIS COURTS, CONFIRMS THAT DEFAMATORY COMMUNICATIONS MADE BY A THIRD PARTY TO AN AGENT OF THE DEFAMED MAY GIVE RISE TO A CLAIM FOR DEFAMATION** 10

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Missner v. Clifford,
393 Ill.App.3d 751 (1st Dist. 2009) 11

RESTATEMENT (SECOND) OF TORTS
§ 577, cmt. e (1977) 11

Sleepy's LLC v. Select Comfort Wholesale Corp.,
909 F.3d 519 (2d Cir. 2018)..12

Teichner v. Bellan,
181 N.Y.S.2d 842 (N.Y. App. Div. 1959) 12, 13

Penn Warranty Corp. v. DiGiovanni,
810 N.Y.S.2d 807 (Sup. Ct. 2005)...12

RESTATEMENT (SECOND) OF TORTS
§ 577, cmt. i (1977)..13

Popko v. Continental Casualty Company,
355 Ill.App.3d 257 (1st Dist. 2005) 13, 14, 15

Jones v. Britt Airways, Inc.,
622 F.Supp. 389 (N.D. Ill. 1985) 13, 14

W. PROSSER & W. KEETON, TORTS
§ 113 (5th ed. 1984)..14

III. **THE PRINCIPLES SET FORTH IN *POPKO* AND *MISSNER* CONFIRM THAT THERE IS NO ABSOLUTE PRIVILEGE FOR DEFAMATORY SPEECH MADE TO A COMPANY'S EXECUTIVES AND MANAGEMENT**..15

Missner v. Clifford,
393 Ill.App.3d 751 (1st Dist. 2009) 15

Popko v. Continental Casualty Company,
355 Ill.App.3d 257 (1st Dist. 2005) 15, 16

RESTATEMENT (SECOND) OF TORTS
§ 577, cmt. e (1977) 16

W. PROSSER & W. KEETON, TORTS
§ 113 (5th ed. 1984)..16

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Small v. Sussman,
306 Ill. App. 3d 639 (1st Dist. 1999) 17

Bilut v. Northwestern Univ.,
296 Ill.App.3d 42 (1st Dist. 1998) 18

Baloun v. Williams, No. 00 C 7584,
2002 WL 31426647 (N.D. Ill. Oct. 25, 2002)....18

TABFG, LLC v. Pfeil,
746 F.3d 820 (7th Cir. 2014) 18

Urb. 8 Fox Lake Corp. v. Nationwide Affordable Hous. Fund 4, LLC,
No. 18-CV-6109, 2018 WL 6446421 (N.D. Ill. Dec. 10, 2018)....18

IV. **THE OUT-OF-STATE CASES RELIED ON BY FOURKITES CONTRADICT THE FIRST DISTRICT'S ESTABLISHED JURISPRUDENCE**....19

Hoch v. Loren,
273 So. 3d 56 (Fla. 4th App. Dist. 2019)....19, 20, 21

Fausett v. American Resolution Management Corp.,
542 F.Supp. 1234 (D. Utah 1982)....19, 20, 21, 22

Popko v. Continental Casualty Company,
355 Ill.App.3d 257 (1st Dist. 2005) 19, 20

Teichner v. Bellan,
181 N.Y.S.2d 842 (N.Y. App. Div. 1959) 19

W. PROSSER & W. KEETON, TORTS
§ 113 (5th ed. 1984)....19, 20, 21

Cochran v. Sears, Roebuck & Co.,
72 Ga. App. 458 (2nd Div. 1945) 20

Kennedy v. James Butler, Inc.,
245 N.Y. 204 (1927) 20, 21

Advantage Pers. Agency, Inc. v. Hicks & Grayson, Inc.,
447 So. 2d 330 (Fla. 3d App. Dist. 1984)....21

RESTATEMENT (SECOND) OF TORTS
§ 577, cmt. e (1977) 22

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RESTATEMENT (SECOND) OF TORTS
§ 577, cmt. i (1977) 22

M. F. Patterson Dental Supply Co. v. Wadley,
401 F.2d 167 (10th Cir. 1968) 22

Jones v. Golden Spike Corp.,
97 Nev. 24 (1981) 22

Simpson v. Mars Inc.,
113 Nev. 188 (1997) 22, 23

30 River Ct. E. Urb. Renewal Co. v. Capograsso,
892 A.2d 711 (N.J. Super. 2006) 23

V. **ADOPTING FOURKITES'S PROPOSED ABSOLUTE PRIVILEGE IS BOTH IMPRACTICAL AND WILL CONFLICT WITH THE BALANCED APPROACH FAVORED BY THE FIRST DISTRICT** 23

Popko v. Continental Casualty Company,
355 Ill.App.3d 257 (1st Dist. 2005) 24

Kuwik v. Starmark Star Mktg. & Admin., Inc.,
156 Ill. 2d 16 (1993) 24

DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE,
§ 1:23 *Publication to Plaintiff's Agent* (West Supp. 2020) 24

2 DAN B. DOBBS, THE LAW OF TORTS
§ 402 (2001) 24

CONCLUSION 25

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NATURE OF THE CASE

Defendant-Appellee FourKites, Inc. ("FourKites") sent defamatory *per* se statements to Plaintiff-Appellant project44, Inc.'s ("project44's") Chief Revenue Officer, as well as two outside members (non-employees) of project44's Board of Directors, accusing it of engaging in financial improprieties and criminal activity. The communications, sent in May 2019, came from fictitious email accounts that were used to try and conceal the true identity of the sender(s). Pre-suit discovery permitted project44 to obtain metadata associated with these email accounts, which data reflected that at least one of the email accounts was set up with a recovery telephone number belonging to FourKites, a direct competitor of project44. project44 thus filed suit against FourKites, and also against the anonymous "John Doe" and "Jane Doe" defendants it had not yet identified. FourKites did not argue below that it did not send these communications.

Nevertheless, the circuit court dismissed the complaint based upon the unprecedented reasoning that the communications were akin to private conversations between two individuals and, therefore, were not published. There are no Illinois cases that support this holding. The decision also mooted an issued subpoena that sought the identity of the Doe defendants based upon additional electronic "footprints" that were left behind in the email accounts. project44 contends, among other points argued below, that the email communications were published and that the circuit court's dismissal order should be vacated and this matter remanded for further proceedings. As this is an appeal from the grant of a motion to dismiss, there is no jury verdict at issue.

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ISSUE PRESENTED FOR REVIEW

Whether the circuit court erred in ruling that actionable defamatory *per se* statements did not state a claim for defamation under Illinois law because those statements were made about a corporate plaintiff to one of the corporation's executive employees and to two non-employee members of its board of directors.

JURISDICTION

This is an appeal pursuant to Illinois Supreme Court Rule 301 from a final judgment. The circuit court granted FourKites's Motion to Dismiss at a hearing on April 21, 2021, and a final and appealable order was entered on April 26, 2021. project44 timely filed a notice of appeal within 30 days thereof, on May 20, 2021.

STATUTES INVOLVED

As this matter involves the interpretation of Illinois common law standards for defamation – specifically to whom defamatory statements may be communicated such that they are published – this Appeal does not require the interpretation of any Illinois statutes.

STATEMENT OF FACTS

The Parties.

Plaintiff-Appellant project44 is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois, and is commonly referred to as "p44." (C 141 V1, at ¶ 12; A 68, at ¶ 12).[1] project44 is in the highly competitive shipping logistics industry,

[1] Citations herein to "C" are to materials contained in the Record on Appeal, while citations to "SUP C" are to materials contained in the Supplemental Record on Appeal. Citations to "R" are to materials contained in the Report of Proceedings, while citations to "A" are to materials contained in the Appendix to Brief of Plaintiff-Appellant project44, Inc. Where applicable, citations to the Record on Appeal, Supplemental Record on Appeal, and Report of Proceedings have been cross-referenced to their corresponding citations in the Appendix.

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where it and its more than 200 employees provide goods and services which permit its customers to connect with, automate, and provide visibility into key transportation processes which, in turn, permits its customers to increase operational efficiencies, reduce costs, improve shipping performance, and deliver an exceptional experience to their own customers. (*Id.*).

Defendant-Appellee FourKites is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois. (C 141 V1, at ¶ 13; A 68, at ¶ 13). Like project44, FourKites is in the highly competitive shipping logistics industry and is a direct competitor of project44. (*Id.*). project44 also named as anonymous defendants in the action below Jane Doe, John Doe #1, John Doe #2, and John Does #3-25 (hereinafter "the Doe Defendants"). (C 140 V1, at ¶¶ 8-9; A 67, at ¶¶ 8-9). The Doe Defendants are unknown individuals, corporations, organizations, or other legal entities and were sued under fictitious names in the circuit court. (*Id.*). None of the Doe Defendants filed appearances in the court below, and, likewise, none of them joined FourKites's motion to dismiss. (C 268 V1; A 131). And while Defendant Jane Doe did petition to intervene to quash a subpoena from project44 seeking Jane Doe's identity, said petition was denied. (C 329 V1; SUP C 8; A 3).

<u>The May 19th Defamatory Communication.</u>

On May 19, 2019, one or more individuals, corporations, organizations, or other legal entities using the email address kenadams8558@gmail.com and the name "Ken Adams" transmitted an email communication entitled "Accounting improprieties at P44" ("the May 19th communication"). (C 141 V1, at ¶ 14; C 17 V1; A 68, at ¶ 14; A 84). The May19th communication was sent to email addresses belonging to Jim Baum and Kevin

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Dietsel, who are both non-employee, outside members of project44's Board of Directors. (C 142 V1, at ¶ 15; C 17 V1; A 69, at ¶ 15; A 84). The May 19th communication is divided into five paragraphs, three of which are numbered. (C 142 V1, at ¶ 16; C 17 V1; A 69, at ¶ 16; A 84). The first numbered paragraph alleges that that "Ex employees [of project44] are silenced with legal threats and defamation suits." (C 142 V1, at ¶ 17; C 17 V1; A 69, at ¶ 17; A 84). The paragraph goes on to state that one of project44's employee's family members "used to be the book keeper for a Chicago Mafia and they are using that to silence folks." (*Id.*). Given the context of the paragraph, the word "they" can only refer to project44. (C 142 V1, at ¶ 17; A 69, at ¶ 17).

The first sentence of the second numbered paragraph states that "[t]here is rampant accounting improprieties" at project44. (C 142 V1, at ¶ 19; C 17 V1; A 69, at ¶ 19; A 84). This is followed by a statement encouraging the recipients of the email "to take a look at the contracts (pilots , [*sic*] out clauses, rev rec etc.)," and concludes by stating "Recent CFO Departure must tell you everything." (C 143 V1, at ¶¶ 20-21; C 17 V1; A 70 at ¶¶ 20-21; A 84). The third numbered paragraph states that a client of project44 ("Estes") "cancelled the contract [with project44]," and that the contract "was only $5k a month and they [Estes] are not even willing to pay this." (C 143 V1 – C 144 V1, at ¶ 22; C 17 V1; A 70 – A 71, at ¶ 22; A 84). Finally, the last paragraph is unnumbered and states that "there is widespread discontent brewing and it's just a matter of time before people go public and another Theranos happen [*sic*] in Chicago." (C 144 V1, at ¶ 23; C 17 V1; A 71, at ¶ 23; A 84).

The sender(s)' comparison to "Theranos" refers to Theranos Inc., a now-defunct company that (along with its founder Elizabeth Holmes) was charged by the U.S. Securities

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and Exchange Commission with securities fraud. (C 144 V1, at ¶ 23; C 25 V1– C 27 V1; A 71, at ¶ 23; A 86 – A 88). Ms. Holmes and Theranos's former president, Ramesh Balwani, have also been indicted on multiple counts of wire fraud and conspiracy to commit wire fraud (their cases are currently pending). (C 144 V1, at ¶ 23; C 29 V1 – C 31 V1; A 71, at ¶ 23; A 90 – A 92).

The purported sender of the May 19th communication, "Ken Adams," is a pseudonym, as project44 has not previously employed anyone named "Ken Adams," nor has it ever worked with or become aware of anyone having this name. (C 145 V1, at ¶ 25; A 72, at ¶ 25).

The May 27th Defamatory Communication.

On May 27, 2019, one or more individuals using the email address jshort5584@gmail.com and the name "Jason Short" transmitted an untitled email communication to an email address belonging to Tim Bertrand (tbertrand@project44.com), project44's Chief Revenue Office ("the May 27th communication"). (C 145 V1, at ¶ 27; C 33; A 72, at ¶ 27; A 94). The May 27th communication addresses Mr. Bertrand as "Tim" and says, *inter alia*, that "I wanted to shed some light so you can fled [*sic*] ASAP and go find another job." (C 145 V1, at ¶ 29; C 33 V1; A 72, at ¶ 29; A 94). The second paragraph states that "[y]ou don't want to be part of the next Ponzi scheme or next theranos [*sic*]." (*Id.*). This is immediately followed by an invitation to "[t]alk to ex [project44] CFO Bruns. Talk to ex [project44] Sales people, talk to customers.. [*sic*] talk to prospects, talk to investors outside p44 [project44]. They will tell you the truth." (C 145 V1– C 146 V1, at ¶ 29; C 33 V1; A 72 – A 73, at ¶ 29; A 94). Like "Ken Adams," the name "Jason Short" is a pseudonym, as project44 has not previously employed anyone named "Jason Short,"

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nor has it ever worked with or become aware of any person having this name. (C 146 V1, at ¶ 31; A 73, at ¶ 31).

FourKites's Involvement with the May 19th and May 27th Defamatory Communications.

The "@gmail.com" domain name in the kenadams8558 and jshort5584 e-mail addresses signifies that the emails were set up with Gmail, which is administered by Google, LLC ("Google"). (C 146 V1, at ¶ 33; A 73, at ¶ 33). In the process of creating a Gmail e-mail account, the creator may leave behind actual contact information (another e-mail address, a real name, a real phone number) to be assured of continued access to the account. (C 146 V1, at ¶ 34; A 73, at ¶ 34). Separately, when the creator logs in to the account, the internet protocol address (or "IP address") of the device the user utilizes to connect (*e.g.*, a cell phone, a laptop computer) will be recorded. (*Id.*). The IP address permits insight into what Internet Service Provider (or "ISP") provided the internet connection to the user, and once this is known, a subpoena can be sent to the ISP to obtain identifying information for the user. (C 146 V1 – C 147 V1, at ¶ 34; A 73 – A 74, at ¶ 34).

On May 30, 2019, project44 filed a verified petition for discovery, pursuant to Ill. S. Ct. R. 224, naming Google as respondent (the "Google Petition") in the Circuit Court of Cook County, Law Division. (C 147 V1, at ¶ 35; C 35 V1 – C 41 V1; A 74, at ¶ 35; A 96 – A 102). The Google Petition requested that Google provide project44 with, *inter alia*, the IP address information for the kenadams8558 and jshort5584 email accounts. (C 147 V1, at ¶ 35; C 41 V1; A 74, at ¶ 35; A 102). The circuit court granted the petition, and on September 18, 2019, Google produced two text documents containing "subscriber and recent login information for the Google Accounts JSHORT5584@GMAIL.COM and KENADAMS8558@GMAIL.COM." (C 147 V1, at ¶¶ 36-37; C 43 V1 – C 54 V1; A 74,

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at ¶¶ 36-37; A 104 – A 115). The information provided in these documents confirmed FourKites's involvement in the sending of the defamatory communications, as it disclosed, *inter alia*, a recovery phone number for the "kenadams8558" Gmail account that belonged to FourKites, as well as IP addresses associated with the "jshort5584" Gmail account also belonging to FourKites. (C 148 V1– C 149 V1, at ¶¶ 38-41; C 51 V1– C 69 V1; A 75 – A 76, at ¶¶ 38-41; A 112 – A 130).

The Circuit Court Defamation Lawsuit and FourKites's Motion to Dismiss.

On April 13, 2020, project44 filed a complaint for defamation in the Circuit Court of Cook County, Law Division, naming, *inter alia*, FourKites as a defendant. (C 137 V1; A 64). The case was subsequently assigned to the Honorable James E. Snyder.

On January 20, 2021, FourKites moved, pursuant to 735 ILCS 5/2-615, to dismiss project44's complaint for failure to state a claim. (C 268 V1; A 131). As the basis for its motion, FourKites asserted that: (1) the May 19th and 27th communications did not rise to the level of defamation *per se*; and (2) that the transmittal of the May 19th communication to project44's outside board members Jim Baum and Kevin Dietsel, as well as the transmittal of the May 27th communication to project44's Chief Revenue Officer Tim Bertrand, did not constitute publications as required by Illinois defamation law. (C 268 V1– C 269 V1; A 131 – A 132).

As to this second argument, FourKites relied principally on two non-Illinois cases, namely a Florida Appellate Court case titled *Hoch v. Loren*, 273 So. 3d 56 (Fla. App. 4th Dist. 2019), and a Utah Federal District Court case titled *Fausett v. American Resolution Management Corp.*, 542 F.Supp. 1234 (D. Utah 1982). (*See* C 272 V1; A 135). FourKites asserted that these cases stood for the proposition that there can be "no publication where

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'a defamatory statement about a plaintiff corporation is made to a managerial employee of the corporation,' because 'a statement to an executive/managerial employee of a corporation is a statement to the corporation itself." (C 272 V1; A 135). Relying on a New Jersey Superior Court case titled *30 River Ct. E. Urb. Renewal Co. v. Capograsso*, 892 A.2d 711 (N.J. Super. 2006), FourKites further argued that "Plaintiff's board members and CRO are 'merely a stand-in or conduit for' Plaintiff itself, such that '[c]ommunications to [them] are in effect communications to [Plaintiff] and are not 'published' to a third party.'" (C 272 V1– C 273 V1; A 135 – A 136).

In response, project44 asserted that Illinois has adopted the Restatement (Second) of Torts which states, *inter alia*, that communications to an agent of the defamed party may constitute a publication. (C 537 V1– C 538 V1; A 166 – A 167). project44 likewise asserted that the Florida and Utah cases relied on by FourKites are incompatible with pre-existing Illinois law, which instead favors finding communications published, and later determining whether the communications are subject to a conditional privilege. (C 538 V1; A 167). project44 further asserted that the reasoning in the Florida and Utah cases relied on by FourKites was faulty. (C 538 V1– C 539 V1; A 167 – A 168).

The circuit court heard argument on FourKites's Motion to Dismiss on April 21, 2021. (R 2 V2; A 5). During oral argument, counsel for FourKites elaborated on their client's position as to publication, asserting that the law of defamation "protects only the interest in reputation" and there can be no damage to a corporation when defamatory communications are made to its executives and management. (R 7 V2– R 8 V2; A 10 – A 11). Counsel went on to argue that the Restatement is inapplicable as it "discusses whether statements from one corporate employee to another employee of the same corporation

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constitute publication" and "that's not the issue that's here." (R 14 V2; A 17). In response, counsel for project44 asserted that the May 19th and May 27th communications were in fact intended to damage project44's reputation, both to sow discontent amongst project44's board of directors, as well as to encourage project44's Chief Revenue Officer to resign. (R 31 V2; A 34). Counsel for project44 likewise reiterated that the Restatement applies to statements made by third parties to agents of a corporation, and that the Florida and Utah cases relied on by FourKites were both inapplicable and wrongly decided. (R 31 V2 – R 34 V2; A 34 – A 37).

Upon completion of oral argument, Judge Snyder informed the parties that he was granting FourKites's Motion to Dismiss, as he agreed that "the statement made to the plaintiff's chief revenue officer" and "the statement made to the two directors of an Illinois corporation" were not published under Illinois defamation law. (R 49 V2; A 52). Nevertheless, Judge Snyder stated that:

> The court does not find that the statements are nonactionable, considering their totality. Statements that a person has a familial relationship to the Chicago mafia or is silencing or participating in running Ponzi schemes implies or states quite directly, criminal activity or matters of disrepute. And a jury could find that these statements, if they find they were made – and they can make the findings to the extent to which they found them to be defamatory.

(R 49 V2– R 50 V2; A 52 – A 53). The order granting FourKites's motion to dismiss, entered April 26, 2021, likewise confirmed that "while the May 19, 2019 and May 27, 2019 email communications, in totally [*sic*] of circumstance are otherwise actionable, as a matter of law these email communications were not published to a third party." (SUP C 8; A 3). The court's order also mooted project44's subpoena seeking information to identify Defendant Jane Doe. (*Id.*). This Appeal followed.

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STANDARD OF REVIEW

As project44's complaint was dismissed pursuant to 735 ILCS 5/2-615 for failure to state a claim, the circuit court's ruling is reviewed *de novo*. *See, e.g., Solaia Tech., LLC v. Specialty Pub. Co.*, 221 Ill.2d 558, 579 (2006). Further, this Court accepts "all well-pleaded facts in the complaint as true and draw[s] all reasonable inferences from those facts in favor of the nonmoving party." *Krueger v. Lewis*, 342 Ill.App.3d 467, 470 (1st Dist. 2003).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN GRANTING FOURKITES'S MOTION TO DISMISS AND HOLDING THAT, AS A MATTER OF ILLINOIS LAW, COMMUNICATIONS DEFAMING A COMPANY, MADE TO THE COMPANY'S OUTSIDE BOARD MEMBERS AND EXECUTIVE EMPLOYEES, ARE NOT PUBLISHED.

The circuit court's dismissal order was unprecedented and unwarranted under Illinois law. Pursuant to its holding, any speaker may send defamatory communications of any nature regarding a company to any of the company's executive or managerial employees, and to any non-employee directors of the company, without fear of facing a defamation claim. In reaching this conclusion the court rejected several, on-point Illinois decisions which previously had not been called into doubt by either this Court or the Illinois Supreme Court.

II. THE RESTATEMENT (SECOND) OF TORTS, AS ADOPTED BY THE ILLINOIS COURTS, CONFIRMS THAT DEFAMATORY COMMUNICATIONS MADE BY A THIRD PARTY TO AN AGENT OF THE DEFAMED MAY GIVE RISE TO A CLAIM FOR DEFAMATION.

There can be no doubt that, in the most literal sense, the May 19th and May 27th communications were published, since the communications were not directed to project44 itself, and Messrs. Baum, Dietsel, and Bertrand do not assert that they were personally

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defamed by the May 19th and May 27th communications. Despite this, FourKites asks this Court to adopt a fiction, and hold that, because of Messrs. Baum's, Dietsel's, and Bertrand's positions as executives and outside board members of project44, they and project44 are effectively one and the same, and thus no publication occurred. To support this argument, FourKites asserts that the Restatement (Second) of Torts – which Illinois courts have adopted in matters concerning defamation – is silent as to this issue, and instead applies only to "intra-corporate" communications (*i.e.*, communications made between agents of the same corporation). This is simply wrong, as the Restatement encompasses both third party and intra-corporate communications and confirms that, in either circumstance, statements made to an agent of the defamed *can* give rise to a claim by the defamed party.

The First District's opinion in *Missner v. Clifford,* 393 Ill.App.3d 751 (1st Dist. 2009), is instructive, as the court in that matter expressly adopted comment (e) to the Restatement (Second) of Torts § 577, which states as follows:

> *e. Publication to agent.* The fact that the defamatory matter is communicated to an agent of the defamer does not prevent it from being a publication sufficient to constitute actionable defamation. The publication may be privileged, however, under the rule stated in § 593. *So too, the communication to a servant or agent of the person defamed is a publication* although if the communication is in answer to a letter or a request from the other or his agent, the publication may not be actionable in defamation.

RESTATEMENT (SECOND) OF TORTS § 577, cmt. e (1977) (emphasis added); *Missner*, 393 Ill.App.3d at 763. As the above shows, comment (e) addresses two sides of the same coin, namely communications made to the agent of the defamer, as well as communications to the agent of the defamed, and in both instances the Restatement observes that the communications may be published. *See* RESTATEMENT (SECOND) OF TORTS § 577, cmt. e (1977). Moreover, comment (e), as well as the Restatement generally, makes no distinction

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as to the type or title of the servant or agent to whom defamatory communications may be published. Although *Missner* admittedly addresses only the portion of comment (e) involving communications made to agents of the *defamer*,[2] decisions from other jurisdictions confirm that this portion of the Restatement applies equally to speech made by third parties to agents of the *defamed*.

For instance, in *Sleepy's LLC v. Select Comfort Wholesale Corp.*, 909 F.3d 519, 528 (2d Cir. 2018), the U.S. Court of Appeals for the Second Circuit reversed a district court holding that, under New York law, communications made by a third party to the agent of the defamed were not published. *Sleepy's LLC*, 909 F.3d at 528. In reaching its holding, the Second Circuit looked to the New York Appellate Division case *Teichner v. Bellan*, 181 N.Y.S.2d 842 (N.Y. App. Div. 1959), which, like *Missner*, adopted § 577, comment (e) of the Restatement, and held that:

> [t]here are decisions in some States that a communication of defamatory matter to an agent of the person defamed in response to an inquiry does not constitute a publication to a third person . . . But the better view seems to us to be that taken in another line of cases, holding that the communication to the plaintiff's agent is a publication, even though the plaintiff's action may ultimately be defeated for other reasons. The agent is, in fact, a different entity from the principal; the communication to the agent is, in fact, a publication to a third person.

Sleepy's LLC, 909 F.3d at 528 (citing *Teichner*, 181 N.Y.S.2d at 845 (collecting supporting cases, citations omitted)); *see also Penn Warranty Corp. v. DiGiovanni*, 810 N.Y.S.2d 807, 814 (Sup. Ct. 2005) (citing to *Teichner* and finding publication where a third-party defendant sent defamatory materials to agents of the defamed corporation, namely the corporation's employees). *Teichner* and its progeny leave no doubt that Restatement § 577

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[2] There appears to be no Illinois case that addresses communications to agents of the *defamed*, and thus this appears to be a matter of first impression before the First District.

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comment (e) applies to both statements made to agents of the defamed as well as agents of the defamer.

FourKites's insistence that § 577, comment (e) applies solely to intra-corporate communications is further undercut by the fact that the Restatement addresses intra-corporate speech elsewhere – namely § 577, comment (i) – which states as follows:

> *Communication by one agent to another agent of the same principal.* The communication within the scope of his employment by one agent to another agent of the same principal is a publication not only by the first agent but also by the principal and this is true whether the principal is an individual, a partnership or a corporation. On the conditions under which the communication is privileged, see § 596.

RESTATEMENT (SECOND) OF TORTS § 577, cmt. i (1977). Comment (i) was expressly adopted by the First District in *Popko v. Continental Casualty Company*, 355 Ill.App.3d 257, 265-266 (1st Dist. 2005), and the First District's reasoning in that matter is relevant here. While acknowledging that "courts remain badly split" on whether intra-corporate communications are published, the *Popko* court nevertheless acknowledged that Illinois is one of the states that "recognize that communication within a corporate environment may constitute publication for defamation purposes." *Popko*, 355 Ill.App.3d at 261-262. The First District expressly rejected the claim that intra-corporate speech merely constituted "a corporation 'talking to itself,'" and instead relied on the Northern District of Illinois's decision in *Jones v. Britt Airways, Inc.*, 622 F.Supp. 389, 391 (N.D. Ill. 1985) for the proposition that:

> publication is "an essential element of a cause of action for libel or slander" that is satisfied by the communication of the defamatory statements to *any third person*, including "the defendant's own agent, employee or officer, even when the defendant is a corporation."

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Popko, 355 Ill.App.3d at 261-262 (citations omitted) (emphasis added). The *Jones* court in turn relied on the treatise Prosser & Keeton on Torts, which summarizes caselaw relevant to the issue of publication and states, in relevant part, that:

> [t]here may be publication to any third person. It may be made to a member of the plaintiff's family, including his wife, or to the plaintiff's agent or employee. It may be made to the defendant's own agent, employee or officer, even where the defendant is a corporation.

W. PROSSER & W. KEETON, TORTS § 113, p. 798 (5th ed. 1984); *see also Jones*, 622 F.Supp. at 391. The *Jones* court further observed that "Illinois slander and libel cases rarely concern the issue of publication because communication to *any third party* satisfies the Illinois publication requirement. Only a qualified privilege can render such statements protected." *Jones*, 622 F.Supp. at 391 (emphasis added).

Importantly, the *Popko* court observed that the position advocated by the plaintiff in that case – that intra-corporate speech is not published – confuses "the issues of publication and privilege." *Popko*, 355 Ill.App.3d at 262. Instead, the *Popko* court held that the speech at-issue was unquestionably published, yet it may still be subject to a conditional privilege and thus not actionable for defamation. *Id.* at 264-265. The court further noted that even if the speech is privileged, said privilege can be waived in instances where "there is a direct intention to injure the plaintiff or a reckless disregard of the plaintiff's rights." *Id*. at 264. While the plaintiff argued that such a holding would "inordinately" expose corporations to liability, the *Popko* court disagreed, and instead held that:

> [w]hile acknowledging competing policy concerns, courts that have rejected the nonpublication rule have concluded that the qualified privilege adequately protects the corporation from unwarranted defamation liability. . . . We believe this approach properly balances competing interests rather than granting what would amount to an absolute privilege for corporations against all defamation actions.

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Id. at 265.

Given the above reasoning, there can be no doubt that, under the Restatement (Second) of Torts (and by extension Illinois law), communications by third parties to agents of a *defamed* corporation are published, such that they may give rise to an action by the defamed corporation.

III. THE PRINCIPLES SET FORTH IN *POPKO* AND *MISSNER* CONFIRM THAT THERE IS NO ABSOLUTE PRIVILEGE FOR DEFAMATORY SPEECH MADE TO A COMPANY'S EXECUTIVES AND MANAGEMENT.

As the holdings of *Popko* and *Missner* show, the First District adheres to the following principles when deciding whether defamatory communications are published:

1. Deference to the Restatement (Second) of Torts;
2. A preference towards finding communications published, and instead evaluating whether said speech is subject to a conditional privilege; and
3. A refusal to resolve issues of publication in a manner such that they would "amount to an absolute privilege . . . against all defamation actions."

(*Missner*, 393 Ill.App.3d at 763; *Popko*, 355 Ill.App.3d at 264-265). Moreover, the First District has shown that it will find corporate communications published even when said speech is characterized as the company "talking to itself," and that the First District will find publication where defamatory statements are made to a company's officer, and the company is a *defendant* in a defamation action. *Popko*, 355 Ill.App.3d at 261-262.

Against this backdrop, FourKites's argument that communications defaming a company are never considered published when made solely to executive or managerial agents of said company necessarily fails. Such a blanket exception is antithetical to the First District's prior jurisprudence in this area, as, *inter alia*, this would set an "absolute

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privilege . . . against all defamation actions" for speech made to a specific category of persons (*i.e.,* a company's executives and managers). *Popko*, 355 Ill.App.3d at 265.

It is therefore not surprising that, in its briefing before the circuit court, FourKites cited to no Illinois case law or portion of the Restatement that supports its position. Instead, FourKites argued that the statements at-issue were akin to "communication with the corporation itself;" however this is no different than claiming that project44 is "talking to itself," which the First District has previously refused to find dispositive. *Popko*, 355 Ill.App.3d at 261-262. Further, given that the First District in *Popko* confirmed that communications made to a company's agent, employee, or officer are published where the company is the *defendant* in a defamation action, FourKites has failed to explain why the same would not hold true where the company is the *plaintiff*.[3] 355 Ill.App.3d at 262.

While FourKites – citing to comment (b) of § 577 of the Restatement – correctly asserted in the circuit court that the "the only interest protected by a defamation claim is that of reputation," FourKites goes too far when it claims that project44's "reputation could not be impacted by comments directed to its leadership." (C 557 V1; A 283). To hold that communications to executives and managers is the "equivalent of a communication to the corporation itself" ignores a litany of instances where this is simply not true, such as communications made to newly hired executives (who have yet to become enmeshed with the company) or to outside managers who, by design, are intended to remain independent

[3] Since the Restatement and Prosser both observe that communications to agents of the defamed and agents of the defamer may be published, there is also no reason why Prosser's statement that communications made to an officer of the *defamer* may be published does not apply equally to communications made to an officer of the *defamed*. *Compare* RESTATEMENT (SECOND) OF TORTS § 577, cmt. e. *with* W. PROSSER & W. KEETON, TORTS § 113, p. 798.

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from the company. (*Id.*). The First District need look no further than this case to see the folly in FourKites's argument, as the May 27th communication to Mr. Bertrand sought to damage the reputation of project44, so as to convince project44's newly hired Chief Revenue Officer to leave project44 "ASAP and go find another job." (C 33 V1; A 94). Likewise, the May 19th communication sought to sully the reputation of project44 to sow distrust between the company and its outside board members. (C 17 V1; A 84). These were blatant attempts to damage project44's reputation in the eyes of Messrs. Baum, Dietsel, and Bertrand, yet, according to FourKites, project44 has no recourse stop these harmful attacks. The First District's prior jurisprudence makes clear that FourKites is wrong.

The Illinois cases relied on by FourKites in its Motion to Dismiss stand only for the general proposition that a corporation can act only through its agents, directors, and officers. (C 271 V1 – C 272 V1; A 134 – A 135). None of these cases address publication in the context of a defamation claim, and – contrary to FourKites's assertions – none of these cases hold that there is an unconditional unity of interest between a corporation and its agents, executives, or managers. For instance, while FourKites cites to *Small v. Sussman*, 306 Ill. App. 3d 639 (1st Dist. 1999) for its observation that "it is axiomatic that a corporation can act only through its agents," said statement was not made in the context of a defamation claim, but instead concerned an unsuccessful attempt by the plaintiff to name a corporation and its agents as co-conspirators. *Small*, 306 Ill. App. 3d at 647; (C 271 V1 – C 272 V1; A 134 – A 135). And while the court in *Small* found the conspiracy claim in that case lacking, elsewhere Illinois recognizes that the unity between a corporation and its agents is not absolute, and that an agent can be named as a co-

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conspirator when they act outside their authority. *See Bilut v. Northwestern Univ.*, 296 Ill.App.3d 42, 48-49 (1st Dist. 1998); *see also Baloun v. Williams*, No. 00 C 7584, 2002 WL 31426647, * 15 (N.D. Ill. Oct. 25, 2002) (finding conspiracy sufficiently alleged among principles and agents where agents were motivated by a personal interest "to get" the plaintiff; *e.g.,* to "harass, coerce, intimidate . . . and destroy Baloun and his business").

Similarly, FourKites' reliance on *TABFG, LLC v. Pfeil*, 746 F.3d 820, 825 (7th Cir. 2014), for the proposition that "only managers, directors and officers of a corporation are authorized to act on the corporation's behalf" is misplaced. (C 272 V1; A 135). That case dealt with the privilege derived from the business judgment rule that "protects them from personal liability for their decisions made on behalf of the corporation," however *TABFG* and subsequent jurisprudence make clear that this is privilege is conditional, not absolute. *TABFG*, 746 F.3d at 825; *see also Urb. 8 Fox Lake Corp. v. Nationwide Affordable Hous. Fund 4, LLC*, No. 18-CV-6109, 2018 WL 6446421, at *4 (N.D. Ill. Dec. 10, 2018) (stating "[h]owever, the privilege is conditional, and does not apply if 'the defendant's conduct was unjustified or malicious,' or 'totally unrelated or even antagonistic to the interest which gave rise to defendant's privilege'") (citations omitted).

In short, the Illinois cases cited by FourKites, rather than supporting a finding that a corporation and its agents, directors, and officers are unconditionally one and the same, are instead further evidence that, consistent with the First District's holding in *Popko*, the unity between a corporation and its agents (including management and executives) is not absolute. Thus, for this reason, too, FourKites's assertion that, under all circumstances, defamatory communications made about a corporation to its executives and managers are not published fails to pass muster.

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IV. <u>THE OUT-OF-STATE CASES RELIED ON BY FOURKITES CONTRADICT THE FIRST DISTRICT'S ESTABLISHED JURISPRUDENCE.</u>

Given the dearth of caselaw in Illinois supporting its position, FourKites's argument for dismissal before the circuit court instead relied on out-of-state cases, in particular *Hoch v. Loren,* 273 So. 3d 56 (Fla. 4th App. Dist. 2019) from Florida's Fourth District Appellate Court, and *Fausett v. American Resolution Management Corp.*, 542 F.Supp. 1234 (D. Utah 1982) from the Utah Federal District Court. (C 272 V1; A 135). There is no denying that these cases hold that defamatory communications made to a company's executives and managers are not published, however neither case is fatal to project44's claims. Rather, the reasoning in *Popko* and *Missner* dictate that here, just like the First District has done when analyzing other defamatory speech, this Court should instead hold that the communications at-issue are published, but may be subject to a conditional privilege. That *Hoch* and *Fausett* reach a different conclusion should have no effect on this Court, as the *Popko* court and other jurisdictions (such as the *Teichner* court) have observed that courts throughout the country are divided on issues involving publication. *See Popko*, 355 Ill.App.3d at 261-262; *Teichner*, 181 N.Y.S.2d at 845. Further, as the court in *Popko* confirmed, courts in the First District are willing to take positions on issues involving publication that contradict the holdings of other jurisdictions. *See Popko*, 355 Ill.App.3d at 261-262.

Likewise, this Court should have no difficulty rejecting the holdings in *Hoch* and *Fausett* since, on their face, the cases are incongruous with established Illinois jurisprudence. This is exemplified by the *Hoch* and *Fausett* courts' treatment of Prosser's statement that "publication may be made to the defendant's own agent, employee or officer, even when the defendant is a corporation." W. PROSSER & W. KEETON, TORTS § 113, p.

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798. While the First District in *Popko* unambiguously agreed with this position, the *Hoch* court flat-out rejected Prosser's reasoning, instead stating that "courts have employed the legal fiction that the party hearing or seeing the purported defamation is so closely connected with the potential defamation plaintiff *or defendant* that they merge into a single entity, so there is no publication to a third person' necessary to the cause of action." *Hoch*, 273 So.3d at 57 (emphasis added); *see also Popko*, 355 Ill.App.3d at 262. Importantly, Prosser's guidance regarding publication (again embraced by *Popko*) applied to statements made to the defendant's own agents, employees, and *officers*. *See* W. PROSSER & W. KEETON, TORTS § 113, p. 798; *see also Popko*, 355 Ill.App.3d at 262. And as discussed *supra*, there is no reason why, under Illinois law, this same logic would not apply to statements made to the *plaintiff's* agent, employee, or officer.

Similarly, the *Fausett* court gives little weight to the reasoning of Prosser, referring to it as "inapposite" to the issue of publication of speech made to a manager or officer of the defamed, and instead asserting that it applies only to "corporate defendants where there has been intra-corporation communication." *Fausett*, 542 F.Supp. at 1241-1242. For support, the *Fausett* court observes that one of the cases cited by Prosser, *Cochran v. Sears, Roebuck & Co.*, 72 Ga. App. 458 (2nd Div. 1945), concerned intra-corporate speech. *Id.* at 1242; *see also* W. PROSSER & W. KEETON, TORTS § 113, p. 798. Yet, the *Fausett* court ignores other cases also cited by Prosser, such as *Kennedy v. James Butler, Inc.*, 245 N.Y. 204 (1927), that clearly involve third party communications. *See* W. PROSSER & W. KEETON, TORTS § 113, p. 798. In *Kennedy*, the New York Court of Appeals, which included Chief Judge (and later Supreme Court Justice) Benjamin Cardozo, affirmed a refusal from the lower court to dismiss a defamation action, finding that statements made

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from the defendant corporation to its store managers, containing allegedly defamatory communications about a *third party*, were indeed published. *Kennedy*, 245 N.Y. at 207. Like the court in *Popko*, the *Kennedy* court espoused a preference for finding communications published, as the court reasoned that allegedly defamatory speech may nevertheless be protected by a conditional privilege. *Id*.

Besides being incompatible with the First District's jurisprudence, the reasoning of the *Hoch* and *Fausett* cases also rests on shaky ground. As a threshold matter, the Florida court's holding in *Hoch* traces back to the Utah Federal District Court's decision in *Fausett*. *See Hoch*, 273 So. 3d 58 (citing *Advantage Pers. Agency, Inc. v. Hicks & Grayson, Inc.*, 447 So. 2d 330) (Fla. 3d App. Dist. 1984)); *Advantage Pers. Agency,* 447 So. 2d at 331 (citing *Fausett*). Thus, in essence, FourKites's central argument as to why project44's complaint should be dismissed rests solely on the *Fausett* District of Utah case.

And yet the *Fausett* case is both internally inconsistent and omits statements from the sources it cites that contradict the court's conclusions. For instance, and as discussed above, the *Fausett* court ignored caselaw cited in Prosser that undercut the court's claim that Prosser applied solely to intra-corporate communications. *See* W. PROSSER & W. KEETON, TORTS § 113, p. 798 (*citing Kennedy*, 245 N.Y. at 207). Further, while the *Fausett* court claimed that § 113 of Prosser applied solely to "corporate defendants," the court failed to address the fact that Prosser goes on to cite cases showing that publication "may be made to a member of the plaintiff's family, including his wife, or to the *plaintiff's agent or employee*." *Compare Fausett*, 542 F.Supp. at 1241-1242 *with* W. PROSSER & W. KEETON, TORTS § 113, p. 798 (emphasis added). On top of this, the *Fausett* court refused to find persuasive § 577, comment (e) of the Restatement – even though § 577 expressly

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states that communications made to agents of the defamed may be published – by again inexplicably concluding that this section of the Restatement applies only to "the issue of whether statements from *one corporate employee to another employee of the same corporation* constitute publication." *Fausett*, 542 F.Supp. at 1242 (emphasis added). Yet, as discussed elsewhere in this brief, comment (e) is not limited solely to intra-corporate communications, as evidenced by, *inter alia*, the fact that such communications have their own dedicated section in the Restatement. *Compare* RESTATEMENT (SECOND) OF TORTS § 577, cmt. e *with* RESTATEMENT (SECOND) OF TORTS § 577, cmt. i.

The *Fausett* court goes on to cite *M. F. Patterson Dental Supply Co. v. Wadley*, 401 F.2d 167 (10th Cir. 1968) and *Jones v. Golden Spike Corp.*, 97 Nev. 24 (1981), in support of its claim that § 577 comment (e) of the Restatement applies solely to intra-corporate communications, yet neither *Patterson* nor *Golden Spike* reference this section of the Restatement. *Fausett*, 542 F.Supp. at 1242. Moreover, both cases otherwise contradict the reasoning of the Restatement, since they hold that intra-corporate communications are not published. *See id.*; *see also M. F. Patterson*, 401 F.2d at 171 (stating "Oklahoma apparently adopts the lack of publication concept"); *Golden Spike*, 97 Nev. at 26-27 (adopting "rule of law" that communication "by one corporate officer to another in the regular course of the corporation's business . . . did not amount to a publication which would support an action for libel"). While the *Fausett* court may have cited these cases to show that other jurisdictions flat-out refuse to find publication in any scenario involving corporate employees and agents, this, too, has been undercut by the Nevada Supreme Court's subsequent overruling of the *Golden Spike* case in favor of reasoning consistent with the Restatement and the First District's holding in *Popko*. *See Simpson v. Mars Inc.*,

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113 Nev. 188, 192 (1997) (overruling *Golden Spike* and finding communications published, consistent with § 577 of the Restatement). Given this, the Court should not find *Hoch* and *Fausett* persuasive, and should instead follow the First District's better-reasoned jurisprudence and hold that the communications at-issue here are published.

Lastly, FourKites also cites to the New Jersey Superior Court case *30 River Ct. E. Urb. Renewal Co. v. Capograsso*, 892 A.2d 711 (N.J. Super. 2006), for the proposition that "Plaintiff's board members and CRO are 'merely a stand-in or conduit for' Plaintiff itself, such that '[c]ommunications to [them] are in effect communications to [Plaintiff] and are not 'published' to a third party.'" (C 272 V1 – C 273 V1; A 135 – A 136). Yet here, too, FourKites's reliance is misplaced, as that case involved a determination that an apartment company's concierge, who was designated by the corporate plaintiff to accept complaints from third parties (namely apartment tenants) was one and the same as the apartment company plaintiff. *Capograsso*, 892 A.2d at 717. Not only are these facts dissimilar from the case-at-hand, but the *Capograsso* court only came to this conclusion after a factual record had been developed. *Id.* As the instant case involves a motion to dismiss, no such record has been made, and thus *Capograsso* – like *Hoch* and *Fausett* – is inapplicable.

V. ADOPTING FOURKITES'S PROPOSED ABSOLUTE PRIVILEGE IS BOTH IMPRACTICAL AND WILL CONFLICT WITH THE BALANCED APPROACH FAVORED BY THE FIRST DISTRICT.

As the above shows, adoption of the *Hoch, Fausett*, and *Capograsso* cases would lead to policies inconsistent with the rationale of the First District. Further, the exception advocated by FourKites makes little sense at the motion to dismiss stage, as, *inter alia*, FourKites has failed to explain how the circuit court is supposed to decide on the pleadings who qualifies as executives and management. These positions are often defined differently among varying companies, and thus this inquiry cannot be definitively resolved on the face

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of a complaint. Moreover, *Capograsso* confirms that even if such an exception is valid (it is not), such a determination cannot be made without first developing a factual record, which was not done here.

Finally, if Illinois were to adopt FourKites's proposed exception, it would insulate senders of even maliciously defamatory communications. While the First District should not chill the dissemination of legitimate concerns about a company, at the same time it cannot sanction the unbridled dissemination of malicious, purposely false communications designed solely to damage a company's reputation. The policies already established by the First District, *i.e.*, the finding of defamatory communications published, but potentially subject to a conditional privilege, "properly balances [these] competing interests rather than granting what would amount to an absolute privilege for corporations against all defamation actions," as even speech that is otherwise protected by a conditional privilege loses that protection if it can be shown that it was disseminated maliciously. *Popko*, 355 Ill.App.3d at 265; s*ee also Kuwik v. Starmark Star Mktg. & Admin., Inc.*, 156 Ill. 2d 16, 26 (1993). It is thus not surprising that multiple treatises consider the approach to publication that the First District has adopted and should continue to follow here to be "the better reasoned and defensible view." DAVID A. ELDER, DEFAMATION: A LAWYER'S GUIDE, § 1:23 *Publication to Plaintiff's Agent* (West Supp. 2020); *see also* 2 DAN B. DOBBS, THE LAW OF TORTS § 402, at 1126 (2001).

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CONCLUSION

WHEREFORE, for the foregoing reasons, Plaintiff-Appellant project44, Inc. respectfully requests that the judgment of the Circuit Court of Cook County granting Defendant-Appellee FourKites, Inc.'s Motion to Dismiss and dismissing project44, Inc.'s complaint with prejudice be REVERSED, and that this case be REMANDED to the circuit court for further proceedings consistent herewith.

Dated: August 25, 2021

Respectfully Submitted,

By: /s/ Douglas A. Albritton

One of the Attorneys for project44, Inc.

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No. 1-21-0575

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PROJECT44, INC.,	)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellant,	)	Cook County, Illinois, County
	)	Department, Law Division
v.	)	
	)	Circuit Court No. 2020-L-004183
FOURKITES, INC.,	)	
	)	The Honorable James E. Snyder
Defendant-Appellee.	)	Judge Presiding
	)	
	)	Notice of Appeal Filed:
	)	May 20, 2021

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is twenty-five (25) pages.

/s/ Douglas A. Albritton
One of the Attorneys for project44, Inc.

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No. 1-21-0575

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PROJECT44, INC.,	)
	) Appeal from the Circuit Court of
Plaintiff-Appellant,	) Cook County, Illinois, County
	) Department, Law Division
v.	)
	) Circuit Court No. 2020-L-004183
FOURKITES, INC.,	)
	) The Honorable James E. Snyder
Defendant-Appellee.	) Judge Presiding
	)
	) Notice of Appeal Filed:
	) May 20, 2021

APPENDIX TO BRIEF OF PLAINTIFF-APPELLANT PROJECT44, INC.

TABLE OF CONTENTS

Tab	Document	Record Page	Appendix Page
1	Order Granting Defendant FourKites, Inc.'s Motion to Dismiss, entered April 26, 2021	SUP C 8	A 3
2	Transcript of April 21, 2021 Hearing on Defendant FourKites, Inc.'s Motion to Dismiss	R 2	A 5
3	Complaint, Filed April 13, 2020	C 137	A 64
4	Exhibit A to Complaint, Filed April 13, 2020	C 16	A 83
5	Exhibit D to Complaint, Filed April 13, 2020	C 24	A 85
6	Exhibit E to Complaint, Filed April 13, 2020	C 28	A 89
7	Exhibit F to Complaint, Filed April 13, 2020	C 32	A 93
8	Exhibit G to Complaint, Filed April 13, 2020	C 34	A 95

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Tab	Document	Record Page	Appendix Page
9	Exhibit H to Complaint, Filed April 13, 2020	C 42	A 103
10	Exhibit I to Complaint, Filed April 13, 2020	C 46	A 107
11	Exhibit J to Complaint, Filed April 13, 2020	C 50	A 111
12	Exhibit K to Complaint, Filed April 13, 2020	C 55	A 116
13	Exhibit L to Complaint, Filed April 13, 2020	C 61	A 122
14	Exhibit M to Complaint, Filed April 13, 2020	C 64	A 125
15	Exhibit N to Complaint, Filed April 13, 2020	C 66	A 127
16	Defendant FourKites, Inc.'s Motion to Dismiss with Exhibits, Filed January 20, 2021	C 249	A 131
17	Plaintiff project44, Inc.'s Response in Opposition to Motion to Dismiss with Exhibits, Filed February 22, 2021	C 432	A 163
18	Defendant FourKites, Inc.'s Reply in Support of Motion to Dismiss, Filed March 5, 2021	C 555	A 281
19	Plaintiff project44, Inc.'s Sur-Reply to Motion to Dismiss, Filed March 31, 2021	C 606	A 291
20	Notice of Appeal, Filed May 20, 2021	C 614	A 294
21	Table of Contents of Record on Appeal		A 296
22	Table of Contents of the Report of Proceedings		A 302
23	Table of Contents of the Supplement to Record on Appeal		A 302

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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC.,	)	
Plaintiff,	)	
v.	)	Case No. 2020-L-4183
FOURKITES, INC., et al.,	)	Calendar Y
Defendants.	)	

ORDER

This matter coming to be heard for hearing on: (1) Defendant FourKites, Inc.'s ("FourKites's") 735 ILCS 5/2-615 Motion to Dismiss Plaintiff's Complaint; and (2) Third Party Jane Doe's Petition for Intervention, all parties present by counsel, IT IS HEREBY ORDERED as follows:

Pursuant to 735 ILCS 5/2-615, the Court finds that, while the May 19, 2019 and May 27, 2019 email communications, in totally of circumstance are otherwise actionable, as a matter of law these email communications were not published to a third party.

Parties are in Agreement:

Thus, Counts I and II for defamation *per se* are dismissed with prejudice. For the same reason, project44's Count III Civil Conspiracy claim is dismissed with prejudice.

(1) Jane Doe's Petition for Intervention is DENIED as moot, as project44's Complaint has been dismissed.

(2) project44's subpoena of AT&T Mobility LLC ("AT&T") is hereby DISMISSED as moot. AT&T is hereby ordered to preserve the documents and information sought pursuant to said subpoena, until the latter of: (1) the issuance of a final, non-appealable order by an Appellate

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Court affirming this Order; or (2) project44 has otherwise exhausted all of its opportunities to appeal this Order. project44 will notify AT&T as to pendency of any appeal of this Order.

(3) This is a final judgment of the Circuit Court.

ENTERED: ENTERED

APR 26 2021

JUDGE [signature] /jd

ORDER PREPARED BY
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FILED
JUL 1 2021
IRIS Y. MARTINEZ
CLERK OF THE CIRCUIT COURT
OF COOK COUNTY, IL

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC.,)
)
Plaintiff,)
)
vs.) No. 2020 L 04183
)
FOURKITES, INC., et al.,)
)
Defendants.)

Remote report of corrected proceedings had at the motion in the above-entitled cause before the HONORABLE JAMES E. SNYDER, Judge of said Court, commencing at 9:00 a.m. on April 21, 2021.

(Proceedings ended at 10:06 a.m.)

Reporter: Angela C. Loisi, CSR, RPR, FCRR
License No.: 084-004571
REPORTING REMOTELY FROM COOK COUNTY, ILLINOIS

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1 THE CLERK: Project44 versus
2 Project44.
3 MR. HAWKINS: Good morning, Your
4 Honor. Peter Hawkins for plaintiff.
5 THE COURT: Good morning.
6 THE CLERK: Mr. Gilbert, you're muted.
7 MR. GILBERT: I'm sorry. Good
8 morning, Your Honor. Scott Gilbert on behalf
9 of Defendant FourKites.
10 MS. HEMERYCK: And good morning, Your
11 Honor. Sondra Hemeryck on behalf of
12 petitioner intervener, Jane Doe.
13 THE COURT: Okay. And I just want to
14 confirm before we proceed, is there anyone
15 here for any plan other than Project44?
16 (Whereupon, a short
17 discussion was held off
18 the record.)
19 MR. GILBERT: Your Honor, this is
20 before you on FourKite's motion to dismiss.
21 And I believe there's also a -- not
22 directly related motion to intervene. It
23 likely makes sense to move forward with the
24 motion to dismiss first. That would be my

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1 suggestion, but, obviously, I would defer to
2 the court.
3 THE COURT: Okay. I have read the
4 issues, by the way, and please go right ahead.
5 MR. GILBERT: Okay. Your Honor, this
6 is before you on Defendant FourKite's motion
7 to dismiss Project44's complaint pursuant to
8 2-615. And, ultimately, the complaint should
9 be dismissed for three reasons.
10 First, the defamation claims failed
11 because there was no third-party publication.
12 Emails at issue were about the plaintiff and
13 they were sent to the plaintiff.
14 Additionally, the statements in those
15 emails were not defamatory per se. And
16 finally, the plaintiff's civil conspiracy
17 claim fails because it effectively asserts
18 that FourKites conspired with itself and --
19 which is an impossibility from a legal
20 perspective.
21 So I'd like to address first, Your
22 Honor, the issue of publication. Establishing
23 an actual -- actual defamation claim hinges on
24 establishing production to a third party. The

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1 statement at issue must have been directed to
2 someone other than the plaintiff, because the
3 entire concept of defamation revolves around
4 protecting against reputational harm. And
5 this is a threshold issue that applies
6 regardless of whether the claim is based on
7 defamation per se or defamation --
8 [indiscernible] -- quad.
9 And the plaintiff's position in this
10 issue would illuminate that requirement
11 altogether. So both parties' briefs address
12 the importance of Section 55 -- 577 of their
13 statement. And that's a good place for us to
14 start this morning.
15 So the plaintiff would ask the court
16 to skip directly to Comment (e). And we'll
17 get to Comment (e), but I think the place to
18 start is actually at the beginning of that
19 role.
20 So Section 577 provides that
21 publication in an alleged defamatory comment
22 must be to quote, one other than the person
23 defamed. And this rule has been recognized by
24 Illinois courts.

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1 They have held that the publication
2 requirement is not satisfied, and a
3 communication is made to the person defamed.
4 And comment B to Section 577, it
5 explains why this requirement exists. And I
6 think it's worth reading it. It says [as
7 read]:
8 "To constitute a
9 publication, it's
10 necessary that the
11 defamatory matter be
12 communicated to someone
13 other than the person
14 defamed. The law of
15 defamation primarily
16 protects only the interest
17 in reputation. Therefore,
18 unless the defamatory
19 matter is communicated to
20 a third person, there has
21 been no loss of
22 reputation. Since
23 reputation is the
24 estimation in which one's

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1 character's held by its
2 neighbors and associates."
3 As I will detail later on, a company's
4 executive leadership is neither its neighbors
5 or its associates.
6 Illinois courts have explained the
7 basis for this requirement as follows: A
8 statement is defamatory that harms an
9 individual's reputation by lowering the
10 individual in the eyes of his community or to
11 deter the community from associating with it.
12 Again, comments made to executive
13 leadership of a company can't trigger that
14 harm.
15 The primary issue before the court
16 then today is in relationship to defamation
17 claims brought by corporations, who is the
18 company and who qualifies as a third party?
19 And in answering that, we should
20 remember a truism long recognized by courts in
21 Illinois, which is, it is axiomatic that a
22 corporation can only act through its agents.
23 Similarly, caseload that's developed
24 around a civil conspiracy claim drives home

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1 the same point, which recognizes that a
2 company cannot conspire with its employees,
3 because that would be akin to conspiring with
4 itself in that same concept which we have
5 here.
6 Here, the two emails that are at issue
7 were sent to P44's chief revenue officer and
8 two members of its board of directors. If
9 members of a company's C-suite and board of
10 directors are not the company, then who is?
11 They are not an outside member of the
12 community. They are the company. So to
13 accept the plaintiff's position here, we hold
14 that even comments to a company's senior
15 leadership constitute publication, and,
16 thereby, eliminate the publication requirement
17 altogether in defamation suits brought by
18 legal entities.
19 As the plaintiff will acknowledge,
20 Illinois courts have not spoken directly on
21 this issue.
22 However, two courts outside of
23 Illinois have considered the issue and reached
24 the same conclusion that advocated by a

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1 pro- -- by FourKites in its brief, which is
2 statements made to executive leadership are
3 the same as statements made by the company.
4 And this concept was being reasonably
5 articulated by a federal court in Utah in
6 Fausett versus American Resolution [sic]
7 Management. There, the alleged defamation
8 related to actions of the plaintiff, ARMCOR's
9 Management, and was communicated to two of the
10 company's chief principals.
11 In holding, there was no publication.
12 The court reasoned the law of defamation
13 protects against the impinging of one's
14 reputation or causing its alienation of its
15 peers.
16 There simply exists no potential for
17 ARMCOR's reputation to be reduced or for
18 ARMCOR to be alienated from its managers,
19 customers, shareholders, institutional
20 leaders, et cetera, when the defamatory
21 statements are made to its management.
22 In essence, the management is the
23 corporation for purposes of communication.
24 And in reaching this conclusion, the Fausett

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1 court considered Comment (e) of Section
2 557- -- 577 of the restatement, which the
3 plaintiff in this matter focuses on.
4 It did not, however, reject Comment
5 (e). Rather, it found it was inapplicable,
6 and it explained why. It said, look,
7 Prosser's statement that publication may be
8 made to the defendant's own agent, employee,
9 or officer, even where the defendant is a
10 corporation is inapposite because the cases on
11 which that statement were premised are cases
12 where the corporate defendants -- or the
13 statements related to the corporate defendants
14 where there has been intracorporate
15 communication.
16 Likewise, cases that have held that
17 communications of servants or agents of a
18 defamed person or corporation --
19 [indiscernible] -- publication are
20 inapplicable. Because those cases discuss the
21 issue of whether statements made from one
22 corporate employee to another employee are the
23 same corporation constitutes publication.
24 Now, that wasn't the issue in Fausett

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1 and it's not the issue that's before this
2 court.
3 Similarly, and more recently in 2019,
4 the Florida Appellate Court reached the same
5 conclusion in Hoch versus Loren when the court
6 considered the same issue in how there's no
7 publication where a defamatory statement about
8 a plaintiff corporation is made to a
9 managerial employee of the corporation,
10 because the statement to an executive
11 managerial employee of a corporation is a
12 statement to the corporation itself.
13 Hoch, in support of its findings,
14 cites to another Florida Appellate court,
15 Advantage Personnel Agency versus Hicks and
16 Grayson.
17 And there, the court was addressing a
18 defamation claim where the allegation was that
19 an executive leader of one company during a
20 meeting with executive leadership of another
21 company made defamatory statements about the
22 plaintiff company's billing practices.
23 And in determining that that could not
24 be a publication, the Florida Appellate court

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1 reached that same conclusion, that these are,
2 in fact, in effect, being made -- comments
3 made to the management of the corporation are
4 comments made to the corporation itself and
5 don't satisfy the publication.
6 That same logic has to apply here,
7 Your Honor. If comments to Plaintiff's
8 executive leadership do not constitute
9 statements to the company, then a third-party
10 publication is eviscerated altogether. That
11 requirement would just fall by the wayside and
12 it would eliminate the focus on whether there
13 could be the possibility of reputational harm
14 making any negative comment made to a company,
15 subject to a defamation claim.
16 And the plaintiff in their response
17 asserts that these assertions from these cases
18 rest on shaky grounds, but I don't think
19 that's accurate.
20 So they attempt to the undercut the
21 logic of Fausett by asserting that it relay-
22 -- relied on a Nevada opinion called Golden
23 Spike. That was subsequently overruled. I
24 don't think that's an appropriate reading of

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1 the basis that Fausett responds to or refers
2 to Golden Spike.
3 They don't cite it in support of their
4 conclusion. They cite it as a basis -- or as
5 a basis for rejecting Comment (e). They cite
6 it as a reason for why Comment (e) really
7 isn't applicable in that scenario stating that
8 it is a case that discusses whether statements
9 from one corporate employee to another
10 employee of the same corporation constitute
11 publication. That's what E addresses, but
12 that's not the issue that's here.
13 With respect to the Florida opinions,
14 there was a 2019 opinion that addressed the
15 same scenario where the alleged defamatory
16 comments were made to Plaintiff's company
17 board that primarily comprised of non-employee
18 directors.
19 And in holding that there was no
20 publication, the court held that the board and
21 CEO were undoubtedly so closely connected with
22 the company, the communications among the
23 board and the CEO were tantamount to
24 communication of the corporation topic on

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1 itself. That's how it reads. If you're --
2 [indiscernible] -- Your Honor. It's also
3 cited in our brief, and I'm happy to provide a
4 copy.
5 The holdings of Fausett and Hoch makes
6 sense in this scenario. And operate to
7 maintain, rather than eviscerate the
8 obligation of a third-party publication
9 requirement for defamation claims brought by
10 companies.
11 There's no comparable Illinois
12 authority on the point, and the cases
13 plaintiff cites are readily distinguishable.
14 So they point to the case Popko versus
15 Continental Casualty Company, but that case
16 really is analogous for the same reasons that
17 some of these other cases pointed out by
18 Fausett aren't analogous.
19 That case concerned whether a
20 supervisor's comments to another supervisor in
21 the workplace about a subordinate to qualify
22 as a publication. That's not analogous to the
23 situation here.
24 The same is true in Missner versus

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1 Clifford, which is cited and relied on by the
2 plaintiff. The court's reference to -- to
3 Comment (e) in that case said [as read]:
4 "Communication of
5 defamatory material from a
6 principal to his agent as
7 in an attorney-client
8 relationship may also be a
9 publication."
10 Again, that's not what we're talking
11 about. We're talking about who is a company
12 for purposes of publication. And this
13 rule -- this Comment (e) really doesn't
14 address it.
15 Plaintiff also cites to a Nevada
16 opinion, Simpson versus Mars. And in that
17 case, the defamation claim hinges on
18 allegations that the employer told coworkers
19 that an employee had engaged in sexual
20 harassment and has been -- and had sexually
21 harassed a colleague. So again, it's apples
22 and oranges in terms of the nature of what was
23 being considered.
24 Ultimately, the issue comes down to

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1 one of reputational harm that simply cannot
2 occur when the allegedly defamatory statement
3 is made to the company's executive leadership.
4 And so this court should reject the
5 plaintiff's invitation to eviscerate that
6 third-party publication requirement, instead
7 following the well-reasoned analysis of
8 Fausett as the law.
9 However, Your Honor, even if the court
10 determined the publication occurred,
11 plaintiff's defamation claim still failed
12 because the statements at issue are not
13 defamatory.
14 We live in a society that allows for
15 free expression of opinions, and for those
16 opinions to be emphasized through rhetoric and
17 hyperbole.
18 As a result, an allegedly defamatory
19 comment that is not actual if it's reasonably
20 interpreted as stating an actual fact. And to
21 evaluate, this court should look at a number
22 of components, including whether this
23 statement has precise and readily understood
24 meaning.

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1 As a result, the vaguer and more
2 generalized an opinion, the more likely that
3 opinion is not actual as a matter of law as
4 the Appellate court recognized in Hopewell
5 versus Vitullo.
6 Additionally, it can't be -- a comment
7 can't be considered defamatory per se. It can
8 easily be subjected to an innocent
9 construction.
10 So as a result, in the Hopewell case,
11 Your Honor, the court held that a statement to
12 the plaintiff was, quote, fired because of
13 incompetence was too vague and general to
14 support an action for defamation as a matter
15 of law.
16 Similarly, Illinois courts have held
17 that comments that -- even that the plaintiffs
18 were, quote, deeply greedy people were not
19 actionable opinions. Statements that a
20 plaintiff was corrupt, used bully tactics,
21 operated a fraud machine, those the court has
22 held are incapable of being shown as true or
23 false.
24 And a First Circuit opinion from the

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1 federal courts held that terms like "rip off,"
2 "fraud," "scandal," and "snake oil job," are
3 not sufficiently precise, and are subject to
4 numerous interpretations which render them
5 nonactionable.
6 In a similar opinion out of the First
7 Circuit, Your Honor, the court held that
8 stating that "X" is a scam -- insert whatever
9 you want for "X" -- lacks perception to render
10 it actual. And, therefore, couldn't be proven
11 true or false and couldn't be defamatory.
12 In Doherty versus Khan, an --
13 [indiscernible] -- from the Illinois Appellate
14 Court, the court held that statements that the
15 plaintiff was incompetent, lazy, dishonest, he
16 could not manage a business, lacks the ability
17 to perform landscaping services, were also
18 nonactionable opinion.
19 And in Piersall, the court held that
20 the statement that the plaintiff was a liar
21 was not actionable.
22 So if we take some of those guardrails
23 and look at the comments that are at issue in
24 this litigation, I think the same conclusion

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1 is required.

2 I'll start with -- there are two

3 emails that are at issue. I will start with

4 the May 27th email, which is to Mr. Bertrand,

5 because it is shorter and -- and more direct.

6 And really, there's only a single statement in

7 this email that could arguably be considered

8 defamatory, which is the statement [as read]:

9 "You don't want to be part

10 of the next Ponzi scheme

11 or the next

12 -- [indiscernible]."

13 Here, it is clear I think that the

14 author is expressing a subjective view,

15 especially when writing content. If you

16 consider the preceding paragraph in this email

17 it says [as read]:

18 "There is one ingredient

19 you missed, a great

20 protect. At some point

21 you have to stop selling

22 shit and start

23 delivering."

24 This is the quote from the email. So

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1 the author here is clearly expressing an
2 opinion that the plaintiff was not producing
3 great product, and that is an unsanctionable
4 opinion, pure and simple.
5 The other then goes on to invite
6 Mr. Bertrand to talk to the company's former
7 CFO, sales people, customers, investors, and
8 others. It's unreasonable to interpret this
9 statement as inviting Mr. Bertrand to ask
10 people, and customers, if the company was a
11 Ponzi scheme.
12 The logical reading of this statement
13 is, I think you've got a bad product. Go talk
14 to other people about it and you'll see what I
15 mean. And that is nonactionable.
16 As the Supreme Court has recognized,
17 using loose figurative language to reflect
18 strong disagreement does not remove something
19 from opinion to fact.
20 And the cases that Plaintiff cites
21 regarding the use of the term "Ponzi scheme"
22 are readily distinguishable. None of those
23 cases hold that simply using that word, in and
24 of itself, is defamatory.

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1 So in Mann versus Swigett, the
2 statements accusing Mon of crimes were
3 explicit, unambiguous, and defamatory, he
4 asserted that the plaintiff had engaged in
5 fraudulent transactions, and the assertion was
6 only susceptible to a single meeting. And
7 that's really not the case here, Your Honor.
8 In Finances Ventures versus King,
9 those allegations again, were not based on any
10 vague reference to the next Ponzi scheme.
11 There was a video that the defendant reviewed
12 where he stated that the plaintiffs were
13 crooks, thieves, operators of a Ponzi scheme,
14 fraudulent, engaging in deceptive trade
15 practices, engaging in criminal behavior that
16 is against the law in stealing thousands from
17 consumers.
18 So there's significantly more context
19 and meat on that bone. It wasn't just that he
20 used the word "Ponzi."
21 And the same is true with the Kahn
22 versus Hanson [phonetic] case. There the
23 website asserted that there were alarming
24 similarities between plaintiff and Bernie

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1 Madoff. And then this -- and then proceeding
2 to go point by point comparing their business
3 practices, including asserting that Madoff had
4 structured his business as a Ponzi scheme and
5 lining up with the defendant what the
6 plaintiff had done for comparative purposes.
7 And again, there's nothing comparable
8 to that in this email. So the May 27th email
9 most recently read as the author's opinion
10 regarding the quality of the plaintiff's
11 product. And the fact that it was emphasized
12 with some figurative language doesn't make it,
13 you know...
14 With respect to the May 19th email,
15 Your Honor, which is the email that went to
16 two members of the board, there are a number
17 of statements, and I'll work through those.
18 None of them, similarly, are actions of
19 defamatory, per se.
20 So there's the statement that X
21 employees were silenced of legal threats and
22 defamation suits. And then there's a named
23 act- -- used to be the bookkeeper for Chicago
24 mafia, and they were using that to silence

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1 those folks.
2 That first sentence, Your Honor, can't
3 be viewed as defamatory per se under really
4 any construction. Businesses regularly remind
5 employees of their obligation under
6 nondisclosure agreements, non-disparagement
7 clauses, and asserting the potential claim or
8 defamation suit if somebody makes a false
9 statement is not criminal and no reason for us
10 to read it as such.
11 To this point, the crime of
12 intimidation, which the plaintiff cites in
13 support of their claim on this allegation,
14 requires that the statement that the threat be
15 made, quote, without lawful authority. And
16 nothing in this indicates that -- that, you
17 know, any statements are being made without
18 lawful authorities. Certainly, a company
19 would be well within their rights to attempt
20 to enforce agreements with non-disparagement
21 or nondisclosure provisions in them.
22 And I think the same is true with
23 respect to the assertion that someone's father
24 was the bookkeeper for the Chicago mafia.

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1 First, there's no clear understanding
2 from this language what is meant by "Chicago
3 mafia." And second, even if the assertion is
4 viewed as implying that someone's dad does
5 taxes for organized crime, that cannot be read
6 to imply that the plaintiff engaged in the
7 criminal act of intimidation.
8 That crime requires a threat to engage
9 in specific acts, none of which are really
10 applicable here. And the only possible one
11 that comes out of the statute that I could
12 identify is a threat to inflict physical harm
13 on the person threatened or any other person
14 or property.
15 And here, there's nothing in the
16 statement that would indicate that there's a
17 threat of physical harm to anyone or anything.
18 In reality, the plaintiff is
19 extrapolating this connection based on a
20 generic reference using the word "mafia." And
21 ultimately, then the claim is based on
22 inference and speculation precisely what
23 defamation per se does not allow.
24 THE COURT: And I think that -- do you

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1 think no reasonable jury could find that a
2 statement that a person has a familial
3 connection to the Chicago mafia is a --
4 MR. GILBERT: I don't think that
5 you --
6 (Indiscernible simultaneous
7 colloquy.)
8 THE COURT: -- no reasonable jury
9 could find that --
10 (Indiscernible simultaneous
11 colloquy.)
12 MR. GILBERT: -- I don't think --
13 (Indiscernible simultaneous
14 colloquy.)
15 MR. GILBERT: Pardon me, Your Honor.
16 I apologize.
17 THE COURT: Go ahead, sir.
18 MR. GILBERT: I was saying, I don't
19 think a reasonable jury could preclude that
20 the statement that somebody's father may have
21 been a bookkeeper for the Chicago mafia
22 indicates that -- that the plaintiff has
23 engaged in any sort of criminal conduct, which
24 would be what they would need to show to

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1 establish defamation per se.
2 THE COURT: Okay.
3 MR. GILBERT: If they were going to go
4 beyond that, I think they would be talking
5 about defamation per quod, which would be a
6 different claim altogether.
7 THE COURT: Okay.
8 MR. GILBERT: Your Honor, there's also
9 a statement pointed to by Plaintiffs that
10 there are rampant -- there is rampant
11 accounting improprieties. This statement has
12 no clear, discernible meaning and cannot be
13 viewed as defamatory.
14 This is a vague, general assertion
15 with no underlying verifiable facts that turn
16 it into a statement capable of being verified.
17 The term impropriety simply means
18 there are actions that are not proper. It
19 could mean the company isn't adhering to GAAP
20 principles. It could mean that they're
21 miscalculating EBITDA or they're doing it
22 wrong.
23 I mean, there are lots of ways people
24 disagree over the way that you account for

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1 certain things, and reasonable people can
2 disagree on whether they're proper or not, but
3 that doesn't push it into the realm of being
4 defamatory per se.
5 There is -- the next statement, Your
6 Honor, is [as read]:
7 "Estes canceled the
8 contract. There's only
9 5,000 a month and they're
10 not even willing to pay
11 this."
12 This simply isn't a defamatory
13 statement. Nothing in it indicates that
14 someone's engaged in misconduct or even done
15 anything that's improper in the business. The
16 contract could be canceled for a myriad of
17 reasons, many of which would not carry any
18 form of defamatory implication. It could
19 easily mean that the client didn't like the
20 product, didn't want to pay for it. That
21 would be a totally appropriate interpretation.
22 It's the most reasonable interpretation, and
23 it wouldn't be defamatory in any way.
24 Finally, there is a statement that

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1 there is widespread discontent ruling, and
2 it's just a matter of time before people go
3 public and another Theranos happening in
4 Chicago.
5 This statement doesn't identify where
6 or with whom the discontent is brewing. And
7 this is a lot like the incompetent statement
8 in -- [indiscernible]. While the term
9 "discontent" may be easily understood, its use
10 here lacks any sort of detail to give it a
11 precise or readily understandable meaning.
12 This content could be viewed for a
13 number of reasons, including, again, due to
14 general dissatisfaction of the product or
15 services. So as noted by the court, although
16 without the public or anyone who reads it
17 might infer some sort of undisclosed or
18 unassumed facts in supporting -- in support of
19 that opinion where the statement is ambiguous,
20 likes this one, and indefinite, without any
21 sort of other facts to support it, it can't
22 support a claim for defamation per se.
23 Finally, Your Honor, with respect to
24 civil conspiracy, this claim fails for a

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1 couple of reasons. First, for all the reasons
2 we set forth the defamation claim fails, and
3 without that underlying claim, there can be no
4 civil conspiracy claim.
5 Secondly, Your Honor, as we laid out
6 in detail in our briefs, we -- ultimately,
7 this is an allegation that FourKites would
8 have conspired with itself, and it would have
9 conspired with its employees, and that's not
10 an actual basis for a civil conspiracy.
11 So for those reasons, Your Honor, we
12 would ask that the court dismiss the
13 plaintiff's complaint in its entirety.
14 THE COURT: Thank you. Please, please
15 go ahead.
16 MR. HAWKINS: Thank you, Your Honor.
17 Defendants' motion to dismiss is only
18 asking this court to rewrite Illinois law
19 based on out-of-state cases that, quite
20 frankly, do rest on faulty -- judgment.
21 It also asks us to turn a blind eye to
22 communications that accuse my client of
23 financial improprieties, of affiliating with
24 organized crime, and using those affiliations

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1 to intimidate others, and engaging in a Ponzi
2 scheme, just to name a few.
3 I understand that it's Defendants'
4 position that these were not injuries to my
5 client's reputation, but they were. They were
6 directed to my client's board of directors
7 to -- sow disconsent -- sow discontent. They
8 were directed to my client's chief revenue
9 officer to encourage him to resign.
10 And simply put, Your Honor, my client
11 has more than met its pleading threshold for
12 defamation claims. And for that reason,
13 Defendants' motion to dismiss must be denied.
14 Now, we know that with respect to
15 publication that Illinois follows the
16 statement, and that from the First District
17 Missner case, that Illinois has also adopted
18 Rule 577, Comment (e), which states that [as
19 read]:
20 "Communications to agents
21 of a party about that
22 party may give rise to a
23 claim of defamation by
24 that party."

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1 My understanding is that the board of
2 directors that were -- the recipients of these
3 emails, as well as my client's chief revenue
4 officer, are agents of Project44. And while
5 Defendants claim that their out-of-court cases
6 set forth an exception to this rule, there's a
7 reason why that exception is not present on
8 the face of the restatement, and that's
9 because the Hoch and Fausett cases relied on
10 by Defendants are -- do, in fact, rest on
11 shaky ground.
12 And quite frankly, the proposed
13 exception that defendants are asserting
14 doesn't make a lot of sense, especially with
15 respect to a motion to dismiss standard.
16 Now, as we said in our brief,
17 Defendants' proposed exception draws
18 from -- generates from the Fausett case, which
19 is a nearly 40-year-old case from the district
20 of Utah. And respectfully, contrary to
21 counsel or Defendants' arguments, that case
22 does look to cases addressing what are
23 so-called intracorporate communication.
24 As a matter of fact, it specifically

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1 states, and I quote [as read]:
2 "The cases that have held
3 the communications to
4 servants or agents of the
5 defamed person or
6 corporation constitute
7 publication."
8 And then it cites to Restatement
9 (second) of Torts, Section 577, Comment (e)
10 [as read]:
11 "Are inapplicable these
12 cases discuss the issue of
13 whether statements from
14 one corporate employee to
15 another corporate employee
16 of the same corporation
17 constitute publication."
18 End quote. So it's clearly looking to
19 intracorporate communications. And yet, we
20 know from the First District Popko case that
21 Illinois holds that intracorporate
22 communications are, in fact, published.
23 And on top of this, perhaps even more
24 importantly, one of the cases that the Fausett

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1 case relies on, the Golden Spike case, has
2 been overruled, subsequently in favor of a
3 holding consistent with the Popko case.
4 It's for that reason, Your Honor, the
5 Westlaw reporting service lists the Fausett
6 case as being at risk of being overruled. And
7 yet, Defendants assert that Illinois court
8 should be following this reasoning.
9 Now, on top of --
10 THE COURT: You know, just by the way,
11 what -- what Westlaw might indicate a risk of
12 being -- that's not authority, of course, but
13 please, go ahead, sir.
14 MR. HAWKINS: Absolutely, Your Honor.
15 And we do not contend that it is authority,
16 but I think it's notable.
17 THE COURT: It's not notable. Thank
18 you.
19 MR. HAWKINS: Okay.
20 THE COURT: The fact of the matter --
21 it's not authoritative. That's specifically
22 the point. I don't have any particular
23 disrespect for it, but it's -- well, let's put
24 it this way: It's not an aspect of something

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1 that I will rely upon in the ruling. Go
2 ahead, sir.
3 MR. HAWKINS: Understood, sir. Thank
4 you.
5 Beyond this proposed exception set
6 forth by defendants, again, just doesn't make
7 much sense, especially with respect to a
8 motion to dismiss. How are we supposed to
9 determine who qualifies as an executive or a
10 manager on a motion to dismiss?
11 Now, I understand that defendants have
12 set forth arguments that there's certain
13 positions in a corporation that are so tied to
14 the corporation that they're one and the same.
15 But the case that they rely on for that, the
16 Capograsso case, reached that conclusion after
17 developing a factual record, i.e., after --
18 beyond the state of a motion to dismiss.
19 And perhaps more importantly, even if
20 that exception were adopted by Illinois
21 courts, I think it would insulate malicious
22 communication, statements made with malice
23 that have been propounded to executives and
24 managers. Now, we know that Illinois and the

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1 restatement both do afford privileges to
2 certain speech, but those privileges go away.
3 They are waived when it's determined that that
4 speech has been made with malice.
5 Yet, Defendants here propose an
6 exception that would shield communication,
7 shield speech that Illinois has otherwise
8 determined should not deserve protection.
9 So it's for those reasons, Your Honor,
10 that we respectfully contend that Defendants'
11 proposed exception should be rejected, and
12 that court should confirm that this
13 communication -- these communications are, in
14 fact, published.
15 Now, turning to the substance of these
16 communications, it's not my intention to go
17 line by line through each one of the
18 statements in these emails today, but, of
19 course, if the court has any questions about
20 any of the specific sections, I'm happy to
21 address those.
22 Rather, I would want to emphasize to
23 the court the importance of considering these
24 communications as a whole. And when we look

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1 at an email titled, and I quote, accounting
2 improprieties in P44, end quote, that accuses
3 my client of financial improprieties, that
4 accuses my client with affiliating with the
5 Chicago mafia, and using those affiliations to
6 intimidate others, that accuses my clients of
7 being akin to the notorious case of Theranos.
8 It is clear that these communications are
9 defamatory per se.
10 Similarly, an email that calls out --
11 flat out calls out my client as being a Ponzi
12 scheme, and again, compares my client to the
13 case of Theranos, all the while advocating to
14 my client's chief revenue officer that he
15 should resign his position is also defamatory
16 per se.
17 I understand that counsel for
18 defendant has said that this is merely a
19 comment that my client does not sell a good
20 product. Well, if that's the case, why didn't
21 it end there? Why did they go on to accuse my
22 client of running a criminal organization and
23 it being akin to a company that's one of the
24 most notorious fraud scandals in the past

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1 decade?
2 Now, Defendants, as we know from
3 counselor's argument, have gone through line
4 by line through each of the statements in
5 these communications and have attempted to
6 pick them apart. But at the end of the day,
7 the defendants have simply failed to show,
8 under no set of circumstances -- my client
9 Project44 is not entitled to the relief that
10 they're asking for at this time.
11 So for these reasons, my client's
12 communications -- or I'm sorry, the
13 communications at issue in this case were
14 published. The communications are defamatory
15 per se, and, therefore, Defendants' motion to
16 dismiss my client's defamation claim should be
17 rejected.
18 Now, lastly, turning to the issue of a
19 conspiracy claim, again, my client has set
20 forth a claim for defamation per se. That
21 claim includes a presumption of damages, and
22 my client has also set forth facts showing
23 that the defendants in this case, including
24 FourKites, all shared the same email accounts

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1 from which these defamatory communications
2 were sent.
3 And the fact that my client does not
4 know whether the other defendants in this case
5 are employees of FourKites or if they're not
6 employees of FourKites, should not sign the
7 efforts to bring forth a conspiracy claim.
8 The fact that defendants are hiding on the
9 Internet should not be a bar to this claim.
10 My client has pled sufficient facts
11 from which the court can infer a showing that
12 even if these other defendants were employees
13 or affiliates of FourKites, that they acted
14 outside of their authorities when they
15 conspired to send these communications.
16 So for these reasons, Your Honor, for
17 the reasons set forth in our brief, we
18 respectfully request that Defendants' motion
19 must be denied. Thanks.
20 THE COURT: Thanks.
21 MR. GILBERT: Can I make a few points
22 in rebuttal?
23 THE COURT: Sure.
24 MR. GILBERT: I'll work backwards a

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1 little bit. On the issue about civil
2 conspiracy, opposing counsel just said, you
3 know, it could exist if they can show that
4 these individuals operated outside of their
5 authorities.
6 They operated outside of their
7 authorities. There's no basis for FourKite's
8 liability. But they're inside their
9 authority -- it would have been at the
10 instruction of FourKites, which would have
11 been a conspiracy within itself, which is
12 impossible.
13 With respect to the Fausett case and
14 the fact that it's, you know, a 40-year-old
15 opinion, its analysis is still good, it makes
16 sense. And on top of that, the restatement
17 cites opinions from like the '20s and the
18 '50s, and that's, you know, the basis for
19 that.
20 The fundamental issue, though, doesn't
21 change, which is, this is about reputational
22 harm and the possibility of it to occur. And
23 to the extent that -- I mean, the logical
24 conclusion of the plaintiff's position is that

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1 there is no longer a third-party publication
2 requirement if a defamation claim is brought
3 by a company, because we're talking about a
4 member of the C-suite and the board of
5 directors. And if that's not the company,
6 then I can't even fathom who possibly could;
7 right?
8 And that's, I think, why Fausett
9 recognizes that it's not a 5779(e) case. It's
10 not rejecting 577(e). It's just saying that's
11 not the issue. It isn't an issue about
12 whether a comment was made to an agent. It's
13 a question of whether the comment was made to
14 us. And here that answer has to...
15 And then, you know, opposing counsel
16 mentioned the issue of malice, and that it
17 somehow infiltrates comments that are made
18 with malice.
19 As it comes to the issue of defamation
20 per se, whether the statement was made with
21 malice or not has nothing to do with the issue
22 of publication.
23 THE COURT: Okay. Let's do about a
24 five-minute break here, and then we'll move on

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1 to what you would like to say about the
2 motion -- the intervener's motion. Okay?
3 (Whereupon, a recess was
4 had.)
5 THE COURT: Okay. All right. Please,
6 go ahead.
7 MS. HEMERYCK: Your Honor, Sondra
8 Hemeryck on behalf of Petitioner intervener.
9 So I'll be very brief, Your Honor, because I
10 really think this is a straightforward motion
11 and I think the issues are covered by the
12 party's brief. I'm happy to answer any
13 questions the court may have.
14 So I think the only thing I would -- I
15 would add to the court at the moment is that,
16 you know, as I said, this is a straightforward
17 motion. And fundamentally, the issue is
18 whether the plaintiff can essentially turn an
19 individual whose identity they don't know,
20 whose identity they are trying to get by
21 serving a premature subpoena on yet another
22 nonparty, can they turn that person
23 effectively into a party defendant, with all
24 the obligations that entails, simply by the

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1 expedient of serving this premature subpoena
2 and essentially putting the -- the petitioner,
3 the unknown party, the anonymous speaker in a
4 position of having to come to the court and
5 say, please quash this subpoena.
6 I mean, it's really a catch-22 that
7 they've tried to create, and there was just no
8 earthly reason for it.
9 Again, the -- the reason that we have
10 sought to intervene here is simply because
11 again, all we're trying to do is move to quash
12 this subpoena in order to avoid having the
13 identity improperly disclosed when they
14 haven't shown that they have stated a viable
15 claim. And that -- and we shouldn't be put in
16 a position of having to now appear as a
17 defendant without having been served, simply
18 because of the fact that FourKites -- you
19 know, Project44 decided to do what we think
20 is -- take -- take an improper action with
21 respect to the subpoena.
22 The other thing I would note is that
23 assuming the court is going to rule today on
24 the motion to dismiss, that ruling may very

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1 well obviate any need for this motion,
2 depending on what the court does.
3 So we will need to see what happens,
4 but, for example, if the court were to grant
5 the motion to dismiss in its entirety, then we
6 don't, obviously, need to intervene.
7 The -- the subpoena will...
8 THE COURT: Okay. Sir?
9 MR. HAWKINS: Yes, Your Honor. I'll
10 also be brief. Actually, counsel for
11 interveners thoughts here that the -- this
12 will likely be mooted given that the relief
13 that the intervener seeks to file a brief for
14 a motion seeking to either quash or stay the
15 subpoena, pending the resolution of the motion
16 to dismiss.
17 Substantively, I just -- we are
18 struggling, quite frankly, to find any case
19 law to support the intervener's position that
20 he could a -- appear in the case solely for
21 the purpose of moot to intervene to quash the
22 subpoena, and not otherwise appear and consent
23 to the jurisdiction, which is what it appears
24 that the intervener was asking for it here.

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1 Again, we have named Jane Doe as a
2 defendant in this case. This case has a
3 history to it prior to the filing of this
4 action. We initially sought discovery of Jane
5 Doe by a Rule 224 petition. But due to COVID,
6 the hearing on that case was delayed past the
7 deadline for the statute of limitations in
8 this case.
9 So we were forced to file this
10 complaint to preserve the statute -- to
11 preserve our claim.
12 And so this has a long --
13 THE COURT: Let me jump in just for a
14 second. That wasn't with me; right?
15 MR. HAWKINS: That is correct,
16 Your Honor, that was not before you.
17 THE COURT: And you never got a
18 hearing?
19 MR. HAWKINS: Our hearing, Your Honor,
20 was originally scheduled for March of 2020,
21 which as we recall was at the -- right at the
22 outset of the COVID pandemic. It was then
23 subsequently postponed until April of 2020,
24 and then later than that I believe, Your

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1 Honor. So it was postponed to a much later
2 date. So the concern was that --
3 THE COURT: Me?
4 MR. HAWKINS: No, Your Honor. This
5 was originally in front of Judge Allen Walker,
6 and then it was transferred. And I apologize
7 what the judge's name --
8 MS. HEMERYCK: I think it was
9 transferred twice.
10 MR. HAWKINS: Yeah, I think you're
11 right, Counsel.
12 THE COURT: I mean, this calendar
13 never shut down.
14 MR. HAWKINS: That is correct,
15 Your Honor. And neither did the -- when we
16 started the calendar for the court for which
17 we filed a Rule 224 petition, it was simply
18 that the hearing was postponed to a date after
19 the deadline for us to file our defamation
20 claim under the relevant statute of
21 limitations.
22 So that's just a little bit of
23 background to this case. But again,
24 the -- the issue is -- is that again, we just

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1 do not understand how Jane Doe can appear
2 solely for the purpose of contesting the
3 subpoena and not otherwise appear
4 substantively in the matter.
5 THE COURT: Okay. Anything else?
6 MS. HEMERYCK: No, I believe we've
7 addressed that issue --
8 THE COURT: Okay.
9 MS. HEMERYCK: -- including --
10 (Indiscernible simultaneous
11 colloquy.)
12 THE COURT: The petition to intervene
13 is not accompanied by a complaint and
14 intervention or pleading in intervention.
15 For example, a petition to intervene
16 could say I -- I would like to intervene so
17 that I can file this motion to quash this
18 subpoena. And -- and that -- that hasn't
19 happened.
20 And -- and this is just -- this is
21 more -- by the way, I'm granting the motion to
22 dismiss, but this is more to decide that in
23 the event that the case returns,
24 the -- however, what has happened is, the

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1 intervener has said, I am Jane Doe. I am that
2 person.
3 She may well be a part of the case
4 now, but that is to decide -- and -- and I
5 only mention that because the motion to
6 dismiss is going to be granted and -- and
7 the -- but the subpoena respondent is directed
8 to identify and -- and preserve responsive
9 documents to that subpoena. And you all need
10 to figure out how you want to get that in
11 there.
12 I -- I have no idea in this day and
13 age whether or not someone the size of AT&T
14 just maintains these things forever in their
15 email or whether -- or in their documents or
16 something or whether at some point they
17 vanish.
18 But to the extent to which this is
19 reviewed, and if it winds up coming back or
20 not, this subpoena response is directed to
21 maintain responsive documents.
22 As Miser indicates -- Missner versus
23 Clifford indicates, publication is a specific
24 term in defamation law, and is an essential

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1 element in a defamation claim. It
2 requires -- defamation is an element of this
3 claim of defamation, requires that the matter
4 be communicated to someone other than the
5 person defamed.
6 I find, as a matter of law, that the
7 statement made to the plaintiff's chief
8 revenue officer is not a statement which has
9 been published to a third party.
10 And I find as well that the court -- I
11 find as matter of law that the statement made
12 to the two directors of an Illinois
13 corporation is not a statement which has been
14 published to a third party.
15 The -- I recognize these are arguable
16 propositions, and that's a ruling of law and
17 there you go.
18 The court does not find that the
19 statements are nonactionable, considering
20 their totality. Statements that a person has
21 a familial relationship to the Chicago mafia
22 or is silencing or participating in running
23 Ponzi schemes implies or states quite
24 directly, criminal activity or matters of

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1 disrepute. And a jury could find that these
2 statements, if they find they were made -- and
3 they can make the findings to the extent to
4 which they found them to be defamatory.
5 Because the defamation claim is
6 dismissed, the civil conspiracy claim is
7 dismissed as well. And this is a final and
8 appealable order of the Circuit Court of Cook
9 County.
10 MR. HAWKINS: Thank you, Your Honor.
11 THE COURT: Thanks for your time.
12 Thank you very much for your time. I mean, I
13 want to -- I want to go off the record for a
14 second.
15 (Whereupon, a short
16 discussion was held off
17 the record.)
18 (Which were all the
19 proceedings had at this
20 time in the above-entitled
21 cause.)
22
23
24

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1 STATE OF ILLINOIS)
2) SS:
3 COUNTY OF C O O K)
4
5 ANGELA C. LOISI, CSR, RPR, FCRR, as an
6 Officer of the Court, says that she is a
7 shorthand reporter doing business in the
8 State of Illinois; that she remotely
9 reported in shorthand the proceedings of
10 said hearing, and that the foregoing is a
11 true and correct transcript of her shorthand
12 notes so taken as aforesaid, and contains
13 the proceedings given at said hearing.
14 IN TESTIMONY WHEREOF: I have hereunto
15 set my verified digital signature on
16 May 14, 2021.
17
18
19
20 ____________________________________
21 Angela C. Loisi, CSR, RPR, FCRR
22
23
24

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A

ability 18:16
above-entitled 1:12 49:20
Absolutely 33:14
accept 8:13
accompanied 46:13
account 26:24
accounting 26:11 36:1
accounts 37:24
accurate 12:19
accuse 29:22 36:21
accuses 36:2,4,6
accusing 21:2
acknowledge 8:19
act 7:22 22:23 24:7
acted 38:13
action 17:14 42:20 44:4
actionable 17:19 18:21
actions 9:8 22:18 26:18
activity 48:24
acts 24:9
actual 4:23,23 16:19,20 17:3 18:10 29:10
ACTUATE 2:2
add 41:15
Additionally 4:14 17:6
address 4:21 5:11 15:14 35:21
addressed 13:14 46:7
addresses 13:11
addressing 11:17 31:22
adhering 26:19
adopted 30:17 34:20
Advantage 11:15
advocated 8:24
advocating 36:13
affiliates 38:13
affiliating 29:23 36:4
affiliations 29:24 36:5
afford 35:1
aforesaid 50:12
age 47:13
Agency 11:15
agent 10:8 15:6 40:12
agents 7:22 10:17 30:20 31:4 32:4
agreements 23:6 23:20
ahead 4:4 25:17 29:15 33:13 34:2 41:6
akin 8:3 36:7,23
al 1:8
alarming 21:23
alienated 9:18
alienation 9:14
allegation 11:18 23:13 29:7
allegations 15:18 21:9
alleged 5:21 9:7 13:15
allegedly 16:2,18
Allen 45:5
allow 24:23
allows 16:14
altogether 5:11 8:17 12:10 26:6
ambiguous 28:19
American 9:6
analogous 14:16 14:18,22
analysis 16:7 39:15
Angela 1:23 50:5 50:21
anonymous 42:3
answer 40:14 41:12
answering 7:19
apart 37:6
apologize 25:16 45:6
appealable 49:8
appear 42:16 43:20,22 46:1,3
APPEARANCES 2:1
appears 43:23
Appellate 11:4,14 11:24 17:4 18:13
apples 15:21
applicable 13:7 24:10
applies 5:5
apply 12:6
appropriate 12:24 27:21
April 1:14 44:23
arguable 48:15
arguably 19:7
argument 37:3
arguments 31:21 34:12
ARMCOR 9:18
ARMCOR's 9:8 9:17
articulated 9:5
asking 29:18 37:10 43:24
asks 29:21
aspect 33:24
assert 33:7
asserted 21:4,23
asserting 12:21 22:3 23:7 31:13
assertion 21:5 23:23 24:3 26:14
assertions 12:17
asserts 4:17 12:17
associates 7:2,5
associating 7:11
assuming 42:23
attempt 12:20 23:19
attempted 37:5
attorney-client 15:7
AT&T 47:13
author 19:14 20:1
authoritative 33:21
authorities 23:18 38:14 39:5,7
authority 14:12 23:15 33:12,15 39:9
author's 22:9
avoid 42:12
axiomatic 7:21
a.m 1:14,15

B

B 6:4
back 47:19
background 45:23
backwards 38:24
bad 20:13
bar 38:9
based 5:6 21:9 24:19,21 29:19
basis 7:7 13:1,4,5 29:10 39:7,18
beginning 5:18
behalf 3:8,11 41:8
behavior 21:15
believe 3:21 44:24 46:6
Bernie 21:24
Bertrand 19:4
20:6,9
beyond 26:4 34:5 34:18
billing 11:22
bit 39:1 45:22
blind 29:21
board 8:8,9 13:17 13:20,23 22:16 30:6 31:1 40:4
bone 21:19
bookkeeper 22:23 23:24 25:21
break 40:24
brewing 28:6
brief 9:1 14:3 31:16 38:17 41:9 41:12 43:10,13
briefs 5:11 29:6
bring 38:7
brought 7:17 8:17 14:9 40:2
bully 17:20
business 18:16 22:2,4 27:15 50:7
Businesses 23:4

C

C 1:23 50:3,5,21
calendar 45:12,16
called 12:22
calls 36:10,11
canceled 27:7,16
CANCILA 2:18
capable 26:16
Capograsso 34:16
carry 27:17
case 13:8 14:14,15 14:19 15:3,17 17:10 21:7,22 30:17 31:18,19 31:21 32:20 33:1 33:1,3,6 34:15 34:16 36:7,13,20

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37:13,23 38:4 39:13 40:9 43:18 43:20 44:2,2,6,8 45:23 46:23 47:3
caseload 7:23
cases 10:10,11,16 10:20 12:17 14:12,17 20:20 20:23 29:19 31:5 31:9,22 32:2,12 32:24
Casualty 14:15
catch-22 42:6
cause 1:12 49:21
causing 9:14
CEO 13:21,23
certain 27:1 34:12 35:2
Certainly 23:18
cetera 9:20
CFO 20:7
change 39:21
character's 7:1
Chicago 2:5,13,21 22:23 23:24 24:2 25:3,21 28:4 36:5 48:21
chief 8:7 9:10 30:8 31:3 36:14 48:7
Circuit 1:3 17:24 18:7 49:8
circumstances 37:8
cite 13:3,4,5
cited 14:3 15:1
cites 11:14 14:13 15:15 20:20 23:12 32:8 39:17
civil 4:16 7:24 28:24 29:4,10 39:1 49:6
claim 4:17,23 5:6 7:24 11:18 12:15 15:17 16:11 23:7 23:13 24:21 26:6 28:22,24 29:2,3 29:4 30:23 31:5 37:16,19,20,21 38:7,9 40:2 42:15 44:11 45:20 48:1,3 49:5,6
claims 4:10 7:17 14:9 30:12
clauses 23:7
clear 19:13 24:1 26:12 36:8
clearly 20:1 32:18
CLERK 3:1,6
client 27:19 29:22 30:10 36:3,4,11 36:12,19,22 37:8 37:19,22 38:3,10
clients 36:6
client's 30:5,6,8 31:3 36:14 37:11 37:16
Clifford 15:1 47:23
closely 13:21
colleague 15:21
colloquy 25:7,11 25:14 46:11
come 42:4
comes 15:24 24:11 40:19
coming 47:19
commencing 1:14
comment 5:16,17 5:21 6:4 10:1,4 12:14 13:5,6 15:3,13 16:19 17:6 30:18 32:9 36:19 40:12,13
comments 7:12 8:14 12:2,4,7 13:16 14:20 17:17 18:23 40:17
communicated 6:12,19 9:9 48:4
communication 6:3 9:23 10:15 13:24 15:4 31:23 34:22 35:6,13
communications 10:17 13:22 29:22 30:20 32:3 32:19,22 35:13 35:16,24 36:8 37:5,12,13,14 38:1,15
community 7:10 7:11 8:12
companies 14:10
company 7:13,18 8:2,10,12 9:3 11:19,21 12:9,14 13:16,22 14:15 15:11 20:10 23:18 26:19 36:23 40:3,5
company's 7:3 8:9 8:14 9:10 11:22 16:3 20:6
comparable 14:11 22:7
comparative 22:6
compares 36:12
comparing 22:2
complaint 4:7,8 29:13 44:10 46:13
components 16:22
comprised 13:17
concept 5:3 8:4 9:4
concern 45:2
concerned 14:19
conclusion 8:24 9:24 11:5 12:1 13:4 18:24 34:16 39:24
conduct 25:23
confirm 3:14 35:12
connected 13:21
connection 24:19 25:3
consent 43:22
consider 19:16
considered 8:23 10:1 11:6 15:23 17:7 19:7
considering 35:23 48:19
consistent 33:3
conspiracy 4:16 7:24 28:24 29:4 29:10 37:19 38:7 39:2,11 49:6
conspire 8:2
conspired 4:18 29:8,9 38:15
conspiring 8:3
constitute 6:8 8:15 12:8 13:10 32:6 32:17
constitutes 10:23
construction 17:9 23:4
consumers 21:17
contains 50:12
contend 33:15 35:10
content 19:15 28:12
contesting 46:2
context 21:18
Continental 14:15
contract 27:8,16
contrary 31:20
Cook 1:2,3,24 49:8
copy 14:4
corporate 10:12 10:13,22 13:9 32:14,15
corporation 7:22 9:23 10:10,18,23 11:8,9,11,12 12:3,4 13:10,24 32:6,16 34:13,14 48:13
corporations 7:17
correct 44:15 45:14 50:11
corrected 1:10
corrupt 17:20
counsel 31:21 36:17 39:2 40:15 43:10 45:11
counselor's 37:3
County 1:2,3,3,24 49:9 50:3
couple 29:1
course 33:12 35:19
court 1:3,13 3:5 3:13 4:2,3 5:15 7:15 9:5,12 10:1 11:2,4,5,14,17 11:24 13:20 16:4 16:9,21 17:4,11 17:21 18:7,14,14 18:19 20:16 24:24 25:8,17 26:2,7 28:15 29:12,14,18 33:7 33:10,17,20 35:12,19,23 38:11,20,23 40:23 41:5,13,15 42:4,23 43:2,4,8 44:13,17 45:3,12 45:16 46:5,8,12 48:10,18 49:8,11 50:6
courts 5:24 7:6,20 8:20,22 17:16

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18:1 34:21
court's 15:2
covered 41:11
COVID 44:5,22
coworkers 15:18
create 42:7
crime 23:11 24:5,8 29:24
crimes 21:2
criminal 21:15 23:9 24:7 25:23 36:22 48:24
crooks 21:13
CSR 1:23 50:5,21
customers 9:19 20:7,10
C-suite 8:9 40:4

D

dad 24:4
damages 37:21
date 45:2,18
day 37:6 47:12
deadline 44:7 45:19
decade 37:1
deceptive 21:14
decide 46:22 47:4
decided 42:19
deeply 17:18
defamation 4:10 4:23 5:3,7,7 6:15 7:16 8:17 9:7,12 11:18 12:15 14:9 15:17 16:11 17:14 22:22 23:8 24:23 26:1,5 28:22 29:2 30:12 30:23 37:16,20 40:2,19 45:19 47:24 48:1,2,3 49:5
defamatory 4:15 5:21 6:11,18 7:8 9:20 11:7,21 13:15 15:5 16:2 16:13,18 17:7 18:11 19:8 20:24 21:3 22:19 23:3 26:13 27:4,12,18 27:23 36:9,15 37:14 38:1 49:4
defamed 5:23 6:3 6:14 10:18 32:5 48:5
defendant 3:9 4:6 10:9 21:11 22:5 36:18 41:23 42:17 44:2
defendants 1:9 2:16 10:12,13 29:17 30:3,13 31:5,10,13,17,21 33:7 34:6,11 35:5,10 37:2,7 37:15,23 38:4,8 38:12,18
defendant's 10:8
defer 4:1
delayed 44:6
delivering 19:23
denied 30:13 38:19
DEPARTMENT 1:3
depending 43:2
deserve 35:8
detail 7:3 28:10 29:6
deter 7:11
determine 34:9
determined 16:10 35:3,8
determining 11:23
developed 7:23
developing 34:17
different 26:6
digital 50:15
direct 19:5
directed 5:1 30:6 30:8 47:7,20
directly 3:22 5:16 8:20 48:24
directors 8:8,10 13:18 30:6 31:2 40:5 48:12
disagree 26:24 27:2
disagreement 20:18
discernible 26:12
disclosed 42:13
disconsent 30:7
discontent 28:1,6 28:9 30:7
discovery 44:4
discuss 10:20 32:12
discusses 13:8
discussion 3:17 49:16
dishonest 18:15
dismiss 3:20,24 4:7 29:12,17 30:13 31:15 34:8 34:10,18 37:16 42:24 43:5,16 46:22 47:6
dismissed 4:9 49:6 49:7
disrepute 49:1
disrespect 33:23
dissatisfaction 28:14
distinguishable 14:13 20:22
district 30:16 31:19 32:20
DIVISION 1:3
documents 47:9 47:15,21
Doe 2:24 3:12 44:1 44:5 46:1 47:1
Doherty 18:12
doing 26:21 50:7
draws 31:17
drives 7:24
due 28:13 44:5

E

e 1:13 5:16,17 10:1 10:5 13:5,6,11 15:3,13 30:18 32:9
earthly 42:8
easily 17:8 27:19 28:9
EBITDA 26:21
effect 12:2
effectively 4:17 41:23
efforts 38:7
either 43:14
element 48:1,2
eliminate 8:16 12:12
email 19:4,7,16,24 22:8,8,14,15 36:1,10 37:24 47:15
emails 4:12,15 8:6 19:3 31:3 35:18
emphasize 35:22
emphasized 16:16 22:11
employee 10:8,22 10:22 11:9,11 13:9,10 15:19 32:14,15
employees 8:2 22:21 23:5 29:9 38:5,6,12
employer 15:18
encourage 30:9
ended 1:15
enforce 23:20
engage 24:8
engaged 15:19 21:4 24:6 25:23 27:14
engaging 21:14,15 30:1
entails 41:24
entire 5:3
entirety 29:13 43:5
entities 8:18
entitled 37:9
especially 19:15 31:14 34:7
essence 9:22
essential 47:24
essentially 41:18 42:2
establish 26:1
establishing 4:22 4:24
Estes 27:7
estimation 6:24
et 1:7 9:20
evaluate 16:21
event 46:23
eviscerate 14:7 16:5
eviscerated 12:10
example 43:4 46:15
exception 31:6,7 31:13,17 34:5,20 35:6,11
executive 7:4,12 9:2 11:10,19,20 12:8 16:3 34:9
executives 34:23
exist 39:3
exists 6:5 9:16
expedient 42:1
explained 7:6 10:6
explains 6:5
explicit 21:3

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expressing 19:14 20:1
expression 16:15
extent 39:23 47:18 49:3
extrapolating 24:19
eye 29:21
eyes 7:10

F

face 31:8
fact 12:2 16:20 20:19 22:11 31:10,24 32:22 33:20 35:14 38:3 38:8 39:14 42:18
facts 26:15 28:18 28:21 37:22 38:10
factual 34:17
failed 4:10 16:11 37:7
fails 4:17 28:24 29:2
fall 12:11
false 17:23 18:11 23:8
familial 25:2 48:21
father 23:23 25:20
fathom 40:6
faulty 29:20
Fausett 9:6,24 10:24 12:21 13:1 14:5,18 16:8 31:9,18 32:24 33:5 39:13 40:8
favor 33:2
FCRR 1:23 50:5 50:21
federal 9:5 18:1
figurative 20:17 22:12
figure 47:10
file 43:13 44:9 45:19 46:17
filed 45:17
filing 44:3
final 49:7
finally 4:16 27:24 28:23
Finances 21:8
financial 29:23 36:3
find 25:1,9 43:18 48:6,10,11,18 49:1,2
findings 11:13 49:3
fired 17:12
first 3:24 4:10,21 17:24 18:6 23:2 24:1 29:1 30:16 32:20
five-minute 40:24
flat 36:11
Floor 2:4
Florida 11:4,14,24 13:13
focus 12:12
focuses 10:3
folks 23:1
following 16:7 33:8
follows 7:7 30:15
forced 44:9
foregoing 50:10
forever 47:14
form 27:18
former 20:6
forth 29:2 31:6 34:6,12 37:20,22 38:7,17
forward 3:23
found 10:5 49:4
FourKites 1:7 2:16 3:9 4:18 9:1 29:7 37:24 38:5 38:6,13 39:10 42:18
FourKite's 3:20 4:6 39:7
frankly 29:20 31:12 43:18
fraud 17:21 18:2 36:24
fraudulent 21:5 21:14
free 16:15
front 45:5
fundamental 39:20
fundamentally 41:17

G

GAAP 26:19
general 17:13 26:14 28:14
generalized 17:2
generates 31:18
generic 24:20
Gilbert 2:11 3:6,7 3:8,19 4:5 25:4 25:12,15,18 26:3 26:8 38:21,24
give 28:10 30:22
given 43:12 50:13
go 4:4 20:13 22:2 25:17 26:3 28:2 29:15 33:13 34:1 35:2,16 36:21 41:6 48:17 49:13
goes 20:5
going 26:3 42:23 47:6
Golden 12:22 13:2 33:1
good 3:3,5,7,10 5:13 36:19 39:15
grant 43:4
granted 47:6
granting 46:21
Grayson 11:16
great 19:19 20:3
greedy 17:18
ground 31:11
grounds 12:18
guardrails 18:22

H

Hanson 21:22
happened 46:19 46:24
happening 28:3
happens 43:3
happy 14:3 35:20 41:12
harassed 15:21
harassment 15:20
harm 5:4 7:14 12:13 16:1 24:12 24:17 39:22
harms 7:8
Hawkins 2:3 3:3,4 29:16 33:14,19 34:3 43:9 44:15 44:19 45:4,10,14 49:10
hearing 44:6,18 44:19 45:18 50:10,13
held 3:17 6:1 7:1 10:16 13:20 17:11,16,22 18:1 18:7,14,19 32:2 49:16
Hemeryck 2:19 3:10,11 41:7,8 45:8 46:6,9
hereunto 50:14
Hicks 11:15
hiding 38:8
hinges 4:23 15:17
history 44:3
Hoch 11:5,13 14:5 31:9
hold 8:13 20:23
holding 9:11 13:19 33:3
holdings 14:5
holds 32:21
HOLMES 2:18
home 7:24
Honor 3:4,8,11,19 4:5,22 12:7 14:2 16:9 17:11 18:7 21:7 22:15 23:2 25:15 26:8 27:6 28:23 29:5,11,16 30:10 33:4,14 35:9 38:16 41:7 41:9 43:9 44:16 44:19 45:1,4,15 49:10
HONORABLE 1:12
Hopewell 17:4,10
hyperbole 16:17

I

idea 47:12
identify 24:12 28:5 47:8
identity 41:19,20 42:13
Illinois 1:1,3,24 2:5,13,21 5:24 7:6,21 8:20,23 14:11 17:16 18:13 29:18 30:15,17 32:21 33:7 34:20,24 35:7 48:12 50:1 50:8
illuminate 5:10
impinging 9:13
implication 27:18
implies 48:23

Purchased from re:SearchIL
SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

imply 24:6
implying 24:4
importance 5:12 35:23
importantly 32:24 34:19
impossibility 4:19
impossible 39:12
improper 27:15 42:20
improperly 42:13
improprieties 26:11 29:23 36:2 36:3
impropriety 26:17
inapplicable 10:5 10:20 32:11
inapposite 10:10
incapable 17:22
includes 37:21
including 16:22 22:3 28:13 37:23 46:9
incompetence 17:13
incompetent 18:15 28:7
indefinite 28:20
indicate 24:16 33:11
indicates 23:16 25:22 27:13 47:22,23
indiscernible 5:8 10:19 14:2 18:13 19:12 25:6,10,13 28:8 46:10
individual 7:10 41:19
individuals 39:4
individual's 7:9
infer 28:17 38:11
inference 24:22
infiltrates 40:17
inflict 24:12
ingredient 19:18
initially 44:4
injuries 30:4
innocent 17:8
insert 18:8
inside 39:8
institutional 9:19
instruction 39:10
insulate 34:21
intention 35:16
interest 6:16
Internet 38:9
interpret 20:8
interpretation 27:21,22
interpretations 18:4
interpreted 16:20
intervene 3:22 42:10 43:6,21 46:12,15,16
intervener 3:12 41:8 43:13,24 47:1
interveners 43:11
intervener's 41:2 43:19
intervention 46:14 46:14
intimidate 30:1 36:6
intimidation 23:12 24:7
intracorporate 10:14 31:23 32:19,21
investors 20:7
invitation 16:5
invite 20:5
inviting 20:9
issue 4:12,22 5:1,5 5:10 7:15 8:6,21 8:23 10:21,24 11:1,6 13:12 15:24 16:12 18:23 19:3 32:12 37:13,18 39:1,20 40:11,11,16,19 40:21 41:17 45:24 46:7
issues 4:4 41:11
i.e 34:17

J

JAMES 1:13
Jane 2:24 3:12 44:1,4 46:1 47:1
job 18:2
Judge 1:13 45:5
judge's 45:7
judgment 29:20
jump 44:13
jurisdiction 43:23
jury 25:1,8,19 49:1

K

K 50:3
Kahn 21:21
Khan 18:12
King 21:8
know 22:13 23:17 30:14 32:20 33:10 34:24 37:2 38:4 39:3,14,18 40:15 41:16,19 42:19

L

L 1:6
lacks 18:9,16 28:10
laid 29:5
Lake 2:4
landscaping 18:17
language 20:17 22:12 24:2
lastly 37:18
law 1:3 2:2 6:14 9:12 16:8 17:3 17:15 21:16 29:18 43:19 47:24 48:6,11,16
lawful 23:15,18
lazy 18:15
leader 11:19
leaders 9:20
leadership 7:4,13 8:15 9:2 11:20 12:8 16:3
legal 4:19 8:18 22:21
let's 33:23 40:23
liability 39:8
liar 18:20
License 1:23
likes 28:20
Likewise 10:16
limitations 44:7 45:21
line 35:17,17 37:3 37:4
lining 22:5
lists 33:5
litigation 18:24
little 39:1 45:22
live 16:14
LLC 2:2
LLP 2:18
logic 12:6,21
logical 20:12 39:23
Loisi 1:23 50:5,21
long 7:20 44:12
longer 40:1
look 10:6 16:21 18:23 31:22 35:24
looking 32:18
loose 20:17
Loren 11:5
loss 6:21
lot 28:7 31:14
lots 26:23
lowering 7:9

M

machine 17:21
Madison 2:20
Madoff 22:1,3
mafia 22:24 23:24 24:3,20 25:3,21 36:5 48:21
maintain 14:7 47:21
maintains 47:14
making 12:14
malice 34:22 35:4 40:16,18,21
malicious 34:21
manage 18:16
management 9:7,9 9:21,22 12:3
manager 34:10
managerial 11:9 11:11
managers 9:18 34:24
Mann 21:1
March 44:20
Mars 15:16
material 15:5
matter 6:11,19 10:3 17:3,14 28:2 31:24 33:20 46:4 48:3,6,11
matters 48:24
mean 20:15 26:19 26:20,23 27:19 39:23 42:6 45:12 49:12
meaning 16:24 26:12 28:11
means 26:17
meant 24:2
meat 21:19

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SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

meeting 11:20 21:6
member 8:11 40:4
members 8:8,9 22:16
mention 47:5
mentioned 40:16
merely 36:18
met 30:11
miscalculating 26:21
misconduct 27:14
Miser 47:22
missed 19:19
Missner 14:24 30:17 47:22
moment 41:15
Mon 21:2
month 27:9
moot 43:21
mooted 43:12
morning 3:3,5,8 3:10 5:14
motion 1:11 3:20 3:22,24 4:6 29:17 30:13 31:15 34:8,10,18 37:15 38:18 41:2 41:2,10,17 42:24 43:1,5,14,15 46:17,21 47:5
move 3:23 40:24 42:11
muted 3:6
myriad 27:16

N

name 30:2 45:7
named 22:22 44:1
nature 15:22
nearly 31:19
necessary 6:10
need 25:24 43:1,3 43:6 47:9
negative 12:14
neighbors 7:2,4
neither 7:4 45:15
Nevada 12:22 15:15
never 44:17 45:13
nonactionable 18:5,18 20:15 48:19
nondisclosure 23:6,21
nonparty 41:22
non-disparagem... 23:6,20
non-employee 13:17
North 2:12
notable 33:16,17
note 42:22
noted 28:15
notes 50:12
notorious 36:7,24
number 16:21 22:16 28:13
numerous 18:4

O

O 50:3,3
obligation 14:8 23:5
obligations 41:24
obviate 43:1
obviously 4:1 43:6
occur 16:2 39:22
occurred 16:10
officer 8:7 10:9 30:9 31:4 36:14 48:8 50:6
oil 18:2
Okay 3:13 4:3,5 26:2,7 33:19 40:23 41:2,5 43:8 46:5,8
one's 6:24 9:13
operate 14:6
operated 17:21 39:4,6
operators 21:13
opinion 12:22 13:14 15:16 17:2 17:3,24 18:6,18 20:2,4,19 22:9 28:19 39:15
opinions 13:13 16:15,16 17:19 39:17
opposing 39:2 40:15
oranges 15:22
order 42:12 49:8
organization 36:22
organized 24:5 29:24
originally 44:20 45:5
outset 44:22
outside 8:11,22 38:14 39:4,6
out-of-court 31:5
out-of-state 29:19
overruled 12:23 33:2,6

P

pandemic 44:22
paragraph 19:16
Pardon 25:15
part 19:9 47:3
participating 48:22
particular 33:22
parties 5:11
party 4:24 7:18 30:21,22,24 41:23 42:3 48:9 48:14
party's 41:12
pay 27:10,20
PC 2:10
peers 9:15
pending 43:15
people 17:18 20:7 20:10,14 26:23 27:1 28:2
perception 18:9
perform 18:17
person 5:22 6:3,13 6:20 10:18 24:13 24:13 25:2 32:5 41:22 47:2 48:5 48:20
Personnel 11:15
perspective 4:20
Peter 2:3 3:4
Peter.hawkins... 2:7
petition 44:5 45:17 46:12,15
petitioner 3:12 41:8 42:2
phonetic 21:22
physical 24:12,17
pick 37:6
Piersall 18:19
place 5:13,17
plaintiff 1:5 2:8 3:4 4:12,13 5:2 5:15 8:19 9:8 10:3 11:8,22 12:16 14:13 15:2 15:15 17:12,20 18:15,20 20:2,20 21:4,24 22:6 23:12 24:6,18 25:22 41:18
plaintiffs 17:17 21:12 26:9
plaintiff's 4:16 5:9 8:13 12:7 13:16 16:5,11 22:10 29:13 39:24 48:7
plan 3:15
Plaza 2:12
pleading 30:11 46:14
please 4:4 29:14 29:14 33:13 41:5 42:5
pled 38:10
point 8:1 14:12,14 19:20 22:2,2 23:11 33:22 47:16
pointed 14:17 26:9
points 38:21
POLSINELLI 2:10
Ponzi 19:10 20:11 20:21 21:10,13 21:20 22:4 30:1 36:11 48:23
Popko 14:14 32:20 33:3
position 5:9 8:13 30:4 36:15 39:24 42:4,16 43:19
positions 34:13
possibility 12:13 39:22
possible 24:10
possibly 40:6
postponed 44:23 45:1,18
potential 9:16 23:7
practices 11:22 21:15 22:3
preceding 19:16
precise 16:23 18:3 28:11
precisely 24:22
preclude 25:19
premature 41:21 42:1
premised 10:11

Purchased from re:SearchIL
SUBMITTED - 22360762 - Candy Velazquez - 5/3/2023 12:30 PM

present 31:7
preserve 44:10,11 47:8
presumption 37:21
primarily 6:15 13:17
primary 7:15
principal 15:6
principals 9:10
principles 26:20
prior 44:3
privileges 35:1,2
pro 9:1
proceed 3:14
proceeding 22:1
proceedings 1:11 1:15 49:19 50:9 50:13
producing 20:2
product 20:3,13 22:11 27:20 28:14 36:20
production 4:24
Project44 1:4 3:1 3:2,15 31:4 37:9 42:19
Project44's 4:7
proper 26:18 27:2
property 24:14
propose 35:5
proposed 31:12,17 34:5 35:11
propositions 48:16
propounded 34:23
Prosser's 10:7
protect 19:20
protecting 5:4
protection 35:8
protects 6:16 9:13
proven 18:10
provide 14:3
provides 5:20
provisions 23:21
public 28:3,16
publication 4:11 4:22 5:21 6:1,9 8:15,16 9:11 10:7,19,23 11:7 11:24 12:5,10 13:11,20 14:8,22 15:9,12 16:6,10 30:15 32:7,17 40:1,22 47:23
published 32:22 35:14 37:14 48:9 48:14
pure 20:4
purpose 43:21 46:2
purposes 9:23 15:12 22:6
pursuant 4:7
push 27:3
put 30:10 33:23 42:15
putting 42:2
P44 36:2
P44's 8:7

Q

quad 5:8
qualifies 7:18 34:9
qualify 14:21
quality 22:10
quash 42:5,11 43:14,21 46:17
question 40:13
questions 35:19 41:13
quite 29:19 31:12 43:18 48:23
quod 26:5
quote 5:22 17:12 17:18 19:24 23:15 32:1,18 36:1,2

R

rampant 26:10,10
reached 8:23 11:4 12:1 34:16
reaching 9:24
read 4:3 6:7 15:3 19:8,17 22:9 23:10 24:5 27:6 30:19 32:1,10
readily 14:13 16:23 20:22 28:11
reading 6:6 12:24 20:12
reads 14:1 28:16
reality 24:18
really 13:6 14:16 15:13 19:6 21:7 23:3 24:9 41:10 42:6
realm 27:3
reason 13:6 23:9 30:12 31:7 33:4 42:8,9
reasonable 25:1,8 25:19 27:1,22
reasonably 9:4 16:19
reasoned 9:12
reasoning 33:8
reasons 4:9 14:16 27:17 28:13 29:1 29:1,11 35:9 37:11 38:16,17
rebuttal 38:22
recall 44:21
recess 41:3
recipients 31:2
recognize 48:15
recognized 5:23 7:20 17:4 20:16
recognizes 8:1 40:9
record 3:18 34:17 49:13,17
reduced 9:17
reference 15:2 21:10 24:20
refers 13:1
reflect 20:17
regarding 20:21 22:10
regardless 5:6
regularly 23:4
reject 10:4 16:4
rejected 35:11 37:17
rejecting 13:5 40:10
related 3:22 9:8 10:13
relationship 7:16 15:8 48:21
relay 12:21
relevant 45:20
relied 12:22 15:1 31:9
relief 37:9 43:12
relies 33:1
rely 34:1,15
remember 7:20
remind 23:4
Remote 1:10
remotely 1:24 50:8
remove 20:18
render 18:4,9
report 1:10
reported 50:9
reporter 1:23 50:7
reporting 1:24 33:5
Representing 2:8 2:16,24
reputation 6:17,22 6:23 7:9 9:14,17 30:5
reputational 5:4
12:13 16:1 39:21
request 38:18
required 19:1
requirement 5:10 6:2,5 7:7 8:16 12:11 14:9 16:6 40:2
requires 23:14 24:8 48:2,3
resign 30:9 36:15
resolution 9:6 43:15
respect 13:13 22:14 23:23 28:23 30:14 31:15 34:7 39:13 42:21
respectfully 31:20 35:10 38:18
respondent 47:7
responds 13:1
response 12:16 47:20
responsive 47:8,21
rest 12:18 29:20 31:10
restatement 10:2 31:8 32:8 35:1 39:16
result 16:18 17:1 17:10
returns 46:23
revenue 8:7 30:8 31:3 36:14 48:8
reviewed 21:11 47:19
revolves 5:3
rewrite 29:18
rhetoric 16:16
right 4:4 40:7 41:5 44:14,21 45:11
rights 23:19
RILEY 2:18
rip 18:1

Purchased from re:SearchIL
SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

rise 30:22
risk 33:6,11
Riverside 2:12
role 5:19
RPR 1:23 50:5,21
rule 5:23 15:13 30:18 31:6 42:23 44:5 45:17
ruling 28:1 34:1 42:24 48:16
running 36:22 48:22

S

SAFER 2:18
sales 20:7
satisfied 6:2
satisfy 12:5
saying 25:18 40:10
says 6:6 19:17 50:6
scam 18:8
scandal 18:2
scandals 36:24
scenario 13:7,15 14:6
scheduled 44:20
scheme 19:10 20:11,21 21:10 21:13 22:4 30:2 36:12
schemes 48:23
Scott 2:11 3:8
se 4:15 5:7 17:7 22:19 23:3 24:23 26:1 27:4 28:22 36:9,16 37:15,20 40:20
second 24:3 32:9 44:14 49:14
Secondly 29:5
Section 5:12,20 6:4 10:1 32:9
sections 35:20
see 20:14 43:3
seeking 43:14
seeks 43:13
sell 36:19
selling 19:21
send 38:15
senior 8:14
sense 3:23 14:6 31:14 34:7 39:16
sent 4:13 8:7 38:2
sentence 23:2
servants 10:17 32:4
served 42:17
service 33:5
services 18:17 28:15
serving 41:21 42:1
set 29:2 31:6 34:5 34:12 37:8,19,22 38:17 50:15
sexual 15:19
sexually 15:20
Sgilbert@polsin... 2:15
shaky 12:18 31:11
shared 37:24
shareholders 9:19
Shemeryck@rs... 2:23
shield 35:6,7
shit 19:22
short 3:16 49:15
shorter 19:5
shorthand 50:7,9 50:11
show 25:24 37:7 39:3
showing 37:22 38:11
shown 17:22 42:14
shut 45:13
sic 9:6
sign 38:6
signature 50:15
significantly 21:18
silence 22:24
silenced 22:21
silencing 48:22
similar 18:6
similarities 21:24
similarly 7:23 11:3 17:16 22:18 36:10
simple 20:4
simply 9:16 16:1 20:23 26:17 27:12 30:10 37:7 41:24 42:10,17 45:17
Simpson 15:16
simultaneous 25:6 25:10,13 46:10
single 19:6 21:6
sir 25:17 33:13 34:2,3 43:8
situation 14:23
size 47:13
skip 5:16
snake 18:2
SNYDER 1:13
society 16:14
solely 43:20 46:2
somebody 23:8
somebody's 25:20
someone's 23:23 24:4 27:14
Sondra 2:19 3:11 41:7
sorry 3:7 37:12
sort 25:23 28:10 28:17,21
sought 42:10 44:4
sow 30:7,7
so-called 31:23
speaker 42:3
specific 24:9 35:20 47:23
specifically 31:24 33:21
speculation 24:22
speech 35:2,4,7
Spike 12:23 13:2 33:1
spoken 8:20
SS 1:1 50:2
standard 31:15
start 5:14,18 19:2 19:3,22
started 45:16
state 1:1 34:18 50:1,8
stated 21:12 42:14
statement 5:1,13 7:8 10:7,11 11:7 11:10,12 16:2,23 17:11 18:20 19:6 19:8 20:9,12 22:20 23:9,14 24:16 25:2,20 26:9,11,16 27:5 27:13,24 28:5,7 28:19 30:16 40:20 48:7,8,11 48:13
statements 4:14 9:2,3,21 10:13 10:21 11:21 12:9 13:8 16:12 17:19 18:14 21:2 22:17 23:17 32:13 34:22 35:18 37:4 48:19,20 49:2
states 30:18 32:1 48:23
stating 13:7 16:20 18:8
statute 24:11 44:7 44:10 45:20
stay 43:14
stealing 21:16
stop 19:21
straightforward 41:10,16
Street 2:4,20
strong 20:18
structured 22:4
struggling 43:18
subject 12:15 18:3
subjected 17:8
subjective 19:14
subordinate 14:21
subpoena 41:21 42:1,5,12,21 43:7,15,22 46:3 46:18 47:7,9,20
subsequently 12:23 33:2 44:23
substance 35:15
substantively 43:17 46:4
sufficient 38:10
sufficiently 18:3
suggestion 4:1
suit 23:8
Suite 2:12,20
suits 8:17 22:22
supervisor 14:20
supervisor's 14:20
support 11:13 13:3 17:14 23:13 28:18,21,22 43:19
supporting 28:18
supposed 34:8
Supreme 20:16
Sure 38:23
susceptible 21:6
Swigett 21:1

T

tactics 17:20
take 18:22 42:20 42:20
taken 50:12
talk 20:6,13

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SUBMITTED - 22560762 - Candy Velazquez - 5/3/2023 12:30 PM

talking 15:10,11 26:4 40:3
tantamount 13:23
taxes 24:5
term 20:21 26:17 28:8 47:24
terms 15:22 18:1
TESTIMONY 50:14
Thank 29:14,16 33:17 34:3 49:10 49:12
Thanks 38:19,20 49:11
Theranos 28:3 36:7,13
thieves 21:13
thing 41:14 42:22
things 27:1 47:14
think 5:17 6:6 12:18,24 18:24 19:13 20:13 23:22 24:24 25:1 25:4,12,19 26:4 33:16 34:21 40:8 41:10,11,14 42:19 45:8,10
third 4:24 6:20 7:18 48:9,14
third-party 4:11 12:9 14:8 16:6 40:1
thoughts 43:11
thousands 21:16
threat 23:14 24:8 24:12,17
threatened 24:13
threats 22:21
three 4:9
threshold 5:5 30:11
tied 34:13
time 28:2 37:10 49:11,12,20
titled 36:1
today 7:16 35:18 42:23
told 15:18
top 32:23 33:9 39:16
topic 13:24
Torts 32:9
totality 48:20
totally 27:21
trade 21:14
transactions 21:5
transcript 50:11
transferred 45:6,9
tried 42:7
trigger 7:13
true 14:24 17:22 18:11 21:21 23:22 50:11
truism 7:20
trying 41:20 42:11
turn 26:15 29:21 41:18,22
turning 35:15 37:18
twice 45:9
two 8:6,8,22 9:9 19:2 22:16 48:12

U

ultimately 4:8 15:24 24:21 29:6
unambiguous 21:3
unassumed 28:18
undercut 12:20
underlying 26:15 29:3
understand 30:3 34:11 36:17 46:1
understandable 28:11
understanding 24:1 31:1
understood 16:23 28:9 34:3
undisclosed 28:17
undoubtedly 13:21
unknown 42:3
unreasonable 20:8
unsanctionable 20:3
use 20:21 28:9
Utah 9:5 31:20

V

vague 17:13 21:10 26:14
vaguer 17:1
vanish 47:17
Ventures 21:8
verifiable 26:15
verified 26:16 50:15
versus 3:1 9:6 11:5,15 14:14,24 15:16 17:5 18:12 21:1,8,22 47:22
viable 42:14
video 21:11
view 19:14
viewed 23:3 24:4 26:13 28:12
Vitullo 17:5
vs 1:6

W

waived 35:3
Walker 45:5
want 3:13 18:9 19:9 27:20 35:22 47:10 49:13,13
wasn't 10:24 21:19 44:14
way 4:4 26:24 27:23 33:10,24 46:21
ways 26:23
wayside 12:11
website 21:23
well-reasoned 16:7
went 22:15
West 2:4,20
Westlaw 33:5,11
we'll 5:16 40:24
we're 15:10,11 40:3 42:11
we've 46:6
WHEREOF 50:14
widespread 28:1
willing 27:10
winds 47:19
word 20:23 21:20 24:20
work 22:17 38:24
workplace 14:21
worth 6:6
wouldn't 27:23
writing 19:15
wrong 26:22

X

X 18:8,9 22:20

Y

Yeah 45:10

0

04183 1:6
084-004571 1:23

1

10:06 1:15
14 50:16
150 2:12
19th 22:14

2

2-615 4:8
20s 39:17
2019 11:3 13:14
2020 1:6 44:20,23
2021 1:14 50:16
21 1:14
224 44:5 45:17
27th 19:4 22:8
2900 2:20

3

3000 2:12
312 2:6,14,22

4

40-year-old 31:19 39:14
471-8724 2:22

5

5 2:4
5,000 27:9
50s 39:18
55 5:12
557 10:2
577 5:12,20 6:4 10:2 30:18 32:9
577(e) 40:10
5779(e) 40:9
579-3110 2:6

6

60602 2:21
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60661 2:5
641 2:4

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819-1900 2:14

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CIRCUIT CLERK
COOK COUNTY, IL
2020L004183

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**IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION**

PROJECT44, INC., a Delaware corporation,

Plaintiff,

v.

FOURKITES, INC., a Delaware corporation,

and

JANE DOE, an individual, corporation, organization, or other legal entity whose name is presently unknown,

and

JOHN DOE #1, aka "Ken Adams," an individual, corporation, organization, or other legal entity whose name is presently unknown, using the email address "kenadams8558 @gmail.com,"

and

JOHN DOE #2, aka "Jason Short," an individual, corporation, organization, or other legal entity whose name is presently unknown, using the email address "jshort5584@gmail. com,"

and

JOHN DOES #3-25, individuals, corporations, organizations, or other legal entities whose names are presently unknown,

Defendants.

2020L004183

Case No. _______________

COMPLAINT

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Plaintiff PROJECT44, INC. ("project44"), complains against Defendants FOUR KITES, INC. ("FourKites"), JANE DOE ("Jane Doe") an individual, corporation, organization, or other legal entity whose name is presently unknown, JOHN DOE #1, aka "Ken Adams" ("Ken Adams") an individual, corporation, organization, or other legal entity whose name is presently unknown, JOHN DOE #2, aka "Jason Short," ("Jason Short") an individual, corporation, organization, or other legal entity whose name is presently unknown, and JOHN DOES #3-25 ("John Does #3-25"), individuals, corporations, organizations, or other legal entities whose names are presently unknown, as follows:

NATURE OF ACTION

1. This is an action for defamation *per se*, arising from two email communications sent on May 19, 2019 and May 27, 2019 from the accounts "kenadams8558@gmail.com," and "jshort5584@gmail.com," respectively. In each communication, the sender(s) - using the pseudonyms "Ken Adams" and "Jason Short," respectively - levied knowingly false and defamatory statements against Plaintiff project44. In particular, the sender(s) accused project44 of lacking ability in their business, of lacking integrity in their business conduct, and engaging in criminal activity. The defamatory statements were directed to both outside members of project44's board of directors, as well as project44's Chief Revenue officer, with the intent to disrupt project44's business activities.

2. project44 is in the highly competitive shipping logistics industry. Over 25,000 different carriers have tracked shipments in project44's system, and it supports all transportation modes and shipping types. project44 has more than 200 employees.

3. The kenadams8558 and jshort5584 e-mail addresses from which the defamatory communications were sent both have an "@gmail" domain name. This signifies that the email

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accounts were set up via Google, LLC ("Google"). Prior to filing this Complaint, project44 obtained an order for pre-suit discovery from Google. Information received from Google identified Defendant FourKites, a competitor of project44, as either an owner or user of the kenadams8558@gmail.com and jshort5584@gmail.com email addresses. Additionally, one or more unknown co-users or co-owners of these email addresses has been identified as accessing these accounts through IP addresses operated by, *inter alia*, AT&T Mobility, LLC ("AT&T"). These unknown co-users or co-owners conspired with Defendant FourKites to send the defamatory communications, and themselves sent the defamatory communications.

4. project44 has filed a petition for discovery, naming AT&T as a respondent, in Cook County Circuit Court to identify the unknown co-users or co-owners. (*See project44, Inc. v. AT&T Mobility, LLC, et al.*, Case No. 2019-L-10520). However, an intervenor appearing anonymously as "Jane Doe," by and through their attorneys, has sought to quash the petition.

5. As of the filing date of this Complaint, no order has been entered on project44's petition for discovery of AT&T. Since the statute of limitations for defamation actions is one year from publication (735 ILCCS 5/13-201), and given that the hearing on project44's petition of AT&T has now been rescheduled to less than a week before project44's claims become time-barred (due to the COVID-19 coronavirus epidemic), project44 has filed this Complaint now before its petition for discovery on AT&T has been resolved.

THE PARTIES

6. Plaintiff project44, Inc. is a Delaware corporation with its principal place of business in Chicago, Illinois.

7. Defendant FourKites, Inc., is a Delaware corporation with its principal place of business in Chicago, Illinois.

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8. Defendant Jane Doe is an unknown individual, corporation, organization, or other legal entity proceeding as intervenor under the fictitious name "Jane Doe" in the related petition for discovery, *project44, Inc. v. AT&T Mobility, LLC, et al.* (Case No. 2019-L-10520), currently pending before the Hon. Allen P. Walker in the Circuit Court of Cook County, Law Division.

9. The true names of the following Defendants are unknown to Plaintiff, who therefore sues these Defendants under such fictitious names:

- John Doe #1, aka "Ken Adams," using the email address kenadams8558@gmail.com;
- John Doe #2, aka "Jason Short," using the email address jshort5584@gmail.com; and
- John Does #3-25, affiliated with or otherwise related to Defendants FourKites, Jane Doe, John Doe #1, or John Doe #2.

project44 alleges that each of the aforementioned Defendants Jane Doe and John Does #1-25 conspired with Defendant FourKites to publish false and defamatory statements concerning project44. project44 will seek leave of court to amend this Complaint and insert their true names in place of their fictitious names when the same have become known to project44.

JURISDICTION AND VENUE

10. Jurisdiction is proper in this Court pursuant to 735 ILCS 5/2-209 because, among other reasons, the defamatory material published by Defendants was published in Illinois representing the commission of a tort within Illinois and, thus, has caused project44 to suffer injury in Illinois. Separately, Defendant FourKites both does business in Illinois and maintains a principal place of business in Illinois.

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

11. Venue is proper in this Court pursuant to 735 ILCS 5/2-101 and 735 ILCS 5/102(a) as, *inter alia*, Cook County is where Defendant FourKites maintains its principal place of business.

FACTUAL BACKGROUND

12. project44 is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois. project44 is commonly referred to in its industry by the abbreviation "p44." project44 is in the highly competitive shipping logistics industry, where it provides goods and services which permit its customers to connect with, automate, and provide visibility into key transportation processes which, in turn, permits its customers to increase operational efficiencies, reduce costs, improve shipping performance, and deliver an exceptional experience to their own customers. Over 25,000 different carriers have tracked shipments in project44's system, and it supports all transportation modes and shipping types including "parcel," "final-mile," "less-than-truckload," "volume less-than-truckload," "truckload," rail, intermodal, and ocean. project44 has more than 200 employees.

13. Defendant FourKites is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois. Like project44, FourKites is in the highly competitive shipping logistics industry. FourKites is a competitor of project44.

The May 19th Defamatory Communication

14. On May 19, 2019, one or more individuals, corporations, organizations, or other legal entities using the email address kenadams8558@gmail.com and the name "Ken Adams" transmitted an email communication titled "Accounting improprieties at P44" ("the May 19th communication"). A true and correct redacted copy of the May 19th communication is attached hereto as Exhibit A (the name of a project44 employee not a party to this litigation has been redacted).

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

15. The May19th communication was sent to email addresses belonging to Jim Baum (jim@ov.vc) and Kevin Dietsel (kevin@sapphireventures.com), who are both non-employee, outside members of project44's Board of Directors. (*See* Exhibit A.) Thus, the May 19th communication was published to one or more third parties, without privilege.

16. The May 19th communication is divided into five paragraphs, three of which are numbered. (*Id.*). The May 19th communication is defamatory *per se* as it, *inter alia*, falsely imputes the commission of one or more crimes by project44, a want of integrity in project44's business conduct, and a lack of ability in project44's business.

17. For example, the first numbered paragraph alleges that that "Ex employees [of project44] are silenced with legal threats and defamation suits." (*Id.*). Immediately thereafter, the paragraph states that one of project44's employee's family members "used to be the book keeper for a Chicago Mafia and they are using that to silence folks." (*Id.*) Given the context of the paragraph, the word "they" can only refer to project44.

18. These statements are defamatory *per se* because, not only do they falsely allege that project44 maintains connections with organized crime, but they also assert that project44 uses those connections to "silence" persons such as project44's ex-employees. (*Id.*) The reference to "Chicago Mafia" conveys the idea that when project44 "silence[s] folks," they do so with threats of violence or other intimidation, a crime in Illinois. (*See* 720 ILCS 5/12-6) (stating that, *inter alia*, "[i]ntimidation is a Class 3 felony.")

19. The first sentence of the second numbered paragraph in the May 19th communication states that "[t]here is rampant accounting improprieties" at project44. (Exhibit A.) Either viewed by itself, or taken in conjunction with the next two sentences, this statement is defamatory *per se* because it falsely imputes both a want of integrity in project44's business

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

conduct, as well as a lack of ability in project44's business (such as the ability to comply with generally accepted accounting procedures). "Impropriety" is commonly understood to mean "dishonest behavior, or a dishonest act." (*See*, https://dictionary.cambridge.org/us/dictionary/english/impropriety, a screenshot of which is attached hereto as Exhibit B.) As such, by using the phrase "accounting improprieties," the sender(s) of the email accuses project44 of dishonest financial practices. The sender(s) further use the term "rampant" to convey that the alleged dishonest financial practices occur frequently. (*See, e.g.,* https://dictionary.cambridge.org/us/dictionary/english/rampant, a screenshot of which is attached hereto as Exhibit C.)

20. The next sentence in the second numbered paragraph of the May 19th communication encourages the recipients "to take a look at the contracts (pilots , [*sic*] out clauses, rev rec etc.)." (Exhibit A.) The fact that this sentence: (1) immediately follows the sender(s) accusation of "accounting improprieties;" (2) is grouped in the same numbered paragraph; and (3) is part of an email titled "Accounting improprieties at P44," means that it, too, is defamatory *per se* because it conveys the false idea that these specific "contracts" contain "accounting improprieties," also imputing both a want of integrity in project44's business conduct, as well as a lack of ability in project44's business. (*Id.*)

21. For the same reasons, the third sentence in the second numbered paragraph ("Recent CFO Departure must tell you everything") is also defamatory *per se*, as it also conveys the false idea that project44's CFO left due to alleged accounting improprieties, again imputing both a want of integrity in project44's business conduct, as well as a lack of ability in project44's business. (*Id.*)

22. The third numbered paragraph of the May 19th communication states that a client of project44 ("Estes") "cancelled the contract [with project44]," and that the contract "was only

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

$5k a month and they [Estes] are not even willing to pay this." This, too, is defamatory *per se* as it falsely imputes a lack of ability in project44's business. Moreover, as the sender(s) chose to convey this information in an email with the subject line "Accounting improprieties at P44," the statement also falsely conveys the idea that the cancelled contract was due to project44's alleged "accounting improprieties," again imputing a want of integrity in project44's business conduct.

23. Finally, the last paragraph of the May 19th communication is unnumbered and states that "there is widespread discontent brewing and it's just a matter of time before people go public and another Theranos happen [*sic*] in Chicago." (*Id.*) This is also defamatory *per se* as it falsely conveys the idea that project44 has committed the crime of fraud. The sender(s)' comparison to "Theranos" refers to Theranos Inc., a now-defunct company that (along with its founder Elizabeth Holmes) was charged by the U.S. Securities and Exchange Commission with securities fraud. (*See, e.g.*, Dkt No. 1 in *SEC v. Holmes, et al.*, Case No. 5:18-CV-01602 (N.D. Cal. March 14, 2018), available at https://www.sec.gov/litigation/complaints/2018/comp-pr2018-41-theranos-holmes.pdf., an excerpt of which is attached hereto as Exhibit D.) Ms. Holmes and Theranos's former president, Ramesh Balwani, have also been indicted on multiple counts of wire fraud and conspiracy to commit wire fraud (their cases are currently pending). (*See, e.g.,* https://www.justice.gov/usao-ndca/pr/theranos-founder-and-former-chief-operating-officer-charged-alleged-wire-fraud-schemes, a screenshot of which is attached hereto as Exhibit E.) Thus, the May 19th email's reference to Theranos falsely conveys the idea that, like Theranos, project44 is allegedly involved in fraudulent activity.

24. Whether viewed individually or as a whole, the statements made in the May 19th communication are defamatory *per se*. The fact that the sender(s) published these false statements

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

to project44's outside board members confirms that the sender(s) intent was to disrupt project44's business activities.

25. "Ken Adams" is a pseudonym, as project44 has not previously employed anyone named "Ken Adams," nor has it ever worked with any persons having this name. The sender(s)' need to conceal their identity speaks to the defamatory nature of this communication.

26. The May 19th communication was either sent by project44's competitor Defendant FourKites, or by one or more unknown entities acting in concert with Defendant FourKites. project44 is thus reasonably concerned that similar information has been published to other parties.

The May 27th Defamatory Communication

27. On May 27, 2019, one or more individuals using the email address jshort5584@gmail.com and the name "Jason Short" transmitted an untitled email communication to an email address belonging to Tim Bertrand (tbertrand@project44.com), project44's Chief Revenue Office ("the May 27th communication"). (A true and correct copy of the May 27th communication is attached hereto as Exhibit F.) Thus, the May 27th communication was published to one or more third parties, without privilege.

28. The May 27th communication is defamatory *per se* as it, *inter alia*, falsely imputes the commission of one or more crimes by project44.

29. For example, the May 27th communication begins by addressing Mr. Bertrand as "Tim" and saying, *inter alia*, "I wanted to shed some light so you can fled [*sic*] ASAP and go find another job." (Exhibit F.) The second paragraph of the May 27th communication states that "[y]ou don't want to be part of the next Ponzi scheme or next theranos [*sic*]." (*Id.*) This is immediately followed by an invitation to "[t]alk to ex [project44] CFO Bruns. Talk to ex [project44] Sales

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

people, talk to customers.. [*sic*] talk to prospects, talk to investors outside p44 [project44]. They will tell you the truth." (*Id.*)

30. Not only does the May 27, 2019 email falsely convey the idea that project44 is liable for criminal conduct by way of its reference to "theranos [*sic*]," the email flat-out falsely accuses project44 of being a criminal enterprise by calling it a "Ponzi scheme." As such, the May 27th communication is defamatory *per se*. (*Id.*) The fact that the sender(s) published these false statements to project44's newly hired Chief Revenue Officer - and encouraged the CRO to resign - confirms that the sender(s) intent was to disrupt project44's business activities.

31. "Jason Short" is a pseudonym, as project44 has not previously employed anyone named "Jason Short," nor has it ever worked with any persons having this name. The sender(s)' need to conceal their identity speaks to the defamatory nature of this communication.

32. The May 27th communication was either sent by project44's competitor Defendant FourKites, or by one or more unknown entities acting in concert with Defendant FourKites. project44 is thus reasonably concerned that similar information has been published to other parties.

project44's Efforts to Identify the Sender(s) of the Defamatory Communications

33. Google, LLC ("Google") hosts and runs one of the world's largest free e-mail systems, known as Gmail. The "@gmail" domain name in the kenadams8558 and jshort5584 e-mail addresses signifies that the emails are set up with Gmail.

34. In the process of creating a free Gmail e-mail account, the creator may leave behind actual contact information (another e-mail address, a real name, a real phone number) to be assured of continued access to the account. Similarly, when the creator logs in to create the account, and thereafter logs in to send and receive e-mail, the internet protocol address (or "IP address") of the device the user utilizes to connect will be recorded. The IP address permits insight into the location

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

where the user is located because it identifies the specific network the user was on when he or she logged into the Gmail account, including what Internet Service Provider (or "ISP") provided the internet connection to the user. Once the ISP is known, a subpoena can also be sent to it to obtain identifying information. The IP address also offers insight into what device was used to log into the account and, thus, can also aid in identifying the person who sent the communication.

35. On May 30, 2019, project44 filed a verified petition for discovery, pursuant to Ill. S. Ct. R. 224, naming Google as respondent (the "Google Petition") in the Circuit Court of Cook County, Law Division. (*See* May 30, 2019 Petition, attached hereto as Exhibit G.) The Google Petition requested that Google provide project44 with, *inter alia*, the IP address information for the kenadams8558 and jshort5584 email accounts. (*See* Exhibit G.)

36. The Google Petition was assigned to the Hon. John M. Ehrlich. On July 25, 2019, Judge Ehrlich entered an order in which Google agreed to provide, *inter alia*, "internet protocol (IP) address(es) assigned to the computer or network connection used by the person or persons who established the above user account at the time the account was established, and reasonably available login IP addresses (with dates and times) assigned to the computer or network connection used by the person or persons who have accessed such user account from the date of the account's establishment to the date of the subpoena." (*See* July 25, 2019 Order, attached hereto as Exhibit H.)

37. On September 18, 2019, Google produced two text documents containing "subscriber and recent login information for the Google Accounts JSHORT5584@GMAIL.COM and KENADAMS8558@GMAIL.COM." (*See* September 18, 2019 Google Correspondence, attached hereto as Exhibit I.) Copies of the produced documents are attached hereto as Exhibit J.

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

38. Exhibit J provides a series of IP addresses used to access both the kenadams8558 and jshort5584 email accounts. (*See* Exhibit J.) In particular, Exhibit J indicates that the IP addresses "78.133.216.228" and "162.234.8.247" were used to access both the kenadams8558 and jshort5584 email accounts, including on May 19, 2019 (the date the first defamatory email was sent). (Exhibit J.) As such, the same entity or entities are responsible for sending both the May 19th and May 27th defamatory communications.

39. With respect to the kenadams8558 account, the "subscriber . . . information" provided by Google includes the following entry: "SMS: +18476443564 [US]." (Exhibit I; Exhibit J.) This entry is a phone number that was provided to Google by the kenadams8558 account owner for identification purposes.

40. The phone number "847-644-3564" is identical to the phone number used by Defendant FourKites in Securities and Exchange Commission filings. (See Notice of Exempt Offering of Securities, retrieved from https://www.sec.gov/Archives/edgar/data/1625230/000162523015000001/xslFormDX01/primary_doc.xml, a copy of which is attached hereto as Exhibit K.) Thus, Defendant FourKites is an owner and/or user of the kenadams8558 account. Furthermore, by virtue of the fact that the same IP addresses were used to access both email accounts-at-issue, Defendant FourKites is also an owner and/or user of the jshort5584 account.

41. Exhibit J further confirms FourKites's involvement by disclosing that the IP address "182.74.119.134" was used to access the jshort5584 account. (*See* Exhibit J.) Using the publicly available "WHOIS IP Lookup Tool," https://www.ultratools.com/tools/ipWhoisLookup, this IP address was identified as belonging to "FOURKITES INDIA PRIVATE L." (*See* screenshot of WHOIS IP Lookup Tool, attached hereto as Exhibit L.) "FOURKITES INDIA PRIVATE L" refers to "FourKites India Private Limited," a subsidiary of Defendant FourKites.

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

(*See, e.g.*, https://www.quickcompany.in/company/fourkites-india-private-limited, a screenshot excerpt of which is attached hereto as Exhibit M (listing Sriram Nagaswamy and Rashi Jain as directors of FourKites India Private Limited); *compare with* https://www.fourkites.com/about/sriram-nagaswamy/ and https://www.fourkites.com/about/rashi-jain, screenshots of which are attached hereto as Exhibit N (listing Sriram Nagaswamy and Rashi Jain as employees of Defendant FourKites).)

42. Exhibit J also contains IP addresses belonging to AT&T Mobility, LLC ("AT&T") for both the kenadams8558 and jshort5584 email accounts. AT&T is a provider of wireless communication services as well as an Internet Service Provider ("ISP"). Each time a user utilizes AT&T's internet services, AT&T assigns the user an IP address. Many ISPs maintain internal logs which record the date, time, and customer identity for each IP address assignment made by that ISP. Upon information and belief, AT&T maintains such logs.

43. The AT&T IP addresses listed in Exhibit J will identify anonymous co-owners or co-users of the kenadams8558 and jshort5584 email accounts (*i.e.* Defendants Jane Doe, John Doe #1, John Doe #2, and John Does #3-25). These anonymous co-owners or co-users of the kenadams8558 and jshort5584 email accounts acted in concert with Defendant FourKites to send the defamatory May19th communication and May 27th communication.

44. Given this, on September 24, 2019, project44 filed another petition for discovery in Cook County Circuit Court, naming, *inter alia*, AT&T as a respondent in discovery. (*See* September 24, 2019 Petition for Discovery (the "AT&T Petition"), attached hereto as Exhibit O.) The AT&T Petition was assigned to the Hon. Alan P. Walker.

45. On November 25, 2019, AT&T sent correspondence to the subscriber(s) associated with the IP addresses identified in the AT&T Petition, notifying them as to the existence of

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

project44's petition. (*See* November 25, 2019 AT&T Correspondence, attached hereto as Exhibit P.) On December 16, 2019, the subscriber(s) intervened in the AT&T Petition, proceeding under the fictitious name "Jane Doe," and by and through their counsel, expressed their intention to oppose and dismiss the petition. (*See* December 16, 2019 Petition for Intervention, and December 16, 2019 Motion Pursuant to 735 ILCS 5/2-401(e) to Appear under Fictitious Name, attached hereto as Exhibit Q and Exhibit R, respectively.) Thus, there is an actual person or entity involved in sending these defamatory communications, and that person or entity does not want their identity known.

46. On February 21, 2020, project44 filed a Motion for Judgment on the Pleadings with respect to the AT&T Petition. (*See* February 21, 2020 Motion for Judgment on the Pleadings, attached hereto as Exhibit S.) Jane Doe opposed project44's Motion and filed their own Motion seeking to dismiss the AT&T Petition. (*See* March 3, 2020 Motion for Post-Hearing Final Relief on project44's Rule 224 Petition for Discovery, attached hereto as Exhibit T.) The motions were fully briefed and a hearing on the motions was set for April 20, 2020. (*See* March 13, 2020 order, attached hereto as Exhibit U.) However, in light of the COVID-19 coronavirus epidemic, the hearing was subsequently rescheduled to May 12, 2020. (*See* March 24, 2020 Cook County electronic notice, attached hereto as Exhibit V.)

47. The statute of limitations for project44's defamation claims is one year from publication, *i.e.* May 19, 2020. (*See* 735 ILCCS 5/13-201.) As such, there is a high likelihood that project44's defamation claims will become time-barred before an order in the AT&T Petition is entered, let alone before project44 receives the information requested from AT&T. This action is therefore proper to preserve project44's claims and to complete the discovery identified herein (whether through this action, or in giving the pending discovery petition time to complete).

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

COUNT I
DEFAMATION *PER SE* – THE MAY 19TH COMMUNICATION

48. project44 hereby reincorporates and restates the above paragraphs as if specifically set forth and re-alleged herein.

49. Defendants conspired with and aided and abetted each other in making the defamatory May 19th communication, which greatly harmed project44's reputation in their trade and business.

50. Defendants each knowingly and voluntarily participated in this common scheme to harm project44's reputation.

51. Defendants did so for the purpose of accomplishing, by concerted action and common design, a harm to the business reputation of project44, to which Defendants agreed.

52. Each Defendant committed overt tortious acts in concert with each other and in furtherance of this conspiracy by making the May 19th communication, and each substantially participated and assisted in such a scheme to defame project44.

53. Each Defendant also accepted and ratified each other's defamatory statements.

54. The May 19th communication constituted defamation *per se* in that such statements concerned project44's reputation in its trade and business by lowering such reputation in the eyes the community and, upon information and belief, deterred the community from associating with project44. Therefore, damages are presumed.

55. The May 19th communication imputed a lack of integrity of project44's business conduct, imputed the commission of one or more crimes, conveyed a lack of ability by project44 in its business, and prejudiced project44 in its business.

56. Defendants knew that the May 19th communication was false, or at the very least, Defendants acted in a reckless disregard of whether the May 19th communication was false or not.

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

57. Accordingly, Defendants acted with malice and made the May 19th communication for the purpose of harming project44's reputation.

58. The May 19th communication contained factual statements, in that: (a) the specific language at issue (*i.e.* statements that project44 was affiliated with the Chicago Mafia and used that affiliation to intimidate persons such as ex-employees; that project44 had engaged in accounting improprieties, that its contracts reflected these improprieties, and that project44's former CFO left because of these improprieties; that a customer had cancelled their contract due to project44's lack of ability and/or accounting improprieties; and that project44 had committed fraud in the same manner as Theranos) have precise meanings which are readily understood; (b) the defamatory statements are capable of being proven true or false; and (c) the full context of the defamatory statements in which they appear in the above-referenced media and in the broader social context and surrounding circumstances are such as to communicate to the readers of these statements that what was read is not opinion, but a statement of fact.

59. As a direct and proximate result of Defendants' defamatory statements, project44 has suffered presumed damages in the form of, *inter alia*, impairment of its business reputation and standing in the community.

60. Additionally, due to the malicious nature of the May 19th communication and the highly egregious conduct of Defendants detailed above, project44 also demands punitive damages.

COUNT II
DEFAMATION *PER SE* – THE MAY 27TH COMMUNICATION

61. project44 hereby reincorporates and restates the above paragraphs as if specifically set forth and re-alleged herein.

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

62. Defendants conspired with and aided and abetted each other in making the defamatory May 27th communication, which greatly harmed project44's reputation in their trade and business.

63. Defendants each knowingly and voluntarily participated in this common scheme to harm project44's reputation.

64. Defendants did so for the purpose of accomplishing, by concerted action and common design, a harm to the business reputation of project44, to which Defendants agreed.

65. Each Defendant committed overt tortious acts in concert with each other and in furtherance of this conspiracy by making the May 27th communication, and each substantially participated and assisted in such a scheme to defame project44.

66. Each Defendant also accepted and ratified each other's defamatory statements.

67. The May 27th communication constituted defamation *per se* in that such statements concerned project44's reputation in its trade and business by lowering such reputation in the eyes the community and, upon information and belief, deterred the community from associating with project44. Therefore, damages are presumed.

68. The May 27th communication imputed the commission of one or more crimes, and thus prejudiced project44 in its business.

69. Defendants knew that the May 27th communication was false, or at the very least, Defendants acted in a reckless disregard of whether the May27th communication was false or not.

70. Accordingly, Defendants acted with malice and made the May 27th communication for the purpose of harming project44's reputation.

71. The May 27th communication contained factual statements, in that (a) the specific language at issue (*i.e.* statements that project44 was a Ponzi scheme and had committed fraud in

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the same manner as Theranos) have precise meanings which are readily understood; (b) the defamatory statements are capable of being proven true or false; and (c) the full context of the defamatory statements in which they appear in the above-referenced media and in the broader social context and surrounding circumstances are such as to communicate to the readers of these statements that what was read is not opinion, but a statement of fact.

72. As a direct and proximate result of Defendants' defamatory statements, project44 has suffered presumed damages in the form of, *inter alia*, impairment of its business reputation and standing in the community.

73. Additionally, due to the malicious nature of the May 27th communication and the highly egregious conduct of Defendants detailed above, project44 also demands punitive damages.

COUNT III
CIVIL CONSPIRACY

74. project44 hereby reincorporates and restates the above paragraphs as if specifically set forth and re-alleged here in.

75. Defendants knowingly and voluntarily entered into an agreement (the "Conspiracy") to, as described above, unlawfully defame project44 via the May 19th communication and the May 27th communication.

76. Defendant FourKites entered into the Conspiracy directly through either Jane Doe, John Doe #1, John Doe #2, or John Does #3-25.

77. In the alternative, Defendant FourKites is liable for Jane Doe's, John Doe #1's, John Doe #2's, and/or John Does #3-25's participation in the Conspiracy under the doctrine of *respondeat superior*. Upon information and belief, one or more of Jane Doe, John Doe #1, John Doe #2, and John Does #3-25 are employees of FourKites, and said Defendants made the

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

defamatory statements to both damage the reputation of project44 and to provide Defendant FourKites with a competitive advantage.

78. project44 has been injured by the Conspiracy and the tortious acts undertaken pursuant to the Conspiracy as described above.

WHEREFORE, Plaintiff project44, Inc. respectfully requests that the Court grant it the following relief:

1. Judgment in project44, Inc.'s favor against Defendants FourKites, Inc., Jane Doe, John Doe #1, John Doe #2, and John Does #3-25, for presumed and actual damages in an amount to be determined at trial;

2. An award of all costs of this suit;

3. An award of punitive damages; and

4. Such other relief this Court deems just.

JURY DEMAND

project44, Inc. requests a trial by jury on all issues permitted to be tried to a jury.

Dated: April 13, 2020 Respectfully submitted,

PROJECT44, INC.

By: /s/ Douglas A. Albritton
One of Its Attorneys
Douglas A. Albritton
Peter G. Hawkins
Actuate Law LLC
FIRM ID No. 62266
641 West Lake, 5th Floor
Chicago, IL 60661
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Counsel for project44, Inc.

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EXHIBIT A

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

From: Ken Adams <kenadams8558@gmail.com>
Sent: Sunday, May 19, 2019 9:03 AM
To: jim@ov.vc; Kevin Diestel <kevin@sapphireventures.com>
Subject: Accounting improprieties at P44

Board members,
I recently left P44 and wanted to bring to your attention certain things.

1. Ex employees are silenced with legal threats and defamation suits. Redacted used to be the book keeper for a Chicago Mafia and they are using that to silence folks.

2. There is rampant accounting improprieties. I encourage you to take a look at the contracts (pilots , out clauses, rev rec etc). Recent CFO departure must tell you everything.

3. Estes cancelled the contract. It was only $5K a month and they are not even willing to pay this.

There is a widespread discontent brewing and it's just a matter of time before people go public and another Theranos happen in Chicago.

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EXHIBIT D

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Attorneys for Plaintiff
SECURITIES AND EXCHANGE COMMISSION
44 Montgomery Street, Suite 2800
San Francisco, CA 94104
(415) 705-2500

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. ELIZABETH HOLMES and THERANOS, INC. Defendants.	Case No. **COMPLAINT**

Plaintiff Securities and Exchange Commission (the "Commission") alleges:

SUMMARY OF THE ACTION

1. This case involves the fraudulent offer and sale of securities by Theranos, Inc. ("Theranos"), a California company that aimed to revolutionize the diagnostics industry, its Chairman and Chief Executive Officer Elizabeth Holmes, and its former President and Chief Operating Officer, Ramesh "Sunny" Balwani. The Commission has filed a separate action against Balwani.

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1 2. Holmes, Balwani, and Theranos raised more than $700 million from late 2013 to
2 2015 while deceiving investors by making it appear as if Theranos had successfully developed a
3 commercially-ready portable blood analyzer that could perform a full range of laboratory tests
4 from a small sample of blood. They deceived investors by, among other things, making false
5 and misleading statements to the media, hosting misleading technology demonstrations, and
6 overstating the extent of Theranos' relationships with commercial partners and government
7 entities, to whom they had also made misrepresentations.
8 3. Holmes, Balwani, and Theranos also made false or misleading statements to
9 investors about many aspects of Theranos' business, including the capabilities of its proprietary
10 analyzers, its commercial relationships, its relationship with the Department of Defense
11 ("DOD"), its regulatory status with the U.S. Food and Drug Administration ("FDA"), and its
12 financial condition. These statements were made with the intent to deceive or with reckless
13 disregard for the truth.
14 4. Investors believed, based on these representations, that Theranos had successfully
15 developed a proprietary analyzer that was capable of conducting a comprehensive set of blood
16 tests from a few drops of blood from a finger. From Holmes' and Balwani's representations,
17 investors understood Theranos offered a suite of technologies to (1) collect and transport a
18 fingerstick sample of blood, (2) place the sample on a special cartridge which could be inserted
19 into (3) Theranos' proprietary analyzer, which would generate the results that Theranos could
20 transmit to the patient or care provider. According to Holmes and Balwani, Theranos'
21 technology could provide blood testing that was faster, cheaper, and more accurate than existing
22 blood testing laboratories, all in one analyzer that could be used outside traditional laboratory
23 settings.
24 5. At all times, however, Holmes, Balwani, and Theranos were aware that, in its
25 clinical laboratory, Theranos' proprietary analyzer performed only approximately 12 tests of the
26 over 200 tests on Theranos' published patient testing menu, and Theranos used third-party
27
28

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

commercially available analyzers, some of which Theranos had modified to analyze fingerstick samples, to process the remainder of its patient tests.

6. In this action, the Commission seeks an order enjoining Holmes and Theranos from future violations of the securities laws, requiring Holmes to pay a civil monetary penalty, prohibiting Holmes from acting as an officer or director of any publicly-listed company, requiring Holmes to return all of the shares she obtained during this period, requiring Holmes to relinquish super-majority voting shares she obtained during this period, and providing other appropriate relief.

JURISDICTION AND VENUE

7. The Commission brings this action pursuant to Sections 20(b), 20(d), and 22(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77t(b), 77t(d), and 77v(a)] and Sections 21(d), 21(e), and 27 of the Securities Exchange Act of 1934 ("Exchange Act") [15 U.S.C. §§ 78u(d), 78u(e), and 78aa].

8. This Court has jurisdiction over this action pursuant to Sections 20(b), 20(d)(1) and 22(a) of the Securities Act [15 U.S.C. §§ 77t(b), 77t(d)(1), and 77v(a)] and Sections 21(d), 21(e) and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e) and 78aa].

9. Defendants, directly or indirectly, made use of the means and instrumentalities of interstate commerce or of the mails in connection with the acts, transactions, practices, and courses of business alleged in this complaint.

10. Venue is proper in this District pursuant to Section 22(a) of the Securities Act [15 U.S.C. § 77v(a)] and Section 27(a) of the Exchange Act [15 U.S.C. § 78aa(a)]. Theranos is headquartered in Newark, California, and Holmes resides in the District. In addition, acts, transactions, practices, and courses of business that form the basis for the violations alleged in this complaint occurred in this District. Defendants met with and solicited prospective Theranos investors in this District, and the relevant offers or sales of securities took place in this District.

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United States Department of Justice

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THE UNITED STATES ATTORNEY'S OFFICE
NORTHERN DISTRICT of CALIFORNIA

Department of Justice

U.S. Attorney's Office

Northern District of California

FOR IMMEDIATE RELEASE Friday, June 15, 2018

Theranos Founder and Former Chief Operating Officer Charged In Alleged Wire Fraud Schemes

Elizabeth Holmes and Ramesh "Sunny" Balwani Are Alleged To Have Perpetrated Multi-million Dollar Schemes To Defraud Investors, Doctors, and Patients.

SAN JOSE - A federal grand jury has indicted Elizabeth A. Holmes and Ramesh "Sunny" Balwani, announced Acting United States Attorney Alex G. Tse, Federal Bureau of Investigation (FBI) Special Agent in Charge John F. Bennett; Food and Drug Administration (FDA) Commissioner Scott Gottlieb; and U.S. Postal Inspection Service (USPIS) Inspector in Charge Rafael Nuñez. The defendants are charged with two counts of conspiracy to commit wire fraud and nine counts of wire fraud. According to the indictment returned yesterday and unsealed today, the charges stem from allegations Holmes and Balwani engaged in a multi-million dollar scheme to defraud investors, and a separate scheme to defraud doctors and patients. Both schemes involved efforts to promote Palo Alto, Calif.-based Theranos.

Holmes, 34, of Los Altos Hills, Calif., founded Theranos in 2003. Theranos is a private health care and life sciences company with the stated mission to revolutionize medical laboratory testing through allegedly innovative methods for drawing blood, testing blood, and interpreting the resulting patient data. Balwani, 53, of Atherton, Calif., was employed at Theranos from September of 2009 through 2016. At times during that period, Balwani worked in several capacities including as a member of the company's board of directors, as its president, and as its chief operating officer.

According to the indictment, Holmes and Balwani used advertisements and solicitations to encourage and induce doctors and patients to use Theranos's blood testing laboratory services, even though the defendants knew Theranos was not capable of consistently producing accurate and reliable results for certain blood tests. The tests performed on Theranos technology, in addition, were likely to contain inaccurate and unreliable results.

The indictment alleges that the defendants used a combination of direct communications, marketing materials, statements to the media, financial statements, models, and other information to defraud potential investors. Specifically, the defendants claimed that Theranos developed a revolutionary and proprietary analyzer that the defendants referred to by various names, including as the TSPU, Edison, or minilab. The defendants claimed the analyzer was able to perform a full range of clinical tests using small blood samples drawn from a finger stick. The defendants also represented that the analyzer could produce results that

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were more accurate and reliable than those yielded by conventional methods—all at a faster speed than previously possible.

The indictment further alleges that Holmes and Balwani knew that many of their representations about the analyzer were false. For example, allegedly, Holmes and Balwani knew that the analyzer, in truth, had accuracy and reliability problems, performed a limited number of tests, was slower than some competing devices, and, in some respects, could not compete with existing, more conventional machines.

FILED DATE: 4/13/2020 10:19 PM 2020L004183

"This district, led by Silicon Valley, is at the center of modern technological innovation and entrepreneurial spirit; capital investment makes that possible. Investors large and small from around the world are attracted to Silicon Valley by its track record, its talent, and its promise. They are also attracted by the fact that behind the innovation and entrepreneurship are rules of law that require honesty, fair play, and transparency. This office, along with our other law enforcement partners in the Bay Area, will vigorously investigate and prosecute those who do not play by the rules that make Silicon Valley work. Today's indictment alleges that through their company, Theranos, CEO Elizabeth Holmes and COO Sunny Balwani not only defrauded investors, but also consumers who trusted and relied upon their allegedly-revolutionary blood-testing technology."

"This indictment alleges a corporate conspiracy to defraud financial investors," said Special Agent in Charge Bennett. "This conspiracy misled doctors and patients about the reliability of medical tests that endangered health and lives."

"The conduct alleged in these charges erodes public trust in the safety and effectiveness of medical products, including diagnostics. The FDA would like to extend our thanks to our federal law enforcement partners for sending a strong message to Theranos executives and others that these types of actions will not be tolerated," said Catherine A. Hermsen, Acting Director, FDA Office of Criminal Investigations.

"The United States Postal Inspection Service has a long history of successfully investigating complex fraud cases," said Inspector in Charge Rafael E. Nuñez. "Anyone who engages in deceptive practices should know they will not go undetected and will be held accountable. The collaborative investigative work on this case conducted by Postal Inspectors, our law enforcement partners, and the United States Attorney's Office illustrates our efforts to protect both consumers and investors."

The Indictment Alleges That Doctors And Patients Were Defrauded

The indictment alleges Holmes and Balwani defrauded doctors and patients by making false claims concerning Theranos's ability to provide accurate, fast, reliable, and cheap blood tests and test results, and through omissions concerning the limits of and problems with Theranos's technologies. The defendants knew Theranos was not capable of consistently producing accurate and reliable results for certain blood tests, including the tests for calcium, chloride, potassium, bicarbonate, HIV, Hba1C, hCG, and sodium. The defendants nevertheless used interstate electronic wires to purchase advertisements intended to induce individuals to purchase Theranos blood tests at Walgreens stores in California and Arizona. Through these advertisements, the defendants explicitly represented to individuals that Theranos's blood tests were cheaper than blood tests from conventional laboratories to induce individuals to purchase Theranos's blood tests.

Further, the indictment alleges that based on the defendants' misrepresentations and omissions, many hundreds of patients paid, or caused their medical insurance companies to pay, Theranos, or Walgreens acting on behalf of Theranos, for blood tests and test results, sometimes following referrals from their defrauded doctors. In addition, the defendants delivered to doctors and patients blood results that were inaccurate, unreliable, and improperly validated. The defendants also delivered to doctors and patients blood test results from which critical results were improperly removed.

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The indictment describes a number of schemes that defendants allegedly employed to mislead investors, doctors, and patients. For example, with respect to investors, defendants performed technology demonstrations during which defendants intended to cause potential investors to believe blood tests were being conducted on Theranos's proprietary analyzer when, in fact, the analyzer really was running a "null protocol" and was not testing the potential investor's blood. Similarly, defendants purchased and used commercially-available analyzers to test patient blood, while representing to investors that Theranos conducted its patients' tests using Theranos-manufactured analyzers.

FILED DATE: 4/13/2020 10:19 PM 2020L004183

The Indictment Alleges That Investors Were Defrauded

According to the indictment, the defendants also allegedly made numerous misrepresentations to potential investors about Theranos's financial condition and its future prospects. For example, the defendants represented to investors that Theranos conducted its patients' tests using Theranos-manufactured analyzers; when, in truth, Holmes and Balwani knew that Theranos purchased and used for patient testing third party, commercially-available analyzers. The defendants also represented to investors that Theranos would generate over $100 million in revenues and break even in 2014 and that Theranos expected to generate approximately $1 billion in revenues in 2015 when, in truth, the defendants knew Theranos would generate only negligible or modest revenues in 2014 and 2015.

Further, defendants allegedly represented to investors that Theranos had a profitable and revenue-generating business relationship with the United States Department of Defense and that Theranos's technology had deployed to the battlefield when, in truth, Theranos had limited revenue from military contracts and its technology was not deployed in the battlefield. In addition, the defendants represented to investors that Theranos would soon dramatically increase the number of Wellness Centers within Walgreens stores when, in truth, Holmes and Balwani knew by late 2014 that Theranos's retail Walgreens rollout had stalled because of several issues, including that Walgreens's executives had concerns with Theranos's performance.

An indictment merely alleges that crimes have been committed, and the defendants are presumed innocent until proven guilty beyond a reasonable doubt.

The indictment charges each defendant with two counts of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, and nine counts of wire fraud, in violation of 18 U.S.C. § 1343. If convicted, the defendants face a maximum sentence of twenty (20) years in prison, and a fine of $250,000, plus restitution, for each count of wire fraud and for each conspiracy count. However, any sentence following conviction would be imposed by the court after consideration of the U.S. Sentencing Guidelines and the federal statute governing the imposition of a sentence, 18 U.S.C. § 3553.

Both defendants appeared today before U.S. Magistrate Judge Susan van Keulen for their initial appearances. The matter was assigned to the Honorable Lucy H. Koh, U.S. District Judge, for further proceedings.

Assistant U.S. Attorneys Jeff Schenk, Robert S. Leach, and John C. Bostic are prosecuting the case with the assistance of Laurie Worthen and Bridget Kilkenny. The prosecution is the result of an investigation by the FDA Office of Criminal Investigations, the FBI, and the US Postal Inspection Service.

Attachment(s):
Download balwani_holmes_indictment.pdf

Topic(s):
Financial Fraud

Component(s):

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EXHIBIT F

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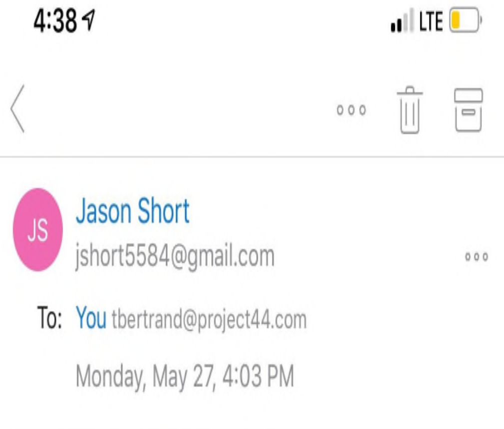

Tim,

I happened to read your post about joining project44.

Congrats!

I wanted to shed some light so you can fled ASAP and go find another job. You mention about people, investors etc in your email. There is one ingredient you missed- a great product. At some point you have to stop selling shit and start delivering.

You don't want to be part of the next Ponzi scheme or next theranos. Talk to ex CFO Bruns. Talk to ex Sales people, talk to customers.. talk to prospects, talk to investors outside p44. They will tell you the truth. If you decide to forward this to broker Jett and move on, you are making a mistake.

I sincerely wish you the best. You seem like a nice guy, you deserve better..

Friend

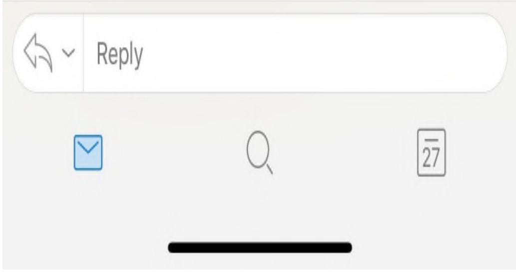

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EXHIBIT G

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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC., a Delaware corporation,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 2019 L - 2019L005907
	)	
GOOGLE, LLC, a Delaware corporation,	)	
	)	
	)	
Respondent.	)	
	)	

VERIFIED PETITION FOR DISCOVERY

project44, Inc. ("project44"), by its undersigned counsel, alleges upon verification as follows for its petition for discovery.

NATURE OF PETITION

1. project44 is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois. It is in the highly competitive shipping logistics industry, and there it provides goods and services which permit its customers to connect with, automate, and provide visibility into key transportation processes which, in turn, permits its customers to increase operational efficiencies, reduce costs, improve shipping performance, and deliver an exceptional experience to their own customers. Over 25,000 different carriers have tracked shipments in project44's system, and it supports all transportation modes and shipping types including "parcel," "final-mile," "less-than-truckload," "volume less-than-truckload," "truckload," rail, intermodal, and ocean. project44 has more than 200 employees.

2. Starting on May 19, 2019, and then again on May 27, 2019, (collectively "the Defamatory Communications"), one or more individuals sent defamatory communications regarding project44 to its Board of Directors (the May 19th communication) and a new employee

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FILED DATE: 5/30/2019 10:40 PM 2019L005963

(the May 27th communication) using the fake names "Ken Adams" and "Jason Short" from the email addresses kenadams8558@gmail.com and jshort5584@gmail.com, respectively. project44 has not previously employed anyone named Ken Adams or Jason Short, nor has it ever worked with any persons having these names. As such the names appear to be made up.

3. The "@gmail" domain name in the kenadams8558 and jshort5584 e-mail addresses signifies that the emails are set up with Respondent Google, LLC ("Google").

4. The Defamatory Communications are defamatory because, among other reasons, they falsely state (a) that one of project44's executives' family is affiliated with the Chicago mafia and "they are using that to silence folks," (b) project44 engages in accounting "improprieties," (c) project44 is akin to "Theranos," the blood-test company that collapsed as a result of the highly publicized securities fraud allegations made against it, (d) project44's goods and services do not perform as stated, and (e) project44 is a "Ponzi scheme."

5. Accordingly, project44 is pursuing this petition for discovery in order to identify the individual(s) responsible for these defamatory postings so that it may seek relief against them. As set forth below, project44 has valid claims for defamation *per se* against these unknown persons which warrant the granting of this petition.

THE PETITION PARTIES AND RESPONDENTS

6. project44 is a Delaware corporation with its principal place of business in Chicago, Illinois.

7. Google, LLC is a Delaware corporation with an office in Chicago located at 320 North Morgan Street, #600, and a registered agent located at Corporation Service Company, 2710 Gateway Oaks Drive, Suite 150N, Sacramento, CA 95833.

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JURISDICTION AND VENUE

8. Illinois is a proper forum for project44 to litigate its defamation claims against the unknown individual(s) described below because the defamatory material they published was sent to project44 in Illinois and, thus, has caused project44 to suffer injury in Illinois.

9. The Respondent Google is a non-party third party that is subject to summons and subpoena process to respond to discovery concerns in Illinois cases, just like any third party, including because of Supreme Court Rule 224.

FACTUAL BACKGROUND

Google

10. Google hosts the world's most used internet search engine, and similarly hosts and runs one of the world's largest free e-mail systems. Anyone can log in to the Google website (www.google.com), click on the link to "Gmail" on the top right corner of the webpage, and proceed from there to create a free e-mail account that will permit the user to send and receive e-mail for free.

11. In the process of creating a free Gmail e-mail account, the creator may leave behind actual contact information (another e-mail address, a real name, a real phone number) in order to be assured of continued access to the account. Similarly, when the creator logs in to create the account, and thereafter logs in to send and receive e-mail, the internet protocol address (or "IP Address") of the device the user utilizes to connect will be recorded. The IP Address permits insight into the location where the user is located because it identifies the specific network the user was on when he or she logged into the Gmail account, including what Internet Service Provider (or "ISP") provided the internet connection to the user. Once the ISP is known, a subpoena can also be sent to it to obtain identifying information. The IP address also offers insight into what

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FILED DATE: 5/30/2019 10:49 PM 2019L005903

device was used to log into the account and, thus, can also aid in identifying the person who sent the communication.

The Defamatory Statements

12. For purposes of this Verified Petition, and pursuant to Ill. S. Ct. R. 224, project44 need only provide allegations about its underlying claims which suffice to demonstrate that it has one or more claims that pass muster pursuant to 735 ILCS 5/2-615. *See, e.g., Maxon v. Ottawa Pub. Co*., 402 Ill. App. 3d 704, 712 (3d Dist. 2010).

13. project44 has valid claims for defamation *per se* against the sender(s) of the Defamatory Statements.

14. First, each of the Defamatory Statements is false.

15. Second, each of the Defamatory Statements were published to one or more third parties, without privilege.

16. Third, each of the Defamatory Statements constitute defamation *per se* because each affirmatively states that project44 and/or individuals in its management have (a) engaged in malfeasance or misfeasance in the discharge of employment duties, (b) unfitness or a lack of ability in their trade, profession or business, and (c) been involved in or affiliated with criminal activity. The Defamatory Statements attack the integrity of project44's conduct, goods and services in the marketplace. Accordingly, project44 has been damaged.

THE DEFAMATORY STATEMENTS WARRANT THE GRANTING OF THIS PETITION

17. Based upon the foregoing, project44 has sufficiently alleged a basis pursuant to Ill. S. Ct. R. 224 for the Court to have a hearing and grant the following discovery:

a. Permitting project44 to issue a subpoena to Google requiring it to provide all information known about the user(s) behind the e-mail addresses kenadams8558@gmail.com and

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jshort5584@gmail.com including, but not limited to, their actual names and other information shared with Google when the e-mail accounts were created, dates and times of e-mail activity, and the internet protocol ("IP") addresses that were used to log in and send the e-mail communications, as set forth in Exhibit A.

WHEREFORE, project44 respectfully requests that, after service of this Verified Petition on Google, that the Court schedule a hearing to consider the relief requested herein.

Dated: May 29, 2019

PROJECT44, Inc.

By: /s/ Douglas A. Albritton
One of Its Attorneys

Douglas A. Albritton
Peter G. Hawkins
Actuate Law LLC
FIRM ID No. 62266
641 West Lake, 5th Floor
Chicago, IL 60661
312-579-3108
doug.albritton@actuatelaw.com
peter.hawkins@actuatelaw.com

Counsel for project44, Inc.

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VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that statements of fact set forth in the foregoing Verified Petition are true and correct, except as to matter therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Cherie Camp

Director, Executive Operations

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EXHIBIT A

Document Requests to Google, LLC

Please produce the records requested below regarding the following email addresses:

(1) kenadams8558@gmail.com

(2) jshort5584@gmail.com

(a) Sign in and log in records for the accounts;

(b) Account creation records, including any other information shared in connection with the account creation including secondary email addresses, phone numbers, and individual or emergency contact information; and

(c) Any and all internet protocol ("IP") addresses and/or ISP records that are connected to or are otherwise affiliated with the above email addresses from any account activity.

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Location: No hearing scheduled

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EXHIBIT H

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC., a Delaware corporation,	)	
	)	
Petitioner,	)	
	)	Case No. 2019-L-005907
v.	)	
	)	Judge John H. Ehrlich
GOOGLE, LLC, a Delaware corporation,	)	
	)	
Respondents.	)	

AGREED ORDER REGARDING
PRODUCTION OF GOOGLE ACCOUNT INFORMATION

This cause coming to be heard on the above-captioned Petition for Pre-Suit Discovery ("Petition") filed pursuant to Illinois Supreme Court Rule 224, counsel for Petitioner and Respondent Google LLC ("Google") agreeing to the below and the Court being fully advised in the premises,

WHEREAS, Petitioner project44, Inc. ("Petitioner") seeks pre-action discovery under Illinois Supreme Court Rule 224 regarding the identity of the owner of the Google Accounts associated with the Gmail addresses kenadams8558@gmail.com and jshort5584@gmail.com (the "Accounts") described in the Petition filed in this matter on May 30, 2019;

WHEREAS, Petitioner agrees to serve upon Google a subpoena properly domesticated in in the Superior Court of Santa Clara County, California (the "Subpoena");

WHEREAS, Google asserts that pre-action disclosure is inappropriate in the absence of a determination by the Court that Petitioner has made the requisite showing pursuant to Rule 224 of the existence of a meritorious cause of action and the necessity of the information sought;

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AND WHEREAS, subject to consideration of any objections raised by the owner(s) of the Accounts as further described in paragraphs 2 and 5 below, the Court HEREBY FINDS that Petitioner has made the requisite showing pursuant to Rule 224 concerning the existence of a meritorious cause of action and the necessity of the pre-action disclosure, issues upon which Google takes no position;

IT IS HEREBY ORDERED:

1. Petitioner's Rule 224 Verified Petition for pre-suit discovery is granted;

2. Absent an objection or motion for protective order filed prior to the expiration of Google's 21-day notice period regarding the Petition and/or Subpoena served on Google, in response to the Subpoena, Google shall produce to Petitioner's counsel reasonably available non-content basic subscriber information ("BSI") that it may have, if any, for the Accounts.

3. For purposes of clarity, BSI shall be limited to the name, phone number, alternative email addresses, internet protocol (IP) address(es) assigned to the computer or network connection used by the person or persons who established the above user account at the time the account was established, and reasonably available login IP addresses (with dates and times) assigned to the computer or network connection used by the person or persons who have accessed such user account from the date of the account's establishment to the date of the Subpoena.

4. Upon Google's production of BSI or certification that no responsive information exists, Petitioner shall dismiss the Petition as to Google with prejudice within 14 days.

5. If any objections or motions to quash are filed within the 21-day period subsequent to issuing notice, Google shall not be obligated to produce BSI pending resolution of the motions or objections, and then only to the extent ordered by the Court.

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6. Google's production of BSI shall satisfy and fully discharge any and all of its obligations in connection with this Petition, absent agreement of the parties or a further court order to the contrary.

7. This Matter is continued for subsequent case management conference on September 26, 2019, at 9:30 (a.m.)/p.m., in Room 2209. re status of discovery.

ENTER:

Judge John H. Ehrlich

JUL 25 2019

JUDGE Circuit Court 2075

AGREED AS TO FORM AND CONTENTS:

Google LLC

By:/s/ Jeremy L. Buxbaum
One of Its Attorneys
Jeremy L. Buxbaum
Perkins Coie LLP
131 South Dearborn Street
Suite No. 1700
Chicago, Illinois 60603-5559
Tel: (312) 324-8400

project44, Inc.

By:/s/ Douglas A. Albritton
One of Its Attorneys
Douglas A. Albritton
Peter G. Hawkins
Actuate Law LLC
641 West Lake, 5th Floor
Chicago, Illinois 60661
Tel: (312) 579-3108

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EXHIBIT I

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Google LLC
1600 Amphitheatre Parkway
Mountain View, California 94043

google-legal-support@google.com
www.google.com

FILED DATE: 4/13/2020 10:09 PM 2019L004580

September 18, 2019

Via Email Only
doug.albritton@actuatelaw.com

Douglas A. Albritton
Actuate Law LLC
641 West Lake, 5th Floor
Chicago, Illinois 60661
312-579-3108

Re: *Project44, Inc. v. Google LLC*, Superior Court of California, County of Santa Clara, 19CV352463 (Internal Ref. No. 2716278)

Dear Douglas A. Albritton:

Pursuant to the subpoena issued in the above-referenced matter, we have conducted a diligent search for documents and information accessible on Google's systems that are responsive to your request. Without waiving, and subject to its objections, Google hereby produces the attached documents. Our response is made in accordance with state and federal law, including the Electronic Communications Privacy Act. See 18 U.S.C. § 2701 et seq. By this response, Google does not waive any objection to further proceedings in this matter.

We understand that you have requested customer information regarding the user account(s) specified in the subpoena, which includes the following information: (1) subscriber and recent login information for the Google Accounts JSHORT5584@GMAIL.COM and KENADAMS8558@GMAIL.COM.

Accompanying this letter is responsive information to the extent reasonably accessible from our system, a list of hash values corresponding to each file, and a signed Certificate of Authenticity. Google may not retain a copy of this production but does endeavor to keep a list of the files and their respective hash values.

Finally, Google requests reimbursement in the amount of $125 for reasonable costs incurred in processing your request. Please forward your payment to Google Custodian of Records, at the address above and please write the Internal Reference Number (2716278) on your check. The federal tax ID number for Google is 77-0493581.

Very truly yours,

Mattingly Messina
Legal Investigations Support

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Google LLC
1600 Amphitheatre Parkway
Mountain View, California 94043

google-legal-support@google.com
www.google.com

Hash Values for Production Files (Internal Ref. No. 2716278)

jshort5584.AccountInfo.txt:

MD5- d18c4b3b56e5f4377fe48c0fc3511b94
SHA512-
c6d03c9f7142b07d86e67626db8feb09e61d6c1bd2201da246eeb6557ae402b740f38acc5499adc360b4e25
75bad7ea1dbf5498e787a3416fd0edf89b29897bd

kenadams8558.AccountInfo.txt:

MD5- b1c3f4bb04def35492f7ed2248b64eda
SHA512-
8d6fa8e37de268c9b0ad853e32c71a6e337256246e088fffcfc0da25f8d2c29fdf4c4c7f89d756ab7a8ee000d1
c92ad20a897910c11128e149d4f8a221c945e8

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Google LLC
1600 Amphitheatre Parkway
Mountain View, California 94043

google-legal-support@google.com
www.google.com

FILED DATE: 4/13/2020 10:09 PM 2019L004580

CERTIFICATE OF AUTHENTICITY

I, Mattingly Messina, certify:

1. I am a Custodian of Records for Google LLC ("Google"), located in Mountain View, California. I am authorized to submit this Certificate of Authenticity on behalf of Google in response to a subpoena dated August 05, 2019 (Google LLC Internal Reference No. 2716278) in the matter of *Project44, Inc. v. Google LLC*. I have personal knowledge of the following facts and could testify competently thereto if called as a witness.

2. The accompanying 2 files contain true and correct copies of records pertaining to the email address JSHORT5584@GMAIL.COM and KENADAMS8558@GMAIL.COM ("Document").

3. The documents attached hereto reflect records made and retained by Google. The records were made at or near the time the data was acquired, entered, or transmitted to or from Google; the records were kept in the course of a regularly conducted activity of Google; and the making of the records were a regular practice of that activity.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: September 18, 2019

Mattingly Messina, Custodian of Records for Google LLC

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EXHIBIT J

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GOOGLE SUBSCRIBER INFORMATION

Name: Ken Adams

e-Mail: kenadams8558@gmail.com

Created on: 2019/05/19-13:54:06-UTC

Terms of Service IP: http://162.234.8.247, on 2019/05/19-13:54:06-UTC

SMS: +18476443564 [US]

Google Account ID: 1084341775642

Last Logins: 2019/05/30-12:39:14-UTC, 2019/05/26-07:34:30-UTC, 2019/05/20-23:48:00-UTC

Time	IP Address	Type
2019/05/30-12:40:08-UTC	http://78.133.216.228	Logout
2019/05/30-12:39:14-UTC	http://78.133.216.228	Login
2019/05/26-07:34:30-UTC	http://107.77.221.123	Login
2019/05/20-23:48:00-UTC	2600:387:b:9::5c	Login
2019/05/19-18:27:33-UTC	http://162.234.8.247	Login
2019/05/19-13:54:07-UTC	http://162.234.8.247	Login
2019/05/19-13:54:07-UTC	http://162.234.8.247	Login

############## * Google Confidential and Proprietary * ###############

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GOOGLE SUBSCRIBER INFORMATION

Name: Jason Short

e-Mail: jshort5584@gmail.com

Created on: 2018/10/05-17:52:43-UTC

Terms of Service IP: http://38.140.193.202, on 2018/10/05-17:52:43-UTC

Google Account ID: 1045318078530

Last Logins: 2019/05/30-12:40:36-UTC, 2019/05/28-02:26:18-UTC, 2019/05/27-19:56:03-UTC

Time	IP Address	Type
2019/05/30-12:40:36-UTC	http://78.133.216.228	Login
2019/05/28-02:26:18-UTC	http://46.83.196.113	Login
2019/05/27-19:56:03-UTC	http://46.83.196.113	Login
2019/05/19-13:48:37-UTC	http://162.234.8.247	Login
2019/05/03-02:47:01-UTC	http://162.234.8.247	Login
2019/04/20-12:44:26-UTC	http://75.104.88.198	Login
2019/04/20-03:39:10-UTC	http://162.234.8.247	Login
2019/04/12-19:34:37-UTC	2600:387:1:809::36	Login

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2019/04/09-23:56:52-UTC	http://75.104.82.7	Login
2019/04/09-03:31:33-UTC	http://162.234.8.247	Login
2019/04/07-18:39:17-UTC	http://162.234.8.247	Login
2019/04/02-03:26:57-UTC	http://162.234.8.247	Login
2019/03/02-21:56:48-UTC	2600:387:b:3::4b	Login
2019/02/28-00:26:27-UTC	2600:387:b:5::25	Login
2019/02/13-08:22:37-UTC	2600:387:8:11::96	Login
2019/02/11-03:44:19-UTC	http://162.234.8.247	Logout
2019/02/11-03:42:55-UTC	http://162.234.8.247	Login
2019/02/07-04:33:21-UTC	http://162.234.8.247	Login
2019/01/31-22:07:04-UTC	http://38.142.190.154	Login
2019/01/31-03:02:22-UTC	http://162.234.8.247	Login
2019/01/28-21:46:20-UTC	http://38.142.190.154	Login
2019/01/24-19:48:22-UTC	http://78.133.216.232	Login
2019/01/19-20:06:35-UTC	http://162.234.8.247	Login
2019/01/15-02:46:04-UTC	http://162.234.8.247	Login
2019/01/13-17:00:52-UTC	http://162.234.8.247	Login
2019/01/08-10:41:08-UTC	http://162.234.8.247	Login

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FILED DATE: 11/13/2020 10:09 PM 2020L000580

```
| 2019/01/01-12:15:11-UTC | http://103.240.101.5                          | Login
|

| 2018/12/21-06:52:53-UTC | http://182.74.119.134                         | Login
|

| 2018/12/20-04:42:28-UTC | 2600:387:6:803::96                      | Login  |

| 2018/12/19-07:08:45-UTC | http://182.74.119.134                         | Login
|

| 2018/12/01-11:26:09-UTC | 2600:1700:7c50:6d80:e4e8:f4b6:e714:753b | Login  |

+-------------------------+-----------------------------------------+--------+
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EXHIBIT K

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The Securities and Exchange Commission has not necessarily reviewed the information in this filing and has not determined if it is accurate and complete.
The reader should not assume that the information is accurate and complete.

FILED DATE: 4/13/2020 10:19 PM 2020L004183

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM D

Notice of Exempt Offering of Securities

OMB APPROVAL	
OMB Number:	3235-0076
Estimated average burden	
hours per response:	4 00

1. Issuer's Identity

CIK (Filer ID Number)

0001625230

Previous Names ☐ None

CloudQwest, Inc.

Entity Type

☒ Corporation
☐ Limited Partnership
☐ Limited Liability Company
☐ General Partnership
☐ Business Trust
☐ Other (Specify)

Name of Issuer

FourKites, Inc.

Jurisdiction of Incorporation/Organization

DELAWARE

Year of Incorporation/Organization

☐ Over Five Years Ago
☒ Within Last Five Years (Specify Year) 2013
☐ Yet to Be Formed

2. Principal Place of Business and Contact Information

Name of Issuer

FourKites, Inc.

Street Address 1: 1165 N Clark St, Ste 700

Street Address 2:

City	State/Province/Country	ZIP/PostalCode	Phone Number of Issuer
CHICAGO	ILLINOIS	60610	847-644-3564

3. Related Persons

Last Name	First Name	Middle Name
Elenjickal	Mathew	

Street Address 1: 1165 N Clark St, Ste 700

Street Address 2:

City	State/Province/Country	ZIP/PostalCode
Chicago	ILLINOIS	60610

Relationship: ☒ Executive Officer ☒ Director ☐ Promoter

Clarification of Response (if Necessary):

Chief Executive Officer, President, Secretary, Treasurer and Director.

4. Industry Group

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

- [ ] Agriculture
- Banking & Financial Services
  - [ ] Commercial Banking
  - [ ] Insurance
  - [ ] Investing
  - [ ] Investment Banking
  - [ ] Pooled Investment Fund
    - Is the issuer registered as an investment company under the Investment Company Act of 1940?
    - [ ] Yes [ ] No
  - [ ] Other Banking & Financial Services
- [ ] Business Services
- Energy
  - [ ] Coal Mining
  - [ ] Electric Utilities
  - [ ] Energy Conservation
  - [ ] Environmental Services
  - [ ] Oil & Gas
  - [ ] Other Energy
- Health Care
  - [ ] Biotechnology
  - [ ] Health Insurance
  - [ ] Hospitals & Physicians
  - [ ] Pharmaceuticals
  - [ ] Other Health Care
- [ ] Manufacturing
- Real Estate
  - [ ] Commercial
  - [ ] Construction
  - [ ] REITS & Finance
  - [ ] Residential
  - [ ] Other Real Estate
- [ ] Retailing
- [ ] Restaurants
- Technology
  - [ ] Computers
  - [ ] Telecommunications
  - [X] Other Technology
- Travel
  - [ ] Airlines & Airports
  - [ ] Lodging & Conventions
  - [ ] Tourism & Travel Services
  - [ ] Other Travel
- [ ] Other

5. Issuer Size

Revenue Range	OR	Aggregate Net Asset Value Range
[ ] No Revenues		[ ] No Aggregate Net Asset Value
[ ] $1 - $1,000,000		[ ] $1 - $5,000,000
[ ] $1,000,001 - $5,000,000		[ ] $5,000,001 - $25,000,000
[ ] $5,000,001 - $25,000,000		[ ] $25,000,001 - $50,000,000
[ ] $25,000,001 - $100,000,000		[ ] $50,000,001 - $100,000,000
[ ] Over $100,000,000		[ ] Over $100,000,000
[X] Decline to Disclose		[ ] Decline to Disclose
[ ] Not Applicable		[ ] Not Applicable

6. Federal Exemption(s) and Exclusion(s) Claimed (select all that apply)

- [ ] Rule 504(b)(1) (not (i), (ii) or (iii))
- [ ] Rule 504 (b)(1)(i)
- [ ] Rule 504 (b)(1)(ii)
- [ ] Rule 504 (b)(1)(iii)
- [ ] Rule 505
- [ ] Investment Company Act Section 3(c)
  - [ ] Section 3(c)(1)
  - [ ] Section 3(c)(2)
  - [ ] Section 3(c)(3)
  - [ ] Section 3(c)(9)
  - [ ] Section 3(c)(10)
  - [ ] Section 3(c)(11)

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

- [X] Rule 506(b)
- [ ] Rule 506(c)
- [ ] Securities Act Section 4(a)(5)
- [ ] Section 3(c)(4)
- [ ] Section 3(c)(5)
- [ ] Section 3(c)(6)
- [ ] Section 3(c)(7)
- [ ] Section 3(c)(12)
- [ ] Section 3(c)(13)
- [ ] Section 3(c)(14)

7. Type of Filing

[ ] New Notice Date of First Sale 2014-11-12 [ ] First Sale Yet to Occur

[X] Amendment

8. Duration of Offering

Does the Issuer intend this offering to last more than one year? [ ] Yes [X] No

9. Type(s) of Securities Offered (select all that apply)

- [ ] Equity
- [X] Debt
- [ ] Option, Warrant or Other Right to Acquire Another Security
- [ ] Security to be Acquired Upon Exercise of Option, Warrant or Other Right to Acquire Security
- [ ] Pooled Investment Fund Interests
- [ ] Tenant-in-Common Securities
- [ ] Mineral Property Securities
- [ ] Other (describe)

10. Business Combination Transaction

Is this offering being made in connection with a business combination transaction, such as a merger, acquisition or exchange offer? [ ] Yes [X] No

Clarification of Response (if Necessary):

11. Minimum Investment

Minimum investment accepted from any outside investor $1 USD

12. Sales Compensation

Recipient

Recipient CRD Number [X] None

(Associated) Broker or Dealer [X] None

(Associated) Broker or Dealer CRD Number [X] None

Street Address 1

Street Address 2

City

State/Province/Country

ZIP/Postal Code

State(s) of Solicitation (select all that apply)
Check "All States" or check individual States [ ] All States [ ] Foreign/non-US

13. Offering and Sales Amounts

Total Offering Amount $1,250,000 USD or [ ] Indefinite

Total Amount Sold $1,235,000 USD

Total Remaining to be Sold $15,000 USD or [ ] Indefinite

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

Clarification of Response (if Necessary):

The company and the lenders agreed to increase the maximum aggregate principal amount of convertible notes to $1,250,000, of which $1,235,000 has been sold.

14. Investors

☐ Select if securities in the offering have been or may be sold to persons who do not qualify as accredited investors, and enter the number of such non-accredited investors who already have invested in the offering.

Regardless of whether securities in the offering have been or may be sold to persons who do not qualify as accredited investors, enter the total number of investors who already have invested in the offering: 12

15. Sales Commissions & Finder's Fees Expenses

Provide separately the amounts of sales commissions and finders fees expenses, if any. If the amount of an expenditure is not known, provide an estimate and check the box next to the amount.

Sales Commissions $0 USD ☐ Estimate

Finders' Fees $0 USD ☐ Estimate

Clarification of Response (if Necessary):

16. Use of Proceeds

Provide the amount of the gross proceeds of the offering that has been or is proposed to be used for payments to any of the persons required to be named as executive officers, directors or promoters in response to Item 3 above. If the amount is unknown, provide an estimate and check the box next to the amount.

$0 USD ☐ Estimate

Clarification of Response (if Necessary):

None, other than indirectly, through the payment of salaries.

Signature and Submission

Please verify the information you have entered and review the Terms of Submission below before signing and clicking SUBMIT below to file this notice.

Terms of Submission

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- Notifying the SEC and/or each State in which this notice is filed of the offering of securities described and undertaking to furnish them, upon written request, in the accordance with applicable law, the information furnished to offerees.*
- Irrevocably appointing each of the Secretary of the SEC and, the Securities Administrator or other legally designated officer of the State in which the issuer maintains its principal place of business and any State in which this notice is filed, as its agents for service of process, and agreeing that these persons may accept service on its behalf, of any notice, process or pleading, and further agreeing that such service may be made by registered or certified mail, in any Federal or state action, administrative proceeding, or arbitration brought against the issuer in any place subject to the jurisdiction of the United States, if the action, proceeding or arbitration (a) arises out of any activity in connection with the offering of securities that is the subject of this notice, and (b) is founded, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these statutes, or (ii) the laws of the State in which the issuer maintains its principal place of business or any State in which this notice is filed.
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Each Issuer identified above has read this notice, knows the contents to be true, and has duly caused this notice to be signed on its behalf by the undersigned duly authorized person.

For signature, type in the signer's name or other letters or characters adopted or authorized as the signer's signature.

Issuer	Signature	Name of Signer	Title	Date
FourKites, Inc.	/s/ Julia Rybakova	Julia Rybakova	Attorney-in-Fact of Mathew Elenjickal, CEO	2015-05-15

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WHOIS IP Lookup Tool

The IPWHOIS Lookup tool finds contact information for the owner of a specified IP address.

Enter a host name or an IP address:

182.74.119.134 Go »

Related Tools: DNS Traversal Traceroute Vector Trace Ping WHOIS Lookup

```
             Source: whois.apnic.net
         IP Address: 182.74.119.134

% [whois.apnic.net]
% Whois data copyright terms    http://www.apnic.net/db/dbcopyright.html

% Information related to '182.74.119.132 - 182.74.119.135'

% Abuse contact for '182.74.119.132 - 182.74.119.135' is 'ipspamsupport@airtel.com'

inetnum:        182.74.119.132 - 182.74.119.135
netname:        SGFQ-2680130-Kanchipuram
descr:          FOURKITES INDIA PRIVATE L
descr:          n/a
descr:          BLOCK 1A 5TH FLOOR WING IT PARK 1/24 MOUNT POONAMALLE ROAD MANAPAKKAM
descr:          CHENNAI 600089
descr:          Kanchipuram
descr:          TAMIL NADU
descr:
descr:          Contact Person: RISHKESAN M
descr:          Email: rishi@fourkites.com
descr:          Phone: 9884435959
country:        IN
admin-c:        NA40-AP
tech-c:         NA40-AP
mnt-by:         MAINT-IN-BBIL
mnt-irt:        IRT-BHARTI-IN
status:         ASSIGNED NON-PORTABLE
last-modified:  2018-07-13T10:44:19Z
source:         APNIC

irt:            IRT-BHARTI-IN
address:        Bharti Airtel Ltd.
address:        ISP Division - Transport Network Group
address:        234 , Okhla Industrial Estate,
address:        Phase III, New Delhi-110020, INDIA
e-mail:         ipspamsupport@airtel.com
abuse-mailbox:  ipspamsupport@airtel.com
admin-c:        NA40-AP
tech-c:         NA40-AP
auth:           # Filtered
remarks:        ipspamsupport@airtel.com was validated on 2019-12-14
mnt-by:         MAINT-IN-BBIL
last-modified:  2019-12-14T08:39:37Z
source:         APNIC

person:         Network Administrator
nic-hdl:        NA40-AP
e-mail:         noc-dataprov@airtel.com
address:        Bharti Airtel Ltd.
address:        ISP Division - Transport Network Group
address:        Plot no.16 , Udyog Vihar , Phase -IV , Gurgaon - 122015 , Haryana , INDIA
address:        Phase III, New Delhi-110020, INDIA
phone:          +91-124-4222222
fax-no:         +91-124-4244017
country:        IN
mnt-by:         MAINT-IN-BBIL
last-modified:  2018-12-18T12:52:19Z
source:         APNIC

% Information related to '182.74.119.0/24AS9498'

route:          182.74.119.0/24
descr:          BHARTI-IN
```


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```
descr:          Bharti Airtel Limited
descr:          Class A ISP in INDIA .
descr:          Plot No. CP-5,sector-8,
descr:          IMT Manesar
descr:          INDIA
country:        IN
origin:         AS9498
mnt-by:         MAINT-IN-BBIL
last-modified:  2012-04-24T07:25:31Z
source:         APNIC

% This query was served by the APNIC Whois Service version 1.88.15-47 (WHOIS-US3)
```

Domain Health
Domain Health Report

DNS Monitoring
Authoritative Monitoring

DNS Tools
DNS Hosting Speed
DNS Lookup
DNS Query Estimator
DNS Traversal
Zone File Dump
DNS Root Server Speed

Email Tools
Email Test
RBL Database Lookup

IP Tools
Decimal IP Calculator
ASN Information
CIDR/Netmask
What's your IP
IP Geo-location Lookup
IPWHOIS Lookup

IPv6 Tools
IPv4 to IPv6 Conversion
IPv6 CIDR to Range
Range to IPv6 CIDR
IPv6 Compress
IPv6 Expand
IPv6 Info
Local IPv6 Range Generator
IPv6 Compatibility

Website Tools
HTTP Headers
Website META Tags
SSL Examination
Website Server Software
What a Website Knows

WHOIS
WHOIS+

Tracing Tools
Looking Glass
Ping
Ping-IPv6
Traceroute
Traceroute-IPv6
Vector Trace

Informational Tools
RFC Lookup
Your Connection Speed

Domain Statistics

Account
Create Free Account
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Security Solutions
Load Testing
Website Performance Management
DDoS Protection
DNS Services

Risk Solutions
Fraud Detection
IP Intelligence
Compliance

Marketing Solutions
Identity Data Management Platform
Customer intelligence
Marketing Analytics
Audience Activation

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Fourkites India Private Limited

As on **15 December 2019**

Information Documents Events Contact

Fourkites India Private Limited incorporated with MCA on **19 January 2015**. The **Fourkites India Private Limited** is listed in the class of **pvtltd** company and classified as **Non Govt Company**. This company is registered at Registrar of Companies(ROC), **Chennai** with an Authorized Share Capital of Rs. **3 CR** and its paid up capital is **3 CR**.

Fourkites India Private Limited's last Annual General Meeting(AGM) was held on **23 September 2019**, and date of latest balance sheet available from Ministry of Corporate Affairs(MCA) is **31 March 2019**.

The company has **2** directors/key management personal Sriram Nagaswamy and Rashi Jain **Fourkites India Private Limited** company registration number is **098868** and its Corporate Identification Number(CIN) provided from MCA is **U74900TN2015PTC098868**.

Fourkites India Private Limited company's registered office address is **Block 1 A,5th Floor,Dlf Itsez,1/124,Shivaji Gardens Nandambakkam Post,Mount Poonamallee Rd,Manapakkam Chennai Chennai Tn 600089 In**. Find other contact information for **Fourkites India Private Limited** such as Email, Website and more below.

The company has reportedly **0** charges associated and **66** documents available for download.

Current status of **Fourkites India Private Limited** company is **Active**.

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- Address Change
- Director Change
- Board Meetings

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in

Rashi Jain

Vice President, Operations (India)

Rashi leads the Operations team responsible for customer implementations, carrier integrations, product support and customer success for FourKites in Europe, Africa and Asia Pacific.

She comes with 15 years of experience in global logistics, procurement and supply chain management. Prior to FourKites, Rashi worked for Fortune 500 companies, including Corning, Ford and Nike in the US and Asian markets, and most recently at an automotive packaging startup in India.

Rashi holds an MBA in General Management from the Tuck School of Business at Dartmouth College, USA, and an Engineering Management degree from BITS Pilani, India.

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in

Sriram Nagaswamy

Director of Software Engineering

Sriram is passionate about building world-class teams, with close to 16 years of experience in building and leading technical and research-oriented teams. His strengths include in-depth technical expertise, a strategic mindset, managing global team engagements to improve operational results, and building research-oriented teams from the ground up.

Sriram's career spans innovation-centric global corporations like Logitech/Lifesize in the US and Samsung R&D in India. His research has been featured in prominent technology publications.

Sriram holds a Master of Science in Electrical and Computer Engineering from the University of Kentucky, Lexington, KY, and a Bachelor of Engineering in Electrical and Electronics Engineering from the University of Madras, Chennai, India.

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Start enhancing your supply chain today.

The road to stronger global supply chain management starts with FourKites. Contact our team to learn more.

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC.,	
Plaintiff,	**No. 2020-L-4183**
v.	**Calendar Y**
FOURKITES, INC., et al.,	
Defendants.	

DEFENDANT FOURKITES, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant FourKites, Inc. ("**FourKites**"), by and through its undersigned counsel, Polsinelli PC, hereby moves pursuant to 735 ILCS 5/2-615 to dismiss Plaintiff Project44, Inc.'s ("**Plaintiff**" or "**P44**") Complaint. In support of its Motion, FourKites states:

INTRODUCTION

Plaintiff's defamation claims (Counts I and II), as well as its conspiracy claim (Count III), are based on two emails sent to three individuals affiliated with P44 in May 2019. *See* Plaintiff's Complaint, attached hereto as **Exhibit A**. Plaintiff claims that the first email was sent from Defendant "John Doe #1" to two members of Plaintiff's Board of Directors from a sender using the pseudonym "Ken Adams." The second email was allegedly sent from "John Doe #2" to Plaintiff's Chief Revenue Officer ("**CRO**") from a sender using the pseudonym "Jason Short" (these emails are referred to collectively in this Motion as the "**Emails**").

Plaintiff's allegations, even if accepted as true, fail to state a defamation claim against FourKites. Defamation requires that the alleged defamatory statements are published to a third-party. Here, Plaintiff cannot establish publication because both emails were sent to members of

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Plaintiff's organization. Moreover, the statements within the two emails do not rise to the level of defamation *per se*. As such, Counts I and II must be dismissed.

Similarly, the Civil Conspiracy claim set forth in Count III of the Complaint should be dismissed because Plaintiff has not pled any elements of a conspiracy claim. The Complaint contains no facts establishing an "agreement" between FourKites and the sender(s) of the Emails, and instead relies solely on conclusory allegations. There are no facts alleged that establish a conspiratorial agreement between the sender(s) and FourKites. Plaintiff alleges, in the alternative, that the sender(s) are employees of FourKites; however, this route also fails to state a claim because it is well established that a corporation cannot engage in a conspiracy with its own agents. In addition, any actionable conspiracy claim requires a "tortious act," but as explained below, Plaintiff cannot make such a showing because the predicate defamation counts fail. Finally, Plaintiff has not pled any facts to show that it was damaged by the alleged conspiracy. Therefore, Count III must be dismissed.

ARGUMENT

I. Legal Standard

A motion to dismiss under section 2-615 attacks the legal sufficiency of a complaint. *Joseph T. Ryerson & Son, Inc. v. Travelers Indem. Co. of Am.*, 2020 IL App (1st) 182491, ¶ 50. The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Id.* All facts apparent from the face of the pleadings, including the exhibits attached thereto, are considered. *Id.* A court considering such a motion accepts as true all well-pleaded facts in the complaint and all reasonable inferences that may be drawn from those facts. *Id.*

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II. Counts I and II Fail to State a Claim of Defamation *Per Se*

Plaintiff's defamation *per se* claims fail for two reasons. First, there was no third-party publication. Second, the statements at issue do not qualify as *per se* defamatory. As a result, Plaintiff's complaint fails to make the necessary *prima facie* showing required to establish the claim. *Anderson v. Beach*, 386 Ill. App. 3d 246, 249 (1st Dist. 2008) (elements of defamation are: (1) a false statement about the plaintiff; (2) unprivileged publication of that statement to a third party; and (3) damages resulting from publication).

Claims of defamation *per se* apply to statements deemed to be so obviously and materially harmful that injury to the plaintiff's reputation is presumed, including words that impute: (1) the commission of a crime, (2) a person is unable to perform or lacks integrity in performing his or her employment duties, and (3) a person lacks ability or otherwise prejudices that person in her or his profession. *Green v. Rogers,* 234 Ill. 2d 478, 491-92 (2009). While it is true that a plaintiff need not plead actual damage to his or her reputation when a statement is defamatory *per se*, such a claim must be pled with a heightened level of precision and particularity. *Id.*

However, even if a statement fits into one of the *per se* categories, this fact, standing alone, "has no bearing on whether the alleged defamatory statement is actionable." *Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 518 (1st Dist. 1998). A statement that falls into one of the *per se* categories will not be actionable if it is reasonably capable of an innocent construction. *Green*, 234 Ill. 2d at 499. Pursuant to this principle, "a court must consider the alleged statement *in context* and give the words of the statement, and any implications arising from them, their natural and obvious meaning." *Id.* (emphasis in original). "If the actual words do not alone denote criminal or unethical conduct and have a broader meaning in common usage than the meaning ascribed by the plaintiff,

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the words are not actionable as defamation *per se*." *Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 093386, ¶ 30.

Additionally, actions for defamation based on loose and figurative language that no person would reasonably believe presented a fact are prohibited by the First Amendment. *Id.* at ¶ 26. Such statements are considered as nothing more than "an expression of opinion," and "[h]owever pernicious an opinion may seem, [society] depend[s] for its correction not on the conscience of judges and juries but on the competition of other ideas." *Solaia Tech., LLC v. Specialty Pub. Co*., 221 Ill. 2d 558, 581 (2006) (internal quotation marks and citation omitted). "[T]he court itself must determine as a question of law whether the statement is a factual assertion that could support a defamation claim." *Stone*, 2011 IL App (1st) 093386, ¶ 26.

Applying these principles to the two emails at issue, it is clear that Plaintiff does not have a legally sufficient defamation claim against the sender(s) of the Emails.

A. The Emails Were Not Published

The Emails were not "published" as that term is defined under the law, preventing Plaintiff from raising a valid claim for defamation. "'Publication' is a term of art in defamation law and is an essential element of any defamation claim." *Missner v. Clifford*, 393 Ill. App. 3d 751, 763 (1st Dist. 2009). "Any act by which defamatory matter is communicated to someone other than the person defamed is a publication." *Missner*, 393 Ill. App. 3d at 763 (citing *Anderson*, 386 Ill. App. 3d at 249; Restatement (Second) of Torts § 577, Comment a, at 201-02 (1977)). The publication requirement is *not* satisfied, however, when the communication is made *to the person defamed*. *Emery v. Ne. Ill. Reg'l Commuter R.R. Corp*., 377 Ill. App. 3d 1013, 1022 (1st Dist. 2007). Here, the "person defamed" is Plaintiff, a corporation, which is only capable of communication through *persons* acting on its behalf. *See Small v. Sussman*, 306 Ill. App. 3d 639, 647 (1st Dist. 1999) ("It

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is axiomatic that a corporation can act only through its agents."). The question for the Court, therefore, is which persons associated with the corporation speak for the corporation such that communication with those persons constitutes communication with the corporation itself, rather than a third person.

That very question was answered in two cases outside Illinois. In *Hoch v. Loren*, 273 So. 3d 56, 58 (Fla. App. 2019), the court found there was no publication where "a defamatory statement about a plaintiff corporation is made to a managerial employee of the corporation," because "a statement to an executive/managerial employee of a corporation is a statement to the corporation itself." Similarly, in *Fausett v. American Resolution Management Corp.*, 542 F. Supp. 1234, 1241 (D. Utah 1982), the court found that "the management *is* the corporation for purposes of communication," and as a result "communication to corporate management of alleged defamation of the corporation does not constitute publication." *Id.* at 1242 (emphasis added).

While there is not an Illinois case that squarely addresses this issue, the rulings set forth above are consistent with basic principles of Illinois corporate law, and are therefore instructive. As in Florida and Utah, a corporation in Illinois acts through its managing principals and governing board. *See, e.g.*, *Manufacturers' Exhibition Bldg. Co. v. Landay*, 219 Ill. 168, 174-75 (1905) (a corporation is an "artificial being[]," which "can act only through its board of directors and officers"); *TABFG, LLC v. Pfeil*, 746 F.3d 820, 825 (7th Cir. 2014) (only managers, directors and officers of a corporation are authorized to act on the corporation's behalf). Consequently, because the Emails at issue here were sent to two of Plaintiff's board members and its CRO—all individuals with authority to bind the corporation and through whom Plaintiff acts—the Emails were effectively sent to Plaintiff, and no publication occurred. Stated differently, Plaintiff's board members and CRO are "merely a stand-in or conduit for" Plaintiff itself, such that

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"[c]ommunications to [them] are in effect communications to [Plaintiff] and are not 'published' to a third party." *30 River Ct. E. Urb. Renewal Co. v. Capograsso*, 892 A.2d 711, 717 (N.J. Super. 2006).

B. The Statements Were Not Defamatory

1. The May 19, 2019 Email to the Board Members

As already noted, an allegedly defamatory statement is not actionable "if it cannot be reasonably interpreted as stating actual fact." *Solaia Tech., LLC*, 221 Ill. 2d at 581. In determining whether a statement is one of opinion or fact, a court should consider "whether the statement has a precise and readily understood meaning; whether the statement is verifiable; and whether the statement's literary or social context signals that it has factual content." *Id.* Thus, for example, in *Solaia*, the Supreme Court held that the statement that plaintiffs were "deeply greedy people" fell "within the bounds of constitutionally protected opinion," and was therefore not actionable, because it had "no precise meaning" and was not "verifiable." *Id.* at 583.

The statements in the May 19 email that there is "widespread discontent brewing" and "it's just a matter of time before people go public and another Theranos happen in Chicago" similarly have no precise and readily understood meaning, much less one that is *per se* defamatory. *See, e.g.*, *Wilkow v. Forbes, Inc.*, 241 F.3d 552, 555 (7th Cir. 2001) ("If it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable."); *see also Madison v. Frazier*, 539 F.3d 646, 655 (7th Cir. 2008) (applying Illinois law and finding that, where the defendant's statements implicated subjective judgment, her "speculations fail to amount to verifiable assertions of fact, lacking precise and readily understood meaning").

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The statement in the May 19 email that "[e]x-employees are silenced with legal threats and defamation suits" does not fall within any of the categories of *per se* defamation—it does not impute the commission of a crime by Plaintiff, impute that Plaintiff is unable to perform or lacks integrity in performing its employment duties, or impute that Plaintiff lacks ability or otherwise prejudices Plaintiff in its profession. And the further statement that "[redacted] dad used to be the book keeper for a Chicago Mafia and they are using that to silence folks" is too vague and lacking in precise meaning to support a defamation claim. *See, e.g.*, *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶¶ 50-52 ("Whether [the plaintiff] was corrupt, used bully tactics, or operated a fraud machine cannot be shown to be true or false[.]"); *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 728 (1st Cir. 1992) ("'rip-off," "fraud," "scandal," and "snake-oil job" are adjectives that "admit of numerous interpretations"); *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987) ("The lack of precision [in the meaning of the word 'scam'] makes the assertion 'X is a scam' incapable of being proven true or false."). Indeed, Plaintiff's suggestion that "silencing" refers to "threats of violence or other intimidation" (*see* Complaint, at ¶ 18) proves the point, as many people would likely *not* interpret the statement that way. It also demonstrates that the statement is non-actionable hyperbole. *See Phantom Touring, Inc.*, 953 F.2d at 728 (calling play "'a rip-off, a fraud, a scandal, a snake-oil job'" mere hyperbole). That it is hyperbole is further demonstrated by the lack of any specific facts supporting it.

The May 19 email's use of the term "rampant accounting improprieties" is likewise too vague and imprecise to be actionable. *See, e.g.*, *Doherty v. Kahn*, 289 Ill. App. 3d 544, 556 (1st Dist. 1997) (statements that plaintiff was "incompetent," "lazy," "dishonest," "cannot manage a business," and/or "lacks the ability to perform landscaping services" were nonactionable opinion because there were no specific facts at the root of the statements); *Piersall v. SportsVision of Chi.*,

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230 Ill. App. 3d 503, 511 (1st Dist. 1992) (statement that plaintiff is a "liar" is a nonactionable opinion because it lacks a factual basis surrounding the statement). As the Court of Appeals noted in *Hopewell*, 299 Ill. App. 3d at 521, "in one sense all opinions imply facts; however, the question of whether a statement is actionable is one of degree," and "[t]he *vaguer and more generalized the opinion the more likely the opinion is non-actionable as a matter of law*." *Id.* at 521 (emphasis added) (internal quotation marks and citations omitted) (holding that "the alleged defamatory statement – 'fired because of incompetence' – is too vague and general to support an action for defamation as a matter of law"). In addition, here, as in *Solaia*, "the context in which [the statement] appeared indicates that it may have been judgmental, but it was not factual." *Id.*

2. The May 27 Email to Project44's CRO

The statements in the May 27 email are likewise not actionable. Plaintiff focuses on statements in the email's first paragraph that "[t]here is one ingredient you missed —a great product" and that Plaintiff has to "stop selling shit." These are plainly statements of subjective opinion, not verifiable fact. *See, e.g.*, *J. Maki Constr. Co. v. Chi. Reg'l Council of Carpenters*, 379 Ill. App. 3d 189, 200-201 (2d Dist. 2008) (statement that plaintiffs' houses were "crappy" was not actionable); *Pompa v. Swanson*, 2013 IL App (2d) 120911, ¶ 23 (statement that plaintiff "performed his job unsatisfactorily" was not actionable). Moreover, these statements suggest at most a "fail[ure] to provide the contracted-for" service, and thus "d[o] not amount to an allegation that [the plaintiff] … lacks integrity or is unable to perform [its] employment or professional duties." *Coghlan*, 2013 IL App (1st) 120891, ¶ 50; *see also Cohen*, 2015 WL 3609689, at *6 (statement focused on business's product, as opposed to misconduct of the business entity itself, does not constitute defamation of the business).

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The only other allegedly defamatory statement in the May 27 email is "You don't want to be part of the next Ponzi scheme or next theranos." The reference to "theranos," as previously discussed, lacks the precise and readily understood meaning necessary for it to be defamatory *per se*. Moreover, the statement as whole is a warning about something the author believes might come to pass, not a factual statement capable of verification. *See, e.g.*, *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. Ct. App. 2001) ("Delander's remark that appellant was going to 'f--- [other drivers] over' is a prediction of a future event and is not a fact capable of verification."); *see also Green*, 234 Ill. 2d at 499 (a statement "will not be actionable *per se* if it is reasonably capable of an innocent construction."); *Stone*, 2011 IL App (1st) 093386, ¶ 30 ("If the actual words do not alone denote criminal or unethical conduct … the words are not actionable as defamation *per se*."). Plaintiff has not alleged a legally sufficient defamation claim against FourKites, and its Complaint must therefore be dismissed.

III. Plaintiff Has Not Pled a Conspiracy Claim

FourKites, like P44, can only act through its employees, and a company cannot conspire with itself. *Kovac v. Barron*, 2014 IL App (2d) 121100, ¶ 105. Therefore, even if accepted as true, P44's allegations fail to state a conspiracy claim. To state a claim for civil conspiracy, a plaintiff must allege facts showing (1) an agreement to accomplish by concerted action either an unlawful purpose or a lawful purpose by unlawful means, (2) a tortious act committed in furtherance of that agreement, and (3) an injury caused by the defendant. *Reuter v. MasterCard International, Inc.*, 397 Ill. App. 3d 915, 927-28 (2010). Conclusory allegations that the defendants agreed with others to achieve some illicit purpose are not sufficient. *Id.* at 928 (citing *Pawlikowski v. Toyota Motor Credit Corp.*, 309 Ill.App.3d 550, 555 (1999)). Here, Plaintiff has not pled the facts necessary to establish any of these elements.

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Plaintiff has not pled any facts showing an "agreement" between FourKites and the email sender(s). In conclusory fashion, Plaintiff alleges that FourKites "knowingly and voluntarily entered into an agreement (the 'Conspiracy') to … unlawfully defame [Plaintiff] via the May 19th communication and the May 27th communication." *See* Complaint, at ¶ 75. Plaintiff has not alleged any other facts to show an agreement with FourKites and another party to defame Plaintiff. "Merely alleging that a party knows that the acts of another are illegal is not enough to show a conspiracy and merely characterizing 'a combination of acts as a conspiracy is insufficient to withstand a motion to dismiss.'" *Id.* (citing *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill.2d 102, 134 (1999) and *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill.2d 12, 23 (1998)). Plaintiff has not sufficiently pled the "agreement" element of a conspiracy claim and therefore Count III must be dismissed.

Perhaps recognizing this deficiency, Plaintiff alleges in the alternative that the email sender(s) are FourKites' employees. (*See* Complaint, at ¶ 77). This allegation defeats, rather than supports, Plaintiff's conspiracy claim because a corporation cannot engage in a conspiracy with its own agents. *See, e.g.*, *Kovac*, at ¶ 105 ("[T]here can be no conspiracy between a principal and an agent, because the acts of an agent are considered in law to be the acts of the principal."); *Davis v. Times Mirror Magazines, Inc.*, 297 Ill. App. 3d 488, 499 (1st Dist. 1998) ("[B]ecause the individual defendants were [the corporate defendant's] agents, there could have been no conspiracy among the individual defendants and [the corporate defendant]."). Therefore, even if accepted as true, this allegation defeats, rather than supports, Plaintiff's conspiracy claim.

Similarly, a civil conspiracy cannot exist between a corporation's own officers or employees. *Van Winkle v. Owens-Corning Fiberglas Corp.*, 291 Ill. App. 3d 165, 173 (4th Dist. 1997). It is not clear whether Plaintiff is claiming that FourKites conspired ***with*** its employees, or

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FILED DATE: 1/20/2021 2:23 PM 2020L004183

is merely responsible for a conspiracy ***between*** its employees. Ultimately, the distinction does not matter because neither scenario is a conspiracy under Illinois law.

Plaintiff's conspiracy claim also fails because it cannot show a tortious act. Plaintiff alleges that FourKites "entered into an agreement to … unlawfully defame [Plaintiff.]" *See*, Complaint, at ¶ 75. As explained above, Plaintiff's allegations do not amount to defamation, and Plaintiff therefore lacks a tortious act to support a conspiracy claim. Where, as here, a plaintiff fails to state an independent cause of action underlying its conspiracy allegations, the claim for a conspiracy also fails. *Indeck N. Am. Power Fund, L.P. v. Norweb PLC*, 316 Ill. App. 3d 416, 432 (1st Dist. 2000).

Finally, Plaintiff has not pled any facts showing an injury caused by FourKites or even the conspiracy. Plaintiff's sole allegation on this point is it "has been injured by the Conspiracy and the tortious acts undertaken pursuant to the Conspiracy." *See*, Complaint, at ¶ 78. Plaintiff's Complaint is devoid of any factual allegations setting forth the injury it suffered and how such injury was caused by FourKites. *See*, *Reuter*, 397 Ill. App. 3d at 928 (dismissing complaint when "the plaintiff failed to allege that he suffered any damages as a result of a tort committed in furtherance of the alleged conspiracy") and *Recio v. GR-MHA Corp.*, 366 Ill. App. 3d 48, 61 (1st Dist. 2006) ("[P]roximate cause is still a required element of the cause of action for conspiracy."). Count III must be dismissed because Plaintiff has not pled injury or causation.

WHEREFORE, Defendant FourKites, Inc. respectfully requests that the Court grant Defendant's Motion, dismiss Plaintiff's Complaint with prejudice, and grant any other relief that the Court deems equitable and just.

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Date: January 20, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2021, a copy of the foregoing was served upon counsel of record through the Court's e-filing system and by e-mail to:

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12-Person Jury

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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC., a Delaware corporation,

Plaintiff,

v.

FOURKITES, INC., a Delaware corporation,

and

JANE DOE, an individual, corporation, organization, or other legal entity whose name is presently unknown,

and

JOHN DOE #1, aka "Ken Adams," an individual, corporation, organization, or other legal entity whose name is presently unknown, using the email address "kenadams8558 @gmail.com,"

and

JOHN DOE #2, aka "Jason Short," an individual, corporation, organization, or other legal entity whose name is presently unknown, using the email address "jshort5584@gmail. com,"

and

JOHN DOES #3-25, individuals, corporations, organizations, or other legal entities whose names are presently unknown,

Defendants.

2020L004183

Case No. ____________

COMPLAINT

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

Plaintiff PROJECT44, INC. ("project44"), complains against Defendants FOUR KITES, INC. ("FourKites"), JANE DOE ("Jane Doe") an individual, corporation, organization, or other legal entity whose name is presently unknown, JOHN DOE #1, aka "Ken Adams" ("Ken Adams") an individual, corporation, organization, or other legal entity whose name is presently unknown, JOHN DOE #2, aka "Jason Short," ("Jason Short") an individual, corporation, organization, or other legal entity whose name is presently unknown, and JOHN DOES #3-25 ("John Does #3-25"), individuals, corporations, organizations, or other legal entities whose names are presently unknown, as follows:

NATURE OF ACTION

1. This is an action for defamation *per se*, arising from two email communications sent on May 19, 2019 and May 27, 2019 from the accounts "kenadams8558@gmail.com," and "jshort5584@gmail.com," respectively. In each communication, the sender(s) - using the pseudonyms "Ken Adams" and "Jason Short," respectively - levied knowingly false and defamatory statements against Plaintiff project44. In particular, the sender(s) accused project44 of lacking ability in their business, of lacking integrity in their business conduct, and engaging in criminal activity. The defamatory statements were directed to both outside members of project44's board of directors, as well as project44's Chief Revenue officer, with the intent to disrupt project44's business activities.

2. project44 is in the highly competitive shipping logistics industry. Over 25,000 different carriers have tracked shipments in project44's system, and it supports all transportation modes and shipping types. project44 has more than 200 employees.

3. The kenadams8558 and jshort5584 e-mail addresses from which the defamatory communications were sent both have an "@gmail" domain name. This signifies that the email

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

accounts were set up via Google, LLC ("Google"). Prior to filing this Complaint, project44 obtained an order for pre-suit discovery from Google. Information received from Google identified Defendant FourKites, a competitor of project44, as either an owner or user of the kenadams8558@gmail.com and jshort5584@gmail.com email addresses. Additionally, one or more unknown co-users or co-owners of these email addresses has been identified as accessing these accounts through IP addresses operated by, *inter alia*, AT&T Mobility, LLC ("AT&T"). These unknown co-users or co-owners conspired with Defendant FourKites to send the defamatory communications, and themselves sent the defamatory communications.

4. project44 has filed a petition for discovery, naming AT&T as a respondent, in Cook County Circuit Court to identify the unknown co-users or co-owners. (*See project44, Inc. v. AT&T Mobility, LLC, et al.*, Case No. 2019-L-10520). However, an intervenor appearing anonymously as "Jane Doe," by and through their attorneys, has sought to quash the petition.

5. As of the filing date of this Complaint, no order has been entered on project44's petition for discovery of AT&T. Since the statute of limitations for defamation actions is one year from publication (735 ILCCS 5/13-201), and given that the hearing on project44's petition of AT&T has now been rescheduled to less than a week before project44's claims become time-barred (due to the COVID-19 coronavirus epidemic), project44 has filed this Complaint now before its petition for discovery on AT&T has been resolved.

THE PARTIES

6. Plaintiff project44, Inc. is a Delaware corporation with its principal place of business in Chicago, Illinois.

7. Defendant FourKites, Inc., is a Delaware corporation with its principal place of business in Chicago, Illinois.

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

8. Defendant Jane Doe is an unknown individual, corporation, organization, or other legal entity proceeding as intervenor under the fictitious name "Jane Doe" in the related petition for discovery, *project44, Inc. v. AT&T Mobility, LLC, et al.* (Case No. 2019-L-10520), currently pending before the Hon. Allen P. Walker in the Circuit Court of Cook County, Law Division.

9. The true names of the following Defendants are unknown to Plaintiff, who therefore sues these Defendants under such fictitious names:

- John Doe #1, aka "Ken Adams," using the email address kenadams8558@gmail.com;
- John Doe #2, aka "Jason Short," using the email address jshort5584@gmail.com; and
- John Does #3-25, affiliated with or otherwise related to Defendants FourKites, Jane Doe, John Doe #1, or John Doe #2.

project44 alleges that each of the aforementioned Defendants Jane Doe and John Does #1-25 conspired with Defendant FourKites to publish false and defamatory statements concerning project44. project44 will seek leave of court to amend this Complaint and insert their true names in place of their fictitious names when the same have become known to project44.

JURISDICTION AND VENUE

10. Jurisdiction is proper in this Court pursuant to 735 ILCS 5/2-209 because, among other reasons, the defamatory material published by Defendants was published in Illinois representing the commission of a tort within Illinois and, thus, has caused project44 to suffer injury in Illinois. Separately, Defendant FourKites both does business in Illinois and maintains a principal place of business in Illinois.

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

11. Venue is proper in this Court pursuant to 735 ILCS 5/2-101 and 735 ILCS 5/102(a) as, *inter alia*, Cook County is where Defendant FourKites maintains its principal place of business.

FACTUAL BACKGROUND

12. project44 is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois. project44 is commonly referred to in its industry by the abbreviation "p44." project44 is in the highly competitive shipping logistics industry, where it provides goods and services which permit its customers to connect with, automate, and provide visibility into key transportation processes which, in turn, permits its customers to increase operational efficiencies, reduce costs, improve shipping performance, and deliver an exceptional experience to their own customers. Over 25,000 different carriers have tracked shipments in project44's system, and it supports all transportation modes and shipping types including "parcel," "final-mile," "less-than-truckload," "volume less-than-truckload," "truckload," rail, intermodal, and ocean. project44 has more than 200 employees.

13. Defendant FourKites is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois. Like project44, FourKites is in the highly competitive shipping logistics industry. FourKites is a competitor of project44.

The May 19th Defamatory Communication

14. On May 19, 2019, one or more individuals, corporations, organizations, or other legal entities using the email address kenadams8558@gmail.com and the name "Ken Adams" transmitted an email communication titled "Accounting improprieties at P44" ("the May 19th communication"). A true and correct redacted copy of the May 19th communication is attached hereto as Exhibit A (the name of a project44 employee not a party to this litigation has been redacted).

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

15. The May19th communication was sent to email addresses belonging to Jim Baum (jim@ov.vc) and Kevin Dietsel (kevin@sapphireventures.com), who are both non-employee, outside members of project44's Board of Directors. (*See* Exhibit A.) Thus, the May 19th communication was published to one or more third parties, without privilege.

16. The May 19th communication is divided into five paragraphs, three of which are numbered. (*Id.*). The May 19th communication is defamatory *per se* as it, *inter alia*, falsely imputes the commission of one or more crimes by project44, a want of integrity in project44's business conduct, and a lack of ability in project44's business.

17. For example, the first numbered paragraph alleges that that "Ex employees [of project44] are silenced with legal threats and defamation suits." (*Id.*). Immediately thereafter, the paragraph states that one of project44's employee's family members "used to be the book keeper for a Chicago Mafia and they are using that to silence folks." (*Id.*) Given the context of the paragraph, the word "they" can only refer to project44.

18. These statements are defamatory *per se* because, not only do they falsely allege that project44 maintains connections with organized crime, but they also assert that project44 uses those connections to "silence" persons such as project44's ex-employees. (*Id.*) The reference to "Chicago Mafia" conveys the idea that when project44 "silence[s] folks," they do so with threats of violence or other intimidation, a crime in Illinois. (*See* 720 ILCS 5/12-6) (stating that, *inter alia*, "[i]ntimidation is a Class 3 felony.")

19. The first sentence of the second numbered paragraph in the May 19th communication states that "[t]here is rampant accounting improprieties" at project44. (Exhibit A.) Either viewed by itself, or taken in conjunction with the next two sentences, this statement is defamatory *per se* because it falsely imputes both a want of integrity in project44's business

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

conduct, as well as a lack of ability in project44's business (such as the ability to comply with generally accepted accounting procedures). "Impropriety" is commonly understood to mean "dishonest behavior, or a dishonest act." (*See*, https://dictionary.cambridge.org/us/dictionary/english/impropriety, a screenshot of which is attached hereto as Exhibit B.) As such, by using the phrase "accounting improprieties," the sender(s) of the email accuses project44 of dishonest financial practices. The sender(s) further use the term "rampant" to convey that the alleged dishonest financial practices occur frequently. (*See, e.g.*, https://dictionary.cambridge.org/us/dictionary/english/rampant, a screenshot of which is attached hereto as Exhibit C.)

20. The next sentence in the second numbered paragraph of the May 19th communication encourages the recipients "to take a look at the contracts (pilots , [*sic*] out clauses, rev rec etc.)." (Exhibit A.) The fact that this sentence: (1) immediately follows the sender(s) accusation of "accounting improprieties;" (2) is grouped in the same numbered paragraph; and (3) is part of an email titled "Accounting improprieties at P44," means that it, too, is defamatory *per se* because it conveys the false idea that these specific "contracts" contain "accounting improprieties," also imputing both a want of integrity in project44's business conduct, as well as a lack of ability in project44's business. (*Id.*)

21. For the same reasons, the third sentence in the second numbered paragraph ("Recent CFO Departure must tell you everything") is also defamatory *per se*, as it also conveys the false idea that project44's CFO left due to alleged accounting improprieties, again imputing both a want of integrity in project44's business conduct, as well as a lack of ability in project44's business. (*Id.*)

22. The third numbered paragraph of the May 19th communication states that a client of project44 ("Estes") "cancelled the contract [with project44]," and that the contract "was only

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

$5k a month and they [Estes] are not even willing to pay this." This, too, is defamatory *per se* as it falsely imputes a lack of ability in project44's business. Moreover, as the sender(s) chose to convey this information in an email with the subject line "Accounting improprieties at P44," the statement also falsely conveys the idea that the cancelled contract was due to project44's alleged "accounting improprieties," again imputing a want of integrity in project44's business conduct.

23. Finally, the last paragraph of the May 19th communication is unnumbered and states that "there is widespread discontent brewing and it's just a matter of time before people go public and another Theranos happen [*sic*] in Chicago." (*Id.*) This is also defamatory *per se* as it falsely conveys the idea that project44 has committed the crime of fraud. The sender(s)' comparison to "Theranos" refers to Theranos Inc., a now-defunct company that (along with its founder Elizabeth Holmes) was charged by the U.S. Securities and Exchange Commission with securities fraud. (*See, e.g.*, Dkt No. 1 in *SEC v. Holmes, et al.*, Case No. 5:18-CV-01602 (N.D. Cal. March 14, 2018), available at https://www.sec.gov/litigation/complaints/2018/comp-pr2018-41-theranos-holmes.pdf., an excerpt of which is attached hereto as Exhibit D.) Ms. Holmes and Theranos's former president, Ramesh Balwani, have also been indicted on multiple counts of wire fraud and conspiracy to commit wire fraud (their cases are currently pending). (*See, e.g.*, https://www.justice.gov/usao-ndca/pr/theranos-founder-and-former-chief-operating-officer-charged-alleged-wire-fraud-schemes, a screenshot of which is attached hereto as Exhibit E.) Thus, the May 19th email's reference to Theranos falsely conveys the idea that, like Theranos, project44 is allegedly involved in fraudulent activity.

24. Whether viewed individually or as a whole, the statements made in the May 19th communication are defamatory *per se*. The fact that the sender(s) published these false statements

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

to project44's outside board members confirms that the sender(s) intent was to disrupt project44's business activities.

25. "Ken Adams" is a pseudonym, as project44 has not previously employed anyone named "Ken Adams," nor has it ever worked with any persons having this name. The sender(s)' need to conceal their identity speaks to the defamatory nature of this communication.

26. The May 19th communication was either sent by project44's competitor Defendant FourKites, or by one or more unknown entities acting in concert with Defendant FourKites. project44 is thus reasonably concerned that similar information has been published to other parties.

The May 27th Defamatory Communication

27. On May 27, 2019, one or more individuals using the email address jshort5584@gmail.com and the name "Jason Short" transmitted an untitled email communication to an email address belonging to Tim Bertrand (tbertrand@project44.com), project44's Chief Revenue Office ("the May 27th communication"). (A true and correct copy of the May 27th communication is attached hereto as Exhibit F.) Thus, the May 27th communication was published to one or more third parties, without privilege.

28. The May 27th communication is defamatory *per se* as it, *inter alia*, falsely imputes the commission of one or more crimes by project44.

29. For example, the May 27th communication begins by addressing Mr. Bertrand as "Tim" and saying, *inter alia*, "I wanted to shed some light so you can fled [*sic*] ASAP and go find another job." (Exhibit F.) The second paragraph of the May 27th communication states that "[y]ou don't want to be part of the next Ponzi scheme or next theranos [*sic*]." (*Id.*) This is immediately followed by an invitation to "[t]alk to ex [project44] CFO Bruns. Talk to ex [project44] Sales

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

people, talk to customers.. [*sic*] talk to prospects, talk to investors outside p44 [project44]. They will tell you the truth." (*Id.*)

30. Not only does the May 27, 2019 email falsely convey the idea that project44 is liable for criminal conduct by way of its reference to "theranos [*sic*]," the email flat-out falsely accuses project44 of being a criminal enterprise by calling it a "Ponzi scheme." As such, the May 27th communication is defamatory *per se*. (*Id.*) The fact that the sender(s) published these false statements to project44's newly hired Chief Revenue Officer - and encouraged the CRO to resign - confirms that the sender(s) intent was to disrupt project44's business activities.

31. "Jason Short" is a pseudonym, as project44 has not previously employed anyone named "Jason Short," nor has it ever worked with any persons having this name. The sender(s)' need to conceal their identity speaks to the defamatory nature of this communication.

32. The May 27th communication was either sent by project44's competitor Defendant FourKites, or by one or more unknown entities acting in concert with Defendant FourKites. project44 is thus reasonably concerned that similar information has been published to other parties.

project44's Efforts to Identify the Sender(s) of the Defamatory Communications

33. Google, LLC ("Google") hosts and runs one of the world's largest free e-mail systems, known as Gmail. The "@gmail" domain name in the kenadams8558 and jshort5584 e-mail addresses signifies that the emails are set up with Gmail.

34. In the process of creating a free Gmail e-mail account, the creator may leave behind actual contact information (another e-mail address, a real name, a real phone number) to be assured of continued access to the account. Similarly, when the creator logs in to create the account, and thereafter logs in to send and receive e-mail, the internet protocol address (or "IP address") of the device the user utilizes to connect will be recorded. The IP address permits insight into the location

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

where the user is located because it identifies the specific network the user was on when he or she logged into the Gmail account, including what Internet Service Provider (or "ISP") provided the internet connection to the user. Once the ISP is known, a subpoena can also be sent to it to obtain identifying information. The IP address also offers insight into what device was used to log into the account and, thus, can also aid in identifying the person who sent the communication.

35. On May 30, 2019, project44 filed a verified petition for discovery, pursuant to Ill. S. Ct. R. 224, naming Google as respondent (the "Google Petition") in the Circuit Court of Cook County, Law Division. (*See* May 30, 2019 Petition, attached hereto as Exhibit G.) The Google Petition requested that Google provide project44 with, *inter alia*, the IP address information for the kenadams8558 and jshort5584 email accounts. (*See* Exhibit G.)

36. The Google Petition was assigned to the Hon. John M. Ehrlich. On July 25, 2019, Judge Ehrlich entered an order in which Google agreed to provide, *inter alia*, "internet protocol (IP) address(es) assigned to the computer or network connection used by the person or persons who established the above user account at the time the account was established, and reasonably available login IP addresses (with dates and times) assigned to the computer or network connection used by the person or persons who have accessed such user account from the date of the account's establishment to the date of the subpoena." (*See* July 25, 2019 Order, attached hereto as Exhibit H.)

37. On September 18, 2019, Google produced two text documents containing "subscriber and recent login information for the Google Accounts JSHORT5584@GMAIL.COM and KENADAMS8558@GMAIL.COM." (*See* September 18, 2019 Google Correspondence, attached hereto as Exhibit I.) Copies of the produced documents are attached hereto as Exhibit J.

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

38. Exhibit J provides a series of IP addresses used to access both the kenadams8558 and jshort5584 email accounts. (*See* Exhibit J.) In particular, Exhibit J indicates that the IP addresses "78.133.216.228" and "162.234.8.247" were used to access both the kenadams8558 and jshort5584 email accounts, including on May 19, 2019 (the date the first defamatory email was sent). (Exhibit J.) As such, the same entity or entities are responsible for sending both the May 19th and May 27th defamatory communications.

39. With respect to the kenadams8558 account, the "subscriber . . . information" provided by Google includes the following entry: "SMS: +18476443564 [US]." (Exhibit I; Exhibit J.) This entry is a phone number that was provided to Google by the kenadams8558 account owner for identification purposes.

40. The phone number "847-644-3564" is identical to the phone number used by Defendant FourKites in Securities and Exchange Commission filings. (See Notice of Exempt Offering of Securities, retrieved from https://www.sec.gov/Archives/edgar/data/1625230/000162523015000001/xslFormDX01/primary_doc.xml, a copy of which is attached hereto as Exhibit K.) Thus, Defendant FourKites is an owner and/or user of the kenadams8558 account. Furthermore, by virtue of the fact that the same IP addresses were used to access both email accounts-at-issue, Defendant FourKites is also an owner and/or user of the jshort5584 account.

41. Exhibit J further confirms FourKites's involvement by disclosing that the IP address "182.74.119.134" was used to access the jshort5584 account. (*See* Exhibit J.) Using the publicly available "WHOIS IP Lookup Tool," https://www.ultratools.com/tools/ipWhoisLookup, this IP address was identified as belonging to "FOURKITES INDIA PRIVATE L." (*See* screenshot of WHOIS IP Lookup Tool, attached hereto as Exhibit L.) "FOURKITES INDIA PRIVATE L" refers to "FourKites India Private Limited," a subsidiary of Defendant FourKites.

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

(*See, e.g.*, https://www.quickcompany.in/company/fourkites-india-private-limited, a screenshot excerpt of which is attached hereto as Exhibit M (listing Sriram Nagaswamy and Rashi Jain as directors of FourKites India Private Limited); *compare with* https://www.fourkites.com/about/sriram-nagaswamy/ and https://www.fourkites.com/about/rashi-jain, screenshots of which are attached hereto as Exhibit N (listing Sriram Nagaswamy and Rashi Jain as employees of Defendant FourKites).)

42. Exhibit J also contains IP addresses belonging to AT&T Mobility, LLC ("AT&T") for both the kenadams8558 and jshort5584 email accounts. AT&T is a provider of wireless communication services as well as an Internet Service Provider ("ISP"). Each time a user utilizes AT&T's internet services, AT&T assigns the user an IP address. Many ISPs maintain internal logs which record the date, time, and customer identity for each IP address assignment made by that ISP. Upon information and belief, AT&T maintains such logs.

43. The AT&T IP addresses listed in Exhibit J will identify anonymous co-owners or co-users of the kenadams8558 and jshort5584 email accounts (*i.e.* Defendants Jane Doe, John Doe #1, John Doe #2, and John Does #3-25). These anonymous co-owners or co-users of the kenadams8558 and jshort5584 email accounts acted in concert with Defendant FourKites to send the defamatory May19th communication and May 27th communication.

44. Given this, on September 24, 2019, project44 filed another petition for discovery in Cook County Circuit Court, naming, *inter alia*, AT&T as a respondent in discovery. (*See* September 24, 2019 Petition for Discovery (the "AT&T Petition"), attached hereto as Exhibit O.) The AT&T Petition was assigned to the Hon. Alan P. Walker.

45. On November 25, 2019, AT&T sent correspondence to the subscriber(s) associated with the IP addresses identified in the AT&T Petition, notifying them as to the existence of

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

project44's petition. (*See* November 25, 2019 AT&T Correspondence, attached hereto as Exhibit P.) On December 16, 2019, the subscriber(s) intervened in the AT&T Petition, proceeding under the fictitious name "Jane Doe," and by and through their counsel, expressed their intention to oppose and dismiss the petition. (*See* December 16, 2019 Petition for Intervention, and December 16, 2019 Motion Pursuant to 735 ILCS 5/2-401(e) to Appear under Fictitious Name, attached hereto as Exhibit Q and Exhibit R, respectively.) Thus, there is an actual person or entity involved in sending these defamatory communications, and that person or entity does not want their identity known.

46. On February 21, 2020, project44 filed a Motion for Judgment on the Pleadings with respect to the AT&T Petition. (*See* February 21, 2020 Motion for Judgment on the Pleadings, attached hereto as Exhibit S.) Jane Doe opposed project44's Motion and filed their own Motion seeking to dismiss the AT&T Petition. (*See* March 3, 2020 Motion for Post-Hearing Final Relief on project44's Rule 224 Petition for Discovery, attached hereto as Exhibit T.) The motions were fully briefed and a hearing on the motions was set for April 20, 2020. (*See* March 13, 2020 order, attached hereto as Exhibit U.) However, in light of the COVID-19 coronavirus epidemic, the hearing was subsequently rescheduled to May 12, 2020. (*See* March 24, 2020 Cook County electronic notice, attached hereto as Exhibit V.)

47. The statute of limitations for project44's defamation claims is one year from publication, *i.e.* May 19, 2020. (*See* 735 ILCCS 5/13-201.) As such, there is a high likelihood that project44's defamation claims will become time-barred before an order in the AT&T Petition is entered, let alone before project44 receives the information requested from AT&T. This action is therefore proper to preserve project44's claims and to complete the discovery identified herein (whether through this action, or in giving the pending discovery petition time to complete).

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

COUNT I
DEFAMATION *PER SE* – THE MAY 19TH COMMUNICATION

48. project44 hereby reincorporates and restates the above paragraphs as if specifically set forth and re-alleged herein.

49. Defendants conspired with and aided and abetted each other in making the defamatory May 19th communication, which greatly harmed project44's reputation in their trade and business.

50. Defendants each knowingly and voluntarily participated in this common scheme to harm project44's reputation.

51. Defendants did so for the purpose of accomplishing, by concerted action and common design, a harm to the business reputation of project44, to which Defendants agreed.

52. Each Defendant committed overt tortious acts in concert with each other and in furtherance of this conspiracy by making the May 19th communication, and each substantially participated and assisted in such a scheme to defame project44.

53. Each Defendant also accepted and ratified each other's defamatory statements.

54. The May 19th communication constituted defamation *per se* in that such statements concerned project44's reputation in its trade and business by lowering such reputation in the eyes the community and, upon information and belief, deterred the community from associating with project44. Therefore, damages are presumed.

55. The May 19th communication imputed a lack of integrity of project44's business conduct, imputed the commission of one or more crimes, conveyed a lack of ability by project44 in its business, and prejudiced project44 in its business.

56. Defendants knew that the May 19th communication was false, or at the very least, Defendants acted in a reckless disregard of whether the May 19th communication was false or not.

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

57. Accordingly, Defendants acted with malice and made the May 19th communication for the purpose of harming project44's reputation.

58. The May 19th communication contained factual statements, in that: (a) the specific language at issue (*i.e.* statements that project44 was affiliated with the Chicago Mafia and used that affiliation to intimidate persons such as ex-employees; that project44 had engaged in accounting improprieties, that its contracts reflected these improprieties, and that project44's former CFO left because of these improprieties; that a customer had cancelled their contract due to project44's lack of ability and/or accounting improprieties; and that project44 had committed fraud in the same manner as Theranos) have precise meanings which are readily understood; (b) the defamatory statements are capable of being proven true or false; and (c) the full context of the defamatory statements in which they appear in the above-referenced media and in the broader social context and surrounding circumstances are such as to communicate to the readers of these statements that what was read is not opinion, but a statement of fact.

59. As a direct and proximate result of Defendants' defamatory statements, project44 has suffered presumed damages in the form of, *inter alia*, impairment of its business reputation and standing in the community.

60. Additionally, due to the malicious nature of the May 19th communication and the highly egregious conduct of Defendants detailed above, project44 also demands punitive damages.

COUNT II
DEFAMATION *PER SE* – THE MAY 27TH COMMUNICATION

61. project44 hereby reincorporates and restates the above paragraphs as if specifically set forth and re-alleged herein.

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

62. Defendants conspired with and aided and abetted each other in making the defamatory May 27th communication, which greatly harmed project44's reputation in their trade and business.

63. Defendants each knowingly and voluntarily participated in this common scheme to harm project44's reputation.

64. Defendants did so for the purpose of accomplishing, by concerted action and common design, a harm to the business reputation of project44, to which Defendants agreed.

65. Each Defendant committed overt tortious acts in concert with each other and in furtherance of this conspiracy by making the May 27th communication, and each substantially participated and assisted in such a scheme to defame project44.

66. Each Defendant also accepted and ratified each other's defamatory statements.

67. The May 27th communication constituted defamation *per se* in that such statements concerned project44's reputation in its trade and business by lowering such reputation in the eyes the community and, upon information and belief, deterred the community from associating with project44. Therefore, damages are presumed.

68. The May 27th communication imputed the commission of one or more crimes, and thus prejudiced project44 in its business.

69. Defendants knew that the May 27th communication was false, or at the very least, Defendants acted in a reckless disregard of whether the May27th communication was false or not.

70. Accordingly, Defendants acted with malice and made the May 27th communication for the purpose of harming project44's reputation.

71. The May 27th communication contained factual statements, in that (a) the specific language at issue (*i.e.* statements that project44 was a Ponzi scheme and had committed fraud in

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

the same manner as Theranos) have precise meanings which are readily understood; (b) the defamatory statements are capable of being proven true or false; and (c) the full context of the defamatory statements in which they appear in the above-referenced media and in the broader social context and surrounding circumstances are such as to communicate to the readers of these statements that what was read is not opinion, but a statement of fact.

72. As a direct and proximate result of Defendants' defamatory statements, project44 has suffered presumed damages in the form of, *inter alia*, impairment of its business reputation and standing in the community.

73. Additionally, due to the malicious nature of the May 27th communication and the highly egregious conduct of Defendants detailed above, project44 also demands punitive damages.

COUNT III
CIVIL CONSPIRACY

74. project44 hereby reincorporates and restates the above paragraphs as if specifically set forth and re-alleged here in.

75. Defendants knowingly and voluntarily entered into an agreement (the "Conspiracy") to, as described above, unlawfully defame project44 via the May 19th communication and the May 27th communication.

76. Defendant FourKites entered into the Conspiracy directly through either Jane Doe, John Doe #1, John Doe #2, or John Does #3-25.

77. In the alternative, Defendant FourKites is liable for Jane Doe's, John Doe #1's, John Doe #2's, and/or John Does #3-25's participation in the Conspiracy under the doctrine of *respondeat superior*. Upon information and belief, one or more of Jane Doe, John Doe #1, John Doe #2, and John Does #3-25 are employees of FourKites, and said Defendants made the

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

defamatory statements to both damage the reputation of project44 and to provide Defendant FourKites with a competitive advantage.

78. project44 has been injured by the Conspiracy and the tortious acts undertaken pursuant to the Conspiracy as described above.

WHEREFORE, Plaintiff project44, Inc. respectfully requests that the Court grant it the following relief:

1. Judgment in project44, Inc.'s favor against Defendants FourKites, Inc., Jane Doe, John Doe #1, John Doe #2, and John Does #3-25, for presumed and actual damages in an amount to be determined at trial;

2. An award of all costs of this suit;

3. An award of punitive damages; and

4. Such other relief this Court deems just.

JURY DEMAND

project44, Inc. requests a trial by jury on all issues permitted to be tried to a jury.

Dated: April 13, 2020 Respectfully submitted,

PROJECT44, INC.

By: /s/ Douglas A. Albritton
One of Its Attorneys
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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2020-L-4183
	)	
FOURKITES, INC., et al.,	)	Calendar Y
	)	
Defendants.	)	
	)	
	)	

PLAINTIFF PROJECT44, INC.'S RESPONSE IN OPPOSITION TO DEFENDANT FOURKITES, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

The emails at the heart of this lawsuit were more than just playground banter or hyperbolic claims that Plaintiff project44, Inc. ("project44") is a "rip-off, a fraud, a scandal, [or] a snake-oil job," as Defendant FourKites, Inc. ("FourKites") asserts. Rather, they were calculated attacks on project44's reputation, designed to sow discord within the company, which we now know were sent by one of its chief competitors.

In the first email, the sender – purporting to be a former employee of project44 – directs project44's board members to accusations that the company is affiliated with organized crime, and that project44 allegedly uses these connections to "silence" people. The email also accuses project44 of "rampant accounting improprieties," and compares project44's business practices to that of Theranos, a company at the center of one of the largest fraud investigations in U.S. history. The second email flat-out accuses project44 of being a Ponzi scheme, and directs those attacks to project44's Chief Revenue Officer, encouraging him to resign.

To add legitimacy to their claims, the sender dresses up untruths as facts, citing to specific individuals in project44's organization whom the sender claims are affiliated with organized crime.

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The sender also cites to specific persons and documents that they claim can prove project44's financial "improprieties." They even call out project44's former customers, implying that project44's business practices have caused it to lose clients.

As explained in the Complaint, prior to filing this action, we obtained information from Google, LLC about the email accounts that sent these communications. This information included a recovery telephone number that matches the number used on SEC filings for FourKites. Separately, IP address data shows that these accounts were accessed using FourKites's network.

Caught red-handed, FourKites does not deny that it was involved in sending these emails, but instead attempts to downplay the severity of the statements. Yet FourKites's arguments fail to show that these emails were truthful, could be innocently construed, or are otherwise legitimized or protected opinion. In short, FourKites has *failed* to prove that, under no set of facts, the allegations made in the May 19th and May 27th emails (especially when read in their entirety) would entitle project44 to the recovery it seeks.

Likewise, it is clear on the face of these emails that they are published. Yet FourKites asks this Court to engage in a fiction and hold that defamatory communications about a corporation that are sent to that company's executives and managers can never give rise to a claim of defamation by that company. For the Court to adopt FourKites's proposed exception would rewrite Illinois law, which follows the Restatement and holds that such communications are published.

Finally, since project44 has set forth a claim for defamation, and has pled facts showing that the defendants, who include unknown parties currently sought to be discovered, were co-owners or co-users of the email accounts at-issue, its conspiracy claim must stand.

For these reasons, project44 respectfully requests that FourKites's Motion to Dismiss be denied.

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

RELEVANT LAW

While FourKites's statements regarding the standards for a Motion to Dismiss are accurate, it fails to acknowledge the fact that "[a] circuit court should not dismiss a complaint under section 2-615 unless it is clearly apparent no set of facts can be proved that would entitle the plaintiff to recovery." *Hadley v. Doe*, 2015 IL 118000, ¶ 29.

FourKites also sets forth the correct elements of a defamation claim, as well as the appropriate categories of *per se* defamatory statements. And while FourKites is correct that a *per se* defamatory statement must not be reasonably capable of an innocent construction, the Illinois Supreme Court in *Hadley* further instructed that:

> courts must give the allegedly defamatory words their natural and obvious meaning. Courts must therefore interpret the allegedly defamatory words as they appeared to have been used and according to the idea they were intended to convey to the reasonable reader. When a defamatory meaning was clearly intended and conveyed, this court will not strain to interpret allegedly defamatory words in their mildest and most inoffensive sense in order to hold them nonlibellous under the innocent construction rule.

Id. at ¶ 31 (citations omitted). The Court in *Hadley* also stated that:

> The innocent construction rule "does not require courts 'to espouse a naïveté unwarranted under the circumstances.'" "[I]f the likely intended meaning of a statement is defamatory, a court should not dismiss the plaintiff's claim under the innocent construction rule. In those circumstances, an innocent construction of the statement would necessarily be strained and unreasonable because the likely intended meaning is defamatory.

Id. at ¶ 32 (citations omitted). As to whether a statement comprises an opinion, *Hadley* stated the following:

> there is no artificial distinction between opinion and fact: a false assertion of fact can be defamatory even when couched within apparent opinion or rhetorical hyperbole. Indeed, '[i]t 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.' Similarly, '[a] defendant cannot escape liability for defamatory factual assertions simply by claiming that the statements were a form of ridicule, humor or sarcasm.' The test is restrictive: a defamatory

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

> statement is constitutionally protected only if it cannot be reasonably interpreted as stating actual fact. Several considerations aid our analysis: whether the statement has a precise and readily understood meaning; whether the statement is verifiable; and whether the statement's literary or social context signals that it has factual content. If a statement is factual, and it is false, it is actionable.

Id. at ¶ 32 (citations omitted).

ARGUMENT

A. The Sender's Defamatory Statements Were Published.

There is no doubt that the emails at-issue in this litigation were published. Exhibits A and F of the Complaint show that they were sent to Jim Baum and Kevin Dietsel (outside board members of project44), as well as Tim Bertrand (project44's Chief Revenue Officer ("CRO")). (*See* Complaint, attached – along with its Exhibits A and F – as Ex. 1, at Exs. A and F.) While FourKites suggests that the transmission of these communications do not count as publications, Defendant's only support for this claim are two non-Illinois cases, *Hoch v. Loren*, 273 So. 3d 56 (Fla. App. 2019) and *Fausett v. American Resolution Management Corp.*, 542 F. Supp. 1234 (D. Utah 1982). (*See* Motion to Dismiss at 5.) Defendant's failure to cite any Illinois caselaw is telling, since Illinois courts follow the "better reasoned and defensible view" espoused by, *inter alia*, the Restatement (Second) of Torts. § 1:23 Publication to plaintiff's agent, Defamation: A Lawyer's Guide § 1:23, attached hereto as Ex. 2 (characterizing the *Fausett* case relied upon by FourKites as "exceptionally dubious"); *see also Missner v. Clifford,* 393 Ill.App.3d 751 (1st Dist. 2009); Restatement (Second) of Torts § 577, cmt. e. In *Missner*, which admittedly did not directly address the issue presently before this Court, the First District nevertheless expressly adopted comment (e) to the Restatement (Second) of Torts § 577, which states that defamatory statements provided to an agent or employee of the defamed party constitute a publication, so long as said statements are not subject to a conditional privilege:

> *e*. *Publication to agent.* The fact that the defamatory matter is communicated to an

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

> agent of the defamer does not prevent it from being a publication sufficient to constitute actionable defamation. The publication may be privileged, however, under the rule stated in § 593. *So too, the communication to a servant or agent of the person defamed is a publication* although if the communication is in answer to a letter or a request from the other or his agent, the publication may not be actionable in defamation.

Restatement (Second) of Torts § 577, cmt. e (emphasis added); *Missner*, 393 Ill.App.3d at 763.

While also not addressing the exact issue before this Court, the analysis provided in *Popko v. Continental Casualty Company*, 355 Ill.App.3d 257 (1st Dist. 2005) is instructive. There, the court rejected the similar *intracorporate* nonpublication rule (involving communications between two agents of the same company), and instead adopted the rule set forth in Restatement (Second) of Torts § 577, comment (i), which – analogous to comment (e) – states that that "[t]he communication within the scope of his employment by one agent to another agent of the same principal is a publication not only by the first agent but also by the principal and this is true whether the principal is an individual, a partnership or a corporation." *Popko*, 355 Ill.App.3d at 263; 265-266 (citing Restatement (Second) of Torts § 577, cmt. i.) The reasoning in *Missner* and *Popko* instructs this Court to similarly hold that communications of a third party, to an agent of a corporation, may give rise to a claim of defamation by that corporation, so long as the statements are not subject to a conditional privilege.

While FourKites claims that their non-Illinois cases merely highlight an exception for executives and managers, no such exception is acknowledged by the Restatement. Moreover, the cases relied on by FourKites are at best on shaky ground. For instance, the holding in *Hoch* is taken directly from another Florida case, *Advantage Pers. Agency, Inc. v. Hicks & Grayson, Inc.*, 447 So. 2d 330 (Fla. 3d DCA 1984) which, in turn, is based on the *Fausett* case. *See Hoch*, 273 So. 3d at 58; *Hicks & Grayson*, 447 So. 2d at 331. In direct contrast to *Missner, Fausett* expressly rejects comment (e) to Section 577 of the Restatement, claiming it is "inapplicable." *Fausett*, 542

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

F. Supp. at 1242. However, the *Fausett* court peculiarly claimed that comment (e) applied only to speech of "one corporate employee to another employee of the same corporation." *Id.* This is simply not true, as intracorporate communications are discussed in comment (i) to section 577 of the Restatement. *Compare* Restatement (Second) of Torts § 577, cmt. e *with* cmt. i; *see also Popko*, 355 Ill.App.3d at 266.

In addition to rejecting comment (e), the *Fausett* court also cited to *M.F. Patterson Dental Supply Co. v. Wadley*, 401 F.2d 167 (10th Cir. 1968) and *Jones v. Golden Spike Corp.* 623 P.2d 970, 971 (Nev. 1981) – both of which upheld the intracorporate *nonpublication* rule – in an apparent attempt to justify the "management" nonpublication rule by way of analogy. *See Fausett*, 542 F. Supp. at 1242. Yet, if the same analogy were applied in Illinois courts, the holding in *Popko* would dictate the opposite result. *See Popko*, 355 Ill.App.3d at 263; 265-266. *Fausett* and its progeny are further undercut by the fact that the Nevada Supreme Court later overruled the *Golden Spike* case. *See Simpson v. Mars Inc.*, 113 Nev. 188, 192 (Nev. 1997). The *Simpson* court expressly rejected the holding in *Golden Spike*, and instead adopted the "better rule," namely § 577 of the Restatement, holding that, like the Illinois court in *Popko* (as well as *Missner*), said communications are published but may be subject to a privilege. *Id.* at 191-192. For this reason, the Westlaw online reporter service lists the *Fausett* case as being possibly overruled. (*See* excerpt of Westlaw *Fausett* opinion, attached hereto as Ex. 3.)

Practically, the exception advocated by FourKites makes little sense, especially at the motion to dismiss stage. For instance, who qualifies as executives and management? Every company defines their positions differently, and this inquiry cannot be definitively resolved on the face of a complaint. Even if FourKites is correct and certain company employees qualify as "a stand-in or conduit" for a company, the case FourKites relied on for that proposition, *30 River Ct.*

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

E. Urb. Renewal Co. v. Capograsso, 892 A.2d 711 (N.J. Super. 2006), reached that conclusion only after a factual record had been developed. *See Capograsso*, 892 A.2d at 717 (stating "*[b]ased on the undisputed record*, we have no hesitation concluding that Lefrak was the landlord and that Class was the landlord's agent") (emphasis added). Moreover, that case addressed a unique situation where it was found that the "landlord . . . [had] designated an agent to accept tenant complaints." *Id.* No such facts exist here (let alone are apparent from the face of the complaint).

Finally, if Illinois were to adopt FourKites's proposed exception, it would insulate senders of even maliciously defamatory communications. While we do not want to chill the dissemination of legitimate concerns about a company, at the same time we cannot sanction the unbridled dissemination of malicious, purposely false communications designed solely to damage a company's reputation.[1] To adopt the exception advocated by FourKites would allow the pendulum to swing too far in this direction. For this reason, as well as the reasons discussed above, the emails at-issue in this matter were published, and FourKites's insistence on a nonpublication rule for corporate management and executives must be rejected.

B. The Statements-At-Issue Are *Per Se* Defamatory.

FourKites improperly focuses on each individual statement made in the May 19th and May 27th emails. In *Tuite v. Corbitt*, 224 Ill.2d 490 (2006), the Illinois Supreme Court rejected such

[1] In contrast, under the rubric adopted by Illinois courts, even speech that is otherwise protected by a conditional privilege loses that protection if it can be shown that it was disseminated maliciously. *See, e.g.*, *Kuwik v. Starmark Star Mktg. & Admin., Inc.*, 156 Ill. 2d 16, 26 (1993). Should this case proceed to discovery, we believe evidence will come to light showing that the May 19th and May 27th emails were sent with malice.

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

divide and conquer tactics, and instead required "a writing 'to be read as a whole.'" *Tuite*, 224 Ill.2d at 512. Here, the May 19th email – when read in its entirety – shows the deliberate intent of the sender (who claims to be a former employee of project44) to alert project44's "Board members," to knowingly false contentions of project44's criminal activities and lack of integrity and/or lack of ability in its profession. (Ex. 1 at Ex. A.) Similarly, the May 27th email reflects the intent of the sender (claiming to be a "Friend" seeking to "shed some light" on project44), to alert project44's Chief Revenue Officer to false claims that project44 is a "Ponzi scheme," and that specific individuals, such as "ex CFO Bruns," allegedly have knowledge of such activities. (Ex. 1 at Ex. F.) These statements are offered by the sender as evidence why project44's Chief Revenue Officer should "go find another job." (*Id.*)

Thus, while we respond to each of FourKites' individual attacks in our argument below, we ask the Court to consider whether, *under no set of facts*, that the May 19th and May 27th emails – *when read in their entirety* – would entitle project44 to the recovery it seeks. Contrary to FourKites's claims, the answer to this inquiry is a resounding "No."

1. The May 19, 2019 Email.

The reference in the May 19th email to "Theranos" has a precise and readily understood meaning, namely that project44, like Theranos, has allegedly committed the crime of fraud. There can be no doubt that the sender's comparison to "Theranos" refers to Theranos Inc., a now-defunct company that (along with its founder Elizabeth Holmes) was charged by the U.S. Securities and Exchange Commission with securities fraud. (*See* Ex. 1 at ¶23.) For this reason, the name "Theranos" has become synonymous with fraud.

Thus, the sender's pronouncement that project44 is the "next Theranos" is no better than the assertion in *Hadley* that the plaintiff was "a Sandusky waiting to be exposed," which the Illinois Supreme Court found actionable for defamation *per se*. *Hadley v. Doe*, 2015 IL 118000, ¶¶ 37-

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

42. In *Hadley,* the Illinois Supreme Court reasoned that "[t]o ignore the reference to a national story of this magnitude would be to 'espouse a naïveté unwarranted under the circumstances.'" *Hadley* 2015 IL 118000, ¶ 37 (internal citations omitted.) The Court found that when the statements made by the defendant were given:

> their natural and obvious meaning, and considering the timing of the comment, we find the idea [defendant] Fuboy intended to convey to the reasonable reader by his statement, 'Hadley is a Sandusky waiting to be exposed. Check out the view he has of Empire from his front door,' was that Hadley was a pedophile or had engaged in sexual acts with children.

Id. Similarly, when given its natural and obvious meaning, the idea that the sender of May 19th email intended to convey to the reader by stating project44 was the "next Theranos," was that project44 was guilty of the crime of fraud.

Similarly, the May 19th email's allegations that: (a) project44 threatens their former employees; (b) that project44 is in league with the "Chicago Mafia"; and (c) that project44 uses said connections "to silence folks [i.e. former employees]" at a minimum comprise an accusation that project44 has engaged in the crime of intimidation, and are thus defamatory *per se*.[2] (*See, e.g.*, Ex. 1 at ¶ 18; Ex. A.) These statements go beyond the naked assertions of "bully tactics" in *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶¶ 50-52, claims of being a "rip-off," "fraud," etc. as in *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 728 (1st Cir. 1992), or a scam as in *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987).

Importantly, the cases cited by Defendant all emphasize the importance of context when determining whether a statement is defamatory. *See Coghlan*, 2013 IL App (1st) 120891, ¶¶ 41,

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[2] FourKites baselessly claims that "many people would likely not interpret" the word "silence" as synonymous with "intimidate." To support such a claim would require evidence outside the Complaint, which is not appropriate at the motion to dismiss stage.

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

50-52; *Phantom Touring*, 953 F.2d at 727; *McCabe,* 814 F.2d at 842-843. *Coghlan* also distinguishes statements found defamatory in *Barakat v. Matz,* 271 Ill.App.3d 662 (1st Dist. 1995) and *Tunca v. Painter,* 2012 IL App (1st) 093384, holding that, in *Barakat* and *Tunca*, "the court held that the defendant's comments implied an underlying factual basis that could have been verified." *Coghlan*, 2013 IL App (1st) 120891, ¶ 52. Here, the context of these emails was not to express an opinion or some other protected speech, but rather to "bring to your [*i.e.* the "Board members"] attention" falsely alleged conduct that the sender asserted was, *inter alia*, criminal. The sender's claim that project44 is affiliated with organized crime, by way of an employee whose relative was a "book keeper for a Chicago Mafia," is verifiable (and false), and is central to the sender's assertion that project44 is using its connections to organized crime to "silence folks." Given such context, these statements cannot be considered hyperbole and are actionable.

Finally, the claim of "rampant accounting improprieties" in the May 19, 2019 email is also defamatory *per se*, as contrary to FourKites's claims, this phrase, too, has a precise and readily understood meaning. *See, e.g., Antell v. Arthur Anderson LLP,* No. 97 C 3456, 1998 WL 245878[3], *1 (N.D. Ill. May 4, 1998) (equating "accounting improprieties" to "accounting manipulations" and "misrepresentations"). Again, the cases Defendant relies on contain only naked statements that lack verifiable assertions of fact. (*See* Motion to Dismiss at 7-8) (observing that, in cited cases, "there were no specific facts at the root of the statements.") Yet here, the sender sought to add legitimacy to their claims by encouraging the board members to "take a look at the contracts (pilots, out clauses rev rec etc)," the implication being that these documents contain evidence of accounting improprieties. (Ex. 1 at ¶ 20.) The sender also tells the recipients that "[r]ecent CFO departure must tell you everything," which conveys the idea that project44's CFO left due to

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[3] Cases with Westlaw cites have been attached hereto as group Ex. 4.

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alleged accounting improprieties. (Ex. 1 at ¶ 21.) The sender's reference to a cancelled contract (with "Estes") also suggests that the former customer ("Estes") ceased doing business with project44 due to project44's alleged improprieties. (Ex. 1 at ¶ 22). The sender's claim that the above documents contain evidence of project44's accounting improprieties is verifiable (and false). Likewise, the sender's claim that project44's CFO left due to accounting improprieties is verifiable (and false). And whether Estes ceased working with project44 because of accounting improprieties is also verifiable (and false). As such, project44 has adequately set forth a claim for defamation based on these statements.

Not surprisingly, other courts have refused to dismiss similar claims for defamation, and affirmed findings that similar statements are defamatory. For instance, in *DSC Logistics, Inc. v. Innovative Movements, Inc.*, No. 03 C 4050, 2004 WL 421977 (N.D. Ill. Feb. 17, 2004), the Northern District of Illinois, applying Illinois law, refused to dismiss a defamation claim where defendants accused plaintiff via email of poor business practices and acting in "utter bad faith," finding that "[t]hese statements are undoubtably [*sic*] criticisms of . . . [plaintiff's] business methods and, as such, fall into a category of statements that are defamatory *per se.*" *DSC Logistics*, 2004 WL 421977, at *1. Similarly, in *Vasquez v. Whole Foods Market Inc.*, 302 F.Supp.3d 36 (D.D.C. 2018) the U.S. District Court for the District of Columbia found plaintiffs sufficiently stated claims for defamation where defendants accused plaintiffs of, *inter alia*, "manipulating a bonus program to their benefit." *Vasquez*, 302 F.Supp.3d at 63. Separately, the Illinois Supreme Court found accusations that plaintiff would "commit bribery or other criminal conduct" contained in a nonfiction book about organized crime to be defamatory *per se*. *Tuite*, 224 Ill.2d at 497. Looking to the context of the statement (as part of a nonfiction book concerning "story after story of corruption"), the Illinois Supreme Court found that there was no reasonable

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innocent construction for the statement, and although defendants did not explicitly accuse the plaintiff of criminal activity, their statement was nonetheless defamatory. *Id.* at 514-515. Finally, courts have allowed defamation *per se* claims to proceed for comparisons to Madoff Investment Securities LLC (another notorious fraud case). *See, e.g., Cohen v. Hansen*, No. 2:12-CV-1401 JCM (PAL), 2015 WL 3609689, *9 (D. Nev. June 9, 2015).

2. The May 27, 2019 Email.

Not only does the May 27, 2019 email convey the idea that project44 is liable for criminal conduct by way of its reference to "theranos [*sic*]," the email flat-out accuses project44 of being a criminal enterprise by calling it a "Ponzi scheme." (Ex. 1 at Ex. F.) This, combined with the fact that the May 27th email is both directed to and calls on the newly-hired CRO of project44 (Tim Bertrand) to resign, and invites Mr. Bertrand to reach out to specific former employees of project44 to confirm the sender's baseless claims, confirms that the statements in the email cannot be innocently construed or are otherwise an opinion. (*Id.*) Whether project44 is being run as a Ponzi scheme, and whether its specific former employees have evidence of such a scheme, are verifiable (and again false).

Multiple courts have found the use of the term "Ponzi scheme" to be defamatory. For instance, in *Mann v. Swigett*, No. 5:10-CV-172-D, 2012 WL 1579323 (E.D.N.C. May 4, 2012), the court found statements accusing plaintiff of "running a 'Ponzi scheme' and engaging in 'fraudulent transactions' to be defamatory *per se*. *Mann*, 2012 WL 1579323, at *4. Similarly, in *Finance Ventures, LLC v. King*, Civil Action No. 4:15-cv-00028-JHM, 2016 WL 9460307 (W.D. Ky. Aug. 8, 2016) the court found statements that plaintiffs were "'crooks,' 'thieves,' operators of a '*Ponzi scheme*,'" etc. to be defamatory *per se*. *Finance Ventures,* 2016 WL 9460307, at *2. Further, in *Cohen v. Hansen*, the court refused to dismiss a claim for defamation *per se* where the

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defendant accused plaintiff of running a Ponzi scheme and (as discussed above) compared the defendant to Bernard Madoff. *Cohen,* 2015 WL 3609689, at *9.

FourKites's claim that the statements in the May 27th email only warn "about something the author believes might come to pass" borders on the absurd. (Motion to Dismiss at 9.) Is it truly FourKites contention that the sender is encouraging Mr. Bertrand to resign simply because project44 may someday become a "Ponzi scheme" or someday become Theranos? The context of the May 27th email in its entirety confirms this is not the case, and thus this argument by FourKites is frivolous.

C. project44 Has Alleged A Civil Conspiracy.

To state a claim for conspiracy sufficient to survive a motion to dismiss, project44 must allege "(1) the existence of an agreement between two or more persons (2) to participate in an unlawful act or a lawful act in an unlawful manner, (3) that an overt act was performed by one of the parties pursuant to and in furtherance of a common scheme, and (4) an injury caused by the unlawful overt act." *Lewis v. Lead Indus. Ass'n*, 2020 IL 124107, ¶ 20. project44's complaint meets each of those elements here. Defendant's singular concern is that project44 has not yet alleged the identity of the Jane Doe or John Doe defendants, which leads it to make the arguments that project44 has not sufficiently alleged an agreement, and that a corporation cannot conspire with its own agents, yet both of these arguments are premature at this pleading stage.

Relevant to both arguments is that project44 had a pending petition, against AT&T, and was set to learn the identify of Jane Doe, but the court dismissed the petition because of the pendency of this case, which was filed after the Covid pandemic set in and the petition hearing was pushed back until after the statute of limitations on project44's claim had run. (*See* Ex. 1 at ¶¶ 46-47; *see also* Transcript of February 3, 2021 Hearing in *project44, Inc. v. AT&T Mobility*

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LLC, No. 2019 L 10520, Cir. Ct. Cook Cty., attached hereto as Ex. 5, at 25:24-28:9.) Upon dismissal, project44 promptly issued a verbatim subpoena to AT&T in this action on February 3, 2021, and Jane Doe has once again sought to delay AT&T's disclosure to project44 of the identity of Jane Doe – who is the owner of at least one AT&T Wireless account used to access the Google email accounts from whence the offending emails were sent.

As to the first argument, the complaint adequately alleged an agreement among FourKites and one or more of the Doe defendants because, among other reasons, the complaint alleges that the Google email accounts were set up with a recovery phone number that traces to Defendant FourKites, a FourKites computer network accessed the emails, and third-party Jane Doe used a device belonging to her (or him) to access those email accounts. (*See* Ex. 1 at ¶¶ 37-45.) Only the anonymity of the internet and free Google email accounts is stopping project44 from learning additional information right now, and discovery will resolve this matter. At this stage, the above facts reflect an agreement among FourKites and Jane Doe to access anonymous email accounts that were set up to publish defamatory emails about project44.

As to the second argument, FourKites simply misstates Illinois law to claim that a corporation cannot conspire with its own agents – which is not true. A company can conspire with its own agent where the agent acts beyond his authority or for his own benefit. *See Bilut v. Northwestern Univ.*, 296 Ill.App.3d 42, 48-49 (1st Dist. 1998); *see also Boloun v. Williams*, No. 00 C 7584, 2002 WL 31426647, * 15 (N.D. Ill. Oct. 25, 2002) (conspiracy sufficiently alleged among principles and agents where agents were motivated by a personal interest "to get" the plaintiff; e.g. to "harass, coerce, intimidate . . . and destroy Baloun and his business"). project44's complaint reasonably pleads a basis for the Court to make such an inference here, such as the use of multiple avenues to access the Google email accounts, including two FourKites assets (the

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recovery number and the internet account), as well as an AT&T Wireless Account belonging to Jane Doe (to whom discovery as to their identity remains and is a simple matter). Unless FourKites is conceding that one of its employees oversaw all that is alleged in the complaint, with FourKites's authority, then project44 has alleged, with permissible inferences drawn in its favor, that FourKites conspired with an unknown third party which is unaffiliated with FourKites, or which was acting outside of its authority or for its own benefit in some manner, to defame project44.

Lastly, for the reasons stated above, project44 has set forth a claim for defamation *per se*, and by the nature of that claim has shown that it was damaged. *See, e.g.*, *Weber v. Cueto*, 253 Ill. App. 3d 509, 518 (5th Dist. 1993) (involving a claim for libel *per se* and stating "in order to recover damages pursuant to count III [conspiracy] of the first-amended complaint, plaintiff would be required to prove that either Cueto or Darling libeled her. In such a case, the liability would be imposed upon all co-conspirators"). project44 has thus met all of the requirements for pleading a civil conspiracy claim.

CONCLUSION

Wherefore, for the foregoing reasons, project44 respectfully requests that Defendant FourKites's Motion to Dismiss be DENIED.

Dated: February 4, 2021

Respectfully Submitted,

By: /s/Peter G. Hawkins
One of the Attorneys for project44, Inc.

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused a copy of the foregoing **PLAINTIFF PROJECT44, INC.'S RESPONSE IN OPPOSITION TO DEFENDANT FOURKITES, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT** to be served on February 14, 2021 via email and certified mail upon:

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__*/s/ Peter G. Hawkins*
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EXHIBIT 1

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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC., a Delaware corporation,

Plaintiff,

v.

FOURKITES, INC., a Delaware corporation,

and

JANE DOE, an individual, corporation, organization, or other legal entity whose name is presently unknown,

and

JOHN DOE #1, aka "Ken Adams," an individual, corporation, organization, or other legal entity whose name is presently unknown, using the email address "kenadams8558 @gmail.com,"

and

JOHN DOE #2, aka "Jason Short," an individual, corporation, organization, or other legal entity whose name is presently unknown, using the email address "jshort5584@gmail. com,"

and

JOHN DOES #3-25, individuals, corporations, organizations, or other legal entities whose names are presently unknown,

Defendants.

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Case No. _______________

COMPLAINT

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Plaintiff PROJECT44, INC. ("project44"), complains against Defendants FOUR KITES, INC. ("FourKites"), JANE DOE ("Jane Doe") an individual, corporation, organization, or other legal entity whose name is presently unknown, JOHN DOE #1, aka "Ken Adams" ("Ken Adams") an individual, corporation, organization, or other legal entity whose name is presently unknown, JOHN DOE #2, aka "Jason Short," ("Jason Short") an individual, corporation, organization, or other legal entity whose name is presently unknown, and JOHN DOES #3-25 ("John Does #3-25"), individuals, corporations, organizations, or other legal entities whose names are presently unknown, as follows:

NATURE OF ACTION

1. This is an action for defamation *per se*, arising from two email communications sent on May 19, 2019 and May 27, 2019 from the accounts "kenadams8558@gmail.com," and "jshort5584@gmail.com," respectively. In each communication, the sender(s) - using the pseudonyms "Ken Adams" and "Jason Short," respectively - levied knowingly false and defamatory statements against Plaintiff project44. In particular, the sender(s) accused project44 of lacking ability in their business, of lacking integrity in their business conduct, and engaging in criminal activity. The defamatory statements were directed to both outside members of project44's board of directors, as well as project44's Chief Revenue officer, with the intent to disrupt project44's business activities.

2. project44 is in the highly competitive shipping logistics industry. Over 25,000 different carriers have tracked shipments in project44's system, and it supports all transportation modes and shipping types. project44 has more than 200 employees.

3. The kenadams8558 and jshort5584 e-mail addresses from which the defamatory communications were sent both have an "@gmail" domain name. This signifies that the email

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accounts were set up via Google, LLC ("Google"). Prior to filing this Complaint, project44 obtained an order for pre-suit discovery from Google. Information received from Google identified Defendant FourKites, a competitor of project44, as either an owner or user of the kenadams8558@gmail.com and jshort5584@gmail.com email addresses. Additionally, one or more unknown co-users or co-owners of these email addresses has been identified as accessing these accounts through IP addresses operated by, *inter alia*, AT&T Mobility, LLC ("AT&T"). These unknown co-users or co-owners conspired with Defendant FourKites to send the defamatory communications, and themselves sent the defamatory communications.

4. project44 has filed a petition for discovery, naming AT&T as a respondent, in Cook County Circuit Court to identify the unknown co-users or co-owners. (*See project44, Inc. v. AT&T Mobility, LLC, et al.*, Case No. 2019-L-10520). However, an intervenor appearing anonymously as "Jane Doe," by and through their attorneys, has sought to quash the petition.

5. As of the filing date of this Complaint, no order has been entered on project44's petition for discovery of AT&T. Since the statute of limitations for defamation actions is one year from publication (735 ILCCS 5/13-201), and given that the hearing on project44's petition of AT&T has now been rescheduled to less than a week before project44's claims become time-barred (due to the COVID-19 coronavirus epidemic), project44 has filed this Complaint now before its petition for discovery on AT&T has been resolved.

THE PARTIES

6. Plaintiff project44, Inc. is a Delaware corporation with its principal place of business in Chicago, Illinois.

7. Defendant FourKites, Inc., is a Delaware corporation with its principal place of business in Chicago, Illinois.

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8. Defendant Jane Doe is an unknown individual, corporation, organization, or other legal entity proceeding as intervenor under the fictitious name "Jane Doe" in the related petition for discovery, *project44, Inc. v. AT&T Mobility, LLC, et al.* (Case No. 2019-L-10520), currently pending before the Hon. Allen P. Walker in the Circuit Court of Cook County, Law Division.

9. The true names of the following Defendants are unknown to Plaintiff, who therefore sues these Defendants under such fictitious names:

- John Doe #1, aka "Ken Adams," using the email address kenadams8558@gmail.com;
- John Doe #2, aka "Jason Short," using the email address jshort5584@gmail.com; and
- John Does #3-25, affiliated with or otherwise related to Defendants FourKites, Jane Doe, John Doe #1, or John Doe #2.

project44 alleges that each of the aforementioned Defendants Jane Doe and John Does #1-25 conspired with Defendant FourKites to publish false and defamatory statements concerning project44. project44 will seek leave of court to amend this Complaint and insert their true names in place of their fictitious names when the same have become known to project44.

JURISDICTION AND VENUE

10. Jurisdiction is proper in this Court pursuant to 735 ILCS 5/2-209 because, among other reasons, the defamatory material published by Defendants was published in Illinois representing the commission of a tort within Illinois and, thus, has caused project44 to suffer injury in Illinois. Separately, Defendant FourKites both does business in Illinois and maintains a principal place of business in Illinois.

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11. Venue is proper in this Court pursuant to 735 ILCS 5/2-101 and 735 ILCS 5/102(a) as, *inter alia*, Cook County is where Defendant FourKites maintains its principal place of business.

FACTUAL BACKGROUND

12. project44 is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois. project44 is commonly referred to in its industry by the abbreviation "p44." project44 is in the highly competitive shipping logistics industry, where it provides goods and services which permit its customers to connect with, automate, and provide visibility into key transportation processes which, in turn, permits its customers to increase operational efficiencies, reduce costs, improve shipping performance, and deliver an exceptional experience to their own customers. Over 25,000 different carriers have tracked shipments in project44's system, and it supports all transportation modes and shipping types including "parcel," "final-mile," "less-than-truckload," "volume less-than-truckload," "truckload," rail, intermodal, and ocean. project44 has more than 200 employees.

13. Defendant FourKites is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois. Like project44, FourKites is in the highly competitive shipping logistics industry. FourKites is a competitor of project44.

The May 19th Defamatory Communication

14. On May 19, 2019, one or more individuals, corporations, organizations, or other legal entities using the email address kenadams8558@gmail.com and the name "Ken Adams" transmitted an email communication titled "Accounting improprieties at P44" ("the May 19th communication"). A true and correct redacted copy of the May 19th communication is attached hereto as Exhibit A (the name of a project44 employee not a party to this litigation has been redacted).

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15. The May19th communication was sent to email addresses belonging to Jim Baum (jim@ov.vc) and Kevin Dietsel (kevin@sapphireventures.com), who are both non-employee, outside members of project44's Board of Directors. (*See* Exhibit A.) Thus, the May 19th communication was published to one or more third parties, without privilege.

16. The May 19th communication is divided into five paragraphs, three of which are numbered. (*Id.*). The May 19th communication is defamatory *per se* as it, *inter alia*, falsely imputes the commission of one or more crimes by project44, a want of integrity in project44's business conduct, and a lack of ability in project44's business.

17. For example, the first numbered paragraph alleges that that "Ex employees [of project44] are silenced with legal threats and defamation suits." (*Id.*). Immediately thereafter, the paragraph states that one of project44's employee's family members "used to be the book keeper for a Chicago Mafia and they are using that to silence folks." (*Id.*) Given the context of the paragraph, the word "they" can only refer to project44.

18. These statements are defamatory *per se* because, not only do they falsely allege that project44 maintains connections with organized crime, but they also assert that project44 uses those connections to "silence" persons such as project44's ex-employees. (*Id.*) The reference to "Chicago Mafia" conveys the idea that when project44 "silence[s] folks," they do so with threats of violence or other intimidation, a crime in Illinois. (*See* 720 ILCS 5/12-6) (stating that, *inter alia*, "[i]ntimidation is a Class 3 felony.")

19. The first sentence of the second numbered paragraph in the May 19th communication states that "[t]here is rampant accounting improprieties" at project44. (Exhibit A.) Either viewed by itself, or taken in conjunction with the next two sentences, this statement is defamatory *per se* because it falsely imputes both a want of integrity in project44's business

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FILED DATE: 4/3/2020 10:49 PM 2020L004183

conduct, as well as a lack of ability in project44's business (such as the ability to comply with generally accepted accounting procedures). "Impropriety" is commonly understood to mean "dishonest behavior, or a dishonest act." (*See*, https://dictionary.cambridge.org/us/dictionary/english/impropriety, a screenshot of which is attached hereto as Exhibit B.) As such, by using the phrase "accounting improprieties," the sender(s) of the email accuses project44 of dishonest financial practices. The sender(s) further use the term "rampant" to convey that the alleged dishonest financial practices occur frequently. (*See, e.g.,* https://dictionary.cambridge.org/us/dictionary/english/rampant, a screenshot of which is attached hereto as Exhibit C.)

20. The next sentence in the second numbered paragraph of the May 19th communication encourages the recipients "to take a look at the contracts (pilots , [*sic*] out clauses, rev rec etc.)." (Exhibit A.) The fact that this sentence: (1) immediately follows the sender(s) accusation of "accounting improprieties;" (2) is grouped in the same numbered paragraph; and (3) is part of an email titled "Accounting improprieties at P44," means that it, too, is defamatory *per se* because it conveys the false idea that these specific "contracts" contain "accounting improprieties," also imputing both a want of integrity in project44's business conduct, as well as a lack of ability in project44's business. (*Id.*)

21. For the same reasons, the third sentence in the second numbered paragraph ("Recent CFO Departure must tell you everything") is also defamatory *per se*, as it also conveys the false idea that project44's CFO left due to alleged accounting improprieties, again imputing both a want of integrity in project44's business conduct, as well as a lack of ability in project44's business. (*Id.*)

22. The third numbered paragraph of the May 19th communication states that a client of project44 ("Estes") "cancelled the contract [with project44]," and that the contract "was only

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FILED DATE: 4/13/2020 10:49 PM 2020L004183

$5k a month and they [Estes] are not even willing to pay this." This, too, is defamatory *per se* as it falsely imputes a lack of ability in project44's business. Moreover, as the sender(s) chose to convey this information in an email with the subject line "Accounting improprieties at P44," the statement also falsely conveys the idea that the cancelled contract was due to project44's alleged "accounting improprieties," again imputing a want of integrity in project44's business conduct.

23. Finally, the last paragraph of the May 19th communication is unnumbered and states that "there is widespread discontent brewing and it's just a matter of time before people go public and another Theranos happen [*sic*] in Chicago." (*Id.*) This is also defamatory *per se* as it falsely conveys the idea that project44 has committed the crime of fraud. The sender(s)' comparison to "Theranos" refers to Theranos Inc., a now-defunct company that (along with its founder Elizabeth Holmes) was charged by the U.S. Securities and Exchange Commission with securities fraud. (*See, e.g.*, Dkt No. 1 in *SEC v. Holmes, et al.*, Case No. 5:18-CV-01602 (N.D. Cal. March 14, 2018), available at https://www.sec.gov/litigation/complaints/2018/comp-pr2018-41-theranos-holmes.pdf., an excerpt of which is attached hereto as Exhibit D.) Ms. Holmes and Theranos's former president, Ramesh Balwani, have also been indicted on multiple counts of wire fraud and conspiracy to commit wire fraud (their cases are currently pending). (*See, e.g.,* https://www.justice.gov/usao-ndca/pr/theranos-founder-and-former-chief-operating-officer-charged-alleged-wire-fraud-schemes, a screenshot of which is attached hereto as Exhibit E.) Thus, the May 19th email's reference to Theranos falsely conveys the idea that, like Theranos, project44 is allegedly involved in fraudulent activity.

24. Whether viewed individually or as a whole, the statements made in the May 19th communication are defamatory *per se*. The fact that the sender(s) published these false statements

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FILED DATE: 4/13/2020 10:49 PM 2020L004183

to project44's outside board members confirms that the sender(s) intent was to disrupt project44's business activities.

25. "Ken Adams" is a pseudonym, as project44 has not previously employed anyone named "Ken Adams," nor has it ever worked with any persons having this name. The sender(s)' need to conceal their identity speaks to the defamatory nature of this communication.

26. The May 19th communication was either sent by project44's competitor Defendant FourKites, or by one or more unknown entities acting in concert with Defendant FourKites. project44 is thus reasonably concerned that similar information has been published to other parties.

The May 27th Defamatory Communication

27. On May 27, 2019, one or more individuals using the email address jshort5584@gmail.com and the name "Jason Short" transmitted an untitled email communication to an email address belonging to Tim Bertrand (tbertrand@project44.com), project44's Chief Revenue Office ("the May 27th communication"). (A true and correct copy of the May 27th communication is attached hereto as Exhibit F.) Thus, the May 27th communication was published to one or more third parties, without privilege.

28. The May 27th communication is defamatory *per se* as it, *inter alia*, falsely imputes the commission of one or more crimes by project44.

29. For example, the May 27th communication begins by addressing Mr. Bertrand as "Tim" and saying, *inter alia*, "I wanted to shed some light so you can fled [*sic*] ASAP and go find another job." (Exhibit F.) The second paragraph of the May 27th communication states that "[y]ou don't want to be part of the next Ponzi scheme or next theranos [*sic*]." (*Id.*) This is immediately followed by an invitation to "[t]alk to ex [project44] CFO Bruns. Talk to ex [project44] Sales

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people, talk to customers.. [*sic*] talk to prospects, talk to investors outside p44 [project44]. They will tell you the truth." (*Id.*)

30. Not only does the May 27, 2019 email falsely convey the idea that project44 is liable for criminal conduct by way of its reference to "theranos [*sic*]," the email flat-out falsely accuses project44 of being a criminal enterprise by calling it a "Ponzi scheme." As such, the May 27th communication is defamatory *per se*. (*Id.*) The fact that the sender(s) published these false statements to project44's newly hired Chief Revenue Officer - and encouraged the CRO to resign - confirms that the sender(s) intent was to disrupt project44's business activities.

31. "Jason Short" is a pseudonym, as project44 has not previously employed anyone named "Jason Short," nor has it ever worked with any persons having this name. The sender(s)' need to conceal their identity speaks to the defamatory nature of this communication.

32. The May 27th communication was either sent by project44's competitor Defendant FourKites, or by one or more unknown entities acting in concert with Defendant FourKites. project44 is thus reasonably concerned that similar information has been published to other parties.

project44's Efforts to Identify the Sender(s) of the Defamatory Communications

33. Google, LLC ("Google") hosts and runs one of the world's largest free e-mail systems, known as Gmail. The "@gmail" domain name in the kenadams8558 and jshort5584 e-mail addresses signifies that the emails are set up with Gmail.

34. In the process of creating a free Gmail e-mail account, the creator may leave behind actual contact information (another e-mail address, a real name, a real phone number) to be assured of continued access to the account. Similarly, when the creator logs in to create the account, and thereafter logs in to send and receive e-mail, the internet protocol address (or "IP address") of the device the user utilizes to connect will be recorded. The IP address permits insight into the location

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where the user is located because it identifies the specific network the user was on when he or she logged into the Gmail account, including what Internet Service Provider (or "ISP") provided the internet connection to the user. Once the ISP is known, a subpoena can also be sent to it to obtain identifying information. The IP address also offers insight into what device was used to log into the account and, thus, can also aid in identifying the person who sent the communication.

35. On May 30, 2019, project44 filed a verified petition for discovery, pursuant to Ill. S. Ct. R. 224, naming Google as respondent (the "Google Petition") in the Circuit Court of Cook County, Law Division. (*See* May 30, 2019 Petition, attached hereto as Exhibit G.) The Google Petition requested that Google provide project44 with, *inter alia*, the IP address information for the kenadams8558 and jshort5584 email accounts. (*See* Exhibit G.)

36. The Google Petition was assigned to the Hon. John M. Ehrlich. On July 25, 2019, Judge Ehrlich entered an order in which Google agreed to provide, *inter alia*, "internet protocol (IP) address(es) assigned to the computer or network connection used by the person or persons who established the above user account at the time the account was established, and reasonably available login IP addresses (with dates and times) assigned to the computer or network connection used by the person or persons who have accessed such user account from the date of the account's establishment to the date of the subpoena." (*See* July 25, 2019 Order, attached hereto as Exhibit H.)

37. On September 18, 2019, Google produced two text documents containing "subscriber and recent login information for the Google Accounts JSHORT5584@GMAIL.COM and KENADAMS8558@GMAIL.COM." (*See* September 18, 2019 Google Correspondence, attached hereto as Exhibit I.) Copies of the produced documents are attached hereto as Exhibit J.

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FILED DATE: 4/13/2020 10:49 PM 2020L004183

38. Exhibit J provides a series of IP addresses used to access both the kenadams8558 and jshort5584 email accounts. (*See* Exhibit J.) In particular, Exhibit J indicates that the IP addresses "78.133.216.228" and "162.234.8.247" were used to access both the kenadams8558 and jshort5584 email accounts, including on May 19, 2019 (the date the first defamatory email was sent). (Exhibit J.) As such, the same entity or entities are responsible for sending both the May 19th and May 27th defamatory communications.

39. With respect to the kenadams8558 account, the "subscriber . . . information" provided by Google includes the following entry: "SMS: +18476443564 [US]." (Exhibit I; Exhibit J.) This entry is a phone number that was provided to Google by the kenadams8558 account owner for identification purposes.

40. The phone number "847-644-3564" is identical to the phone number used by Defendant FourKites in Securities and Exchange Commission filings. (See Notice of Exempt Offering of Securities, retrieved from https://www.sec.gov/Archives/edgar/data/1625230/000162523015000001/xslFormDX01/primary_doc.xml, a copy of which is attached hereto as Exhibit K.) Thus, Defendant FourKites is an owner and/or user of the kenadams8558 account. Furthermore, by virtue of the fact that the same IP addresses were used to access both email accounts-at-issue, Defendant FourKites is also an owner and/or user of the jshort5584 account.

41. Exhibit J further confirms FourKites's involvement by disclosing that the IP address "182.74.119.134" was used to access the jshort5584 account. (*See* Exhibit J.) Using the publicly available "WHOIS IP Lookup Tool," https://www.ultratools.com/tools/ipWhoisLookup, this IP address was identified as belonging to "FOURKITES INDIA PRIVATE L." (*See* screenshot of WHOIS IP Lookup Tool, attached hereto as Exhibit L.) "FOURKITES INDIA PRIVATE L" refers to "FourKites India Private Limited," a subsidiary of Defendant FourKites.

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(*See, e.g.*, https://www.quickcompany.in/company/fourkites-india-private-limited, a screenshot excerpt of which is attached hereto as Exhibit M (listing Sriram Nagaswamy and Rashi Jain as directors of FourKites India Private Limited); *compare with* https://www.fourkites.com/about/sriram-nagaswamy/ and https://www.fourkites.com/about/rashi-jain, screenshots of which are attached hereto as Exhibit N (listing Sriram Nagaswamy and Rashi Jain as employees of Defendant FourKites).)

42. Exhibit J also contains IP addresses belonging to AT&T Mobility, LLC ("AT&T") for both the kenadams8558 and jshort5584 email accounts. AT&T is a provider of wireless communication services as well as an Internet Service Provider ("ISP"). Each time a user utilizes AT&T's internet services, AT&T assigns the user an IP address. Many ISPs maintain internal logs which record the date, time, and customer identity for each IP address assignment made by that ISP. Upon information and belief, AT&T maintains such logs.

43. The AT&T IP addresses listed in Exhibit J will identify anonymous co-owners or co-users of the kenadams8558 and jshort5584 email accounts (*i.e.* Defendants Jane Doe, John Doe #1, John Doe #2, and John Does #3-25). These anonymous co-owners or co-users of the kenadams8558 and jshort5584 email accounts acted in concert with Defendant FourKites to send the defamatory May19th communication and May 27th communication.

44. Given this, on September 24, 2019, project44 filed another petition for discovery in Cook County Circuit Court, naming, *inter alia*, AT&T as a respondent in discovery. (*See* September 24, 2019 Petition for Discovery (the "AT&T Petition"), attached hereto as Exhibit O.) The AT&T Petition was assigned to the Hon. Alan P. Walker.

45. On November 25, 2019, AT&T sent correspondence to the subscriber(s) associated with the IP addresses identified in the AT&T Petition, notifying them as to the existence of

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project44's petition. (*See* November 25, 2019 AT&T Correspondence, attached hereto as Exhibit P.) On December 16, 2019, the subscriber(s) intervened in the AT&T Petition, proceeding under the fictitious name "Jane Doe," and by and through their counsel, expressed their intention to oppose and dismiss the petition. (*See* December 16, 2019 Petition for Intervention, and December 16, 2019 Motion Pursuant to 735 ILCS 5/2-401(e) to Appear under Fictitious Name, attached hereto as Exhibit Q and Exhibit R, respectively.) Thus, there is an actual person or entity involved in sending these defamatory communications, and that person or entity does not want their identity known.

46. On February 21, 2020, project44 filed a Motion for Judgment on the Pleadings with respect to the AT&T Petition. (*See* February 21, 2020 Motion for Judgment on the Pleadings, attached hereto as Exhibit S.) Jane Doe opposed project44's Motion and filed their own Motion seeking to dismiss the AT&T Petition. (*See* March 3, 2020 Motion for Post-Hearing Final Relief on project44's Rule 224 Petition for Discovery, attached hereto as Exhibit T.) The motions were fully briefed and a hearing on the motions was set for April 20, 2020. (*See* March 13, 2020 order, attached hereto as Exhibit U.) However, in light of the COVID-19 coronavirus epidemic, the hearing was subsequently rescheduled to May 12, 2020. (*See* March 24, 2020 Cook County electronic notice, attached hereto as Exhibit V.)

47. The statute of limitations for project44's defamation claims is one year from publication, *i.e.* May 19, 2020. (*See* 735 ILCCS 5/13-201.) As such, there is a high likelihood that project44's defamation claims will become time-barred before an order in the AT&T Petition is entered, let alone before project44 receives the information requested from AT&T. This action is therefore proper to preserve project44's claims and to complete the discovery identified herein (whether through this action, or in giving the pending discovery petition time to complete).

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COUNT I

<u>DEFAMATION *PER SE* – THE MAY 19TH COMMUNICATION</u>

48. project44 hereby reincorporates and restates the above paragraphs as if specifically set forth and re-alleged herein.

49. Defendants conspired with and aided and abetted each other in making the defamatory May 19th communication, which greatly harmed project44's reputation in their trade and business.

50. Defendants each knowingly and voluntarily participated in this common scheme to harm project44's reputation.

51. Defendants did so for the purpose of accomplishing, by concerted action and common design, a harm to the business reputation of project44, to which Defendants agreed.

52. Each Defendant committed overt tortious acts in concert with each other and in furtherance of this conspiracy by making the May 19th communication, and each substantially participated and assisted in such a scheme to defame project44.

53. Each Defendant also accepted and ratified each other's defamatory statements.

54. The May 19th communication constituted defamation *per se* in that such statements concerned project44's reputation in its trade and business by lowering such reputation in the eyes the community and, upon information and belief, deterred the community from associating with project44. Therefore, damages are presumed.

55. The May 19th communication imputed a lack of integrity of project44's business conduct, imputed the commission of one or more crimes, conveyed a lack of ability by project44 in its business, and prejudiced project44 in its business.

56. Defendants knew that the May 19th communication was false, or at the very least, Defendants acted in a reckless disregard of whether the May 19th communication was false or not.

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57. Accordingly, Defendants acted with malice and made the May 19th communication for the purpose of harming project44's reputation.

58. The May 19th communication contained factual statements, in that: (a) the specific language at issue (*i.e.* statements that project44 was affiliated with the Chicago Mafia and used that affiliation to intimidate persons such as ex-employees; that project44 had engaged in accounting improprieties, that its contracts reflected these improprieties, and that project44's former CFO left because of these improprieties; that a customer had cancelled their contract due to project44's lack of ability and/or accounting improprieties; and that project44 had committed fraud in the same manner as Theranos) have precise meanings which are readily understood; (b) the defamatory statements are capable of being proven true or false; and (c) the full context of the defamatory statements in which they appear in the above-referenced media and in the broader social context and surrounding circumstances are such as to communicate to the readers of these statements that what was read is not opinion, but a statement of fact.

59. As a direct and proximate result of Defendants' defamatory statements, project44 has suffered presumed damages in the form of, *inter alia*, impairment of its business reputation and standing in the community.

60. Additionally, due to the malicious nature of the May 19th communication and the highly egregious conduct of Defendants detailed above, project44 also demands punitive damages.

COUNT II
DEFAMATION *PER SE* – THE MAY 27TH COMMUNICATION

61. project44 hereby reincorporates and restates the above paragraphs as if specifically set forth and re-alleged herein.

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62. Defendants conspired with and aided and abetted each other in making the defamatory May 27th communication, which greatly harmed project44's reputation in their trade and business.

63. Defendants each knowingly and voluntarily participated in this common scheme to harm project44's reputation.

64. Defendants did so for the purpose of accomplishing, by concerted action and common design, a harm to the business reputation of project44, to which Defendants agreed.

65. Each Defendant committed overt tortious acts in concert with each other and in furtherance of this conspiracy by making the May 27th communication, and each substantially participated and assisted in such a scheme to defame project44.

66. Each Defendant also accepted and ratified each other's defamatory statements.

67. The May 27th communication constituted defamation *per se* in that such statements concerned project44's reputation in its trade and business by lowering such reputation in the eyes the community and, upon information and belief, deterred the community from associating with project44. Therefore, damages are presumed.

68. The May 27th communication imputed the commission of one or more crimes, and thus prejudiced project44 in its business.

69. Defendants knew that the May 27th communication was false, or at the very least, Defendants acted in a reckless disregard of whether the May27th communication was false or not.

70. Accordingly, Defendants acted with malice and made the May 27th communication for the purpose of harming project44's reputation.

71. The May 27th communication contained factual statements, in that (a) the specific language at issue (*i.e.* statements that project44 was a Ponzi scheme and had committed fraud in

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the same manner as Theranos) have precise meanings which are readily understood; (b) the defamatory statements are capable of being proven true or false; and (c) the full context of the defamatory statements in which they appear in the above-referenced media and in the broader social context and surrounding circumstances are such as to communicate to the readers of these statements that what was read is not opinion, but a statement of fact.

72. As a direct and proximate result of Defendants' defamatory statements, project44 has suffered presumed damages in the form of, *inter alia*, impairment of its business reputation and standing in the community.

73. Additionally, due to the malicious nature of the May 27th communication and the highly egregious conduct of Defendants detailed above, project44 also demands punitive damages.

COUNT III
CIVIL CONSPIRACY

74. project44 hereby reincorporates and restates the above paragraphs as if specifically set forth and re-alleged here in.

75. Defendants knowingly and voluntarily entered into an agreement (the "Conspiracy") to, as described above, unlawfully defame project44 via the May 19th communication and the May 27th communication.

76. Defendant FourKites entered into the Conspiracy directly through either Jane Doe, John Doe #1, John Doe #2, or John Does #3-25.

77. In the alternative, Defendant FourKites is liable for Jane Doe's, John Doe #1's, John Doe #2's, and/or John Does #3-25's participation in the Conspiracy under the doctrine of *respondeat superior*. Upon information and belief, one or more of Jane Doe, John Doe #1, John Doe #2, and John Does #3-25 are employees of FourKites, and said Defendants made the

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defamatory statements to both damage the reputation of project44 and to provide Defendant FourKites with a competitive advantage.

78. project44 has been injured by the Conspiracy and the tortious acts undertaken pursuant to the Conspiracy as described above.

WHEREFORE, Plaintiff project44, Inc. respectfully requests that the Court grant it the following relief:

1. Judgment in project44, Inc.'s favor against Defendants FourKites, Inc., Jane Doe, John Doe #1, John Doe #2, and John Does #3-25, for presumed and actual damages in an amount to be determined at trial;

2. An award of all costs of this suit;

3. An award of punitive damages; and

4. Such other relief this Court deems just.

JURY DEMAND

project44, Inc. requests a trial by jury on all issues permitted to be tried to a jury.

Dated: April 13, 2020 Respectfully submitted,

PROJECT44, INC.

By: /s/ Douglas A. Albritton
One of Its Attorneys
Douglas A. Albritton
Peter G. Hawkins
Actuate Law LLC
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Counsel for project44, Inc.

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Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

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EXHIBIT A

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From: Ken Adams <kenadams8558@gmail.com>
Sent: Sunday, May 19, 2019 9:03 AM
To: jim@ov.vc; Kevin Diestel <kevin@sapphireventures.com>
Subject: Accounting improprieties at P44

Board members,
I recently left P44 and wanted to bring to your attention certain things.

1. Ex employees are silenced with legal threats and defamation suits. Redacted used to be the book keeper for a Chicago Mafia and they are using that to silence folks.

2. There is rampant accounting improprieties. I encourage you to take a look at the contracts (pilots , out clauses, rev rec etc). Recent CFO departure must tell you everything.

3. Estes cancelled the contract. It was only $5K a month and they are not even willing to pay this.

There is a widespread discontent brewing and it's just a matter of time before people go public and another Theranos happen in Chicago.

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Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

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COOK COUNTY, IL
2020L004183

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EXHIBIT F

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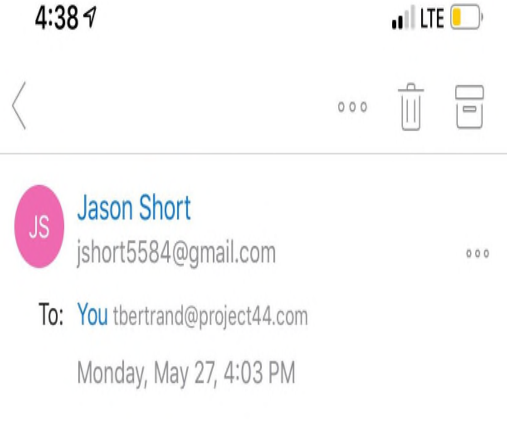

Tim,

I happened to read your post about joining project44.

Congrats!

I wanted to shed some light so you can fled ASAP and go find another job. You mention about people, investors etc in your email. There is one ingredient you missed- a great product. At some point you have to stop selling shit and start delivering.

You don't want to be part of the next Ponzi scheme or next theranos. Talk to ex CFO Bruns. Talk to ex Sales people, talk to customers.. talk to prospects, talk to investors outside p44. They will tell you the truth. If you decide to forward this to broker Jett and move on, you are making a mistake.

I sincerely wish you the best. You seem like a nice guy, you deserve better..

Friend

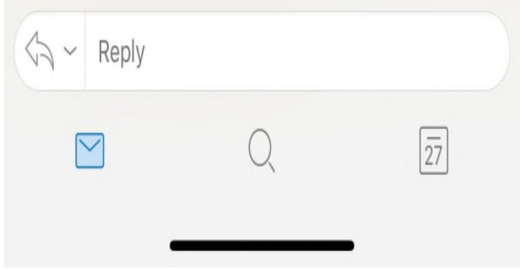

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EXHIBIT 2

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Defamation: A Lawyer's Guide § 1:23

Defamation: A Lawyer's Guide December 2020 Update
David Elder

Chapter 1. The Prima Facie Case

VI. Publication

§ 1:23. Publication to plaintiff's agent

References Correlation Table

West's Key Number Digest

- West's Key Number Digest, Libel and Slander 23(1)

Substantial case law[1] also treats statements to plaintiff's agent as the "legal equivalent"[2] of statements directly to plaintiff, which are unquestionably not publications under the general rule. This is found to be particularly true where the statements are "both authorized and invited" by the principal.[3] This indefensible rule commingles in indiscriminating fashion questions of publication,[4] privilege[5] and consent,[6] and evidences gross confusion concerning the parameters of each. By comparison, the better reasoned and defensible view[7] treats such statements as published, applies any qualified privileges appropriate to the facts, and finds consent absent unless plaintiff knew defendant would defame him to the servant initiating an inquiry.[8]

By contrast, where defendant libels or slanders the corporate employer to its employees, limited, questionable case law rejects the preferred rule finding publication in notification to plaintiff's agent(s).[9] This dissemination is deemed merely a publication to the corporate entity defamed and involving no possible loss of reputation.[10] The latter view seems exceptionally dubious. If a labor union erroneously disseminates a communique to company employees intimating the corporation was in imminent danger of bankruptcy, this would clearly constitute a published defamation potentially harmful, maybe even devastating, to the corporation's business persona.

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Footnotes

1 See, e.g., Reece v. Finch, 562 So. 2d 195, 198 (Ala. 1990) [agent-insurance company appointed by doctor to inquire into his suitability and competence as to insurability]; Freeman v. Dayton Scale Co., 159 Tenn. 413, 19 S.W.2d 255, 256–57 (1929); Rowe v. Isbell, 599 So. 2d 35, 36 (Ala. 1992); Delval v. PPG Industries, Inc., 590 N.E.2d 1078, 1081 (Ind. Ct. App. 1st Dist. 1992) [A referral from the company to mental health professionals under a referral plan was a communication to plaintiff's agent and not a publication].

And see Roberts v. Lane, 210 Ga. App. 10, 435 S.E.2d 227, 229 (1993) [plaintiff's attorney]; Wisner v.

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Harvey, 694 So. 2d 348, 350–51 (La. Ct. App. 1st Cir. 1996) [same]; Craig v. Colonial Penn Ins. Co., 335 F. Supp. 2d 296, 311-12 (D. Conn. 2004) [same]; Melton v. Ousley, 925 N.E.2d 430 (Ind. Ct. App. 2010) [same]; Gomberg v. Zwick, Friedman & Goldbaum, P.A., 693 So. 2d 1064, 1065–66 (Fla. Dist. Ct. App. 4th Dist. 1997) [where the matter was sent to plaintiff's lawyer via fax using the designated fax number, the no-publication rule was not defeated where a co-user of the fax saw the letter—defendant-firm could rely on plaintiff's counsel to protect confidentiality]; Snyder v. Ag Trucking, Inc., 57 F.3d 484, 489–90, 1995 FED App. 0184P (6th Cir. 1995) [defendant-employer's response to plaintiff's attorney attempt to settle claims instead of suing](the court drew the analogy to communications related to judicial proceedings); Friel v. Angell Care Inc., 113 N.C. App. 505, 440 S.E.2d 111, 113 (1994) [plaintiff's friend]. Note that Gomberg was later relied on in the setting of a Fax sent directly to plaintiff, imposing upon her the duty of assuring Fax confidentiality. Martinelli v. International House USA, 161 Cal. App. 4th 1332, 75 Cal. Rptr. 3d 186, 189-90 (2d Dist. 2008), review denied, (June 25, 2008).
On matters published by attorneys entitled to the judicial proceedings see § 2:11.

2 Reece v. Finch, 562 So. 2d 195, 198 (Ala. 1990). And see Freeman v. Dayton Scale Co., 159 Tenn. 413, 19 S.W.2d 255, 256–57 (1929); Jones v. Britt Airways, Inc., 622 F. Supp. 389, 392 (N.D. Ill. 1985).

3 Reece v. Finch, 562 So. 2d 195, 198 (Ala. 1990). Such would not be true consent unless plaintiff was aware that defendant would defame him or her. See § 2:2. And see Martinelli v. International House USA, 161 Cal. App. 4th 1332, 75 Cal. Rptr. 3d 186, 189-90 (2d Dist. 2008), review denied, (June 25, 2008) [where an attorney gave a family insurance agency Fax as a mode of communicating with her regarding a relative-client, a Fax to plaintiff's daughter at the agency as a means of communicating with her was the equivalent of receipt by plaintiff]. And see 30 River Court v. Capograsso, 892 A. 2d 711, 715–18 (N.J. Super. App. Div. 2006), where the court held that an "invited" communication to plaintiff's agent was not a publication under the rule in Restatement Second, Torts § 577, cmt. e (1977) ["… (T)he communication to a servant or agent of the person defamed is a publication although if the communication is in answer to a letter or request from the other or his agent, the publication may not be actionable in defamation"]. Note that the agent in question, the apartment building concierge, was an appointed recipient for complaints. The court interpreted the facts as having "invited and directed [the tenant] to make *any* complaints concerning the tenancy" to the concierge. *30 River Court* at 717. This seems rather a stretch. The tenant charged the corporate landlord with hiring "goons" to run her off the road and illegally opening her mail! The actual policy underlay for this overly broad rule protecting "outrageous customer statements," is an absolute privilege supported by a plethora of statutes accorded tenants against landlords. This is made clear by the court's concluding statement: "… (L)andlords are required by law to invite communications from their tenants, either directly or through a superintendent or concierge. And tenants must be able to bring problems to a landlord's attention without having to worry that if they complain too stringently the landlord will sue them for defamation." *30 River Court* at 717–18. The court alternatively held that there was no publication because it was not understood by the concierge in a defamatory manner. *30 River Court* at 718–19. See § 1:20, supra.

4 See supra.

5 See supra and §§ 2:23 to 2:35.

6 See § 2:2.

7 See, e.g., Williams v. Burns, 463 F. Supp. 1278, 1281–82 (D. Colo. 1979); Hedgpeth v. Coleman, 183 N.C. 309, 111 S.E. 517, 519, 24 A.L.R. 232 (1922); Frank B. Hall & Co., Inc. v. Buck, 678 S.W.2d 612, 617–18 (Tex. App. Houston 14th Dist. 1984), writ refused n.r.e. (Dec. 12, 1984); Restatement (Second) of Torts § 577, comm. e (1977); Sleepy's LLC v. Select Comfort Wholesale Corp., 909 F.3d 519, 528–29, 128 U.S.P.Q.2d 1830 (2d Cir. 2018) [applying New York's "'better view'": "'The agent is, in fact, a different entity from the principal; the communication is, in fact a publication to a third person.'"] (internal citation omitted); Drew v. Quest Diagnostics, 2014 WL 200812, *12-13 (N.D. Ala. 2014) [the court "strains to understand" how plaintiff's personal physician was his "agent"—in any event, such was fact-intensive and

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inappropriate for resolution on the pleadings]. Compare City of Fairbanks v. Rice, 20 P.3d 1097, 1107 (Alaska 2000), reh'g granted (Oct. 13, 2000), where the court noted the division in the precedent but declined to follow the non-publication rule as to a communication to plaintiff's attorney where there was no evidence the attorney was authorized to receive such a communication.

8 Frank B. Hall & Co., Inc. v. Buck, 678 S.W.2d 612, 617–18 (Tex. App. Houston 14th Dist. 1984), writ refused n.r.e. (Dec. 12, 1984). There was no consent where plaintiff was unaware defendant would defame him in communications to the agent. Frank B. Hall & Co., Inc. v. Buck, 678 S.W.2d 612, 617–18 (Tex. App. Houston 14th Dist. 1984), writ refused n.r.e. (Dec. 12, 1984). On consent generally see § 2:2.

9 Fausett v. American Resources Management Corp., 542 F. Supp. 1234, 1241–42 (D. Utah 1982).

10 Fausett v. American Resources Management Corp., 542 F. Supp. 1234, 1241–42 (D. Utah 1982). And see Astro Tel, Inc. v. Verizon Florida, LLC, R.I.C.O. Bus. Disp. Guide (CCH) P 12418, 2013-2 Trade Cas. (CCH) ¶ 78567, 2013 WL 5781658, *19-20 (M.D. Fla. 2013).

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EXHIBIT 3

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KeyCite Yellow Flag - Negative Treatment
Declined to Follow by In re Texas Intern. Securities Litigation, W.D.Okla., January 29, 1987

KeyCite Overruling Risk - Negative Treatment
Overruling Risk Simpson v. Mars Inc., Nev., January 5, 1997

542 F.Supp. 1234
United States District Court, D. Utah, Central Division.

Lonnie FAUSETT, Plaintiff,
v.
AMERICAN RESOURCES MANAGEMENT CORPORATION, a Utah corporation, and John Does I through X, Defendants.

Civ. No. C-80-0110.
|
June 30, 1982.

Synopsis

Former corporate officer brought securities fraud action against corporation and various defendants, alleging that their wrongful conduct artificially inflated price of corporate stock thereby “forcing” him to purchase more shares of such stock in order to cover short sales to which he was committed, and corporation counterclaimed for, inter alia, recovery of short swing profits, breach of fiduciary duty, defamation, and punitive damages. On defendants’ motion for summary judgment and plaintiff’s motion for partial summary judgment, the District Court, Winder, J., held that: (1) fraud-on-the-market theory would be rejected and proof of reliance required in cases primarily involving misrepresentation; (2) former officer was entitled to seek recovery, notwithstanding dissemination of information after he was committed to sell; (3) reliance is presumed in cases in which person sells short and misrepresentations are not made or fraud is not completed and impact from deceit is not felt until after commitment to sell short is made; (4) there could be no cause of action for breach of fiduciary duty against former officer, who had relinquished position with corporation and thus was no longer burdened with fiduciary duties; (5) communication to corporate management of alleged defamation of corporation does not constitute publication; and (6) genuine issue of material fact existed as to whether plaintiff’s communications regarding corporation were made in order to hold corporation up to hatred, contempt or ridicule, precluding summary judgment as to punitive damages arising from publication of defamatory statements.

Ordered accordingly.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (19)

[1] **Securities Regulation** Fraud on the market

The fraud-on-the-market theory of reliance in securities fraud action would be rejected and proof of reliance required in cases primarily involving misrepresentations. Securities Exchange Act of 1934, § 10(b) as amended 15 U.S.C.A. § 78j(b).

1 Cases that cite this headnote

[2] **Securities Regulation** Buyers or sellers

If defendants’ fraudulent conduct in dissemination of untrue statements and omission of material facts necessary to make statements not misleading artificially inflated price of corporate stock, thereby “forcing” plaintiff to purchase more shares of stock in order to cover short sales to which he was already committed, plaintiff would be entitled to recover against defendants for securities fraud. Securities Exchange Act of 1934, § 10(b) as amended 15 U.S.C.A. § 78j(b).

1 Cases that cite this headnote

[3] **Securities Regulation** Presumptions and burden of proof

Reliance is presumed in cases in which person sells short and misrepresentations are not made or fraud is not completed and impact from such deceit is not felt until after commitment to sell short is made. Securities Exchange Act of 1934,

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CASES WITH WESTLAW CITATIONS CITED IN PROJECT44'S OPPOSITION TO FOURKITES, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

TABLE OF CONTENTS

4-A. *Antell v. Arthur Anderson LLP,* No. 97 C 3456, 1998 WL 245878 (N.D. Ill. May 4, 1998)

4-B. *Boloun v. Williams*, No. 00 C 7584, 2002 WL 31426647 (N.D. Ill. Oct. 25, 2002)

4-C. *Cohen v. Hansen*, No. 2:12-CV-1401 JCM (PAL), 2015 WL 3609689 (D. Nev. June 9, 2015)

4-D. *DSC Logistics, Inc. v. Innovative Movements, Inc.*, No. 03 C 4050, 2004 WL 421977 (N.D. Ill. Feb. 17, 2004)

4-E. *Finance Ventures, LLC v. King*, Civil Action No. 4:15-cv-00028-JHM, 2016 WL 9460307 (W.D. Ky. Aug. 8, 2016)

4-F. *Mann v. Swigett*, No. 5:10-CV-172-D, 2012 WL 1579323 (E.D.N.C. May 4, 2012)

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EXHIBIT 4-A

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KeyCite Yellow Flag - Negative Treatment
Distinguished by In re Apex Automotive Warehouse, L.P., Bankr.N.D.Ill., March 9, 1999

1998 WL 245878
Only the Westlaw citation is currently available.
United States District Court, N.D. Illinois.

James B. ANTELL, III, Nick Pino, Anthony Dicamillo, and Ralph Corigliano Plaintiffs
v.
Arthur ANDERSEN LLP., Defendant.

No. 97 C 3456.
|
May 4, 1998.

MEMORANDUM OPINION AND ORDER

ANDERSEN, District J.

***1** On February 20, 1998, Magistrate Judge Martin C. Ashman filed and served upon the parties his report and recommendation concerning the motion of Defendant, Arthur Andersen LLP ("Arthur Andersen"), to dismiss the instant complaint pursuant to Fed.R.Civ.P. 12(b)(6). Judge Ashman recommends that Arthur Andersen's motion be granted in part and denied in part.

After a careful consideration of the above-referenced motion, the applicable memoranda of law, other relevant pleadings, Judge Ashman's report, and the parties' objections, the Court hereby adopts in full the report and recommendation.

I. BACKGROUND

For purposes of a motion to dismiss, the allegations in the complaint are presumed true. The Discovery Zone, Inc. (the "Discovery Zone") owns, operates, and franchises children's indoor recreational centers. In June 1993, the Discovery Zone offered its stock to the public for the first time.

Each of the four named Plaintiffs purchased Discovery Zone stock in the pertinent time period. According to Plaintiffs, between March 31, 1994 and September 15, 1995, the officers and directors of the Discovery Zone inflated the price of the company's stock by using false and misleading financial statements in the company's annual Form 10–K Securities and Exchange Commission ("SEC") filings for the years ending 1993 and 1994. Plaintiffs further allege that Arthur Andersen, an independent accounting firm, audited these financial statements and issued unqualified or "clean" audit opinions. Additionally, Plaintiffs contend that the officers and directors of the Discovery Zone and Arthur Andersen engaged in various accounting improprieties which converted normal operating expenses to capital thereby masking operational loses. Accordingly, Plaintiffs allege that these accounting manipulations and other misrepresentations deceived the public into believing that the Discovery Zone was profitable and well positioned for dramatic future growth.

The Discovery Zone filed the pertinent Form 10–Ks and audit reports prepared by Arthur Andersen with the SEC on March 31, 1994 and March 31, 1995.

On November 9, 1994, the Discovery Zone reported a substantial operating loss for the third quarter of 1994. On November 28, 1994, the first putative class action was filed against the Discovery Zone and certain officers and directors alleging that these defendants improperly inflated the price of Discovery Zone stock in violation of §§ 10(b) and 20 of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) and 78t, and SEC Rule 10b–5, 17 C.F.R. § 240.10b–5.

Several other putative class actions were also filed against the Discovery Zone and certain officers and directors. All of the separate lawsuits were consolidated in front of Judge Ruben Castillo (the "Related Action"). On January 31, 1995, James B. Antell, III ("Antell") filed a consolidated putative class action complaint in the Related Action and later amended that pleading on April 25, 1995 and November 16, 1995. Antell purchased Discovery Zone stock on December 7, 1994.

***2** In the Related Action, Antell asserted a fraud-on-the-market theory on behalf of a class of shareholders who purchased Discovery Zone stock during the period that the price of the stock was purportedly

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inflated due to the defendants' alleged manipulations and misrepresentations.

As part of the Related Action, on September 5, 1995 Arthur Andersen was served with a subpoena seeking its work papers from its 1993 and 1994 audits of the Discovery Zone's financial statements. In December 1996 and January 1997, Arthur Andersen produced documents which allegedly demonstrated, for the first time, that Arthur Andersen acted with scienter in the alleged accounting manipulations. Based on this information, on March 28, 1997, Antell sought leave to file a third amended complaint in the Related Action asserting similar fraud-on-the-market claims against Arthur Andersen. Judge Castillo denied the motion on the grounds that the addition of Arthur Andersen would delay discovery and prejudice the defendants. Nonetheless, Judge Castillo's order did not preclude the filing of a separate lawsuit against Arthur Andersen.

On May 9, 1997, Antell filed a putative class action against Arthur Andersen. Antell seeks damages on behalf of the class of shareholders who purchased Discovery Zone stock between March 31, 1994 and September 15, 1995. Antell claims that Arthur Andersen's audit reports either intentionally or recklessly failed to disclose that the Discovery Zone's financial statements were materially misstated and not in compliance with Generally Accepted Accounting Principles and General Accepted Auditing Standards. Antell brings claims under § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and SEC Rule 10b–5, 17 C.F.R. § 240.10b–5, (Count I) and common law fraud (Count II).

On August 6, 1997, Judge Ashman granted the motion of class members Nick Pino ("Pino"), Anthony DiCamillo ("DiCamillo"), and Ralph Corigliano ("Corigliano") for appointment as lead plaintiffs. Corigliano purchased Discovery Zone stock on March 24, 1995. DiCamillo and Pino purchased the stock on September 13, 1995 and September 14, 1995, respectively.

Arthur Andersen filed a motion to dismiss Plaintiffs' claims on July 21, 1997. In its motion to dismiss, Arthur Andersen argues that Plaintiffs' federal securities claim (Count I) is barred by the applicable statutes of limitations and repose. Arthur Andersen further asserts that the Court should decline to exercise supplemental jurisdiction over Plaintiffs' state law claim for common law fraud (Count II). Plaintiffs contend that their claims are not time barred.

Judge Ashman issued his report and recommendation on February 20, 1998 recommending that Arthur Andersen's motion to dismiss based on the one-year statute of limitations be denied and that the motion be granted based on the applicable three-year statute of repose. Accordingly, Judge Ashman recommends that all claims for purchases made in reliance on the March 31, 1994 Form 10–K and the accompanying supplemental claims for common law fraud be dismissed. The Plaintiffs and Arthur Andersen each filed and briefed their objections in March 1998.

II. DISCUSSION

***3** A motion to dismiss a complaint pursuant to Fed.R.Civ.P. 12(b)(6) does not test whether the plaintiff will prevail on the merits but instead whether the claimant has properly stated a claim. *Triad Assoc. v. Chicago Housing Auth.,* 892 F.2d 583, 586 (7th Cir.1989), *cert. denied,* 498 U.S. 845, 111 S.Ct. 129, 112 L.Ed.2d 97 (1990). The court must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiff. *Chaney v. Suburban Bus Div. of Reg'l Transp. Auth.,* 52 F.3d 623, 626–627 (7th Cir.1995) (citations omitted). Dismissal is proper only if it appears beyond doubt that the plaintiff cannot prove any of the facts in support of her claim that would entitle her to the requested relief. *Hughes v. Rowe,* 449 U.S. 5, 9–10, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980).

With these standards in mind, we now turn to the report and recommendation. In doing so, we must "make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which a specific written objection has been made." Fed.R.Civ.P. 72(b). This "de novo determination" does not require a new hearing, but simply means that we must give "fresh consideration to those issues to which specific objections have been made." *Rajaratnam v. Moyer,* 47 F.3d 922, 925 n. 8 (7th Cir.1995) (*quoting* 12 Charles A. Wright et al., *Federal Practice and Procedure* § 3076.8 (Supp.1994)).

An action claiming a violation of Section 10(b) or Rule 10b–5 must be brought "within one year after the discovery of the facts constituting the violation and within three years after such violation." *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 364, 111 S.Ct. 2773, 115 L.Ed.2d 321 (1991); 15 U.S.C. § 78i(e). The statue of limitations is an affirmative

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defense. In the context of a motion to dismiss, a plaintiff is not required to negate an affirmative defense in his complaint. *Fugman v. Aprogenex, Inc.,* 961 F.Supp. 1190, 1198 (N.D.Ill.1997). Nonetheless, if the plaintiff pleads facts that establish that his suit is time barred, he pleads himself out of court. *Tregenza v. Great American Communications Co.,* 12 F.3d 717, 718 (7th Cir.1993), *cert. denied,* 511 U.S. 1085, 114 S.Ct. 1837, 128 L.Ed.2d 465 (1994).

A. One–Year Statute of Limitations

The one-year limitations period begins to run when a plaintiff has "inquiry notice" of the alleged fraud rather than when a plaintiff actually discovers the fraud. *Id.* at 722. The test is an objective one. *Law v. Medco Research, Inc.,* 113 F.3d 781, 786 (7th Cir.1997). A person is charged with "inquiry notice" when she becomes aware of facts that would lead a reasonable person to investigate whether she has a claim under Section 10(b) or Rule 10b–5. *Marks v. CDW Computer Centers, Inc.,* 122 F.3d 363, 367 (7th Cir.1997). " 'Suspicious circumstances, coupled with ease of discovering, without the use of legal process, whether the suspicion is well grounded, may cause the statute of limitations to start to run before the plaintiffs discover the actual fraud." ' *Fujisawa Pharm. Co., Ltd. v. Kapoor,* 115 F.3d 1332, 1335 (7th Cir.1997) (citing *Law,* 113 F.3d at 786).

***4** Judge Ashman recommends that Arthur Andersen's motion to dismiss based on the one-year limitations period be denied. Arthur Andersen objects to Judge Ashman's conclusion that Plaintiffs did not have "inquiry notice" of their claim more than one year before the action was commenced. Plaintiffs offer no objection on this point. For the following reasons, we agree with Judge Ashman and overrule Arthur Andersen's objection.

Plaintiffs filed the instant action against Arthur Andersen on May 9, 1997. Arthur Andersen contends that Plaintiffs had inquiry notice of this claim on November 28, 1994, the day the original complaint in the Related Action was filed. Arthur Andersen asserts that the Related Action complaint proclaimed to the world that Discovery Zone shareholders asserted fraud based on the same type of accounting manipulations and practices that Plaintiffs claim in the instant lawsuit. Thus, Arthur Andersen concludes that Plaintiffs were sufficiently alerted that Arthur Andersen, the auditor of the purported fraudulent financial statements, may have participated in the alleged fraud.

A "reasonable investor is presumed to have information available in the public domain, and therefore [a plaintiff] is imputed with constructive knowledge of this information." *Whirlpool Fin. Corp. v. GN Holdings, Inc.,* 67 F.3d 605, 610 (7th Cir.1995). Arthur Andersen correctly states that pleadings in a lawsuit can provide inquiry notice of a claim. *See* *Astor Chauffeured Limousine Co. v. Runnfeld Inv. Corp.,* 910 F.2d 1540, 1544 (7th Cir.1990); *Cashman v. Coopers & Lybrand,* 877 F.Supp. 425, 436–437, n. 14 (N.D.Ill.1995). Nonetheless, Plaintiffs are not charged with inquiry notice until they knew or should have known Arthur Andersen acted with scienter. *Law,* 113 F.3d at 786.

Plaintiffs contend that they could not have known that Arthur Andersen may have joined in the alleged fraudulent accounting treatment until Arthur Andersen produced its work papers in the Related Action in late 1996 and early 1997. Specifically, in ¶ 80 of the complaint Plaintiffs allege that:

> Beginning in December 1996 and continuing in January 1997, as a result of discovery in the action against the Related Action Defendants, which discovery had previously been stayed, plaintiffs received work papers of Arthur Andersen relating to the 1993 and 1994 audits. Included in the Administration Binder produced by Arthur Andersen, contained as part of the 1993 work papers, were Audit Issue Control Documents dated February 7, 1994. These documents and related documents revealed for the first time, that Arthur Andersen knew or recklessly disregarded that the public financial statements for the years ended December 31, 1993, and December 31, 1994, issued or disseminated in the name of [the Discovery Zone], were materially false and misleading and that Arthur Andersen's audits did not conform with GAAS.

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Although the pleadings filed in the Related Action and the disclosures in the Form 10–K filings may have created suspicious circumstances as to Arthur Andersen's knowledge and activities, we cannot accept Arthur Andersen's assertion that these documents conclusively provided inquiry notice of Arthur Andersen's supposed recklessness or intentional misconduct. In order to make the inference Arthur Andersen requires, the Court must ignore the equally reasonable inference that the Related Action pleadings and the SEC filings merely put Plaintiffs on notice that Arthur Andersen acted only in a negligent manner.

***5** Whether a plaintiff has inquiry notice of a claim under Section 10(b) or Rule 10b–5 is a question of fact and, as such, is often inappropriate for resolution of a motion to dismiss. *Marks,* 122 F.3d at 366. At this stage of the proceedings, we must assume the truth of Plaintiffs' allegations and draw all reasonable inferences in their favor. Thus, for purposes of the motion to dismiss we find that Plaintiff had inquiry notice of the instant claim against Arthur Andersen when it received Arthur Andersen's work papers in December 1996 or January 1997. Arthur Andersen's motion to dismiss based on the one-year statue of limitations is, therefore, denied.

B. Three–Year Statute of Repose

In *Lampf,* the Supreme Court adopted a three-year statute of repose for claims brought under Section 10(b) and Rule 10b–5. The Supreme Court, however, did not specifically define the "violation" that triggers the repose period. Plaintiffs assert that a plaintiff's purchase of a security triggers the repose period. Judge Ashman and Arthur Andersen both suggest that the alleged misrepresentation is the "violation" contemplated by the statute of repose.

Based on the statute of repose, Judge Ashman recommends that Arthur Andersen's motion to dismiss be granted for all claims for purchases made in reliance on the Discovery Zone's March 31, 1994 Form 10–K filing, namely all purchases made prior to March 31, 1995. Plaintiffs object to Judge Ashman's recommendation. Defendant offers no objection on this point. For the following reasons, we agree with Judge Ashman and overrule Plaintiffs' objection.

Whether Plaintiffs' claims are time-barred under the statute of repose depends on when the repose period began to run. Although the Seventh Circuit has not yet determined the triggering event in the Section 10(b) or Rule 10b–5 context, the court has held that a period of repose bars a suit a fixed number of years after an action by a defendant, even if this period ends before a plaintiff suffers any injury. *Beard v. J.I. Case Co.,* 823 F.2d 1095, 1097 n. 1 (7th Cir.1987). *Accord* *Lampf,* 501 U.S. at 363 (stating "the purpose of the 3–year [statute of repose] is clearly to serve as a cutoff...."); *Law,* 113 F.3d at 786 (noting that "the three-year statute of repose gives defendants a definite limit beyond which they needn't fear being sued"). For the following reasons, we hold that the repose period is triggered by the alleged misrepresentation rather than by a plaintiff's purchase of a security.

An examination of the language of 15 U.S.C. § 78i(e), § 9(e) of the of the 1933 Security and Exchange Act, the rule adopted by the Supreme Court in *Lampf,* is instructive. Pursuant to § 78i(e), claims must be "brought within one year after the discovery of the facts constituting the *violation* and within three years after such *violation.*" The employment of the term "violation" for purposes of both the one-year statute of limitations period and the three-year repose period demonstrates that a "violation" occurs at the time of the alleged fraudulent conduct. As discussed above, *see supra* Section A, a party must commence a Section 10(b) or Rule 10b–5 claim within one-year after discovery of the facts constituting the alleged fraudulent conduct. If we held that the repose period begins when a plaintiff purchased the Discovery Zone stock, "violation" would have two different meanings in the same sentence.

***6** Additionally, although the *Lampf* opinion did not specifically decide what constitutes a triggering event for the repose period, the Court stated:

> As there is no dispute that the earliest of plaintiffs-respondent's complaints was filed *more than three years after petitioner's alleged misrepresentations,* plaintiffs-respondent's claims were untimely.

Lampf, 501 U.S. at 364 (emphasis added). Furthermore, the Ninth Circuit and the SEC agree that a "violation" of Section 10(b) or Rule 10b–5 does not

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depend on a sale or purchase of a security. *E.g.* *S.E.C. v. Rana Research, Inc.,* 8 F.3d 1358, 1364 (9th Cir.1993); *In re Cambridge Biotech Corp.,* Exch. Act. Rel. No. 33–7358, 1996 WL 595674 (Oct. 17, 1996).

Thus, we find that the three-year repose period for Section 10(b) and Rule 10b–5 claims begins to run when a defendant makes an affirmative misrepresentation. *Accord* *In re Prudential Ins. Co. of America Sales Practices Litigation,* 975 F.Supp. 584, 603–604 (D.N.J.1997) (holding that the alleged misrepresentation rather than the sale or purchase of a security triggers the three-year repose period); *In re Phar–Mor, Inc. Securities Litigation,* 892 F.Supp. 676, 687–688 (W.D.Pa.1995) (same); *Continental Bank, Nat'l Assoc.,* 777 F.Supp. 92, 102 (D.Mass.1991) (same); *Greenberg v.. Boettcher & Co.,* 755 F.Supp. 776, 784–785 (N.D.Ill.1991) (same); *c.f.,* *Otto v. Variable Annuity Life Ins. Co.,* 816 F.Supp. 458, 461 (N.D.Ill.1991) (declining to select a triggering date for affirmative misrepresentation cases and noting in *dicta* that "a violation of § 10(b) and Rule 10b–5 is comprised not only of a misrepresentation or omission of material fact, but also includes the purchase or sale of any security").

In their objection, Plaintiffs assert that Judge Ashman's conclusion that the misrepresentation triggers the repose period is contrary to law. We have already rejected this argument and agree with Judge Ashman's analysis. Furthermore, Plaintiffs' reliance on *Kleban v. S.Y.S. Restaurant Management, Inc.,* 912 F.Supp. 361 (N.D.Ill.1995), is misplaced. In *Kleban,* the court held that the sale of the security triggers the repose period. *Id.* at 367. We are not bound by this decision and for the reasons stated above we disagree with its reasoning.

Likewise, *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975), offers Plaintiffs no assistance. In *Blue Chip Stamps,* the Supreme Court held only that actual purchasers and sellers of securities have standing to pursue a claim under the anti-fraud provisions of the Security and Exchange Act of 1934. The Court did not decide when the repose period begins to run or define "violation" in the repose context. Therefore, Plaintiffs' objection is denied.

In sum, all claims for purchases made in reliance on the Discovery Zone's March 31, 1994 Form 10–K filing, namely all purchases made prior to March 31, 1995, are time bared by the statute of repose. Because Antell and Corigliano purchased the stock before March 31, 1995, their federal claims are time-barred. Generally, when federal claims are dismissed, the court should decline to exercise jurisdiction over supplemental state law claims. *United Mine Workers of America v. Gibbus,* 383 U.S. 715, 726–727, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). Accordingly, the Court will not exercise supplemental jurisdiction over the state law claims based on purchases made before March 31, 1995. Thus, the claims of Antell and Corigliano are dismissed.

***7** Additionally, in his report, Judge Ashman overlooked the purchase dates of Plaintiffs DiCamillo and Pino which occurred on September 13, 1995 and September 14, 1995. Because DiCamillo and Pino relied on the alleged misrepresentations contained in the March 31, 1995 Form 10–K filing, the repose period for their claims had not expired when the instant action was filed on May 9, 1997. Thus, Plaintiffs DiCamillo and Pino may pursue the federal and state law claims in Counts I and II for purchases made in reliance on the Discovery Zone's March 31, 1995 Form 10–K, namely all purchases made between March 31, 1995 and September 15, 1995.

C. Tolling Of The Three–Year Statue Of Repose

Plaintiffs also contend that the statue of repose was tolled on March 28, 1997, three days before the anniversary of the initial Form 10–K filing. On that date, Plaintiffs filed their motion to amend the complaint in the Related Action to add Arthur Andersen as a defendant. Plaintiffs, thus, argue that the repose period was tolled during the pendency of their motion. Judge Ashman rejected Plaintiffs' assertion and we agree with Judge Ashman.

In *Lampf,* the Supreme Court squarely rejected the doctrine of equitable tolling in securities fraud cases. The Court held that "it is evident that the equitable tolling doctrine is fundamentally inconsistent with the 1–and 3–year [limitations] structure." *Lampf,* 501 U.S. at 363.

Moreover, even if the clock stopped running while Judge Castillo decided Plaintiffs' motion to amend, from March 28, 1997 to May 2, 1997, the repose period would only be extend by three days. Plaintiffs, however, waited four days before filing the instant suit. Thus, we reject Plaintiffs' equitable tolling argument.

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III. CONCLUSION

For the foregoing reasons, we adopt Magistrate Judge Ashman's report and recommendation. Arthur Andersen's motion to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) based on the one-year statute of limitations is denied. The motion to dismiss based on the three-year statute of repose is granted in part and denied in part.

Claims for purchases made in reliance on the Discovery Zone's March 31, 1994 Form 10–K filing are time barred under the statute of repose, namely purchases made prior to March 31, 1995. The claims of Plaintiffs Antell and Corigliano are, thus, dismissed. Accordingly, we decline to exercise supplemental jurisdiction of their state law claims. Claims for purchases made in reliance on the Discovery Zone's March 31, 1995 Form 10–K filing are timely. Therefore, Arthur Andersen's motion to dismiss is denied as to Plaintiffs DiCamillo and Pino. Plaintiffs DiCamillo and Pino may pursue the federal and state law claims in Counts I and II for purchases made in reliance on the Discovery Zone's March 31, 1995 Form 10–K, namely all purchases made between March 31, 1995 and September 15, 1995.

The objections to the report and recommendation of Plaintiffs and Arthur Andersen are hereby overruled.

***8** It is so ordered.

All Citations

Not Reported in F.Supp., 1998 WL 245878

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EXHIBIT 4-B

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2002 WL 31426647
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

Frank A. BALOUN, et al., Plaintiffs,
v.
Edward W. WILLIAMS, et al. Defendants.

No. 00 C 7584.
|
Oct. 25, 2002.

Synopsis
Licensed real estate broker and his current and former businesses brought action against employees or former employees of the Illinois' Office of Banks and Real Estate (OBRE), alleging various claims arising from employees' investigation into broker's business practices and temporary suspension of plaintiffs' real estate licenses. On employees' motion to dismiss for lack of subject matter jurisdiction and failure to state claim, the District Court, Nan R. Nolan, United States Magistrate Judge, held that: (1) employees' alleged misconduct in securing temporary suspension of plaintiffs' licenses was random and unauthorized, and thus Illinois was not required to provide pre-deprivation hearing prior to suspension of license; (2) Illinois' post-deprivation remedies were adequate, under due process clause, to redress any injuries that plaintiffs sustained as result of employees' random and unauthorized alleged misconduct; (3) plaintiffs stated equal protection claim; (4) argument that Commissioner of OBRE and general counsel were entitled to absolute quasi-judicial immunity from broker's claims was undeveloped, and thus argument was waived; (5) employees would be entitled to prosecutorial immunity from § 1983 claims for their acts towards initiating prosecution against plaintiffs, but not for their administrative actions; (6) Chief of Prosecutions in real estate division of OBRE was not entitled to absolute immunity from defamation claims; (7) plaintiffs sufficiently alleged that § 1985(3) conspiracy claims against employees fell within exception to intracorporate immunity doctrine; (8) plaintiffs' claims for conspiracy, defamation, and tortious interference with business against employees were not claims against State as to which Illinois Court of Claims had exclusive jurisdiction; and (9) plaintiffs stated claims for tortious interference with business expectancy, prospective business relationships, and contracts.

Motion granted in part, and denied in part.

West Headnotes (24)

[1] **Evidence**Proceedings in other courts
EvidenceOfficial proceedings and acts
EvidenceEffect of judicial notice

Court may generally take judicial notice of another court or agency's decision or of document filed in another matter only for limited purpose of recognizing fact of such litigation or judicial act, not for truth of matters asserted in other litigation.

1 Cases that cite this headnote

[2] **Evidence**Proceedings in other courts
EvidenceOfficial proceedings and acts

In, inter alia, § 1983 action against employees of Illinois' Office of Banks and Real Estate (OBRE), arising from suspension of real estate brokers' licenses, district court would only take judicial notice of facts in decisions of other court or agency that were not subject to reasonable dispute and that were capable of accurate and ready determination by resort to sources whose accuracy could not reasonably be questioned. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[3] **Federal Civil Procedure**Fact issues

Issue of whether due process required State of Illinois to provide notice and opportunity to be heard to real estate broker and his businesses prior to temporarily suspending their licenses in cases evidencing danger to public interest, safety, and welfare could not be determined at motion to dismiss stage. U.S.C.A. Const.

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Amend. 14; S.H.A. 5 ILCS 100/10–65, 225 ILCS 454/20–55, 225 ILCS 454/20–65.

[4] **Brokers**Licenses and taxes
Constitutional Law Real estate agents and brokers

Alleged misconduct of employees of the Illinois' Office of Banks and Real Estate (OBRE) in securing temporary suspension of real estate licenses of broker and his businesses was random and unauthorized, and thus State was not required by due process to provide pre-deprivation hearing to broker and his businesses to address whether employees should engage in alleged misconduct prior to temporary suspension of licenses. U.S.C.A. Const. Amend. 14.

[5] **Brokers**Licenses and taxes
Constitutional Law Real estate agents and brokers

Illinois' post-deprivation remedies were adequate, under due process clause, to redress any injuries that real estate broker and his businesses sustained as result of alleged random and unauthorized misconduct by employees of the Illinois' Office of Banks and Real Estate (OBRE) in temporarily suspending their real estate licenses; plaintiffs could, and did, have temporary suspension rescinded through state proceedings, and plaintiffs could, and did, bring state tort claims against employees to redress their injuries. U.S.C.A. Const. Amend. 14.

[6] **Brokers**Licenses and taxes
Constitutional Law Real estate brokers and agents

Allegations that real estate broker, whose license was temporarily suspended allegedly as result of misconduct of employees of the Illinois' Office of Banks and Real Estate (OBRE), was treated differently by employees from other similarly situated persons without any compelling state interest, thereby denying broker equal protection under the law, sufficiently asserted "class of one" equal protection claim. U.S.C.A. Const. Amend. 14.

[7] **Brokers**Licenses and taxes
Constitutional Law Real estate brokers and agents

Allegations that state employees, who initiated investigation which resulted in temporary suspension of licenses of real estate broker and his businesses, were out to get broker in retaliation for his advice to one of his agents, and that employees' actions were taken without any compelling state interest, sufficiently asserted equal protection claim under "totally illegitimate animus" theory. U.S.C.A. Const. Amend. 14.

[8] **Federal Civil Procedure**Motion and proceedings thereon

State employees' challenges to real estate brokers' First Amendment and due process claims, which were raised for first time in employees' reply brief on their motion to dismiss, would not be considered in determining motion, since brokers were not given fair opportunity to respond. U.S.C.A. Const. Amend. 1, 14.

[9] **Federal Civil Procedure**Motion and proceedings thereon

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Argument that Commissioner of Office of Banks and Real Estate (OBRE) of the State of Illinois and general counsel were entitled to absolute quasi-judicial immunity from real estate brokers' claims, arising from investigation of brokers and temporary suspension of brokers' real estate licenses, was waived at motion to dismiss stage, where argument was undeveloped.

[10] **Public Employment** Judicial immunity
States Liabilities for official acts

Doctrine of absolute quasi-judicial immunity would not apply to shield Commissioner of Office of Banks and Real Estate (OBRE) of the State of Illinois and general counsel from civil damages for their administrative decisions, relating to training, supervising, and disciplining employees, who allegedly engaged in vendetta against real estate broker and his businesses and caused temporary suspension of their real estate licenses; doctrine only applied to judicial decisions.

[11] **Civil Rights** States and territories and their officers and agencies

State employees' acts of filing complaint against real estate broker and his businesses with the Office of Banks and Real Estate (OBRE), petitioning for summary suspension of their real estate licenses, and failing to provide notice of request for summary suspension to broker constituted acts toward initiating prosecution, such that employees would be entitled to prosecutorial immunity from § 1983 claims arising from acts. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[12] **Civil Rights** States and territories and their officers and agencies

Section § 1983 claims against state employees based on their failure to train and supervise subordinates, who allegedly engaged in vendetta against real estate broker and his business and caused the temporary suspension of their real estate licenses, were not barred by absolute prosecutorial immunity; employees' actions with regards to training and supervision of subordinates were administrative, rather than prosecutorial. 42 U.S.C.A. § 1983.

2 Cases that cite this headnote

[13] **Civil Rights** States and territories and their officers and agencies

To extent § 1983 claims by real estate broker, whose real estate license was temporarily suspended, against Chief of Prosecutions in real estate division of Illinois' Office of Banks and Real Estate (OBRE) were based on Chief's investigatory conduct, Chief would not be entitled to absolute immunity. 42 U.S.C.A. § 1983.

[14] **Libel and Slander** Official acts, reports, and records

Chief of Prosecutions in real estate division of Illinois' Office of Banks and Real Estate (OBRE) was not entitled to absolute immunity from real estate broker's claim that he made allegedly defamatory statements about broker to broker's franchisor.

[15] **Conspiracy** Civil rights conspiracies

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Allegations that employees of Illinois' Office of Banks and Real Estate (OBRE) conspired to destroy real estate broker and his businesses solely because of employees' personal desire to get broker for his advice to one of his agents sufficiently asserted that employees were motivated by personal motives unconnected to OBRE's official business, so as to bring broker's § 1985(3) conspiracy claim against employees within exception to intracorporate immunity doctrine. 42 U.S.C.A. § 1985(3).

1 Cases that cite this headnote

[16] **Conspiracy** Civil rights conspiracies

Allegations that ten employees of Illinois' Office of Banks and Real Estate (OBRE) conspired to destroy real estate broker, and engaged in numerous acts in furtherance of conspiracy over period of one year, were sufficient, at motion to dismiss stage, to overcome intracorporate conspiracy bar to § 1985(3) claims against employees. 42 U.S.C.A. § 1985(3).

2 Cases that cite this headnote

[17] **Civil Rights** Time to Sue

In Illinois, two-year limitations period applied to § 1983 claims. 42 U.S.C.A. § 1983.

[18] **Courts** Exclusive or Concurrent Jurisdiction

Real estate broker's claims for conspiracy, defamation, and tortious interference with business against employees of Illinois' Office of Banks and Real Estate (OBRE) were not claims against the State as to which Illinois Court of Claims had exclusive jurisdiction; broker alleged that employees acted outside scope of their authority and in violation of state law when they allegedly conspired to destroy broker and his businesses, defamed broker, and interfered with his business. S.H.A. 705 ILCS 505/8.

1 Cases that cite this headnote

[19] **Federal Civil Procedure** Fact issues

Issue of whether employees of Illinois' Office of Banks and Real Estate (OBRE) were protected from liability from real estate broker's conspiracy, defamation, and tortious interference with business claims, pursuant to Illinois doctrine of public officials' immunity, could not be determined at motion to dismiss stage of proceedings due to factual disputes as to whether employees' actions towards broker, which resulted in the temporary suspension of his real estate license, were taken in good faith.

[20] **Federal Civil Procedure** Fact issues

Issue of whether employees of Illinois' Office of Banks and Real Estate (OBRE) were entitled to absolute immunity from real estate broker's conspiracy, defamation, and tortious interference with business claims, under Illinois law, could not be determined at motion to dismiss stage of proceeding, where record did not reveal whether employees were acting within scope of their official duties when they allegedly engaged in misconduct.

[21] **Conspiracy** Particular Subjects of Conspiracy

Real estate broker sufficiently alleged that employees of Illinois' Office of Banks and Real Estate (OBRE) were acting beyond scope of

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

their authority and motivated solely by a personal interest, rather than benefit of the OBRE, when they allegedly conspired to destroy broker and his businesses, so as to bring conspiracy claim within exception to general principal, under Illinois law, that corporation cannot conspire with its agents.

1 Cases that cite this headnote

[22] **Torts** Business relations or economic advantage, in general

Allegations that real estate broker had successful and ongoing franchise relationship with franchisor prior to investigation of broker's business practices by employees of Illinois' Office of Banks and Real Estate (OBRE), that broker reasonably expected that franchise agreement would be renewed, that OBRE employee made defamatory statements regarding broker's integrity to franchisor, and that broker was forced to sell two of his businesses at a loss after franchisor began to question his integrity, were sufficient to assert tortious interference with business expectancy claim against employees, under Illinois law.

1 Cases that cite this headnote

[23] **Torts** Business relations or economic advantage, in general

Allegations that real estate broker was in process of recruiting agents for his offices at time that employees of Illinois' Office of Banks and Real Estate (OBRE) allegedly engaged in harassing conduct towards broker, that broker had reasonably valid business expectancy of hiring several new agents, that employees knew or should have known that broker continuously sought additional agents to generate more sales for his office, and that employees' conduct interfered with broker's prospective business relationships with agents, sufficiently asserted claim for tortious interference with prospective business relationships against employees, under Illinois law.

[24] **Torts** Contracts in general

Allegations that real estate broker and his businesses had contracts with various real estate agents, which employees of Illinois' Office of Banks and Real Estate (OBRE) were aware of, that employees induced breach of contracts by summarily suspending real estate licenses of broker and businesses and pursuing unfounded investigation into broker's business practices, and that broker was damaged when agents terminated their relationship with broker as result of employees' actions, sufficiently asserted tortious interference with contract claim against employee, under Illinois law.

MEMORANDUM OPINION AND ORDER

NOLAN, Magistrate J.

***1** Plaintiff Frank Baloun ("Baloun"), a licensed real estate broker and owner or former owner of the three corporate plaintiffs, brought this lawsuit under 42 U.S.C. § 1983 alleging that ten employees or former employees of the Office of Banks and Real Estate of the State of Illinois (the "OBRE") violated plaintiffs' civil rights by, among other things, summarily suspending their real estate licenses without prior notice and an opportunity to be heard and thereafter pursuing an unfounded year-long investigation into Baloun's business practices. Plaintiffs also brought supplemental state law claims for conspiracy, defamation, and tortious interference. Defendants now move to dismiss the amended complaint pursuant to Federal Rules of Civil

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

Procedure 12(b)(1) and 12(b)(6). For the reasons explained below, defendants' motion to dismiss is granted in part and denied in part.

I. *FACTUAL BACKGROUND*

[1] [2] Plaintiffs allege the following facts which are taken as true for purposes of ruling on the motion to dismiss. *Fredrick v. Simmons Airlines, Inc.,* 144 F.3d 500, 502 (7th Cir.1998).[1] At all relevant times, Baloun was a licensed real estate broker. Am. Cmplt. ¶ 4. Plaintiff Alliance Downtown Real Estate, Inc. ("Alliance Downtown") is a real estate broker corporation licensed by the OBRE. *Id.* Baloun was the managing broker and owner of Alliance Downtown. *Id.* ¶ 6. Baloun was also the managing broker and owner of Plaintiffs Lake Front Realty, Inc. ("Alliance Lincoln Park") and Alliance North Suburban Real Estate Inc. ("Alliance North Suburban"). *Id.* ¶ 7. Baloun was allegedly forced to sell Alliance Lincoln Park and Alliance North Suburban as a result of defendants' unlawful actions. *Id.* ¶ 7 fn. 1.

All of the defendants were employees of the OBRE during the relevant time period. *Id.* ¶ 19. The OBRE is an agency of the State of Illinois which, among other things, issues real estate broker licenses and regulates these licenses. *Id.* ¶ 19. Defendants held the following positions at OBRE: 1) Edward Williams ("Williams")—Chief of Prosecutions in the Real Estate Division; 2) Ronald J. Zito ("Zito")—Investigator; 3) Donald Potter ("Potter")—Investigator; 4) Dale Turner ("Turnet")—General Counsel; 5) Jack Shaffer ("Shaffer")—Commissioner of OBRE before January 1999; 6) William Darr ("Darr")—Commissioner of OBRE after approximately January 1999; 7) Eli Sidwell ("Sidwell")—Director of Real Estate; 8) Chris McAuliffe ("McAuliffe")—Assistant Commissioner of OBRE before spring 1999; 9) Patrick Brady ("Brady")—Assistant Commissioner of OBRE after spring 1999; 10) Carlo DeFranco ("DeFranco")—Supervisor of Investigations. *Id.* ¶¶ 9–18.

Prior to December 1998, Baloun had received no complaints by OBRE representatives concerning his three real estate broker offices. *Id.* ¶ 20. In December of 1998, Baloun and Zito met at one of Baloun's offices. *Id.* ¶ 22. Baloun learned that Zito planned to meet with one of Baloun's agents named Bernstein. *Id.* According to plaintiffs, Zito attempted to force Bernstein to admit to improper conduct as a real estate agent. *Id.* Zito also allegedly attempted to prohibit Baloun from meeting with and participating in Zito's conference with Bernstein. *Id.* Plaintiffs further allege that Zito threatened Baloun by stating, "Unless he [Bernstein] signs this, and agrees not to contest discipline, I'm coming after you." *Id.* ¶ 23. In accordance with Baloun's advice, Bernstein refused to sign the allegedly false statement. *Id.*

***2** Within days after Zito and Baloun's initial meeting, Zito and Potter began to attempt "to get" Baloun by conducting audits and threatening to falsely report that Baloun refused to produce records, refused to cooperate, or otherwise was in violation of his duties as a licensed real estate broker. *Id.* ¶ 24. Baloun informed Zito and Potter on numerous occasions that he would fully cooperate with their investigation after hiring legal counsel. *Id.* ¶ 26. Williams aided and advised Zito and Potter in their investigation by contacting colleagues and employees of Baloun as well as representatives of the franchiser who issued the real estate franchisees to Baloun and accusing Baloun of illegal business practices, crimes of moral turpitude, and engaging in check kiting. *Id.* ¶ 25. Williams made false allegations concerning Baloun and assisted Zito and Potter in filing false statements during their investigation of plaintiffs. *Id.* ¶ 32. The above actions by Zito, Potter, and Williams continued through January, 2000. *Id.* ¶ 27. Baloun complained to Shaffer, Darr, Brady, Tuner, Sidwell, McAuliffe, and Williams, all of whom were supervisors at the OBRE, concerning the actions of Zito, Potter, and Williams. *Id.* ¶ 28. Plaintiffs allege that Shaffer, Darr, Brady, Turner, Sidwell, McAuliffe had a duty to supervise, instruct, train, control, and discipline Zito, Potter, and Williams but failed to do so. *Id.* ¶¶ 29, 30.

Prior to suspending plaintiffs' real estate brokerage licenses, the OBRE filed a complaint and a petition for summary suspension. Defs' Memo. Exhs. A, B. The complaint alleged, among other things, that an audit of the escrow records of the Alliance Downtown offices revealed a shortage of approximately $21,365 and an additional variance of approximately $87,518 and that Baloun failed to produce certain requested escrow records and related documents. Defs' Memo. Exh. A. The petition for summary suspension stated that given the alleged shortages and variances, plaintiffs' failure to produce all of the requested escrow records presented "a grave risk that substantial, additional shortages" may exist requiring emergency action. Defs' Memo. Exh. B. Plaintiffs allege that the petition for summary suspension was based on false statements by Zito, Potter, and Williams. Am. Cmplt. ¶ 33.

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

On December 29, 1998, Baloun's real estate brokerage license was summarily suspended without prior notice and an opportunity to respond. Am. Cmplt. ¶¶ 33, 52; Defs' Memo. Exh. C. The next day, Zito served Baloun with the order of summary suspension which suspended Baloun's personal real estate broker's licenses and all corporate licenses. Am. Cmplt. ¶ 48. On December 31, 1998, plaintiffs filed for and were granted a temporary restraining order staying the summary suspension of plaintiffs' real estate license until January 5, 1999. Defs' Memo. Exh. D. On January 11, 1999, the OBRE restored plaintiffs' licenses to active status. Defs' Memo. Exh. E.

***3** After plaintiffs' licenses were restored to active status, defendants continued to investigate plaintiffs and filed two additional complaints with the OBRE containing twelve counts. Am. Cmplt. ¶ 82(g). On November 9, 1999, Williams withdrew six of the counts pending against plaintiffs. Am. Cmplt. ¶ 82(g) fn.1. On February 1, 2000, Williams and Baloun entered into a consent order in which Baloun was reprimanded and all remaining counts against Baloun were withdrawn. *Id.* On February 7, 2000, Williams withdrew all counts remaining against the corporate plaintiffs. *Id* . After a more than a year-long investigation of plaintiffs, defendants admitted that they had no evidence to support the allegations concerning plaintiffs and abandoned all of the allegations. Am. Cmplt. ¶ 36. Baloun was allegedly forced to sell two of his franchises at a significant loss because of defendants' actions. Am. Cmplt. ¶ 35.

II. *DISCUSSION*

The purpose of a motion to dismiss is to test the sufficiency of the complaint, not to decide its merits. *Gibson v. Chicago,* 910 F.2d 1510, 1520 (7th Cir.1990). A motion to dismiss will be granted only "if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which entitles him to relief." *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). In reviewing a motion to dismiss for failure to state a claim and for lack of subject matter jurisdiction, the court takes as true all factual allegations in the plaintiff's complaint and draws all reasonable inferences in his favor. *Komorowski v. Townline Mini–Mart & Restaurant,* 162 F.3d 962, 964 (7th Cir.1998 (per curiam); *Fredrick v. Simmons Airlines, Inc.,* 144 F.3d 500, 502 (7th Cir.1998). "[D]ocuments attached to a motion to dismiss [for failure to state a claim] are considered part of the pleadings if they are referred to in the plaintiff's complaint and are central to his claim. Such documents may be considered by a district court in ruling on the motion to dismiss." *Wright v. Assoc. Ins. Cos. Inc.,* 29 F.3d 1244, 1248 (7th Cir.1994). Moreover, where dismissal is sought on the ground of lack of jurisdiction, "[t]he district court may properly look beyond the jurisdictional allegations of the complaint and view whatever evidence has been submitted on the issue to determine whether in fact subject matter jurisdiction exists." *Long v. Shorebank Development Corp.,* 182 F.3d 548, 554 (7th Cir.1999).

Plaintiffs' amended complaint contains six counts: (1) violations of 42 U.S.C. § 1983 procedural due process, equal protection, and first amendment rights, (2) "violations of 42 U.S.C. § 1983 based on supervisors liability of Shaffer, Turner, McAuliffe, Sidwell, Williams and DeFranco or Darr and Brady, sued in their individual capacities," (3) civil conspiracy—state law claim; (4) defamation; and (5) two counts of tortious interference with business. Defendants raise numerous arguments in support of their motion to dismiss the entire amended complaint with prejudice. The Court will address each of defendants' arguments in turn.

A. *Federal Claims*

1. *Procedural Due Process*

***4** [3] Plaintiffs' allegations that the procedures utilized violated due process can be classified into the following three categories: (1) plaintiffs challenge the temporary suspension of their real estate licenses without prior notice and an opportunity to respond; (2) plaintiffs challenge defendants' failure thereafter to hold prompt hearings on the OBRE complaints; and (3) plaintiffs challenge defendants' unfounded year-long investigation of plaintiffs designed to harass and retaliate against plaintiffs.[2] Defendants' motion only addresses the first due process claim.[3] *See* Defs' Memo., pp. 4–12. Defendants argue in part that this procedural due process claim should be dismissed because (1) it fails to allege that any violation occurred as a result of anything but a random and unauthorized act and not any established state procedure and (2) fails to allege that plaintiffs did not have adequate state remedies.

Procedural due process claims require a two-step analysis.

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Porter v. DiBlasio, 93 F.3d 301, 305 (7th Cir.1996). First, the court considers whether the plaintiffs were deprived of a constitutionally protected interest. *Id.* The second step requires a determination of what process was due with respect to that deprivation. *Id.* Defendants do not dispute that plaintiffs possessed property interests in their real estate broker's licenses. Baloun also had a liberty interest in pursuing his profession as a realtor. *See Becker v. Illinois Real Estate Admin. and Disciplinary Bd.,* 884 F.2d 955 (7th Cir.1989). Defendants focus on the second part of the due process analysis: whether plaintiffs received all the process that was due to them.

Due process is a flexible concept which requires different procedural protections depending on the factual circumstances of each case. *Zinermon v. Burch,* 494 U.S. 113, 127, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). As a general rule, the constitution requires some type of a hearing prior to the deprivation of liberty or property by government actors. *Id* . Under certain circumstances, "a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process." *Id.* at 128; *Lolling v. Patterson,* 966 F.2d 230, 234 (7th Cir.1992) (holding "deprivations of property which occur without a predeprivation hearing do not violate due process so long as the state provides a meaningful postdeprivation remedy."). "The Supreme Court has recognized that the practical exigencies of a situation may often counsel against affording plenary pre-deprivation process to an individual." *Doyle v. Camelot Care Centers, Inc.,* 2002 WL1992496 (7th Cir.2002). An "important government interest, accompanied by a substantial assurance that the deprivation is not baseless or unwarranted, may in limited cases demanding prompt action justify postponing the opportunity to be heard." *Fed. Deposit Ins. Corp. v. Mallen,* 486 U.S. 230, 240, 108 S.Ct. 1780, 100 L.Ed.2d 265 (1988). "The constitutionality of such schemes, however, frequently turns on the availability of sufficiently prompt post-deprivation hearings." *Doyle v. Camelot Care Centers, Inc.,* 2002 WL1992496 (7th Cir.2002).

***5** Although the parties appear confused on this issue, the amended complaint seems to allege two types of procedural due process claims with respect to the temporary suspension. Plaintiffs' first claim challenges the adequacy of the State's established procedure of not providing notice and some type of a hearing prior to a summary suspension of real estate licenses. Plaintiffs' second claim seems to challenge the OBRE officials' alleged misconduct in securing a temporary deprivation of plaintiffs' licenses.

To the extent that plaintiffs are challenging the State's failure to provide notice and an opportunity to respond prior to a temporary suspension in cases evidencing a danger to the public interest, safety, and welfare, plaintiffs state a viable due process claim. Defendants point out that the Illinois Real Estate License Act of 2000 (the "Real Estate License Act" or the "Act") provides that the Commissioner may temporarily suspend the license of a licensee without a hearing in certain limited circumstances. The Real Estate License Act states: "The Commissioner may temporarily suspend the license of a licensee without a hearing, simultaneously with the institution of proceedings for a hearing provided for in Section 20–60 of this Act, if the Commissioner finds that the evidence indicates that the public interest, safety, or welfare imperatively requires emergency action." 225 ILCS 454/20–65. The Act further provides that if the Commissioner temporarily suspends a license without a hearing before the Board, a hearing must be held within 30 days after the suspension occurred, unless the suspended licensee seeks a continuance of the hearing. *Id.* The Illinois Administrative Procedure Act, which the Real Estate License Act expressly adopts and incorporates with one limited exception, provides that no agency shall suspend any valid license without first giving written notice to the licensee and an opportunity to be heard except that if "the agency finds that the public interest, safety, or welfare imperatively requires emergency action ... summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined. 5 ILCS 100/10–65; 225 ILCS 454/20–55.

To determine the sufficiency of the process due plaintiffs prior to temporarily suspending their real estate licenses, the Court must balance the following three factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

In this case, the Court cannot conclude at the motion to dismiss stage that plaintiffs were afforded all the process they were due in relation to the temporary suspension of their real estate licenses. As to the first *Mathews* factor, the Court has no difficulty concluding that plaintiffs have a substantial interest in maintaining their real estate licenses. *Becker,* 884 F.2d at 958 (holding plaintiff's interest in obtaining a real estate license is "obviously

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

substantial" given the time and money invested). Plaintiffs allege that the temporary suspension of their real estate licenses resulted in the termination of all of Baloun's real estate listings, his real estate agents quitting and finding other employment, a restriction on his ability to represent buyers, and a breach of his franchise agreements with RE/MAX. Am. Cmplt. ¶ 48. Although the deprivation of plaintiffs' licenses was temporary in nature, it clearly affected Baloun's important interest in maintaining his livelihood. Second, the risk of an erroneous deprivation of plaintiffs' real estate licenses through the procedures used is not nonexistent where the plaintiffs were not provided with notice of the petition for summary suspension and an opportunity to respond to the charges before the temporary suspension was ordered. Plaintiffs may be able to show that the risk of error is great enough to warrant the additional safeguards of pre-suspension notice and an opportunity to respond.

***6** Neither the amended complaint nor the motion to dismiss address the fiscal or administrative burdens that additional safeguards would entail under these circumstances. The Court has no way of determining at this early state in the litigation the costs of pre-suspension notice and a hearing. Moreover, the probative value of additional procedures is great under the circumstances alleged. Plaintiffs have a substantial interest in notice and some opportunity to respond or tell their side of the story to an impartial agency decision-maker prior to the temporary suspension of their real estate licenses. Given the merger record, the Court cannot conclude that additional procedures would not reduce the chances that defendants would erroneously suspend plaintiffs' licenses. Finally, the State's interest in protecting the integrity of public real estate transactions and ensuring that escrow monies are properly held by those persons and entities that it licenses is clearly substantial. The State also has a significant interest in acting quickly where the evidence indicates that the public interest, safety, or welfare requires emergency action.

Balancing the *Mathews* factors in light of the facts pleaded, the Court finds that due process may have required the State to provide some pre-suspension notice and opportunity to be heard. Facts not in the complaint may change this analysis, but the Court cannot find that "it appears beyond doubt" that plaintiffs cannot prove any facts that would support a procedural due process challenge to the State's procedures concerning temporary suspension. Thus, at this initial pleading stage, the Court concludes that the complaint adequately states a procedural due process claim based on the pre-deprivation procedures afforded.

[4] The Court concludes, however, that plaintiffs have not plead sufficient facts to demonstrate that the OBRE officials in this case acted in anything other than a "random and unauthorized" fashion in securing the temporary suspension of plaintiffs' real estate licenses. A predeprivation hearing is impracticable when the state officials acted in a "random and unauthorized" fashion, rather than pursuant to an established state procedure. "[W]hen deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply 'impracticable' since the state cannot know when such deprivations will occur." *Hudson v. Palmer,* 468 U.S. 517, 533, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). The Supreme court has also applied the rationale of the rule regarding random and unauthorized takings of property to liberty deprivations. *See* *Zinermon,* 494 U.S. at 132. Whether a defendant's conduct is "random and unauthorized," as opposed to "predictable and authorized," is a question of law appropriate for resolution at the 12(b)(6) stage. *Hamlin v. Vaudenberg,* 95 F.3d 580, 584 n. 2 (7th Cir.1996).

Plaintiffs state in their response that defendants' actions were not random and unauthorized. Plaintiffs' amended complaint, however, fails to allege anything other than random and unauthorized acts causing the temporary loss of property and liberty. Defendants' alleged conduct was random and not predictable from the point of view of the State. Defendants exercise a certain degree of discretion in investigating charges and bringing petitions for temporary suspension but that discretion does not include pursuing personal vendettas against licensees by filing knowingly false charges. The State cannot predict precisely when its employees will pursue personal vendettas against licensees. *Hudson,* 468 U.S. at 521 n. 2.

***7** Defendants' alleged actions were also not authorized. Plaintiffs' amended complaint repeatedly states that the OBRE officials acted unlawfully, illegally, and maliciously by harassing and retaliating against Baloun. Am. Cmplt ¶¶ 33, 37, 41, 45, 58, 59. Plaintiffs allege that Zito and Potter were unlawfully and maliciously attempting "to get" Baloun. Am. Cmplt. ¶¶ 24, 40. Plaintiffs further allege that summary suspension was based on unlawful, knowingly false, and malicious statements by Zito, Potter, and Williams concerning Baloun's escrow accounts. Am. Cmplt. ¶¶ 33, 45, 46, 57.

Plaintiffs have not identified any state procedure which authorizes employees of the OBRE to unlawfully harass and retaliate against real estate license holders by, among

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

other things, filing and pursing knowingly false charges. While state officials were obviously authorized to use the state procedure to investigate alleged escrow account violations, they were not authorized to harass Baloun by pursing charges they knew were false. The alleged unlawful actions of the OBRE employees cannot be said to have been made pursuant to an established state procedure. In fact, plaintiffs explicitly allege that defendants failed to follow established state procedures regarding OBRE investigations and prosecutions. Am. Cmplt. ¶ 81(f). The State could not have known of the unlawful conduct so as to be in a position to provide plaintiffs with notice and a hearing to address whether the OBRE officials should engage in the alleged misconduct prior to the summary suspension of their real estate licenses. *Zinermon,* 494 U.S. at 137.

[5] Because plaintiffs were only entitled to postdeprivation remedies for the defendants' alleged misconduct, it is necessary to determine whether the post-deprivation remedies available under state law are adequate. In *Easter House v. Felder,* 910 F.2d 1387, 1406 (7th Cir.1990) (en banc), the court of appeals applied the rule regarding random and unauthorized takings in holding that Illinois tort law provided an adequate post-deprivation remedy to a private adoption agency which alleged that state officials had conspired to harass it and to deprive it of its property interest in renewing its operating license. The court concluded that Illinois law provided due process because it recognized a number of tort actions under which the plaintiff could have sought damages for its deprivations of property. *Id.* at 1405. A post-deprivation remedy is inadequate only if it "is meaningless or nonexistent and, thus, in no way can be said to provide the due process relief guaranteed by the [F]ourteenth [A]mendment." *Id* at 1406.

Plaintiffs had adequate post-deprivation state law remedies and thus, have not stated a claim for a denial of procedural due process. In fact, plaintiffs successfully availed themselves of certain state law remedies and have not demonstrated that these remedies and the other available remedies are inadequate. Plaintiffs admit that the temporary suspension was rescinded through state proceedings. The day after plaintiffs were served with the summary suspension they moved the circuit court for injunctive relief and received a temporary restraining order staying the summary suspension order until January 5, 1999. On January 11, 1999, the OBRE restored Plaintiffs' licenses to active status. Although the current record is unclear concerning whether the status of plaintiffs' licenses between January 6 and January 10, it is reasonable to assume that plaintiffs could have moved the circuit court for an order further staying the summary suspension, and plaintiffs have not argued otherwise.

***8** Moreover, Plaintiffs have several state tort causes of action which provided meaningful postdeprivation remedies sufficient to satisfy due process. For example, "under Illinois law, an injured party may bring an action if a third party interferes with the injured party's contractual relationship or if it 'tortiously interferes' with the injured party's 'prospective economic advantage ." ' *Easter House,* 910 F.2d at 1405. Plaintiffs' amended complaint in fact alleges tortious interference with business, defamation, and a state law conspiracy claim. The Court concludes that Illinois post-deprivation remedies are adequate to redress any injuries plaintiffs claim to have sustained as a result of the defendants' alleged misconduct in temporarily suspending their real estate licenses.

2. *Equal Protection*

[6] Defendants argue that plaintiffs fail to state an equal protection claim because plaintiffs do not allege that they are members of a protected class. A classic equal protection claim alleges, among other things, membership in a protected class. Plaintiffs do not claim that they were treated differently because of membership in any class but rather proceed under a "class of one" equal protection claim recognized by the Supreme Court in *Village of Willowbrook v. Olech,* 528 U.S. 562, 120 S.Ct. 1073, 145 L.Ed.2d 1060 (2000). The Supreme Court held that an individual may state a "class of one" equal protection claim if he alleges that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* at 564. The amended complaint alleges that defendants treated Baloun "differently from other similarly situated persons without any compelling state interest thereby denying Baloun equal protection under the law." Am. Cmplt. ¶ 63. Baloun's allegations sufficiently state a claim of a violation of Baloun's right to equal protection.

[7] The Seventh Circuit has also held that "an individual may state a claim under the equal protection clause if he can show that state government took an action that 'was a spiteful effort to 'get' him for reason wholly unrelated to any legitimate state objective." ' *Albiero v. City of Kankakee,* 246 F.3d 927, 932 (7th Cir.2001). Plaintiffs allege that Zito and Potter were out "to get" Baloun in retaliation for his advice to Bernstein. Am. Cmplt ¶¶ 24, 40. The Court can reasonably infer from the allegations of

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

the amended complaint that ill will was the sole cause of the complained-of actions. *Albiero,* 246 F.3d at 932. The amended complaint also alleges that the defendants' actions were "without any compelling state interest." Am. Cmplt. ¶ 63. Defendants' contention that the activities of Zito and Potter in auditing Baloun's escrow account were clearly related to a legitimate government interest is not supported by the allegations of the amended complaint which the Court must accept as true at this stage of the proceedings. Thus, plaintiffs' allegations also state a claim under a "totally illegitimate animus" equal protection theory.

3. *First Amendment*

***9** [8] Defendants state in one sentence in their motion to dismiss that "Plaintiffs' first amendment claim fails to state a claim upon which relief can be granted," but their memorandum fails to discuss plaintiffs' first amendment claim. Not surprisingly, plaintiffs' response did not address defendants' unsupported request to dismiss the first amendment claim. For the first time in their reply brief, defendants provide an analysis supporting their argument that plaintiffs fail to state a first amendment claim. It is too late to develop an argument for the first time in a reply brief. *See* *Aliwoli,* 127 F.3d at 635 (holding party may not assert new argument in reply brief). Because plaintiffs have not had a fair opportunity to respond to defendants' first amendment argument, the motion to dismiss is denied in this respect.

4. *Quasi–Judicial Immunity*

Defendants next argue that all of plaintiffs' claims against Commissioner Shaffer and General Counsel Turner are barred by the doctrine of absolute quasi-judicial immunity. As defendants correctly state, judicial immunity protects judges from a suit for civil damages when performing judicial functions, and the relevant analysis is based upon the nature of the functions the judge was performing. *Forrester v. White,* 484 U.S. 219, 224, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988). The Supreme Court has extended absolute immunity to federal administrative law judges. *Butz v. Economou,* 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978). Defendants bear the burden of demonstrating that absolute immunity is justified for the actions in question. *Forrester,* 484 U.S. at 224.

[9] In their memorandum, defendants merely summarize the general law on judicial immunity in two short paragraphs. Then, with no analysis whatsoever of how the law applies to the allegations in this case and the functions at issue, defendants conclude that Commissioner Shaffer and General Counsel Turner are entitled to absolute quasi-judicial immunity. Defendants' undeveloped argument is waived for purposes of the motion to dismiss. *United States v. South,* 28 F.3d 619, 629 (7th Cir.1994) (noting that "perfunctory and undeveloped arguments" are waived). " 'Ours is an adversary system', and it is up to the party seeking relief to sufficiently develop his arguments." *Id.* (*quoting* *United States v. Seacott,* 15 F.3d 1380, 1390 (7th Cir.1994) (Easterbrook, J., concurring)). If they desire to do so, Shaffer and Turner may present a properly supported argument for absolute quasi-judicial immunity at the summary judgment stage.

[10] Even if the defendants had presented a properly supported argument, the Court would reject their argument with respect to certain of the allegations in this case. Plaintiffs' allegations are based in part on Shaffer's and Turner's failure to train, supervise, and discipline defendants Zito, Potter, and Williams. The training, supervising, and disciplining of Zito, Potter, and Williams are administrative functions, not judicial functions. The doctrine of absolute judicial immunity does not shield judges from civil damages for administrative decisions. *Forrester,* 484 U.S. at 229 (holding that judge's decision to fire probation officer was administrative not judicial in nature and not entitled to absolute immunity). At the pleading stage, plaintiffs' allegations against Shaffer and Turner based on a failure to train, supervise, and discipline are sufficient to defeat dismissal based on absolute quasi-judicial immunity.

5. *Prosecutorial Immunity*

***10** [11] Defendants similarly contend that certain actions taken by defendants Williams, Turner Shaffer, McAuliffe, Darr and Brady are protected from suit by the doctrine of prosecutorial immunity. It is well settled that prosecutors are absolutely immune from liability under § 1983 for "initiating a prosecution and ... presenting the State's case" as long as their conduct is "intimately associated with the judicial phase of the criminal process." *Imbler v. Pachtman,* 424 U.S. 409, 430–31, 96 S.Ct. 984, 47 L.Ed.2d 128 (1976). The Seventh Circuit has also held that absolute immunity shields a prosecutor if he

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"initiates charges maliciously, unreasonably, without probable cause, or even on the basis of false testimony or evidence." *Henry v. Farmer City State Bank,* 808 F.2d 1228, 1238 (7th Cir.1986). Prosecutors are not, however, absolutely immune from liability for their "administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or for judicial proceedings." *Buckley v. Fitzsimmons,* 509 U.S. 259, 273, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993).

[12] Defendants argue that plaintiffs' claims based on defendants Williams, Turner, Shaffer, McAufliffe, Darr and Brady's actions in filing a complaint with the OBRE, petitioning for summary suspension of plaintiffs' licenses, failing to provide plaintiffs with notice of the request for summary suspension, and investigating the facts in this case are all actions taken in connection with initiating and prosecuting the case before the OBRE. The Court agrees that the acts of filing a complaint with the OBRE, petitioning for summary suspension, and failing to provide notice of the request for summary suspension are not investigative in function but rather clearly constitute acts toward initiating a prosecution. Plaintiffs' claims against Williams, Turner, Shaffer, McAufliffe, Darr and Brady, however, appear to be based mainly on their failure to train, supervise, control, and discipline Zito, Potter, and Williams. The training and supervision of Zito, Potter, and Williams is an administrative function, and therefore, plaintiffs' claims against Williams, Turner, Shaffer, McAufliffe, Darr, and Brady based on failure to train and supervise are not barred by absolute prosecutorial immunity.

[13] Defendants also contend that prosecutorial immunity shields Williams, Turner, Shaffer, McAufliffe, Darr and Brady's actions in investigating the facts in this case. The relevant inquiry in determining whether a prosecutor is entitled to absolute immunity is whether the prosecutor is acting as an advocate in performing the task for which he is sued. *Anderson v. Simon,* 217 F.3d 472, 475 (7th Cir.2000). In a criminal case, the role of advocate normally begins on arrest because " '[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." ' *Id.* (*quoting* *Buckley v. Fitzsimmons,* 509 U.S. 259, 113 S.Ct. 2606, 125 L.Ed.2d 209 (1993)). "Nonetheless, probable cause to arrest does not immunize a prosecutor for all activities performed following the arrest, if these activities are investigative in nature." *Id.*

***11** In this case, the amended complaint does not allege that defendants Turner, Shaffer, McAufliffe, Darr and Brady engaged in investigatory conduct. With respect to Williams, plaintiffs generally allege that Williams' actions were investigative in nature and not in furtherance of the prosecution. The relevant question is what alleged specific acts of Williams form the basis of his alleged liability to plaintiffs. The amended complaint alleges that Williams helped Zito and Potter in their investigation of plaintiffs. Am. Cmplt. ¶ 25. Plaintiffs allege that Williams contacted RE/MAX as part of the investigation of plaintiffs while no complaint was pending. *Id.* ¶¶ 25, 58(a). The amended complaint further alleges that Williams made false allegations regarding Baloun's escrow accounts in support of the petition for summary suspension and assisted Zito and Potter in filing false statements during their investigation. *Id.* ¶¶ 32, 57. The amended complaint states that prior to the summary suspension, Williams "personally conducted or participated in an investigation of Baloun." *Id.* ¶ 54. Construing these allegations in the light most favorable to plaintiffs, it can reasonably be inferred that Williams investigated plaintiffs in preparation for filing the complaint with the OBRE (the administrative equivalent of an arrest). Given the limited record before the Court, the Court determines that Williams is not entitled to absolute immunity for at least part of the investigation plaintiffs condemn. Defendants' motion to dismiss is denied with respect to this issue.

[14] Finally, plaintiffs allege that Williams made defamatory statements about Baloun to RE/MAX. Am. Cmplt. ¶¶ 90, 91. Williams is not absolutely immune from suit for allegedly defamatory statements he made to RE/MAX. *Buckley,* 509 U.S. at 277–78 (holding prosecutor not entitled to absolute immunity for out-of-court statements to the press).

6. *Intracorporate Conspiracy Doctrine*

[15] Defendants further contend that the conspiracy claim against them under § 1985(3) is barred by the intracorporate conspiracy doctrine. Defendants argue that all of the Defendants named in the amended complaint were employees and agents of the OBRE and cannot be considered conspirators. Under the intracorporate conspiracy doctrine, "a conspiracy cannot exist solely between members of the same entity." *Payton v. Rush–Presbyterean–St. Luke's Med. Ctr.,* 184 F.3d 623, 632 (7th Cir.1999). The Seventh Circuit has held that "managers of a corporation jointly pursuing its lawful business do not become 'conspirators' when acts within the scope of their employment are said to be

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

discriminatory or retaliatory." *Travis v. Gary Community Mental Health Center, Inc.,* 921 F.2d 108, 110 (7th Cir.1990). This doctrine has been applied to officials working within a government agency as well as private corporations. *Wright v. Ill. Dep't of Children and Family Services,* 40 F.3d 1492, 1508 (7th Cir.1994).

***12** The Seventh Circuit has recognized two exceptions to the intracorporate conspiracy doctrine. One exception applies where the employees are shown to have been motivated solely by personal bias. *Hartman v. Board of Trustees of Community College Dist. No. 508,* 4 F.3d 465, 470 (7th Cir.1993). "In that case, the interests of the corporation would have played no part in the employees' collective action, so the action could not have been taken within the scope of employment." *Id.* Here, the allegations reasonably support a conclusion that defendants were motivated solely by a personal interest, rather than the interests of the OBRE. Plaintiffs allege that defendants Zito and Potter were motivated by a personal desire to "get" Baloun because Baloun advised Bernstein not to sign a false statement sought by Zito. Plaintiffs further allege that the defendants conspired to destroy Baloun and his businesses. It can reasonably be inferred from these allegations that defendants were motivated by personal motives unconnected to the OBRE's official business.

[16] Second, the Seventh Circuit has recognized that the intracorporate conspiracy doctrine does not apply where "the conspiracy was part of some broader discriminatory pattern." *Hartman,* 4 F.3d at 470–71. The Seventh Circuit has not defined the "broader discriminatory pattern" exception but has identified relevant factors as the number of agents involved and the nature and scope of the conspiracy. *Jefferson v. City of Harvey,* 2000 WL 15097, *5 (N.D.Ill. Jan.5, 2000). In the instant case, the amended complaint alleges a conspiracy involving ten OBRE employees involving numerous acts over a period of one year. These allegations are sufficient to avoid the intracorporate conspiracy bar at this stage of the proceedings. *Id.* (holding conspiracy allegations involving numerous officers over a significant time span survived motion to dismiss).

7. *Statute of Limitations*

[17] Defendants argue that plaintiffs' claims under § 1983 against defendants Darr and Brady are barred as the actions complained of are outside the applicable statute of limitations period. Because Section 1983 does not contain an express statute of limitations, federal courts borrow the forum state's statute of limitations for personal injury claims. *Wilson v. Garcia,* 471 U.S. 261, 276, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). In Illinois, the applicable statute of limitations period for § 1983 actions is two years. *Booker v. Ward,* 94 F.3d 1052, 1056 (7th Cir.1996). Plaintiffs named Darr and Brady as defendants for the first time in their amended complaint filed on August 31, 2001. Plaintiffs did not respond to defendants' request that the court dismiss claims against Darr and Brady which fall outside the two year statute of limitations period and thus, apparently concede this point. Defendants' motion to dismiss claims against Darr and Brady based on actions occurring before August 31, 1999 is granted.

B. *State Law Claims*

***13** Plaintiffs' amended complaint includes state law claims for conspiracy, defamation, and tortious interference with business. Defendants argue that Plaintiffs' state law claims are barred by sovereign, public official, and absolute immunity. Defendants also argue that plaintiffs fail to state a claim for civil conspiracy, defamation, and tortious interference. As explained below, the Court agrees in part and disagrees in part.

1. *Sovereign Immunity*

[18] State law rules of sovereign immunity govern state law causes of action in federal court. *Magdziak v. Byrd,* 96 F.3d 1045, 1048 (7th Cir.1996). Except as provided in the Illinois Court of Claims Act, 705 ILCS 505/8, the State of Illinois is immune from suit in any court. *Richman v. Sheahan,* 270 F.3d 430, 441 (7th Cir.2001). The Illinois Court of Claims has exclusive jurisdiction over [a]ll claims against the State founded upon any law of the State of Illinois or upon any regulation thereunder by an executive or administrative officer or agency ..." and "[a]ll claims ... for damages sounding in tort...." 705 ILCS 505/8(a), (d). A claim is against the state when: " 'there are (1) no allegations that an agent or employee of the State acted beyond the scope of his authority through wrongful acts; (2) the duty alleged to have been breached was not owed to the public generally independent of the fact of State

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employment; and (3) where the complained-of actions involve matters ordinarily within that employee's normal and official functions of the State." ' Healy v. Vaupel, 133 Ill.2d 295, 140 Ill.Dec. 368, 549 N.E.2d 1240, 1247 (Ill.1990) (*quoting* Robb v. Sutton, 147 Ill.App.3d 710, 101 Ill.Dec. 85, 498 N.E.2d 267, 272 (1986)).

In this case, plaintiffs' state law claims are based on the same factual allegations contained in the Section 1983 claims. Defendants allegedly conspired to harass, coerce, intimidate, and destroy Baloun and his businesses through various means. Plaintiffs also allege that Zito, Potter, and Williams knowingly made false statements and allegations about Baloun. Williams allegedly interfered with Baloun's contractual relationships with RE/MAX and various real estate agents. Plaintiffs' amended complaint alleges that Zito, Potter, and Williams acted illegally and unlawfully harassed and retaliated against Baloun by filing and pursing false charges. Zito's and Potter's actions were allegedly motivated by a desire to "get" Baloun. The amended complaint also alleges that the remaining defendants knew or should have known of the unlawful acts by Zito, Potter, and Williams. These allegations survive defendants' motion to dismiss because plaintiffs allege that defendants acted outside the scope of their authority and in violation of state law. *See* Busch v. Bates, 323 Ill.App.3d 823, 257 Ill.Dec. 558, 753 N.E.2d 1184, 1190–91 (Ill.App.2001) (holding trial court properly exercised jurisdiction over plaintiff's case where amended complaint alleged that the defendants "maliciously, unlawfully[,] and wrongfully conspired together[ ] and with others * * * to compose, publish[,], and utter false and malicious statements [ ] concerning plaintiff's reputation, credibility, integrity, and ability as a crime scene technician [ ] and thereby injure[d] and damage[d] plaintiff.").

2. *Public Official Immunity*

***14** [19] Defendants also contend that they are protected from liability under the doctrine of public officials' immunity. The common law doctrine of public officials' immunity provides that public officials are not subject to personal liability for their performance of discretionary duties. Currie v. Lao, 148 Ill.2d 151, 170 Ill.Dec. 297, 592 N.E.2d 977, 983–84 (Ill.1992). "The doctrine is premised upon the principle that a public decisionmaker should not be subject to personal liability where he makes a decision based upon his perception of the public needs." Id. at 984. As defendants acknowledge, public official immunity is conditioned upon the good faith exercise of discretion. Rossi v. Bower, 2002 WL 1160151, *9 (N.D.Ill. May 29, 2002); Bell v. Irwin, 2001 WL 1803645, *5–6 (S.D.Ill. May 30, 2001). Thus, the doctrine applies only in situations where there are no allegations of bad faith. In the present case, plaintiffs claim the defendants unlawfully, illegally, and maliciously harassed and retaliated against Baloun. If true, these allegations demonstrate that defendants' actions were not taken in good faith. Accordingly, the Court cannot dismiss plaintiffs' state law claims based on public officials' immunity at this time.

3. *Absolute Immunity*

[20] Next, the Court addresses whether common law absolute immunity precludes plaintiffs' state law claims. Defendants argue that Williams' alleged defamatory statements are barred since Illinois law has an absolute privilege against defamation for government officials for statements made within the scope of their official duties. The rationale for this privilege is ensuring that government officials are:

> free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties-suites which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government.

Barr v. Matteo, 360 U.S. 564, 571, 79 S.Ct. 1335, 3 L.Ed.2d 1434 (1959). Absolute immunity has been applied to virtually every common law tort including, but not limited to, malicious prosecution, tortious interference with business, false arrest, blackmail, fraud, intimidation, and invasion of privacy claims. Morton v. Hartigan, 145 Ill.App.3d 417, 99 Ill.Dec. 424, 495 N.E.2d 1159, 1165 (Ill.App.1986). "An absolute privilege cannot be overcome by a showing of improper motivation or knowledge of falsity." Geick v. Kay, 236 Ill.App.3d 868, 177 Ill.Dec. 340, 603 N.E.2d 121, 127

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(Ill.App.1992). The absolute immunity doctrine is limited to situations in which the government official's action is within the scope of his powers. *Blair v. Walker,* 64 Ill.2d 1, 349 N.E.2d 385, 389 (Ill.1976) (holding that the Governor of Illinois was protected from actions for civil defamation when making statements "which are legitimately related to matters committed to his responsibility."); *Harris v. News–Sun,* 269 Ill.App.3d 648, 206 Ill.Dec. 876, 646 N.E.2d 8, 11 (Ill.App.1995) (stating "the proper focus of the absolute immunity inquiry is on the nature of the government official's duties, and not on his/her rank or title.").

***15** Defendants argue that Williams is protected by the absolute immunity doctrine even if his alleged statements were in fact defamatory because he was at all relevant times the Chief of Prosecution in the Real Estate Division of OBRE. Defendants also contend that the other state officials named as Defendants are entitled to absolute immunity. The Court cannot determine on a motion to dismiss whether Williams' alleged defamatory statements to RE/MAX and the actions of the other defendants were within the course of their official duties. The current record does not reveal the precise parameters of defendants' official duties. Defendants' motion to dismiss the state law claims on the ground of absolute immunity is denied.

4. *Civil Conspiracy Claim*

[21] Under Illinois law, a "[c]ivil conspiracy consists of a combination of two or more persons for the purpose of accomplishing by some concerted action either an unlawful purpose or a lawful purpose by an unlawful means." *Bilut v. Northwestern University,* 296 Ill.App.3d 42, 230 Ill.Dec. 161, 692 N.E.2d 1327, 1332 (Ill.App.1998). Defendants argue that plaintiffs fail to state a claim for civil conspiracy under state law because as a general rule, principals and agents are incapable of conspiring with one another. *Id.* The *Bilut* court recognized two exceptions to this general rule where: (1) the interests of a separately incorporated agent diverge from the interests of the corporate principal and the agent at the time of the conspiracy is acting beyond the scope of his authority or for his own benefit, rather than that of the principal or (2) the agent is acting not as an agent but as a principal. Both of these exceptions arise from the case of *Pink Supply Corp. v. Hiebert, Inc.,* 788 F.2d 1313, 1317 (8th Cir.1986), in which the court held that "[w]hen the interests of the principal and agents diverge, and the agents at the time of the conspiracy are acting beyond the scope of their authority or for their own benefit rather than that of the principal," they may be capable of conspiring with the principal.

Plaintiffs' allegations reasonably support a conclusion that defendants were acting beyond the scope of their authority and motivated solely by a personal interest, rather than the benefit of the OBRE. Defendants Zito and Potter were allegedly motivated by a personal desire to "get" Baloun. Plaintiffs further allege that the defendants conspired to harass, coerce, intimidate Baloun and destroy Baloun and his businesses. Plaintiffs also allege that Zito, Potter, and Williams knowingly filed and pursued false charges against Baloun. Williams allegedly interfered with Baloun's contractual relationships with RE/MAX and various real estate agents. The amended complaint also alleges that the remaining defendants knew or should have known of the unlawful acts by Zito, Potter, and Williams. These allegations met the exception to the general principal that a corporation cannot conspire with its agents, and plaintiffs' state law conspiracy claim stands.

5. *Defamation Claim*

***16** Defendants contend that defendant Zito cannot be held liable for defamation because the only alleged defamatory statement by Zito was his announcement that plaintiffs' businesses were shut down and the amended complaint establishes the truth of this statement. Plaintiffs failed to respond to defendants' argument regarding defendant Zito. Accordingly, the Court assumes plaintiffs have no objection to the granting of the motion to dismiss with respect to this issue and this defendant.

6. *Tortious Interference*

[22] Defendants also summarily argue without any analysis that plaintiffs' tortious interference with a prospective economic advantage claim should be dismissed. In Illinois, a plaintiff can recover for tortious interference with business expectancy by showing: (1) a reasonable expectation of entering into a valid business relationship; (2) the defendant's knowledge of the plaintiff's expectancy; (3) purposeful interference by the defendant that prevents the plaintiff's legitimate expectancy from ripening into a valid business relationship; and (4) damages to the plaintiff resulting from such interference. *International Marketing Limited v.*

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Archer–Daniels–Midland Co., Inc., 192 F.3d 724, 731 (7th Cir.1999) (applying Illinois law). To recover for the related tort of interference with existing contractual rights, a plaintiff must show "(1) the existence of a valid and enforceable contract between the plaintiff and another; (2) defendant's awareness of this contractual relation; (3) the defendant's intentional and unjustified inducement of a breach of the contract; (4) subsequent breach by the other, caused by the defendant's wrongful conduct; and (5) damages." *Id.*

Plaintiffs have stated a claim for tortious interference with business expectancy. Plaintiffs allege that they had a successful and ongoing franchise relationship with RE/MAX prior to defendants' investigation of plaintiffs' business practices. Am. Cmplt. ¶ 97. Plaintiffs further allege that Baloun's franchise agreement regarding his Lincoln Park real estate office was scheduled for renewal in July of 1999. *Id.* ¶ 98. According to the amended complaint, Baloun had a reasonable expectation of renewing the franchise relationship with RE/MAX. *Id.* Plaintiffs allege that defendants were aware of Baloun's relationship with RE/MAX. *Id.* ¶ 100. Plaintiffs also allege that defendant Williams contacted RE/MAX on several occasions in March of 1999 and made defamatory statements regarding Baloun's integrity, honesty, and business practices. *Id.* Plaintiffs further allege that as a result of defendants summary suspension of their real estate licensees, defendants' unfounded investigation into Baloun's business practices, and Williams' alleged defamatory statements, RE/MAX began to question Baloun's integrity and Baloun was forced to sell two of his real estate offices for below market price. *Id.* ¶¶ 101, 106–108. These allegations sufficiently allege that defendants engaged in tortious interference with Baloun's ability to enter into a renewal of its franchise agreement with RE/MAX.

***17** [23] Plaintiffs also sufficiently allege tortious interference with a prospective business relationship with real estate agents. At the time of defendants' actions, Baloun was in the process of attempting to recruit additional real estate agents for his offices. Am. Cmplt. ¶ 114. Baloun alleges that he had a reasonably valid business expectancy of hiring several new agents. *Id.* Plaintiffs further allege that defendants knew or should have know that Baloun continuously sought additional real estate agents to generate more sales for his offices. *Id.* ¶ 115. Defendants' actions interfered with Baloun's prospective business relationships with new real estate agents, and Baloun was damaged in an amount equal to the lost revenues from new real estate agents which he reasonably expected to hire in the relevant time period. *Id.* ¶¶ 116, 119. Plaintiffs have adequately alleged a claim for tortious interference with prospective business relationships with real estate agents.

[24] Lastly, plaintiffs' amended complaint sufficiently states a cause of action for tortious interference with contract. Baloun had contracts with various real estate agents, and defendants were allegedly aware of these contracts. Am. Cmplt. ¶¶ 109, 112. Plaintiffs allege that defendants induced the breach of these contracts by summarily suspending plaintiffs' real estate licenses and pursing an unfounded investigation into Baloun's business practices. *Id.* ¶ 113. Plaintiffs allege that as a result of defendants' actions, real estate agents terminated their employment relationship with Baloun and Baloun suffered damages in an amount equal to the lost revenues of the real estate agents. *Id.* ¶¶ 113, 116, 118.

III. *CONCLUSION*

For the reasons set forth above, Defendants' Motion to Dismiss is granted in part and denied in part. Plaintiffs' procedural due process claim based on defendants' random and unauthorized conduct in temporarily suspending their real estate licenses is dismissed. Plaintiffs' defamation claim against defendant Zito is dismissed. Any claims against Darr and Brady under § 1983 based on actions occurring before August 31, 1999 are dismissed. Finally, any claims against defendants Williams, Turner, Shaffer, McAuliffe, Darr, and Brady based on their filing a complaint with the OBRE, petitioning for summary suspension, and failing to provided prior notice of their request for a summary suspension are barred by the doctrine of prosecutorial immunity. Defendants' motion is otherwise denied. Defendants are directed to answer plaintiffs' remaining claims within 20 days from the date of this Opinion.

This case is set for a status hearing on November 19, 2002 at 9:00 a.m. for the purpose of setting a discovery schedule.

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Footnotes

1 Defendants attached to their motion to dismiss the OBRE's administrative complaint, the petition for summary suspension, the order of summary suspension, the order of the Circuit Court of Cook County, Illinois staying the order of summary suspension, and the order of reinstatement. Defendants argue that the Court may take judicial notice of the decision of another court or agency. As explained in *Opoka v. Immigration and Naturalization Service,* 94 F.3d 392, 395 (7th Cir.1996), a court may generally take judicial notice of another court or agency's decision or of a document filed in another matter only for the limited purpose of recognizing the fact of such litigation or judicial act, not for the truth of the matters asserted in the other litigation. *See also* *General Electric Capital Corp. v. Lease Resolution Corp.,* 128 F.3d 1074, 1082 fn. 6 (stating "We agree that courts generally cannot take notice of findings of fact from other proceedings for the truth asserted therein because these findings are disputable and usually are disputed.").
The Court declines to rely on the facts cited in the exhibits attached to defendants' current motion because defendants have failed to satisfy the indisputability requirement of Fed.R.Evid. 201(b). The Court merely takes judicial notice of facts that are not subject to reasonable dispute and capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. *General Electric Capital Corp.,* 128 F.3d at 1081. For instance, the Court takes judicial notice of the fact that the Commissioner of the OBRE issued an order of summary suspension on December 29, 1998 and made certain findings therein. The Court does not, however, take judicial notice of the findings made by the Commissioner for the truth of the matters asserted.

2 "Clearly, an unwarranted investigation by licensing officials conducted in a manner calculated to discourage customers or interfere with a licensee's business may violate a property right." *Easter House v. Felder,* 910 F.2d 1387, 1407 (7th Cir.1990).

3 Defendants challenge plaintiffs other due process claims for the first time in their reply brief. The Court will not address arguments raised for the first time in a reply brief. *Aliwoli v. Gilmore,* 127 F.3d 632, 635 (7th Cir.1997) (holding party may not assert new argument in reply brief).

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EXHIBIT 4-C

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United States District Court, D. Nevada.

Bradley Stephen COHEN, et al., Plaintiff(s),
v.
Ross B. HANSEN, et al., Defendant(s).

No. 2:12–CV–1401 JCM (PAL).
|
Signed June 9, 2015.

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Dean G. Von Kallenbach, Young Denormandie, P.C., Seattle, WA, for Defendant(s).

ORDER

JAMES C. MAHAN, District Judge.

***1** Presently before the court is defendants Ross B. Hansen, Northwest Territorial Mint, LLC, and Steven Earl Firebaugh's motion for summary judgment. (Doc. # 205). Plaintiffs Bradley Stephen Cohen and Cohen Asset Management filed a response (doc. # 213), and defendants filed a reply (doc. # 220–1).

I. Background

Plaintiff Bradley Stephen Cohen ("Cohen") resides in California. (Doc. # 40, first amended compl. at ¶ 1). He is the president and chief executive officer of Cohen Asset Management ("CAM"), a privately held California corporation. (*Id.* at ¶ 1–2). CAM acquires, finances and operates industrial properties across the United States. (*Id.* at ¶ 2).

Defendant Ross B. Hansen ("Hansen") is a resident of the state of Washington and a part-time resident of Nevada. (*Id.* at ¶ 3). Defendant Northwest Territorial Mint, LLC ("NW Mint") is a Washington limited liability company. (*Id.* at ¶ 4). NW Mint is registered to do business in Nevada and maintains a physical address and corporate offices at 80 East Airpark Vista Boulevard, Dayton, Nevada. (*Id.* at ¶ 4). Defendant Steven Earl Firebaugh ("Firebaugh") is a resident of Nevada.

In April 2012, plaintiffs discovered allegedly defamatory and malicious websites—http://bradley-cohen.com and http://bradleyscohen.com—containing intentionally false and disparaging publications about plaintiffs. (*Id.* at ¶ 9). The websites, among other things, compared plaintiff Cohen to Bernie Madoff and displayed a picture with plaintiff Cohen allegedly photoshopped with a picture of Bernie Madoff. (*Id.* at ¶ 12). The websites contained allegedly false and scandalous allegations against plaintiffs Cohen and CAM.

Plaintiffs allege that defendants secretly created and established the websites and intended to conceal any involvement with the websites' creation. (*Id.* at ¶ 29). Defendants allegedly created the websites in retaliation for two lawsuits regarding business leases, which defendants lost, in Washington state court. (*Id.* at ¶ 31).

Based on the foregoing, plaintiffs filed an amended complaint alleging the following causes of action against all defendants: (1) defamation and defamation per se; (2) invasion of privacy/false light; (3) intentional infliction of emotional distress by plaintiff Cohen; (4) intentional interference with future expected business; and, (5) injunctive relief. (Doc. # 40). Plaintiffs also requested general, presumed, or assumed damages, punitive damages, attorneys' fees and costs, injunctive relief, and other relief as the court deems proper. (*Id.* at 26).

Discovery has been contentious. Magistrate Judge Leen has ordered both parties to produce or supplement discovery that they have resisted providing. Plaintiffs have consistently stated, throughout the discovery process, that they are seeking only general and presumed damages. Plaintiffs refused to produce financial information or information regarding specific monetary damages because they claimed they were not alleging actual damages.

***2** On July 25, 2013, the court entered a written order

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directing plaintiffs to produce documents supporting all of their theories regarding damages. (Doc. # 91). The court also directed plaintiffs to provide supplemental written responses to certain discovery requests. (*Id.*). The court explained to plaintiffs numerous times that they would be precluded from using any undisclosed evidence of actual damages for any purpose. Again, plaintiffs represented that they did not have, were not alleging, and knew of no actual damages.

On October 30, 2013, defendants filed a motion for summary judgment as to the claims requiring actual damages. (Doc. # 119). Plaintiffs then argued, for the first time, that they suffered actual damages; therefore, summary judgment was not appropriate. (Doc. # 135). Defendants filed a motion to exclude evidence regarding plaintiffs' actual damages.[1] (Doc. # 150). The magistrate judge granted defendants' motion and ordered sanctions precluding plaintiffs from claiming or introducing any evidence of actual damages attributable to defendants' alleged conduct for any purpose in the case, including motion practice and trial. (Doc. # 178).

Plaintiffs filed an objection, asking this court to reconsider the magistrate judge's order. (Doc. # 180). The court denied plaintiffs' objection. (Doc. # 195). Accordingly, plaintiffs are precluded from claiming or introducing any evidence of actual damages.

Defendants filed the instant motion for summary judgment requesting summary judgment be granted in their favor as to each of plaintiffs' claims. (Doc. # 205).

II. Legal Standard

The Federal Rules of Civil Procedure provide for summary judgment when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that "there is no genuine issue as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(a). A principal purpose of summary judgment is "to isolate and dispose of factually unsupported claims." *Celotex Corp. v. Catrett,* 477 U.S. 317, 323–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In determining summary judgment, a court applies a burden-shifting analysis. "When the party moving for summary judgment would bear the burden of proof at trial, it must come forward with evidence which would entitle it to a directed verdict if the evidence went uncontroverted at trial. In such a case, the moving party has the initial burden of establishing the absence of a genuine issue of fact on each issue material to its case." *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.,* 213 F.3d 474, 480 (9th Cir.2000) (citations omitted).

In contrast, when the nonmoving party bears the burden of proving the claim or defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to make a showing sufficient to establish an element essential to that party's case on which that party will bear the burden of proof at trial. *See* *Celotex Corp.,* 477 U.S. at 323–24. If the moving party fails to meet its initial burden, summary judgment must be denied and the court need not consider the nonmoving party's evidence. *See* *Adickes v. S.H. Kress & Co.,* 398 U.S. 144, 159–60, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970).

***3** If the moving party satisfies its initial burden, the burden then shifts to the opposing party to establish that a genuine issue of material fact exists. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). To establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n,* 809 F.2d 626, 631 (9th Cir.1987).

In other words, the nonmoving party cannot avoid summary judgment by relying solely on conclusory allegations that are unsupported by factual data. *See* *Taylor v. List,* 880 F.2d 1040, 1045 (9th Cir.1989). Instead, the opposition must go beyond the assertions and allegations of the pleadings and set forth specific facts by producing competent evidence that shows a genuine issue for trial. *See* *Celotex Corp.,* 477 U.S. at 324. At summary judgment, a court's function is not to weigh the evidence and determine the truth, but to determine whether there is a genuine issue for trial. *See* *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 249, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The evidence of the nonmovant is "to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255. But if the evidence of the nonmoving party is merely colorable or is not significantly probative, summary judgment may be granted. *See* *id.* at 249–50.

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III. Discussion

(1) Defamation and defamation per se by CAM and Cohen against all defendants

A. Defamation

In Nevada, "the general elements of a defamation claim require a plaintiff to prove: '(1) a false and defamatory statement by [a] defendant concerning the plaintiff; (2) an unprivileged publication to a third person; (3) fault, amounting to at least negligence; and (4) actual or presumed damages.' " *Pegasus v. Reno Newspapers,* 118 Nev. 706, 57 P.3d 82, 90 (2002) (citing *Chowdhry v. NLVH, Inc.,* 109 Nev. 478, 851 P.2d 459, 462 (1993)).

Plaintiffs argue that, due to the magistrate judge's ruling excluding any evidence of actual damages, they withdraw their claim for defamation. (Doc. # 200 at 4–5; doc. # 213 at 36). Accordingly, plaintiffs assert that defendants' motion for summary judgment regarding defamation is now moot. Defendants request that the court grant summary judgment in spite of plaintiffs' attempt to argue that they withdraw the claim. (Doc. # 220–1 at 8).

Federal Rule of Civil Procedure 41(a)(1) establishes two methods for the voluntary dismissal of an action without a court order or a motion. First, the plaintiff may file a notice of dismissal before an answer or summary judgment motion has been served. Fed.R.Civ.P. 41(a)(1)(A)(i). Second, the plaintiff may at any time file a stipulation of dismissal signed by all the parties. Fed.R.Civ.P. 41(a)(1)(A)(ii).

***4** Plaintiffs' statement to the court that they withdraw their claim for defamation does not properly remove the claim from this court's consideration. Defendants filed an answer to plaintiffs' amended complaint on July 11, 2013. (Doc. # 85). Plaintiffs first mentioned their intent to "withdraw" on December 9, 2014, in a response to defendants' motion to extend time to file dispositive motions-nearly a year and a half after defendants' answer. (Doc. # 200). The parties did not stipulate to remove this claim, and defendants have not filed a motion requesting this court's permission to dismiss particular claims. *See* Fed.R.Civ.P. 41(a)(2). Accordingly, defendants are entitled to summary judgment on this issue.

B. Defamation per se

Nevada has recognized statements tending to injure the plaintiff in his or her business or profession as defamatory per se.[2] *Chowdhry v. NLVH, Inc.,* 109 Nev. 478, 851 P.2d 459, 484–84 (Nev.1993). If the defamatory communication "imputes a 'person's lack of fitness for trade, business, or profession,' or tends to injure the plaintiff in his or her business, it is deemed defamation per se and damages are presumed." *Id.* (quoting *K–Mart Corp. v. Washington,* 109 Nev. 1180, 866 P.2d 274, 282 (Nev.1993), *overruled on other grounds by* *Pope v. Motel 6,* 121 Nev. 307, 114 P.3d 277 (Nev.2005)).

In determining whether a statement constitutes defamation per se, words "are to be taken in their plain and natural import according to the ideas they convey to those to whom they are addressed; reference being had not only to the words themselves but also to the circumstances under which they were used." *Talbot v. Mack,* 41 Nev. 245, 169 P. 25, 29 (Nev.1917). A statement that directly imputes to the plaintiff "dishonesty, lack of fair dealing, want of fidelity, integrity, or business ability," even in general terms and without supporting details, is considered defamation per se. *Id.* at 30.

At issue are multiple websites, which plaintiffs assert defendants published for the sole purpose of smearing plaintiffs. The websites include statements that plaintiffs are guilty of crimes similar to those committed by Bernie Madoff, that plaintiff Cohen was convicted of fraud, that plaintiffs and their related companies had been incurring and continued to incur losses, that investigators had speculated CAM was actively engaging in lawsuits in an attempt to hold off creditors, that plaintiffs "scammed" tenants out of millions of dollars, and that CAM is known to sue tenants and former tenants because of greed. (Doc. # 40 at 9).

Defendants assert that plaintiffs' claims cannot succeed for a number of reasons, including that: (1) CAM's claim is actually for business disparagement, which it cannot prove; (2) Cohen is a limited-purpose public figure, and is subject to an actual malice showing; and (3) the websites are not defamatory per se because they are statements of opinion. The court will address each in turn.

1. CAM's claim is properly asserted as defamation per se

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***5** The Supreme Court of Nevada has differentiated between defamation *per se* and business disparagement. *Clark Cty. Sch. Dist. v. Virtual Educ. Software, Inc.,* 125 Nev. 374, 213 P.3d 496, 504 (Nev.2009). Statements accusing an individual of personal misconduct in his or her business or attacking the individual's business reputation may be brought as an action for defamation *per se. Id.* However, if the statements are directed towards the quality of the individual's product or services, the claim is one for business disparagement. *Id.*

Defendants assert that CAM's claim for defamation per se is actually a claim for business disparagement. Accordingly, defendants assert that, because CAM cannot prove that it suffered actual damages—a requirement to assert business disparagement—the court should dismiss CAM's business disparagement claim.

Both plaintiffs and defendants cite this court's decision in *Sentry Insurance v. Estrella Insurance Service, Inc.,* No. 2:13–CV–169–JCM–GWF, 2013 WL 2949610, at *1 (D.Nev. June 13, 2013), to support their positions. In *Sentry* plaintiffs Sentry Insurance, et al. ("Sentry") underwrote insurance policies that defendant Estrella Insurance Service, Inc. ("Estrella") issued. 2013 WL 2949610 at *1. At some point plaintiffs terminated the underwriting agreement with Estrella. *Id.* Plaintiffs then replaced Estrella with other underwriters. *Id.* Plaintiffs alleged that, when the replacement underwriters contacted plaintiffs' insureds, the insureds stated that Estrella representatives told them that "Sentry Plaintiffs and/or insurance agencies whom Sentry Plaintiffs had assigned their policies to were frauds and/or thieves." *Id.*

This court found that the alleged statement implicated an attack on the individuals' reputations and their lack of fitness for trade, business, or profession—not an attack on a product or service. Therefore, defamation per se was the appropriate claim. *Id.* at *3.

In contrast, in *Clark County School District v. Virtual Education Software, Inc.,* the Clark County School District ("CCSD") reviewed several of Virtual Education's courses because of concerns about their academic rigor. *Virtual Educ.,* 213 P.3d at 500. CCSD decided the courses did not meet its standards, and in a letter sent to Virtual Education's vice president, stated that "some of the courses can be completed in three to five hours," "tests can be successfully passed without reading the material," that there is "no safeguard to determine that the candidate is the one who actually takes the tests," and the courses did "not require the analysis, synthesis and application levels usually required for graduate coursework." *Id.* at 504. These statements attacked a product the business offered, and the Nevada Supreme Court held that business disparagement was the appropriate claim. *Id.*

Defendants cite a non-controlling case, *Aegis Council, LLC v. Maldonado, et al.,* 3:10–cv–00756–RCJ–WGC, 2011 U.S. Dist. LEXIS 36572, at *1 (D.Nev. Mar. 30, 2011). In *Aegis,* the plaintiff did not specifically identify a cause of action. *Id.* at *3. Defendants allegedly posted onRipoffReport.com that a service the plaintiff offered was a "tax avoidance scam," that "[t]his group of people is bilking millions of dollars from unsophisticated and sophisticated investors nationally selling this tax avoidance scheme," and that the company was a "fraud," "not legal," and "scammers." *Id.* at *2–3. The court found the complaint asserted a business disparagement claim, because the statements against Aegis were directed at the service offered. *Id.* at *3, 14.

***6** The *Aegis* court focused on the difference between accusing an *individual* of personal misconduct (defamation per se) versus accusing an individual's *business* of misconduct (business disparagement). While the Nevada Supreme Court has not "clearly stated whether a corporation or other business entity can proceed on a theory of defamation per se where communications concern the business's product or injure the business's reputation," *Virtual Educ.,* 213 P.3d at 504, this court anticipates that the Nevada Supreme Court would find this claim viable under the instant facts. *See Sentry,* 2013 WL 2949610, at *3.

Unlike in *Virtual Educ.,* which focused solely on the product offered and whether it stacked up to industry standards, the defendants in the instant case are not just alleging an inferior product from Cohen Asset Management. Defendants are alleging, as in *Sentry,* that the business itself is a complete fraud and organized for the purpose of perpetrating Cohen's illegal and corrupt activities.

Most of the allegedly defamatory statements are made against Cohen. However, defendants attack the fraudulent and illegal nature of the business by not just its connection to and management by Cohen, but also the company's allegedly illegal and fraudulent operations and "evasive" tactics necessitating an "army of investigators" to "unravel the web." (Doc. # 206–3 at 7). Important in the instant case is that the company itself is the means by which Cohen supposedly perpetrated his frauds and illegal activity. Cohen's alleged frauds and illegal activities are intrinsically tied to the company's operation and business dealings.

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

Further, attacks on Cohen are necessarily attacks against the company. CAM's investment committee makes its decision by majority vote. (Doc. # 119–26 at 3). However, for the committee to approve an investment, Cohen must be in the majority. (*Id.* at 4). Therefore, while Cohen's vote alone cannot approve a particular investment, he must vote for an investment or else it cannot pass. (*Id.*) Therefore, all of CAM's investment decisions are contingent on Cohen's support. By calling into question Cohen's fitness for trade, business, or profession, defendants are necessarily calling into question CAM's fitness for trade, business, or profession.

This court finds defendants' statements on the websites to be clear attacks on the reputations of the company and its employees. Defendants' statements attack CAM's fitness for trade, business, or profession, not the products it offers. CAM's claim against defendants is properly construed as one for defamation per se and not business disparagement.

2. Cohen is not a limited-purpose public figure

Defendants assert that Cohen is a limited-purpose public figure who cannot make the required showing that defendants acted with actual malice. (Doc. # 205 at 26). If a plaintiff is a public figure, whether general or limited, he or she also bears the burden of proving by clear and convincing evidence that the defendant acted with actual malice, meaning knowledge of or reckless disregard with respect to the statement's falsity. *Pegasus v. Reno Newspapers, Inc.,* 118 Nev. 706, 57 P.3d 82, 90–91 (Nev.2002). A limited public figure is an individual who has "achieved fame or notoriety based on [his or her] role in a particular public issue." *Id.* at 91 (citing *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 351–52, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974)). "A limited purpose public figure is a person who voluntarily injects himself or is thrust into a particularly public controversy or public concern, and thereby becomes a public figure for a limited range of issues." *Id.*

***7** Defendants argue that Cohen is a limited-purpose public figure who is subject to a higher defamation standard. (Doc. # 205 at 26). Defendants rely on *Pegasus,* which held that a restaurant was a public figure "for the limited purpose of a food review or reporting on its goods and services" because it "voluntarily entered the public spectrum by providing public accommodation and seeking public patrons." *Id.* at 92.

Defendants assert that Cohen's "stature and reach in the real estate investing community is sufficient to make him a limited-purpose public figure." (Doc. # 205 at 26). Defendants assert that Cohen, the namesake and CEO of his firm, relies on the public to carry on his business and welcomes qualified individual investors. (*Id.*). Therefore, defendants assert that, "[b]y entering the stream of commerce and offering CAM's investment services to qualifying members of the public, Cohen has become a public figure under Nevada law." (*Id.* at 27, 57 P.3d 82).

In *Bongiovi v. Sullivan,* 122 Nev. 556, 138 P.3d 433 (Nev.2006), the Nevada Supreme Court held that a doctor was not a limited-purpose public figure. *Id.* at 445. The doctor held a national reputation as a skilled surgeon, published numerous articles and abstracts, contributed to multiple books and textbooks, belonged to specialized medical groups, and had been the subject of newspaper articles because of a successful surgery he had performed on an infant. *Id.* at 443. The court held that, though the doctor voluntarily entered the public spectrum by providing public services and seeking public patrons, he did not inject himself into the thrust of a particular public controversy or public concern by means of his professional accomplishments and activities. *Id.* at 445. Participation in professional organizations, publications, and the newspaper article were not enough to show that the doctor "affirmatively stepped outside of his private realm of practice to attract public attention." *Id.* at 446.

The court finds that Cohen's alleged nationwide business and reputation, speaking engagements at investment associations, and membership on various boards do not equate with Cohen "voluntarily inject[ing] himself or [being] thrust into a particular public controversy or public concern." *Id.* at 445. The court further finds that these factors also do not show that Cohen "affirmatively stepped outside of his private realm of practice to attract public attention." *Id.* Defendants identify no public controversy connected with Cohen or his business beyond financial investing generally being "a publicly scrutinized industry." (Doc. # 205 at 27). Just as publications and participation in professional organizations are standard in the medical industry, speaking engagements among colleagues and association memberships are standard in the investment industry and do not bring Cohen out of the private realm of his practice. Like *Bongiovi,* Cohen's activity in the investment community and membership on various boards and associations does not qualify him as a

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limited-purpose public figure.

3. A factfinder must determine whether the websites assert opinion or fact

***8** Defendants assert that their statements against Cohen and CAM are matters of opinion and are, therefore, not defamatory. (Doc. # 205 at 27). Though the general rule provides that "only assertions of fact, not opinion, can be defamatory[,] ... expressions of opinion may suggest that the speaker knows certain facts to be true or may imply that facts exist which will be sufficient to render the message defamatory if false." *Wynn v. Smith,* 117 Nev. 6, 16 P.3d 424, 431 (Nev.2001) (citing *K–Mart Corporation v. Washington,* 109 Nev. 1180, 866 P.2d 274, 281 (Nev.1993), *overruled on other grounds by* *Pope v. Motel 6,* 121 Nev. 307, 114 P.3d 277 (Nev.2005)). Further, "statements of belief are defamatory if they imply the existence of defamatory facts that are not disclosed to the listener ... for example, the statement I think he must be an alcoholic is actionable because a jury might find that it implied that the speaker knew undisclosed facts justifying his opinion." Restatement (Second) Torts, § 556; *see also* *Gordon v. Dalrymple,* No. 3:07–CV–00085–LRH–RA, 2008 WL 2782914, at *4 (D.Nev. July 8, 2008) ("Any statement which presupposes defamatory facts unknown to the interpreter is defamatory.").

The determination of whether a statement is capable of a defamatory construction is a question of law. *Branda v. Sanford,* 97 Nev. 643, 637 P.2d 1223, 1225–26 (Nev.1981). "In reviewing an allegedly defamatory statement, the words must be viewed in their entirety and in context to determine whether they are susceptible of a defamatory meaning." *Lubin v. Kunin,* 117 Nev. 107, 17 P.3d 422, 425–26 (Nev.2001) (internal quotations omitted). In Nevada, in order to determine if a statement is one of fact or opinion, "the court must ask whether a reasonable person would be likely to understand the remark as an expression of the source's opinion or as a statement of existing fact." *Pegasus v. Reno Newspapers, Inc.,* 118 Nev. 706, 57 P.3d 82, 87 (Nev.2002); *see also* *Wynn,* 16 P.3d at 431. If a statement is susceptible to different constructions, resolution of any ambiguity is a question of fact for the jury. *Branda,* 637 P.2d at 1225–26.

The Nevada Supreme Court has noted that a federal district court, applying Nevada law, enunciated three factors for determining whether an alleged defamatory statement includes a factual assertion: (1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact; (2) whether the defendant used figurative or hyperbolic language that negates that impression; and (3) whether the statement in question is susceptible to being proved true or false. *Pegasus,* 57 P.3d at 88 n. 19 (citing *Flowers v. Carville,* 112 F.Supp.2d 1202, 1211 (D.Nev.2000)).

The websites at issue appear to be identical. The title at the top of each page reads: "Bradley S. Cohen Is Bradley S. Cohen the Bernie Madoff of real estate?" (*See* docs.119–3; 119–4). The first page reads, "Bradley S. Cohen's Investors Lose Tens of Millions of Dollars While Cohen lives a life of glamor and luxury. The alarming similarities between these two investment firm founders." (Docs.119–3 at 2; 119–4 at 2). The websites proceed to compare Cohen and Madoff by posting Cohen's and Madoff's photos next to one another and detailing a list of superficial comparisons, include statements such as:

> ***9** —[Cohen] [h]as structured his business as an intricate web that is nearly unexplainable by company officials.
>
> —[Madoff] [s]tructured his business and transactions in a complex way to conceal fraud and perpetuate a ponzi scheme.
>
> —Senior company leadership was "uncomfortable" and refused to answer questions about [Cohen] and his financial dealings.
>
> —Employees could not explain [Madoff's] personal or company financial dealings.
>
> —[Cohen] [h]as overall responsibility for management of his firm, strategically directs investment funds.
>
> —[Madoff] [h]ad ultimate management authority over the assets of his clients and the ability to direct investments.
>
> —[Cohen] [l]ives in a palacious Beverly Hills Mansion valued at over $7,000,000.
>
> —[Madoff] [o]wned expensive homes in prestigious locations, including a lavish Manhattan apartment.

(Docs.119–3 at 3; 119–4 at 3).

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

The websites also contained statements that, "[r]ecently, the Senior Vice President of Cohen Asset Management, Doreen Ray (pictured right) was asked under oath about the intricacies of company finances." (Docs. # # 119–3 at 8; 119–4 at 8). The websites states that "her response was initially evasive, then ultimately revealed the following ominous facts...." (Docs.1193 at 8; 119–4 at 8). The websites then recite the following "facts" from Ray's "under oath" testimony during a separate, unconnected lawsuit:

- "[Ray] expressed a complete inability to explain any details of the company's **financial transactions,** despite being the highest ranking officer on the Asset Management Team."

- "She stated that she was **uncomfortable answering questions** about Bradley Cohen and his financial dealings."

- "Properties owned by Cohen Asset Management or its related companies have **occupancy rates as low as 28%.**"

> "Properties owned by Cohen Asset Management or its related companies are **currently generating operating losses.**"

> "**Losses continue to mount** as the companies lose tenants."

> "She **does not know where the money is coming from to cover the operating losses,** but does know that the companies can dip into a revolving line of credit through which all Cohen Asset Management companies are financed."

- Cohen Asset Management has recently **lost tens of millions of dollars** in investor funds, yet Bradley Cohen is clearly living the life of luxury. Losses of the Cohen Asset Management's CAM Core+ Fund 1 are clear from the company's financial statement below. [Graph is attached.]"

(Docs.119–3 at 8–9; 119–4 at 8–9) (emphasis in original).

Further, the websites allege to have posted the company's third quarter financial report and graphs detailing the company's losses. (Docs.119–3 at 13; 119–4 at 13). The websites include copies of a Third Circuit opinion reversing the dismissal of civil Racketeer Influenced and Corrupt Organizations Act ("RICO") claims against "Brad Cohen" of Philadelphia, who plaintiffs point out is a different individual—Brad Scott Cohen—and not plaintiff Brad Stephen Cohen. (Doc. # 119–4 at 38–47). The websites post the full opinion in conjunction with numerous news articles discussing "Brad Cohen's" fraud charges, conviction and sentencing, "numerous swindles," and revocation of probation under a section titled "A History of Convictions." (Docs.119–3 at 26; 119–4 at 26).

***10** Defendants assert that the statements on the websites, when read in context, demonstrate that the statements are purely opinion. (Doc. # 205 at 29). Defendants assert that the fact that the websites "express[ ] negative views about Cohen and CAM would make a reasonable person suspicious as to whether they contain statements of fact." (*Id.*). Further, defendants assert that they do not make factual assertions, but merely pose questions to encourage readers to think critically. Defendants also assert that the fact that the websites and their domain names are registered and hosted anonymously outside of the United States also indicates that they are not affiliated with any trusted entity for information about real estate investing. Finally, defendants argue that, even without these comments, statements published on a blog that accepts comments like the websites at issue are inherently less likely to be viewed as statements of fact. (*Id.* at 29–30).

Plaintiffs respond that the general tones of defendants' websites are different from their cited cases and attempt convince the reader that defendants have actually uncovered shady and criminal dealings. (Doc. # 213 at 20). Plaintiffs assert that defendants have carefully crafted their websites to appear as professional, credible, and factual as possible. (*Id.*). Plaintiffs further assert that defendants' websites actually caused plaintiffs' investors, lenders and vendors to make inquiries and conduct investigations of plaintiffs, hesitate to do business with plaintiffs, and in at least two known cases, not invest millions of dollars with plaintiffs. (*Id.*).

Throughout the website, defendants are careful to include small notes to hedge their accusations. For example, with respect to the Third Circuit case and various web articles addressing the illegal activities and conviction of "Brad

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Cohen," defendants note that they are suggesting that plaintiff Cohen, based on his vague career history on CAM's website, might be the "Brad Cohen" in these articles.[3] (Docs.119–3 at 26; 119–4 at 26). Defendants also posit their accusations in the form of questions.

A question mark is a "rhetorical device" which can serve two purposes: (1) making clear the author's lack of definitive knowledge about an issue; and (2) inviting the reader to consider the possibility of other justifications for the defendant's actions, thereby negating the impression that the statement implies a false assertion of fact. *Partington v. Bugliosi,* 56 F.3d 1147, 1157 (9th Cir.1995). If the question can be reasonably read as an assertion of a false fact, it may be actionable. *Id.*

In *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990), the court found that "[s]imply couching a statement—"Jones is a liar"—in terms of opinion—"In my opinion Jones is a liar"—does not dispel the factual implications contained in the statement. *Id.* at 19. In the same manner that the *Milkovich* court rejected the concept that adding "in my opinion" before an assertion of defamatory fact insulates the speaker from a defamation action, this court rejects the idea that defendants putting what may be defamatory fact in the form of a question counteracts the impression that the speaker is communicating an actual fact.

***11** Further, the general tenor of the websites is precise with allegedly accurate graphs, earnings statements of employees, and quarterly reports that invite readers to draw specific conclusions regarding CAM and Cohen's activities. The websites are not ranting blogs or free flow, stream-of-consciousness musings. The careful weaving of "facts" that were testified to "under oath," newspaper articles, graphs, earning statements, and the like into the defendants' gently questioning narrative are designed to bring doubt into the minds of investors regarding plaintiffs and their activities. (*See, e.g.,* docs.119–3; 119–4). Defendants boldly asserted on their websites—in response to a letter from plaintiffs threatening legal action—that "not one untrue statement is found on this site," and that "Cohen [won't] disclose the company's financial documents to disprove the alleged 'defamatory statements' here [on the websites]." (Doc. # 214–1 at 255).

Defendants' argument that the anonymous registry and hosting of the domain names outside the United States would weigh in any way against the website's credibility to the average user is wholly unconvincing. The court does not believe that the average internet user would check the domain registry or host unless the web browser notified the user that a certain website posed a security risk. Further, the court questions whether the average internet user would even know how to check the domain registry or hosting country of a website or whether the average user would know what that information means.

Additionally, the domain names do not give any indication of bias. They are merely two separate variations of Cohen's name, which weighs against defendants' assertion that a reasonable person would see the websites as opinion. *Cf. Obsidian Fin. Grp., LLC v. Cox,* 812 F.Supp. 1220, 1230 (D.Or.2011) (obsidianfinancesucks.com clearly demonstrated website's bias). The court also does not find that the language used by defendants was figurative or hyperbolic. Defendants make specific accusations and imputations of criminal activity and unethical activity and provide supporting information, described as "facts" to attempt to bolster those accusations for readers.

Finally, the court finds that the statements alleged in defendants' websites are indeed susceptible to being proved true or false. In this case, the truth of the defendants' assertions on the websites is disputed. Viewing the evidence in the light most favorable to plaintiffs, defendants' accusations are therefore capable of defamatory meaning. *See, e.g., Flowers v. Carville,* 310 F.3d 1118, 1129 (9th Cir.2002).

Accordingly, because the published statements could be construed as defamatory statements of fact, and are therefore actionable, Nevada law instructs that the factfinder should resolve the matter. *See Pegasus v. Reno Newspapers, Inc.,* 118 Nev. 706, 57 P.3d 82, 88 (2002). The court will deny defendants' motion for summary judgment with respect to Cohen's and CAM's claim for defamation per se against defendants.

(2) Invasion of privacy/false light by all plaintiffs against all defendants

A. CAM

***12** Defendants assert that the court should grant summary judgment with respect to CAM's claim for false light invasion of privacy because a corporation cannot possess privacy rights. (Doc. # 205 at 6–7). Plaintiffs state that CAM withdraws its claim for false light/invasion of privacy against defendants, because Nevada's adoption of

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the false light/invasion of privacy tort followed the Restatement (Second) of Torts § 652A, *et seq.* (1977), which precludes privacy/false light claims by corporations. (Doc. # 213 at 4–5). Plaintiffs assert that they "indicated, and the Court recognized, they would withdraw CAM's false light invasion of privacy claim in connection with defendants' requested extension to file their MSJ." (Docs.200 at 4–5, 207 at 2–3). Therefore, plaintiffs assert that defendants' motion for summary judgment on CAM's false light invasion of privacy claim was unnecessary and is now moot. (Doc. # 213 at 38). Defendants request that the court grant summary judgment in spite of plaintiffs' attempt to argue that they withdrew CAM's claim. (Doc. # 220–1 at 8).

According to the *Restatement (Second) of Torts* § 652I, a corporation has no privacy rights; such rights are personal and can be held only by human beings. As discussed previously, plaintiffs' statement to the court that CAM is "no longer pursuing a claim for false light invasion of privacy" does not properly remove the claim from this court's consideration. *See* Fed.R.Civ.P. 41(a). The parties did not stipulate to dismiss this claim, nor did plaintiffs move for the court to dismiss the claim. *Id.* Accordingly, defendants are entitled to summary judgment on this issue.

B. Cohen

The Supreme Court of Nevada expressly recognized false light invasion of privacy as a valid and separate cause of action in 2014. *See* *Franchise Tax Bd. of Cal. v. Hyatt,* 335 P.3d 125, 141 (Nev.2014), *reh'g denied* (Nov. 25, 2014), *petition for cert. filed* (Mar. 25, 2015) ("[W]e, like the majority of courts, conclude that a false light cause of action is necessary to fully protect privacy interests, and we now officially recognize false light invasion of privacy as a valid cause of action in connection with the other three privacy causes of action that this court has adopted."). The court clarified that, under Nevada law, defamation law seeks to protect an objective interest in one's reputation—either economic, political, or personal—in the outside world. *Id.* at 141 (citations omitted). Conversely, false light invasion of privacy protects one's subjective interest in freedom from injury to the person's right to be left alone. *Id.* (citations omitted).

For example, situations such as being falsely portrayed as a victim of a crime, such as sexual assault, or being falsely identified as having a serious illness, or being portrayed as destitute, may place a person in a harmful false light without rising to the level of defamation. *Id.* (citations omitted).

***13** In Nevada "the injury in privacy actions is mental distress from having been exposed to public view, while the injury in defamation actions is damage to reputation." *Flowers v. Carville,* 310 F.3d 1118, 1132 (9th Cir.2002) (citation omitted). Like defamation, false light requires actual malice. *Id.* However, courts place less emphasis on public reputation in the false light tort than in defamation. The thrust of a false light action is the subjective "privacy" of the subject. False light also requires an implicit false statement of objective fact. *Id.*

Defendants assert that they did not portray Cohen in a false light by giving publicity to his business activities or stating true facts about his personal life. (Doc. # 205 at 15). Defendants assert that they did not make untrue statements, and also that they did not do anything that would be highly offensive to a reasonable person. (*Id.* at 17).

Plaintiffs assert that defendants did not publicize Cohen's true business activities. (Doc. # 213 at 36). Instead, plaintiffs assert that defendants' websites falsely claimed Cohen was (1) the next Madoff; (2) running a Ponzi scheme, fraud, shell game or scam; (3) looting company assets; (4) taking investor and tenant money; (5) suing to hold off creditors; and (6) suing tenants based on unfounded accusations and greed. (*Id.*). Further, plaintiffs assert that defendants published a picture of Cohen's home, political contributions, and misconstrued information from a confidential financial report. (*Id.* at 36–37).

Defendants respond by asserting that Cohen attempts to bootstrap his false light claim onto the websites' comments concerning CAM as a company. (Doc. # 220–1 at 14). Defendants assert that the websites do not contain the statements that plaintiffs cite. Defendants further assert that, even assuming the websites included the statements plaintiffs cite, these alleged statements concern CAM's activities, not Cohen's. (*Id.*). Therefore, defendants argue that Cohen cannot hold plaintiffs liable for portraying CAM in a false light. (*Id.*).

Defendants' bootstrap argument is a clever attempt to parse the language of the statements. Though Cohen and CAM are technically separate entities, the court has previously discussed that Cohen has ultimate veto power over investments and control in shaping and directing company decisions. Therefore, Cohen and CAM are nearly one and the same. The court finds that the

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defendants have not met their burden to negate an essential element of plaintiffs' case. The court will deny defendants' motion for summary judgment with respect to Cohen's false light claim.

(3) Intentional infliction of emotional distress by Cohen against all defendants

To establish a claim of intentional infliction of emotional distress ("IIED"), plaintiff must prove: (1) defendant engaged in "extreme and outrageous conduct with either the intention of, or reckless disregard for, causing emotional distress; (2) [plaintiff] suffered severe or extreme emotional distress; and (3) actual or proximate causation." *Posadas v. City of Reno,* 109 Nev. 448, 851 P.2d 438, 444 (Nev.1993).

A. Extreme or outrageous conduct

***14** Nevada courts look to the Restatement (Second) of Torts for guidance in interpreting claims for intentional infliction of emotional distress ("IIED"). *Quinn v. Thomas,* No. 2:09–cv–00588–KJD–RJJ, 2010 WL 3021795, at *5 (D.Nev. July 28, 2010) (citing *Star v. Rabello,* 97 Nev. 124, 625 P.2d 90, 92 (Nev.1981); *Olivero v. Lowe,* 116 Nev. 395, 995 P.2d 1023, 1027 (Nev.2000)). According to Restatement (Second) Torts § 46, cmt. d, behavior that is "tortious or even criminal" is not necessarily extreme and outrageous. "Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.; see also Welder v. Univ. of S. Nev.,* 833 F.Supp.2d 1240, 1245 (D.Nev.2011). Liability does not extend "to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities." Comment d of Restatement (Second) of Torts § 46 (1965).

Determination of whether a defendant's conduct amounts to an extraordinary transgression of the bounds of socially tolerable conduct is a fact-specific inquiry. *See, e.g., Norman v. Gen. Motors Corp.,* 628 F.Supp. 702, 704–05 (D.Nev.1986). Courts consider a defendant's conduct on a case-by-case basis and in light of the totality of the circumstances. *See id.* (considering "totality of the circumstances" in determining whether conduct is extreme and outrageous).

Extreme and outrageous conduct may arise "from the actor's knowledge that the other is peculiarly susceptible to emotional distress, by reason of some physical or mental condition or peculiarity." Restatement (Second) of Torts § 46 cmt. f. "[H]owever, ... major outrage is essential to the tort; and the mere fact that the actor knows that the other will regard the conduct as insulting, or will have his feelings hurt, is not enough." *Id.* Extreme and outrageous conduct also "may arise from an abuse by the actor of a position, or a relation with the other, which gives him actual or apparent authority over the other, or power to affect his interests." *Id.* cmt. e (stating as an example that police officers have been held liable for extreme abuse of their position).

Defendants assert that Cohen cannot establish extreme or outrageous conduct by Hansen because publishing comments comparing Cohen to Bernie Madoff on websites is not extreme or outrageous. Defendants assert that Hansen's conduct was not extreme and outrageous and did not cause Cohen to suffer extreme or severe emotional distress. (Doc. # 205 at 19, 21). Further, defendants assert that, since the gravamen of Cohen's claim is defamation, he should not be allowed to maintain a separate claim for IIED. (Doc. # 205 at 23).

Plaintiffs respond that defendants' websites, which assert that Cohen runs a Ponzi scheme, is the next Bernie Madoff, and loots company assets, constitutes extreme and outrageous conduct "beyond all bounds of decency and intolerable in a civilized society." (Doc. # 213 at 39 n. 2). Plaintiffs allege that the websites have been active for over two and a half years. (*Id.*).

***15** Neither the parties nor this court have identified any Nevada case that has addressed an analogous factual scenario to the present case. In *Card v. Pipes,* 398 F.Supp. 1126 (D.Or.2004), a university professor brought an action against operators of a think tank's website alleging claims for defamation and IIED. *Id.* at 1130. The think tank had published statements in a newspaper and later on an internet website stating that the professor had called Israel a "terrorist state," Israelis "baby killers," and insisted in his final exam that students agree with his view that Israel "stole land." *Id.* at 1135. The professor further alleged that the think tank operators had attempted to coerce him to undertake certain actions with the threat of continued publication of the allegedly defamatory statements. *Id.* at 1136.

The operators moved to dismiss. The court found that, considering the totality of the allegations, the alleged conduct was not sufficiently outrageous to state a claim

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for IIED. *Id.* Specifically, the court noted that no special relationship existed between the parties, that defendants' conduct merely involved "conversations between defendants and plaintiff as well as publication on defendants' website and in one issue of the Jewish Review[,]" and that, despite alleging that "defendants' motive was to defame and injure him [,]" plaintiff was "not a particularly vulnerable individual." *Id.*

Here, the websites at issue discuss Cohen, place his photo next to Bernie Madoff's, make superficial comparisons between Cohen and Bernie Madoff, and include statements such as:

> —Is Bradley S. Cohen the Next Bernie Madoff? The alarming similarities between these two investment firm founders. (Docs.119–3 at 2; 119–4 at 2).
>
> —Bradley S. Cohen's Investors Lose Tens of Millions of Dollars While Cohen lives a life of glamour and luxury. (Docs.119–3 at 2; 119–4 at 2).
>
> —Like Bernie Madoff, Cohen has a palacious home in an impressive neighborhood, an office in a celebrity and wealth-filled location, heavy involvement in industry organizations and on influential boards, and a company with an elusive and complex web of financial dealings. (Docs.119–3 at 11; 119–4 at 11).
>
> —Despite losses to his investors, Cohen has maintained his extravagant lifestyle and image. He has been a contortionist when it comes to keeping the secret of his true financial picture, creating a complex web of companies and dealings, but how long can this continue? (Docs.119–3 at 11–12; 119–4 at 11–12).
>
> —Cohen recently refinanced his mansion for approximately $4,000,000.00, perhaps in an attempt to prop up his crumbling empire. (Docs.119–3 at 13; 119–4 at 13).

The websites also posted copies of a Third Circuit opinion reversing the dismissal of civil Racketeer Influenced and Corrupt Organizations Act ("RICO") claims against "Brad Cohen" of Philadelphia. (Doc. # 119–4 at 38–47). Plaintiffs point out the Brad Cohen in the Third Circuit case is a different individual—Brad Scott Cohen—and not plaintiff Brad Stephen Cohen. (*Id.*).

***16** The court finds that, as a matter of law, Cohen cannot state a claim for IIED. Like *Card,* the allegedly defamatory statements at issue here were published online. Though the accusations at issue in the instant case include criminal implications, as opposed to the potentially unpopular and incendiary statements in *Card,* the totality of the circumstances, including the tenuous comparisons to Bernie Madoff, that Cohen is not a particularly vulnerable individual, and the lack of a special relationship between Cohen and defendants (i.e. where defendants have a position of power over Cohen), the court concludes that defendants statements cannot meet the threshold to be considered extreme and outrageous. The court will grant summary judgment in favor of defendants.

The court notes that defendants also argue that where the gravamen of a claim is defamation, many jurisdictions do not permit separate causes of action for mental and/or emotional distress. *See Dworkin v. Hustler Magazine, Inc.,* 668 F.Supp. 1408, 1420–21 (C.D.Cal.1987), *aff'd,* 867 F.2d 1188 (9th Cir.1989) (applying California law) (citing *Wilson v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 111 A.D.2d 807, 808, 490 N.Y.S.2d 553 (N.Y.App.1985)).

In *Dworkin,* the Ninth Circuit recognized that without such a rule, any defective defamation claim could be revived by pleading an IIED claim. *Id.* As explained by one California state court, to allow an emotional distress claim based on facts underlying a defamation claim would be "a step toward 'swallowing up and engulfing the whole law of public defamation.' " *Flynn v. Higham,* 149 Cal.App.3d 677, 681, 197 Cal.Rptr. 145 (Ct.App.1983). Nevada has not adopted this position, nor has it given any indication of its inclination to do so. *See, e.g., Woods v. Kings Row Trailer Park,* No. 63190, 2015 WL 2329289, at *1 (Nev. May 13, 2015) (finding that the lower court should have construed appellant's complaint as seeking relief for intentional infliction of emotional distress and defamation and holding that appellant stated claims for both). Accordingly, the court does not find this argument persuasive. The court will grant summary judgment in favor of defendants with respect to Cohen's claim of IIED.

(4) Intentional interference with future expected business by all plaintiffs against all defendants

Liability for the tort of intentional interference with future expected business requires proof of the following elements: (1) a prospective contractual relationship between the plaintiff and a third party; (2) knowledge by the defendant of the prospective relationship; (3) intent to harm the plaintiff by preventing the relationship; (4) the

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absence of privilege or justification by the defendant; and (5) actual harm to the plaintiff as a result of the defendant's conduct. *Wichinsky v. Mosa,* 109 Nev. 84, 847 P.2d 727, 729–30 (Nev.1993) (citing *Leavitt v. Leisure Sports, Inc.,* 103 Nev. 81, 734 P.2d 1221, 1225 (Nev.1987)).

Actual harm, i.e., actual damages, is a required element of this claim. Due to the magistrate judge's ruling excluding any evidence of actual damages, plaintiffs assert that they withdraw their claim for intentional interference with prospective business advantage (Doc. # 213 at 36). Accordingly, plaintiffs assert that defendants' motion for summary judgment regarding this issue is now moot. Defendants request that the court grant summary judgment in spite of plaintiffs' attempt to argue that they withdraw the claim. (Doc. # 220–1 at 8).

***17** Plaintiffs' statement to the court that they withdraw their claim for intentional interference with future expected business does not properly remove the claim from this court's consideration. *See* Fed.R.Civ.P. 41(a). The parties did not stipulate to dismiss this claim, nor did plaintiffs move for the court to dismiss the claim. *Id.* Accordingly, defendants are entitled to summary judgment on this issue.

(5) Injunctive relief by all plaintiffs against all defendants

Under Nevada law, injunctive relief is not a cause of action, but rather a type of remedy. *See* *In re Wal–Mart Wage & Hour Emp't Practices Litig.,* 490 F.Supp.2d 1091, 1130 (D.Nev.2007). In this case, plaintiffs request that the court "enter a final and permanent injunction enjoining any republication of the offending [defamatory and false] statements and compelling Defendants to take down permanently the offending statements from the websites." (Doc. # 40 at 26).

Under Nevada law, plaintiffs' request is for relief and not a separate cause of action. Based on this interpretation, plaintiffs concede to dismiss injunctive relief as a separate claim, but not the relief as a remedy. Accordingly, plaintiffs' claim for injunctive relief is dismissed. Plaintiffs may still obtain the remedy of injunctive relief as appropriate under the other claims for relief.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that defendants Ross B. Hansen, Northwest Territorial Mint, LLC, and Steven Earl Firebaugh's motion for summary judgment (doc. # 205) be, and the same hereby is, GRANTED with respect to plaintiffs' claim for defamation, CAM's claim of invasion of privacy/false light, and plaintiffs' claim for intentional interference with future expected business, and DENIED with respect to all other claims. Plaintiffs' claim for defamation per se and Cohen's claim for false light invasion of privacy shall proceed.

IT IS FURTHER ORDERED that Cohen and CAM's claim for injunctive relief against defendants be, and the same hereby is, DISMISSED.

All Citations

Not Reported in F.Supp.3d, 2015 WL 3609689

Footnotes

[1] The parties have used special damages, actual damages, quantifiable damages, and quantifiable economic harm interchangeably in the majority of their pleadings. For the purpose of clarity, this court will use "actual damages" when referring to all of these terms.

[2] Defamation is divided into slander (spoken defamation) and libel (written defamation). Restatement (Second) of Torts § 568. All of the statements contained in plaintiffs' complaint are libel, because they were published online on a website; therefore, the law of defamation by libel is the pertinent law in this case. *See* *Flowers v. Carville,* 292 F.Supp.2d 1225, 1232 (D.Nev.2003) *aff'd,* 161 F. App'x 697 (9th Cir.2006) (statements spoken on a television show and written in a published book considered under libel law).

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[3] The court does not accept defendants' assertions that the fair reporting of judicial proceedings protects their use of the Third Circuit case reporting on a different Brad Cohen's illegal activities from being considered defamatory. The fair report privilege is premised on the theory that members of the public have a manifest interest in observing and being made aware of public proceedings and actions. *Wynn v. Smith,* 117 Nev. 6, 16 P.3d 424, 429 (2001). While Brad Cohen of Philadelphia, the subject of the judicial proceedings, may have no claim against defendants given the fair reporting privilege, he is not plaintiff Cohen here.

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2004 WL 421977
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

DSC LOGISTICS, INC., Plaintiff,
v.
INNOVATIVE MOVEMENTS, INC., and Ike Bakhsh, Defendants.

No. 03 C 4050.
|
Feb. 17, 2004.

Attorneys and Law Firms

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MEMORANDUM OPINION AND ORDER

ZAGEL, J.

***1** Plaintiff DSC Logistics, Inc. ("DSC") is a supply chain management company that was hired by Solo Cup Company ("Solo") to oversee Solo's logistics and transportation operations. Defendant Innovative Movements, Inc. ("IMI") is a commercial carrier that worked for Solo prior to the transition of the logistics functions to DSC and continued that work with DSC after the transition. Defendant Ike Bakhsh is the managing employee of IMI. The basis of DSC's current suit is an email sent by Bakhsh to Solo in which DSC claims Bakhsh made false and defamatory statements about DSC's business policies, practices, capabilities, and integrity.

Defendants now move, pursuant to Federal Rule of Civil Procedure 12(b)(6), to dismiss DSC's claims regarding defamation *per se,* commercial disparagement, and tortious interference with business expectancy and contractual relations. A motion to dismiss under Rule 12(b)(6) is proper where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief. *Conley v. Gibson,* 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). In reviewing a motion to dismiss, the court must construe all allegations in the complaint in the light most favorable to the plaintiff and accept all well-pled facts and allegations as true. *Bontkowski v. First Nat'l Bank,* 998 F.2d 459, 461 (7th Cir.1993).

I. Defamation *Per Se*

Most of Defendants' Motion to Dismiss is directed at DSC's claims of defamation *per se.* According to Illinois law, a statement made in reference to a corporation is defamatory *per se* if it assails the corporation's financial position, business methods, or accuses the corporation of fraud, or mismanagement. *Geske & Sons v.. NLRB,* 103 F.3d 1366, 1373 (7th Cir.1997). If a statement is deemed defamation *per se,* the plaintiff need not prove actual damages; rather such statements are considered so obviously and materially harmful that injury may be presumed. *Kolegas v. Heftel Broad. Corp,* 154 Ill.2d 1, 180 Ill.Dec. 307, 607 N.E.2d 201, 206 (Ill.1992).

DSC claims the following statements made in Bakhsh's email were defamatory *per se:* (1) DSC's "procedures are not only time consuming and costly, but [also] are tedious and repetitious [and] will create errors," (2) Defendants have "only been met with demands for more information; information that has been provided more than once," (3) DSC's practice is "not to pay ... invoice[s]," (4) "no rebilling or corrections are accepted" by DSC, (5) Defendants "are not the only ones that have this problem," (6) "there are others who also have full intentions to take legal actions," and (7) DSC has acted in "utter bad faith." These statements are undoubtably criticisms of DSC's business methods and, as such, fall into a category of statements that are defamatory *per se.*

Defendants argue that even if the statements fall into a *per se* category, they are still nonactionable because they have an alternative innocent construction and because they are opinions protected by the First Amendment. Under the innocent construction rule, a statement, taken in its

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context, that can reasonably be innocently construed is not actionable as defamation *per se.* *Chapski v. Copley Press, Inc.,* 92 Ill.2d 344, 65 Ill.Dec. 884, 442 N.E.2d 195, 199 (Ill.1982). However, when the meaning is clear, the courts should not strain to interpret allegedly defamatory words such that they fit with an innocent construction. *Bryson v. News Am. Publs., Inc.,* 174 Ill.2d 77, 220 Ill.Dec. 195, 672 N.E.2d 1207 (Ill.1996). Given the email's strongly negative tone, fitting Bakhsh's statements into an innocent construction is next to impossible. Since it would be difficult to read these statements as anything other than criticisms of DSC's business practices, the innocent construction rule does not apply.

***2** Under the First Amendment, statements of opinion are nonactionable even if they fall into a *per se* category. *Hopewell v. Vitullo,* 299 Ill.App.3d 513, 233 Ill.Dec. 456, 701 N.E.2d 99, 102 (Ill.App.Ct.1998). "Opinions and Judgments may be harsh, critical, or even abusive, yet still not subject the writer to liability." *Vee See Constr. Co. v. Jensen & Halstead, Ltd.,* 79 Ill.App.3d 1084, 35 Ill.Dec. 444, 399 N.E.2d 278, 281 (Ill.App.Ct.1979). However, a statement is only protected if it cannot be "reasoanbly interpreted as stating actual facts." *Bryson,* 174 Ill.2d 77 at 100, 220 Ill.Dec. 195, 672 N.E.2d 1207 (quoting *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 20, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990)). I find that much of the email's content could reasonably be construed as fact.[1] Therefore, the statements are not entitled to First Amendment protections.

Lastly, Defendants argue that Bakhsh's email is not sufficiently defamatory to warrant damages without proof. There appears to be some disagreement over whether Illinois law requires plaintiffs to overcome an additional sufficiency hurdle after showing the complained of statement fits into a *per se* category. Some courts have required plaintiffs to show that the statements are so obviously and naturally harmful to plaintiff's reputation that proof of injury can be done away with. *Management Servs. v. Health Management Sys.,* 907 F.Supp. 289, 293–94 (C.D.Ill.1995); *See also* *Brown & Williamson Tobacco Corp. v. Jacobson,* 713 F.2d 262, 268 (7th Cir.1983). However, other courts have either explicitly rejected this notion stating that this "additional hurdle ... does not exist under Illinois law," *Republic Tobacco, L.P. v. N. Atl. Trading Co.,* 254 F.Supp.2d 985, 1000 (N.D.Ill.2002), or have failed to include this hurdle as a criterion. *Bryson,* 174 Ill.2d 77 at 100, 220 Ill.Dec. 195, 672 N.E.2d 1207.

While I tend to think that a sufficiency showing is not required, I need not decide that issue now. The statements here are so obviously and naturally hurtful that they easily meet the heightened requirement for sufficiently defamatory statements. Defendants sent an email, which was highly critical of DSC's ability to conduct its business, to one of DSC's largest and most important clients. Injury to DSC's reputation in this instance can be assumed.

II. Commercial Disparagement

To state a claim for commercial disparagement, a plaintiff must allege that defendant made false and demeaning statements about the quality of plaintiff's goods or services. *Appraisers Coalition v. Appraisal Inst.,* 845 F.Supp. 592, 610 (N.D.Ill.1994). *See Also* *Crinkley v. Dow Jones & Co.,* 67 Ill.App.3d 869, 24 Ill.Dec. 573, 385 N.E.2d 714, 719 (Ill.App.Ct.1978)("defamation and commercial disparagement are separate and distinct torts"). As discussed above, the statements made in Bakhsh's email criticized DSC's business practices. Accordingly, DSC has stated a valid claim for commercial disparagement.

III. Tortious Interference with Contract and Business Relationships

Defendants argue that both DSC's claims of tortious interference with contract and tortious interference with business relationships are improperly pled.[2] To state a claim for tortious interference with a business relationship, DSC must plead (1) a reasonable expectation of future business with a third party, (2) defendant's knowledge of the prospective business, (3) defendant's purposeful interference to prevent the expectancy from being fulfilled, and (4) resulting damage to the plaintiff. *Cook v. Winfrey,* 141 F.3d 322, 327 (7th Cir.1998) (citing *Fellhauer v. Geneva,* 142 Ill.2d 495, 154 Ill.Dec. 649, 568 N.E.2d 870 (1991)). In its complaint, DSC alleged a reasonable expectation of future business with Solo, knowledge by the defendants of that business expectancy, interference in the form of the email, and damages. Therefore, I find DSC has properly alleged a complaint for tortious interference with a business relationship.

***3** To state a claim for tortious interference with a

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contract, DSC must plead (1) a valid contractual relationship, (2) defendant's awareness of that contract, (3) intentional or unjustifiable action by the defendant to induce the other party to breach, (4) the other party's resulting contractual violation, and (5) damages. *Cook,* 141 F.3d 322 at 327 (citing *Lusher v. Becker Bros., Inc.,* 155 Ill.App.3d 866, 108 Ill.Dec. 748, 509 N.E.2d 444 (Ill.App.Ct.1987)). DSC has alleged a contractual relationship with Solo, which was well known by the Defendants, however, DSC has not alleged that Solo was induced, by Bakhsh's email, to breach its contractual agreement. DSC states only that "Defendants know that DSC is currently involved in arbitration of a dispute with Solo under the Agreement." DSC does not allege that the arbitration is related to the email. For this reason, I find that DSC has not pled the required elements for tortious interference with a contract.

Defendants' Motion to Dismiss is DENIED as to DSC claims for defamation *per se,* commercial disparagement, and tortious interference with a business relationship and is GRANTED as to DSC's claim for tortious interference with a contract.

All Citations

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Footnotes

1 Some examples of factual assertions include whether errors were created by DSC's procedures, whether DSC's procedures were costly/tedious/repetitious, whether DSC paid all of its invoices, whether DSC refused to accept rebilling or bill corrections, whether other carriers had experienced problems with DSC, and whether other companies planned to take legal action.

2 Defendants also challenge these claims on the grounds that Illinois law requires a defamatory statement for recovery. Since I have found that DSC has made a proper claim for defamation *per se,* I need not address that issue.

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2016 WL 9460307
Only the Westlaw citation is currently available.
United States District Court, W.D. Kentucky.

FINANCE VENTURES, LLC, et al., Plaintiffs
v.
Charles "Chuck" KING, Defendant

CIVIL ACTION NO. 4:15-cv-00028-JHM
|
Signed 08/04/2016
|
Filed 08/05/2016

Attorneys and Law Firms

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Charles "Chuck" King, Cascade, VA, pro se.

ORDER

Joseph H. McKinley, Jr., Chief Judge

***1** This matter is before the Court on Plaintiffs' Motion for Partial Summary Judgment on the Defamation Claim (Count I) [DN 25]. Fully briefed, this matter is ripe for decision. For the following reasons, Plaintiffs' Motion is **DENIED**.

I. BACKGROUND

Plaintiffs initially filed suit on February 13, 2015 alleging claims of defamation and libel, tortious interference with existing business relations, tortious interference with prospective business relations, and breach of contract. (Pl.'s Compl. [DN 1] ¶¶ 53–84.) Plaintiffs have requested injunctive relief, along with compensatory and punitive damages, interests, and costs. (Id. ¶¶ 85–92.) Defendant moved to dismiss this action, which this Court granted only as to the breach of contract claim. (Mem. Op. and Order [DN 22] at 16.) Plaintiffs previously requested that this Court grant partial summary judgment as to Count I for defamation, which was denied in the same opinion, reasoning that "the record [was] not fully developed sufficiently for the Court to grant summary judgment for the Plaintiffs." (Id. at 17.) Therefore, Plaintiffs' "motion for partial summary judgment [was] denied without prejudice," but the Court encouraged Plaintiffs to "refile[ ] [their motion] following the close of discovery." (Id.)

Although the discovery deadlines have now passed, the record has not been developed whatsoever, and Plaintiffs once again move for partial summary judgment on Count I. Defendant specifically noted that "[t]he case has not been more fully developed as your honor has ask[ed] in his opinion and order back in Sept 18 2015," "[n]or [have] the plaintiffs obtain[ed] discovery, affidavits, or declarations from defendant in any way or ask[ed] for any information from defendant to support their case." (Def.'s Resp. [DN 28] at 3.) Plaintiffs maintain that despite the undeveloped record, they are entitled to summary judgment on Count I.

II. STANDARD OF REVIEW

Before the Court may grant a motion for summary judgment, it must find that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party bears the initial burden of specifying the basis for its motion and identifying that portion of the record that demonstrates the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). Once the moving party satisfies this burden, the non-moving party thereafter must produce specific facts demonstrating a genuine issue of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986).

Although the Court must review the evidence in the light most favorable to the nonmoving party, the non-moving party must do more than merely show that there is some "metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio

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Corp., 475 U.S. 574, 586 (1986). Instead, the Federal Rules of Civil Procedure require the nonmoving party to present specific facts showing that a genuine factual issue exists by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence ... of a genuine dispute[.]" Fed. R. Civ. P. 56(c)(1). Further, "Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Anderson, 477 U.S. at 256.

III. DISCUSSION

A. Defamation Claim

***2** The defamation claim at issue primarily arises from the videos produced and made publically available by Defendant on YouTube and his own personal website, i2gfullrefund.com, regarding Plaintiffs and Plaintiffs' business. In these videos, Defendant takes great pains to disapprovingly, indignantly, and repetitively berate Plaintiffs for their business practices. He accuses Plaintiffs of engaging in criminal and unethical behavior, all the while asserting that his remarks regarding their unscrupulous conduct are nothing short of unequivocal "FACT[S]!" (Def.'s Resp. [DN 28] at 3.)

Generally, "[d]efamation by writing and by contemporary means analogous to writing ... is libel. Defamation communicated orally is slander." Stringer v. Wal-Mart Stores, Inc., 151 S.W.3d 781, 793 (Ky. 2004), overruled on other grounds by Toler v. Sud-Chemie, Inc., 458 S.W.3d 276 (Ky. 2014) (citation omitted). Under Kentucky law, in order to plead a prima facie case of defamation, plaintiffs must prove that a defendant used 1) "defamatory language"; 2) "about the plaintiff"; 3) that was "published"; and 4) that has "cause[d] injury to reputation." Id. Defamation is a "quasi-intentional tort" with its basis "in strict liability," meaning that the plaintiff need not prove that the defendant acted with negligence except in the element of publication. Columbia Sussex Corp. v. Hay, 627 S.W.2d 270, 273 (Ky. Ct. App. 1981). In other words, due to its status under strict liability, the defendant's intent and fault are irrelevant. Id. at 273–74.

Here, Plaintiffs assert that Defendant has satisfied all elements required to establish a prima facie case for defamation and that no questions of material fact exist for the purposes of summary judgment. Plaintiffs bear the initial burden of proving no material facts exists, and here, Plaintiffs have successfully established a prima facie case for defamation against Defendant and have met their burden.

First, Defendant's language was defamatory per se. "While spoken words are slanderous per se only if they impute crime, infectious disease, or unfitness to perform duties of office, or tend to disinherit him, written or printed publications, which are false and tend to injure one in his reputation or to expose him to public hatred, contempt, scorn, obloquy, or shame, are libelous per se." Stringer, 151 S.W.3d at 795 (citing Courier Journal Co. v. Noble, 65 S.W.2d 703, 703 (1933)); see Columbia Sussex, 627 S.W.2d at 274 ("[I]t is not necessary that involvement in a crime be imputed to establish slander per se, certainly when such activity is indeed suggested, the requisites are met.") And, whether a cause of action for defamation "is actionable per se is a matter of law" for the court to decide. Columbia Sussex, 627 S.W.2d at 274.

Plaintiffs have satisfied the first element. Defendant's videos feature him stating that Plaintiffs are "crooks," "thieves," operators of a "Ponzi scheme," fraudulent, engaging in "deceptive trade practices," engaging in "criminal" behavior that is "against the law," and "stealing from thousands of consumers." (Pls.' Mem. Supp. Mot. Summ. J. [DN 25-1] at 8–12 nn. 35–42 (quoting Defendant's YouTube videos).) The allegations in Defendant's videos alone clearly impute crime; therefore, the statements constitute defamation per se. See Columbia Sussex, 627 S.W.2d at 274 ("Herein the words challenged conveyed the strong assertion that [one of the plaintiffs] was implicated in the robbery, a criminal offense. Standing alone, those words must be held slanderous per se."); Stringer, 151 S.W.3d at 795 (quoting 50 Am. Jur. 2d Libel and Slander § 185 (1995)) ("A false accusation of theft is actionable per se.").

***3** Plaintiffs have also satisfied the second prong of the test for defamation: that the statements were made about the plaintiff. Defendant himself admits that the videos that he posted to the Internet were about Plaintiffs and contained "truth news commentary" regarding "Plaintiffs' actions." (Def.'s Answer [DN 7] at 4.) Defendant personally identifies many employees of Plaintiff Finance Ventures in many of his videos, including Plaintiff Rick

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Maike, the founder of Finance Ventures. (Exhibit B to Pls.' First Mot. Partial Summ. J. [DN 13-29] at 2–8, 12–18, 24–25, 27–30, 33, 37, 39, 40, 42–44, 51, 53, 56.)

Similarly, Plaintiffs have easily met the third prong: publication. "[D]efamatory language is 'published' when it is intentionally or negligently communicated to someone other than the party defamed." Stringer, 151 S.W.3d at 794. Defamatory Internet publications are treated no differently than other forms of communication, meaning defamatory statements made on the Internet are considered published for the purposes of this element. See In re Davis, 347 B.R. 607, 611 (W.D. Ky. 2006); Mitan v. Davis, 243 F. Supp. 2d 719, 724 (W.D. Ky. 2003). Here, Defendant's videos appear in at least two different Internet locations: YouTube and i2gfullrefund.com. These videos are accessible to any Internet user and have collectively been viewed thousands of times on YouTube alone, meaning Defendant communicated the defamatory statements to third parties other than the defamed Plaintiffs. Plaintiffs have shown that Defendant published the defamatory content.

The last element is injury to Plaintiffs' reputation. "[T]he proof necessary to demonstrate an injury to reputation varies depending on the characterization of the defamatory language." Stringer, 151 S.W.3d at 793. "Under slander per se the very nature of the defamatory utterance is presumptive evidence of the injury to reputation." Columbia Sussex, 627 S.W.2d at 274. Therefore, "the presentation of special damages is optional; it is required neither for a prima facie case nor for the recovery of punitive damages." Id. (citing Taylor v. Moseley, 186 S.W. 634 (1916); Walker v. Tucker, 295 S.W. 138 (1927)). Here, Defendant's statements were defamatory per se as determined under the first element. Plaintiffs therefore need not present any specific evidence of injury in order to satisfy this last prong.

Because Plaintiffs have met all four elements in order to successfully plead a claim for defamation, Plaintiffs have established a prima facie case against Defendant for defamation per se. Plaintiffs have, as the moving parties, met their initial burden for the purposes of summary judgment.

Plaintiffs insist that the Defendant has squandered his chance to show there is any evidence to support his defense of the truth concerning these allegations because discovery in the case is now closed. However, Defendant, who is appearing pro se, has pointed to the fact that there is an ongoing FBI investigation which lends him considerable support in asserting a truth defense. Furthermore, there is evidence which is a part of a civil forfeiture action which raises questions of fact as to the truth defense. Because there is evidence to support a finding that the Defendant's statements are true, Plaintiffs are not entitled to summary judgment. The motion is **denied**.

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EXHIBIT 4-F

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2012 WL 1579323
Only the Westlaw citation is currently available.
United States District Court, E.D. North Carolina,
Western Division.

William C.MANN, Plaintiff,
v.
M. Dale SWIGGETT, Defendant.

No. 5:10–CV–172–D.
|
May 4, 2012.

Attorneys and Law Firms

James Braxton Craven, III, James Braxton Craven, Attorney at Law, Durham, NC, for Plaintiff.

M. Dale Swiggett, Mebane, NC, pro se.

ORDER

JAMES C. DEVER III, Chief Judge.

***1** On October 12, 2011, defendant M. Dale Swiggett ("defendant" or "Swiggett"), proceeding pro se, filed "Interrogatories Propounded to '3rd Party Defendants' " [D.E. 80]. On October 13, 2011, William C. Mann ("plaintiff" or "Mann") responded in opposition by filing his fifteenth motion to strike and motion for sanctions [D .E. 82]. In support, Mann noted that mere are no third-party defendants in this case and that there have never been any third-party defendants in this case. *Id.* On November 8, 2011, Swiggett filed a motion to amend counterclaim [D.E. 89]. On November 9, 2011, Mann responded in opposition to the motion to amend counterclaim [D.E. 90]. Again, Mann noted the obvious: there are no counterclaims in this case, and there have never been any counterclaims in this case. *Id.*

Mann's responses are correct. Therefore, the court grants Mann's motion to strike [D.E. 82], and strikes Swiggett's interrogatories propounded to third-party defendants. Additionally, the court denies Swiggett's motion to amend counterclaim [D.E. 89]. These rulings, however, do not end the matter. As explained below, the court awards judgment as to liability on Mann's libel claim and directs Magistrate Judge Webb to hold an evidentiary hearing and issue a memorandum and recommendation as to Mann's damages.

I.

Despite this court's repeated warnings to Swiggett, Swiggett has continued to clutter the docket with nonsensical filings and continued to disregard this court's orders, the local rules, and the Federal Rules of Civil Procedure. Specifically, on October 28, 2010, the court "admonished defendant concerning the court's expectation that he abide by the Federal Rules of Civil Procedure and the local rales of this court and warned him about possible sanctions for failure to comply," [D.E. 20] (citing *Hathcock v. Navistar Int'l Transp. Corp.,* 53 F.3d 36, 40–41 (4th Cir.1995)). On August 23, 2011, the court referred a multitude of motions to Magistrate Judge Daniel for disposition (when appropriate) or for a memorandum and recommendation ("M & R") [D.E. 70]. On October 31, 2011, Magistrate Judge Daniel recommended denying all of Swiggett's motions, after finding them procedurally improper or meritless. [D.E. 88] 5–6. On December 16, 2011, the court adopted Magistrate Judge Daniel's M & R, and noted that Judge Daniel again warned Swiggett about his conduct in the litigation [D.E. 97]. This court added its own observation and warning: "Notably, throughout the litigation, defendant has filed ridiculous pleadings and sought to litigate matters that are not in this case." *Id.* 1.

On December 21, 2011, Judge Daniel heldastatus conference [D.E. 98]. Swiggett then filed yet another ridiculous pleading entitled "Confirmation of Notice for False Claims Act" and attached a letter addressed to various public officials seeking to have his criminal record expunged and making a variety of bizarre allegations and requests [D.E. 99]. On December 21, 2011, Mann filed his seventeenth motion to strike and motion for sanctions [D.E. 100] concerning Swiggett's December 21, 2011 filing.

***2** On January 12, 2012, Mann filed a motion for summary judgment [D.E. 101] and a supporting memorandum [D.E. 102]. The motion and memorandum discussed the one claim in this case: Mann's libel claim under Norm Carolina law. *Id.*

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On January 13, 2012, Swiggett responded to Mann's seventeenth motion to strike and motion for sanctions with another bizarre and nonsensical filing [D.E. 103]. On that same date, Swiggett mailed interrogatories and document-production requests to Mann. *See* [D .E. 106].

On January 17, 2012, Mann objected to the discovery requests that Swiggett mailed on January 13, 2012. *Id.* In support, Mann noted that the proposed discovery violated the scheduling order, which states, "All discovery shall be completed by January 13, 2012." *Id.* 1 (emphasis removed); see [D.E. 87]. Mann also noted that Swiggett's discovery requests violated Federal Rules of Civil Procedure 33 and 34, in that Swiggett purported to propound interrogatories and document requests to Mann and eight non-parties to this case. [D.E. 106] 1–2.

On January 25, 2012, Swiggett filed yet another bizarre and nonsensical motion, in which Swiggett asked the court to deny Mann's objection to the late-filed discovery, grant "default and summary judgment" to Swiggett, and refer the case to the Attorney General of the United States for criminal investigation [D.E. 107]. In support, Swiggett contends that his untimely interrogatories and document requests really were a request under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. *See* [D.E. 107] 1. Of course, if Swiggett really were making a FOIA request, he would have sent the request to a federal agency subject to FOIA. *Cf.* 5 U.S.C. §§ 551(1), 552(f). Mann and the other individual identified in the interrogatories or document requests are not federal agencies under FOIA. As such, Swiggett's FOIA contention is frivolous. As for Swiggett's request for "default and summary judgment," Swiggett asserts entitlement to such relief "due to the deliberate and malicious nature of bringing this civil action against [him] which has resulted in physical, mental and financial damages...." [D.E. 107] 3. In light of the standards governing entry of a default judgment or summary judgment, this request also is frivolous. *See* Fed.R.Civ.P. 55–56; *Celotex Corp.v. Catrett,* 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986); *Ryan v. Homecomings Fin. Network,* 253 F.3d 778, 780 (4th Cir.2001). As for Swiggett's request that the court refer the case to the Attorney General for criminal investigation, Swiggett confuses the current U.S. Attorney for the Eastern District of North Carolina (Thomas Walker) with the current Attorney General (Eric Holder). In any event, this request also is frivolous.

On January 26, 2012, Mann replied to Swiggett's latest motion [D.E. 108]. Mann renewed his request for summary judgment. *Id.* Alternatively, he requested partial summary judgment, sanctions, and summary denial of Swiggett's January 25, 2012 motion. *Id.*

***3** On March 2, 2012, Swiggett filed a document entitled "Reply to Plaintiff's Response, Declaration of Whistleblower Dodds Frank Relator" [D.E. 110]. The document is untimely and violates Local Civil Rule 7.1(f), and contains more gibberish. *Id.* On March 5, 2012, Mann responded to Swiggett's latest filing and again requested summary judgment, or, alternatively, partial summary judgment, sanctions, and summary denial of defendant's January 25, 2012 motion [D.E. 111].

After a thorough review of the record, it is clear that Swiggett continues to disregard this court's warnings, this court's scheduling order, this court's local rules, and the Federal Rules of Civil Procedure. Swiggett seems to believe that he can file whatever he wants to file, whenever he wants to file it, even if the filing has no connection to the pending case. This court lacks the time or inclination to act as a babysitter for Swiggett. Indeed, this court has approximately 440 pending civil cases and 182 pending criminal cases, and these figures exclude the plethora of habeas petitions and prisoner civil-rights cases that flood the court's docket. This court will not permit Swiggett to run roughshod over the Federal Rules of Civil Procedure, this court's local rules, this court's orders, or mis court's docket.

Swiggett's conduct reflects bad faith. Moreover, in light of the record, the court finds that Swiggett has no intention to change his behavior or to comply with this court's orders, the local rules, or the Federal Rules of Civil Procedure. As such, the court grants Mann's motions to strike and for sanctions [D.E. 82, 85, 100], Moreover, the court concludes that sanctions are warranted and that the sanction of striking Swiggett's answer is appropriate in light of the volume of frivolous filings that defendant continues to make in this case, defendant's refusal to comply with this court's orders and local rules, and defendant's bad faith. *See, e.g., Nat'l Hockey League v. Metro. Hockey Club, Inc.,* 427 U.S. 639, 639–42, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976) (per curiam); *Hathcock,* 53 F.3d at 40–41.

II.

Alternatively, the court grants Mann's motion for

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summary judgment as to liability on plaintiff's libel claim. Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a); *see also* *Celotex,* 477 U.S. at 322; *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). Mann argues that Swiggett's statements in various letters and articles are libelous in that they allege that Mann committed environmental crimes and criminal fraud. *See* [D.E. 102] 1–5. Swiggett's sole response is that he should be awarded summary judgment because of "the deliberate and malicious nature of bringing this civil action against [him] which has resulted in physical, mental and financial damages...." [D.E. 107] 3.

Under North Carolina law, libel occurs when a party injures a person by publishing to a third party false and defamatory statements about the person. *See* *Harrell v. City of Gastonia,* 392 F. App'x 197, 206 (4th Cir.2010) (per curiam) (unpublished); *Griffin v. Holden,* 180 N.C.App. 129, 133, 636 S.E.2d 298, 302 (2006). However, "[w]hen an unauthorized publication is libelous *per se,* malice and damages are presumed from the fact of publication and no proof is required as to any resulting injury," *Renwick v. News & Observer Publ'g Co.,* 310 N.C. 312, 316, 312 S.E.2d 405, 408 (1984) (quotation omitted); *see* *Griffin,* 180 N.C.App. at 134, 636 S.E.2d at 303. *Libel per se* occurs when the published statements are "susceptible of but one meaning" and are "obviously defamatory...." *Renwick,* 310 N.C. at 316–17, 312 S.E.2d at 408–09 (quotations and emphasis omitted); *see* *Griffin,* 180 N.C.App. at 133–34, 636 S.E.2d at 302–03. Statements accusing another of committing infamous crimes are, as a matter of law, obviously defamatory. *Renwick,* 310 N.C. at 317, 312 S.E.2d at 409; *Harrell,* 392 F. App'x at 206.

***4** On April 7, 2010, Swiggett published a letter that accused Mann of committing various crimes, including environmental crimes and criminal fraud (e.g., running a "Ponzi scheme" and engaging in "fraudulent transactions"). [D.E. 3–2] 1 (April 7, 2010 letter). Swiggett sent the April 7, 2010 letter to numerous people, including George Holding, the former U.S. Attorney for the Eastern District of North Carolina, and Sara Conti, a bankruptcy trustee. *Id.* 1–2. Swiggett also sent the letter to Guy Stephen Gulick, Guy Geoffrey Gulick, and Garen Gregory Gulick. [D.E. 3–3] 1. Swiggett also authored an article entitled *The Tale of Two Golf Pros,* which accused Mann of criminal fraud (i.e., running a "Ponzi scheme") and bank fraud. [D.E. 3–7] 1–2. Swiggett's statements accusing Mann of crimes are explicit, unambiguous, and defamatory. *See, e.g.,* *Renwick,* 310 N.C. at 316–17, 312 S.E.2d at 408–09. In addition, the record reveals that Swiggett's accusations are false. Indeed, Swiggett does not identify a single credible source to verify any of his allegations regarding Mann's alleged criminal conduct. Instead, Swiggett relies solely on his own bizarre, self-concocted theories to support his false and defamatory accusations. *See* [D.E. 102–11] ¶¶ 1–13; *see also* [D.E. 102–12] ¶ 5. Moreover, because Swiggett's statements are libel *per se,* malice and injury are presumed. *See, e.g.,* *Renwick,* 310 N.C. at 316, 312 S.E.2d at 408. Accordingly, there are no genuine issues of material fact as to liability, and Mann is entitled to judgment as a matter of law on his libel claim against Swiggett.

The only remaining issue is to determine the amount of damages. The court refers the issue of damages to United States Magistrate Judge Webb for an evidentiary hearing and a memorandum and recommendation. *See* 28 U.S.C. § 636(b)(1)(B). After the evidentiary hearing, Judge Webb will issue a memorandum with proposed findings and recommendations. *See id.* In making this referral, the court notes that neither Mann's complaint [D.E. 1, 3], nor Swiggett's answer [D.E. 25] requested a jury trial, and the time to do so has long since expired. *See* Fed.R.Civ.P. 38; *Gen. Tire & Rubber Co. v. Watkins,* 331 F.2d 192, 195–97 (4th Cir.1964); *Timmons v. United States,* 194 F.2d 357, 359 (4th Cir.1952).

III.

In sum, the court GRANTS plaintiffs pending motions to strike and for sanctions [D.E. 82, 85, 100], STRIKES defendant's answer [D.E. 25], and AWARDS judgment to plaintiff as to liability on plaintiff's libel claim. Alternatively, the court GRANTS plaintiff's motion for summary judgment as to liability on plaintiff's libel claim [D.E. 101]. The court REFERS the issue of damages to United States Magistrate Judge Webb for an evidentiary hearing and a memorandum and recommendation. Defendant's motion to consolidate [D.E. 84], motion to amend counterclaim [D.E. 89], motion to dismiss [D.E. 104], and motion for default judgment, for summary judgment, and to refer the case to the Attorney General of the United States [D.E. 107] are DENIED as frivolous.

***5** SO ORDERED.

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EXHIBIT 5

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STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - LAW DIVISION

PROJECT44, INC., a Delaware corporation,	)	
Petitioner,	)	
vs.	)	No. 2019 L 10520
AT&T MOBILITY LLC, a Delaware limited liability company,	)	
Respondent.	)	

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause before the Hon. KAREN L. O'MALLEY, Judge of said Court, commencing on Wednesday, February 3, 2021, at 11:00 AM, via Zoom.

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1 PRESENT:
2 ACTUATE LAW, by
MR. PETER HAWKINS and
3 MR. DOUG ALBRITTON,
641 W. Lake Street, 5th Floor
4 Chicago, Illinois 60661
(312) 579-3009
5 (pete.hawkins@actuatelaw.com)
Appeared on behalf of Petitioner;
6
7 RILEY SAFER HOLMES & CANCILA LLP, by
MS. SONDRA A. HEMERYCK and
8 MR. AZAR ALEXANDER,
70 W. Madison Street, Suite 2900
9 Chicago, Illinois 60602
(312) 471-8724
10 (shemeryck@rshc-law.com)
Appeared on behalf of Respondent.
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1 THE COURT: Good morning. So we're here on
2 Project44, Inc., a Delaware corporation,
3 Petitioner, vs. AT&T Mobility, LLC, a Delaware
4 limited liability company, Case No. 19 L 10520.
5 Can everyone please identify
6 themself for the record.
7 MR. HAWKINS: Yes. Peter Hawkins for
8 Petitioner, Project44, and with me this morning is
9 my co-counsel, Doug Albritton.
10 COURT REPORTER: Can you tell me where
11 you're from too, please.
12 MR. HAWKINS: Certainly. I'm with the law
13 firm of Actuate Law, LLC.
14 COURT REPORTER: Thank you.
15 MS. HEMERYCK: Sondra Hemeryck, Riley Safer
16 Holmes & Cancila, on behalf of Intervenor Jane Doe,
17 and with me on the call is my associate, Azar
18 Alexander.
19 THE COURT: Good morning.
20 And, Madam Court Reporter, I know
21 working remotely presents some challenges and
22 operating through Zoom presents some challenges.
23 You may not be able to hear us at some point.
24 Please feel free to wave or speak up if that is

1 becoming an issue. Or if someone's internet starts
2 going in and out I may not be able to see that and
3 it may appear on your screen, please don't hesitate
4 to let the Court know so that we are able to obtain
5 a record.
6 COURT REPORTER: Thank you.
7 THE COURT: You're very welcome. Thank you.
8 So, first, I want to start by
9 saying I'm Judge Karen O'Malley, and this matter,
10 in reviewing all of the pleadings that have been
11 provided by counsels, has certainly had a bit of a
12 history on this 224 petition. I see that it was
13 filed before Judge Walker, who previously sat on
14 Calendar Z. I took over Calendar Z late 2020 when
15 Judge Walker moved to the chancery division.
16 I see from the history of the case
17 that's contained within the pleadings that this 19
18 petition was filed prior to any subsequent
19 litigation that has been filed and is now pending
20 on a defamation case in the commercial division
21 here in Cook County.
22 I also understand -- and I'll ask
23 anybody to clarify if I'm incorrect in the
24 procedural history here in just a moment. But I

1 understand that the petition was brought by
2 Project44 originally naming Google, and that was
3 actually heard by Judge Ehrlich in 2019. This is a
4 subsequent 224 petition.
5 There were two named respondents
6 there. One of them is not subject to the hearing
7 today. The target here on the 224 is AT&T
8 Mobility, LLC.
9 Judge Gillespie, who was sitting in
10 Judge Walker's stead, had granted the petition.
11 That grant of the petition was subsequently, I
12 believe, either reversed or vacated after Jane Doe
13 intervened in the case and sought that relief.
14 Judge Walker I believe set a
15 briefing schedule on the sufficiency of the
16 petition. All of those matters were fully briefed.
17 The courts went into remote
18 operations on March 16th. For a period of time
19 only emergency motions were being heard by the
20 Court up and until approximately June of 2021.
21 This matter was then renoticed or
22 brought back to the Court's attention several
23 months later, and the matter was set for hearing
24 today.

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Page 6

1 Is there anything inaccurate about
2 what I've just summarized about some of the
3 procedural history of this case?
4 MR. HAWKINS: Your Honor, I believe that
5 summarizes it completely accurately.
6 THE COURT: Okay. Good. I just want to
7 make sure -- since I'm the last one to the
8 proceedings, I want to make sure I'm completely up
9 to speed.
10 So after -- and with all of the --
11 or the petition being fully briefed, there was then
12 a supplemental brief that was filed on behalf of
13 the intervenor by Ms. Hemeryck -- Ms. Hemeryck, can
14 you please tell me how to pronounce your name.
15 MS. HEMERYCK: You actually just got it,
16 your Honor. It's Hemeryck.
17 THE COURT: Okay. Ms. Hemeryck filed a
18 supplemental brief and advised the Court at that
19 point that the defamation action was now pending,
20 or is pending in front of Judge Schneider on the
21 commercial calendar. And then I received a
22 supplemental brief as well from the movant on the
23 petition, and I have reviewed those as well.
24 I had previously reviewed the

Page 7

1 complaint that's been filed in commercial, and
2 normally can do that through a remote desktop
3 operation, which is failing this morning, so
4 counsels kindly sent me another copy of that this
5 morning for the Court to have access to during this
6 hearing.
7 Before I have you argue, which I'll
8 certainty let you do, as to whether -- the first
9 question is whether this Court should be
10 considering the substance of this proceeding and
11 the substance of this petition.
12 Given that there is now a
13 defamation action that is pending and based on this
14 Court's review of the complaint in that action, the
15 action is related to the identical emails that are
16 identified in this 224 petition, and it's the
17 content of those emails from which the defamation
18 is alleged.
19 Normally a 224, as it says in its
20 title, is for presuit litigation. Fairly recently
21 that's been interpreted, in this Court's
22 estimation, in two different ways that are not
23 necessarily consistent in different appellate court
24 rulings.

Page 8

1 In the most recent -- or in
2 Project44's responsive pleading to the supplemental
3 brief that Ms. Hemeryck has provided -- and
4 Ms. Hemeryck herself talks about the Dent case.
5 Now, Mr. Hawkins, I want to talk to
6 you, or Mr. Albritton -- I'm not sure who's going
7 to be arguing this for you.
8 MR. HAWKINS: I'll be presenting argument,
9 your Honor.
10 THE COURT: And you rely on Dent. And the
11 difference in Dent was there was no cause of
12 action -- there was no lawsuit filed in Dent. Dent
13 relies on, you know, other precedent, and
14 particularly Beale vs. Edgemark, 279 Ill.App. 3d
15 242, which is a 1996 case, wherein the Court there
16 said even when a lawsuit was pending in federal
17 court, a 224 petition could proceed.
18 In Dent, though, when interpreting
19 Beale -- and there's been a lot between Beale and
20 Dent, because Dent is 2020 and there are a number
21 of cases that have affirmed, essentially, that 224s
22 are to be brought presuit.
23 So explain to me why you believe
24 it's appropriate for this Court when there's a

Page 9

1 defamation related to the exact same emails that
2 you're seeking this information on here in the 224,
3 why this Court should be making a determination on
4 the 224 and why that's not just now subject to
5 discovery in 201 by either naming AT&T as a
6 respondent in discovery or naming the defendants
7 that you believe are subject to -- or are the
8 proponents of the defamatory emails.
9 MR. HAWKINS: Thank you, your Honor.
10 And to be very clear, it was
11 certainly our intention when we filed this petition
12 for it to be a presuit discovery action, and
13 unfortunately circumstances out of our control led
14 us to this situation that we are in today.
15 This was fully noticed up and we
16 would have had -- we presumably would have had an
17 order on it prior to the one-year statute of
18 limitations for a defamation action, but
19 unfortunately that wasn't the case, and, as your
20 Honor noted, the Court wasn't even really hearing
21 motions prior to June of 2020.
22 THE COURT: That is not true, and I just
23 want to point out for clarification in the record
24 emergency motions were heard at all times. There

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1 was never a suspension of emergency motions. One
2 of the things that was outlined in the general
3 administrative order is an emergency was things
4 involving a statute of limitations.
5 MR. HAWKINS: I understood, your Honor, and
6 I --
7 THE COURT: And I also agree with you that
8 operations were very limited and there was not
9 always clarity on what was being heard. I agree
10 with you.
11 MR. HAWKINS: And I appreciate that, your
12 Honor. And it was a judgment call on our part as
13 to what qualified as an emergency motion and what
14 didn't, and we made the decision in part --
15 principally in part, your Honor, based on the
16 Hadley decision that came up from the Illinois
17 Supreme Court that this was one option to preserve
18 our claim and to also at the same time have our
19 Rule 224 petition go forward.
20 Again, this was fully briefed by
21 the time the courts were shut down in the COVID-19
22 pandemic.
23 So I would say our first position
24 here is that for us to start all over again and to

1 go to the commercial calendar on this issue would
2 really not only waste the parties' resources but
3 waste the resources that the Court has invested in
4 resolving this action both through your Honor as
5 well as Judge Walker and therefore we believed that
6 this was the most appropriate means of continuing
7 this issue.
8 On top of that, your Honor, I know
9 that counsel for Jane Doe has asserted that, you
10 know, we had already named FourKites as a
11 defendant, therefore, the Rule 224 petition served
12 its purpose, but as the Dent case that you
13 highlighted, your Honor, as well as the other cases
14 that we cited to, allow us to continue going
15 forward with this petition so long --
16 (Reporter interruption for audio
17 drop.)
18 MR. HAWKINS: So long as we are not engaging
19 in a fishing expedition.
20 COURT REPORTER: Thank you.
21 MR. HAWKINS: I'll do my best to stay a
22 little closer to my computer.
23 But this is obviously a unique
24 situation, your Honor, we have a unique set of

1 facts, and I believe that the Hadley case out of
2 the Illinois Supreme Court speaks to this issue.
3 It also dealt with a unique
4 situation. It dealt with a complaint that had
5 already been filed, and Count 2 for that complaint
6 was something titled Rule 224 discovery.
7 Clearly, it was not set up
8 appropriately for a Rule 224 disposition, yet the
9 Supreme Court allowed it to go forward, and the
10 reason why it did that is because it found that the
11 parties were given notice that the individual -- or
12 the entity from which discovery was being sought
13 was identifiable, that the parties were represented
14 by counsel, and that there was no prejudice in
15 letting this go forward and that there was no undue
16 surprise.
17 And as we set forth in our briefs,
18 your Honor, we believe that the same situation is
19 warranted here. This is certainly not a unique
20 situation and we're not advocating for this as a
21 general rule, but given the specific circumstances
22 of this case we do believe that Hadley is
23 instructive.
24 THE COURT: Let me ask you this,

1 Mr. Hawkins. What is the prejudice to your client,
2 to Project44, if this petition is not heard or is
3 dismissed because you have a claim pending and you
4 can pursue the 201 discovery pursuant to that
5 lawsuit?
6 MR. HAWKINS: The prejudice, your Honor, is
7 that both the parties and the Court have invested a
8 significant amount of resources in resolving this
9 petition already. There is a subpoena already out
10 to AT&T, as you know, your Honor, that Judge Walker
11 continued pending resolution of this petition.
12 And, therefore, for us to basically start over from
13 scratch again will be reinventing the wheel and
14 resolving numerous issues that have effectively
15 already been resolved or are about to be resolved
16 should we continue forward with this proceeding.
17 Additionally, your Honor, there's
18 no risk of inconsistent rulings between this Court
19 and the commercial calendar but for any other
20 reason that Jane Doe is not a party to that motion
21 to dismiss in the commercial calendar.
22 Moreover, while a motion to dismiss
23 and a Rule 224 petition are judged upon similar
24 standards, they're not identical. We cite to the

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1 Catholic Diocese of Rochester case vs. Doe to raise
2 that point.
3 So this is not going to lead to a
4 prejudice upon Jane Doe in this case, it's not
5 going to lead to an inconsistency, and it will
6 maximize the usage of both the parties' and the
7 Court's resources.
8 THE COURT: Ms. Hemeryck, what would you
9 like to say?
10 MS. HEMERYCK: Thank you, your Honor.
11 So, obviously, Intervenor Jane Doe,
12 we agree with the Court that the cases cited by
13 Petitioner do not answer the question that is
14 before this Court. And as you point out, in the
15 Dent case there was no other case that was pending.
16 In the Hadley case -- I want to
17 come back to -- there was also no other case.
18 There were not two different cases in the Hadley
19 situation where you had two different courts were
20 be going to be addressing the same issues.
21 But the most important thing is --
22 and I know your Honor asked about prejudice, and
23 Project44's counsel has argued about prejudice.
24 That's not the test and that's not the question.

1 Rule 224 allows a party, a
2 potential plaintiff, to bring a prefiling petition
3 in order to identify someone who may be liable in
4 damages. That's it. That's its sole purpose. It
5 has one purpose and one purpose only. And the
6 burden is on the petitioner -- in this case
7 Project44 -- to show that the relief it is seeking
8 is necessary.
9 It's not necessary here. This
10 petition, as your Honor alluded to at the outset,
11 serves no purpose at this point.
12 And we're not criticizing the
13 decision that Project44 made to file a defamation
14 complaint. Again, that's not the issue. The
15 question of whether we should or shouldn't have is
16 not the issue. The question is at this point is
17 this an appropriate Rule 224 action, and it is not.
18 There is -- and you'll notice,
19 actually, if you look at their response, there is
20 no argument in the response by Project44 about why
21 this is necessary, because they can't make that
22 showing. Because, as you point out, your Honor, if
23 the defamation complaint they filed against
24 FourKites survives the pending motion to dismiss,

1 which is a 2-615 motion, then they can get the
2 identity of the users behind the IP addresses
3 through the normal Rule 201 discovery in that case.
4 That's how we normally do it.
5 Rule 224 is a special procedure for
6 when that is not an option. It is an option here.
7 There's just no reason for them to use Rule 224 at
8 this point and no reason to have this Court ruling
9 on the issue.
10 And, in fact, Project44 even states
11 in their complaint that, you know, they should be
12 able to get this discovery in that action. It's in
13 their complaint that they filed in front of Judge
14 Schneider.
15 And if you look -- looking at the
16 Dent case, there's actually a quote from the Dent
17 case that I wanted to share. The Court in the Dent
18 case says that the Supreme Court's clear intent in
19 promulgating Rule 224 was to provide a mechanism to
20 enable a person or entity before filing a lawsuit
21 to identify parties who may be responsible in
22 damages.
23 Again, they did eventually file
24 before a lawsuit, but that's no longer the case

1 now. Now there is a lawsuit. They don't need Rule
2 224.
3 THE COURT: But in Beale the Court found
4 that although there was a cause of action already
5 filed and pending, that that did not preclude the
6 petitioner there from seeking the identification of
7 an additional defendant for other -- or more than
8 one defendant.
9 How is that different than what
10 Project44 is seeking to do in accord with this --
11 MS. HEMERYCK: Well, as you point out, your
12 Honor, that was -- the Beale case was many, many
13 years ago. A lot of water under the bridge since
14 then and a lot more clarity I think has been
15 brought to the purpose of Rule 224 since that time.
16 I would say that -- I'm just
17 looking at Rule 224 again. What the Beale case is
18 really about I would say is more what is the scope
19 of the discovery that Rule 224 allows beyond just a
20 name. Does it allow other discovery into, for
21 example, what is the relationship between the
22 person whose identity is being sought and their
23 potential liability.
24 So I don't believe -- and I have to

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

1 read it more careful again, I have to admit, but I
2 don't believe the court in Beale was terribly
3 focused on the question of what happens if you have
4 another lawsuit. And here particularly we've got
5 another state court lawsuit.
6 So it's very clear, as Project44
7 themselves has stated, that they can use the
8 Illinois discovery rules to get exactly the
9 information they're looking for through the normal
10 discovery procedures.
11 I'd also note that, you know,
12 Mr. Hawkins suggested that somehow -- as long as
13 they're not engaging in a fishing expedition, then
14 they can use the Rule 224 procedure. Again, that's
15 not the rule. You know, that is one thing the
16 courts look at, is this a fishing expedition, but
17 before you even get to that question you have to
18 sustain your burden, their burden to show it is
19 necessary.
20 The other thing I would point
21 out -- and I think there is a concern about
22 inconsistent adjudications, and I think there's a
23 concern about an attempt by Project44 to get
24 multiple bites at the apple. Because I mentioned

1 what happens, right. So there's a pending 2-615
2 motion to dismiss before Judge Schneider, and if
3 that is denied and the defamation complaint
4 survives the motion, then they'll be able to take
5 the normal discovery and get exactly what they're
6 looking for here.
7 If, however, in the law division
8 case -- I mean, the commercial calendar case, if
9 FourKites prevails and the defamation claims are
10 dismissed, then Project44 can't carry its burden in
11 this court to show that the claims can survive a
12 2-615 motion because they obviously didn't. So
13 that's another reason this petition simply serves
14 no purpose at all. There's absolutely nothing they
15 can get here that they cannot get in the Judge
16 Schneider case. And that is the default method,
17 that is default method.
18 Also, I do want to talk about -- if
19 the Court will indulge me for a moment, I do want
20 to talk about the Hadley case, because Project44
21 brought it up. I think it's really important to
22 understand -- and, again, it's a very recent
23 Illinois Supreme Court -- understand what the
24 actual posture of Hadley was.

1 In the Hadley case the plaintiff
2 filed the defamation suit against the individual
3 who had posted allegedly defamatory comments on a
4 newspaper's website, and they filed it against the,
5 like, handle -- right -- the internet handle;
6 didn't know the actual name.
7 Then the Court, the circuit court
8 when they tried to get discovery to determine --
9 they actually sought discovery in the defamation
10 case from the ISP provider to find out the
11 identity, the Court said no, no, you need to file a
12 Rule 224 petition to get that. The Supreme Court
13 was very clear that was wrong. That was absolutely
14 wrong.
15 The Court, nevertheless, allowed
16 the discovery because it would have been too harsh
17 a sanction. There was a whole argument in that
18 case where the defendant said, Well, you've now
19 brought -- you've now asserted this Rule 224 count.
20 That is supposed to be a separate action,
21 therefore, it should be treated as a separate
22 action, which means your original complaint should
23 be dismissed because now it's outside the
24 limitations period.

1 That would have been an incredibly
2 harsh result when all that the plaintiff there did
3 was do what the circuit court told them to do. But
4 the Supreme Court was very clear in saying -- in
5 saying that that was erroneous, that Hadley erred
6 in pursuing Rule 224 relief after his suit was
7 filed. The Court was very clear about that. You
8 can't have your Rule 224 petition once you've got a
9 suit on file.
10 And in this case the fact that they
11 filed a Rule 224 petition first but then didn't get
12 a ruling and then went ahead and filed their
13 complaint, it has the same effect as though they
14 had filed the Rule 224 petition later. They
15 just -- and the effect is that it's not necessary
16 and it's inappropriate and this Court should not be
17 asked to rule on it.
18 In terms of the waste of judicial
19 resources that was pointed to by Project44's
20 counsel, there's a Rule 261 -- there's a section
21 2-615 motion to dismiss in the case in front of
22 Judge Schneider right now. They're going to brief
23 that. He's going to decide it. It's going to
24 determine whether that case goes forward or not.

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

1 If it goes forward, they'll get their discovery.
2 So there's no waste of resources
3 here. That ruling has to take place. And, again,
4 that's the normal procedure. And they've chosen to
5 go that route, and that's fine, but they can't do
6 that and then also continue to pursue this
7 completely purposeless Rule 224 petition.
8 THE COURT: Mr. Hawkins, would you like to
9 respond?
10 MR. HAWKINS: Your Honor, just a couple
11 points to respond to here.
12 Beale is still good law. It was
13 cited by the Dent case in 2020. I don't think its
14 analysis is outdated. It's certainly relevant to
15 the issues here. And I think what we are getting
16 at with the Hadley case, and as we discussed in our
17 briefs, is absolutely we're not going to contend
18 that the purpose of Rule 224 is for presuit
19 discovery. It's on its face in the statute.
20 But what we have here is a very
21 unique circumstance, and the Illinois Supreme Court
22 has shown that in very unique circumstances, as in
23 the Hadley case, that we not elevate form over
24 substance and allow a Rule 224 discovery to go

1 through when there are other extenuating
2 circumstances that warrant its application in a
3 case.
4 Additionally, your Honor, we
5 actually filed a complaint in the commercial court.
6 We named FourKites. We named Jane Doe. FourKites
7 filed a motion to dismiss and Jane Doe didn't join
8 that motion to dismiss. We notified eight months
9 ago Jane Doe of the pendency of the commercial case
10 and said if you would like to accept service on
11 behalf of Jane Doe we would certainly not object to
12 that. They chose not to. They chose not to join
13 the FourKites' motion to dismiss.
14 So I don't necessarily agree with
15 counsel's suggestion that even if there is a ruling
16 for FourKites, that that's going to dispose of this
17 and it's going to affect Jane Doe.
18 MS. HEMERYCK: Your Honor, if I could just
19 respond to the last point.
20 THE COURT: Sure.
21 MS. HEMERYCK: That's -- and I hate to put
22 it this way. That's a preposterous argument. The
23 Illinois Supreme Court has made very clear that
24 defensive nonmutual collateral estoppel is

1 acceptable here, and the idea that somehow they are
2 allowed to say -- when the test in this court, as
3 everyone acknowledges, is could a defamation claim
4 based on these emails survive a 2-615 motion to
5 dismiss and another judge says Nope, doesn't
6 survive, I dismiss it, that they can still come in
7 here and say to this Court we get to reargue this
8 here, I think that's ridiculous.
9 THE COURT: Well, but couldn't the Court and
10 couldn't Judge Schneider say as to FourKites the
11 complaint does not survive? As to the remaining
12 John and Jane Doe -- I mean, there's many -- I
13 think more than 20 John Does and one Jane Doe.
14 Couldn't the Court there say it
15 doesn't survive as to FourKites, but it survives to
16 the remaining parties who haven't brought the
17 motion to dismiss?
18 MS. HEMERYCK: Well, if it's dismissed, the
19 arguments -- and I'm sorry. I have to find the
20 actual brief.
21 The arguments that are being
22 made -- I think it would depend on the ruling,
23 right. But the arguments that are being made in
24 the motion to dismiss by FourKites are based on --

1 are virtually the same arguments that we've made
2 here, which are that these emails, regardless of
3 who sent them -- that's not the issue -- these
4 emails cannot support a defamation claim. These
5 emails are either not published to a third party or
6 are not defamatory per se.
7 They've also got a conspiracy claim
8 in here, but the defamation claims and the
9 arguments being made in the defamation claims are
10 the same issues that are being addressed here,
11 which is that these emails cannot support a
12 defamation claim. They're not defamatory per se
13 and/or they weren't published to a third party.
14 If Judge Schneider dismisses the
15 complaint on either of those grounds, those would
16 be equally applicable here. It doesn't matter
17 whether they're suing FourKites or Jane Doe. If
18 those emails aren't defamatory, they're not
19 defamatory.
20 THE COURT: All right. Anything further
21 before I rule on this issue?
22 MS. HEMERYCK: Not from the Intervenor Jane
23 Doe, your Honor.
24 THE COURT: All right. This Court

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

1 recognizes that courts should not be inflexible,
2 but the Court also recognizes that Rule 224 is
3 designed for a particular purpose, and although
4 there is authority that indicates that -- and as
5 the rule itself states -- that a person or entity
6 who wishes to engage in discovery for the sole
7 purpose of ascertaining the identity of one who may
8 be responsible in damages may file an independent
9 action for such discovery. And here that's exactly
10 what Project44 did prior to bringing their suit.
11 The suit in and of itself and the
12 complaint that's pending before Judge Schneider
13 relates to the identical emails that the discovery
14 has sought pursuant to this petition. It is not
15 clearly -- well, I should say this. Project44
16 followed the correct procedures in pursuing their
17 Rule 224 petition.
18 This Court is concerned, however,
19 with the requirements for the petition to issue,
20 that being that the allegations in the petition
21 itself must survive a 2-615, when the allegations
22 are also now pending in this unusual circumstance
23 before Judge Schneider and a 2-615 is pending there
24 as well.

1 Additionally, although the Illinois
2 courts have said that 2-6 -- I'm sorry, that 224
3 can be used post the filing the suit, as was
4 indicated in Beale, that hasn't been the case in
5 much of the other authority that our appellate
6 courts have relied on where in those cases, like in
7 Dent, there was no other litigation.
8 Here the Court finds that the
9 information sought -- information sought to be
10 obtained pursuant to the 224 is obtainable through
11 201 and additional discovery in that case pending
12 before Judge Schneider.
13 On behalf of the Circuit Court of
14 Cook County and myself, I would like to apologize,
15 quite honestly, to Project44 for the delays that
16 this pandemic has caused in them getting a
17 resolution prior to the filing of the complaint.
18 And I certainly don't intend for Project44 to be
19 prejudiced in any way in their pursuit of
20 discovery. It's merely a procedural issue that the
21 Court is viewing at this juncture.
22 And based on the allegations in the
23 complaint filed and now pending before Judge
24 Schneider, the Court finds that there is a

1 potential for inconsistent results in the issuance
2 of this 224 petition and the 615 ruling that Judge
3 Schneider will be making.
4 The Court further finds that
5 Project44 has the remedy of seeking this identical
6 discovery in that proceeding based on the nature of
7 the allegations in the complaint.
8 For those reasons, the Court is
9 dismissing the petition.
10 Any questions? Anything further?
11 MS. HEMERYCK: My only question, your Honor,
12 would be would you like the parties to prepare the
13 order? I'm not sure how this works now that we're
14 all remote.
15 THE COURT: If you -- Mr. Hawkins, it's your
16 petition. If you would prepare the order and
17 circulate that. You can certainly incorporate the
18 record by reference in the order, or if you prefer
19 to incorporate the actual typed-up proceeding, I
20 allow you to do that as well. I would ask that you
21 make that determination.
22 If you plan to incorporate the
23 actual transcript of the proceedings today, I would
24 ask that you first submit an order so we can get

1 something entered dismissing the petition and we
2 could reference in that order that a subsequent
3 order will come to incorporate the record and then
4 I can enter that as a subsequent order on that
5 date.
6 But given the delays that you've
7 encountered in this case, I would like you to have
8 an order on the record -- or in the record today,
9 or tomorrow at latest, dismissing the petition so
10 that you can move forward in any way that you see
11 fit more expeditiously.
12 MR. HAWKINS: Absolutely, your Honor. We
13 will take care of that.
14 MS. HEMERYCK: Thank you, your Honor.
15 MR. HAWKINS: Thank you.
16 THE COURT: And does that conclude the
17 hearing?
18 MR. HAWKINS: We have nothing further to
19 add, your Honor.
20 THE COURT: We're off the record, then.
21 * * * * *
22
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1 STATE OF ILLINOIS)
) SS.
2 COUNTY OF DU PAGE)
3
4 I, Janet L. Brown, CSR. No. 84-002176, do
5 hereby certify that I reported in shorthand the
6 proceedings had at the hearing of the
7 above-entitled cause and that the foregoing Report
8 of Proceedings, Pages 1 through 30, inclusive, is a
9 true, correct, and complete transcript of my
10 shorthand notes taken at the time and place
11 aforesaid.
12 I further certify that I am not counsel for
13 nor in any way related to any of the parties to
14 this suit, nor am I in any way, directly or
15 indirectly interested in the outcome thereof.
16 This certification applies only to those
17 transcripts, original and copies, produced under my
18 direction and control; and I assume no
19 responsibility for the accuracy of any copies which
20 are not so produced.
21 IN WITNESS WHEREOF I have hereunto set my
22 hand this 8th day of February, 2021.
23
24 Certified Shorthand Reporter

Purchased from re:SearchIL

FILED DATE: 2/22/2021 3:45 PM 2020L004183

A

able 3:23 4:2,4 16:12 19:4
above-entitled 1:13 30:7
absolutely 19:14 20:13 22:17 29:12
accept 23:10
acceptable 24:1
access 7:5
accord 17:10
accuracy 30:19
accurately 6:5
acknowledges 24:3
action 6:19 7:13 7:14,15 8:12 9:12,18 11:4 15:17 16:12 17:4 20:20,22 26:9
actual 19:24 20:6 24:20 28:19,23
Actuate 2:2 3:13
add 29:19
additional 17:7 27:11
Additionally 13:17 23:4 27:1
addressed 25:10
addresses 16:2
addressing 14:20
adjudications 18:22
administrative 10:3
admit 18:1
advised 6:18
advocating 12:20
affect 23:17
affirmed 8:21
aforesaid 30:11
ago 17:13 23:9
agree 10:7,9 14:12 23:14
ahead 21:12
Albritton 2:3 3:9 8:6
Alexander 2:8 3:18
allegations 26:20 26:21 27:22 28:7
alleged 7:18
allegedly 20:3
allow 11:14 17:20 22:24 28:20
allowed 12:9 20:15 24:2
allows 15:1 17:19
alluded 15:10
amount 13:8
analysis 22:14
and/or 25:13
answer 14:13
anybody 4:23
apologize 27:14
appear 4:3
Appeared 2:5,10
appellate 7:23 27:5
apple 18:24
applicable 25:16
application 23:2
applies 30:16
appreciate 10:11
appropriate 8:24 11:6 15:17
appropriately 12:8
approximately 5:20
argue 7:7
argued 14:23
arguing 8:7
argument 8:8 15:20 20:17 23:22
arguments 24:19 24:21,23 25:1,9
ascertaining 26:7
asked 14:22 21:17
asserted 11:9 20:19
associate 3:17
assume 30:18
attempt 18:23
attention 5:22
AT&T 1:8 3:3 5:7 9:5 13:10
audio 11:16
authority 26:4 27:5
Azar 2:8 3:17

B

back 5:22 14:17
based 7:13 10:15 24:4,24 27:22 28:6
basically 13:12
Beale 8:14,19,19 17:3,12,17 18:2 22:12 27:4
becoming 4:1
behalf 2:5,10 3:16 6:12 23:11 27:13
believe 5:12,14 6:4 8:23 9:7 12:1,18,22 17:24 18:2
believed 11:5
best 11:21
beyond 17:19
bit 4:11
bites 18:24
bridge 17:13
brief 6:12,18,22 8:3 21:22 24:20
briefed 5:16 6:11 10:20
briefing 5:15
briefs 12:17 22:17
bring 15:2
bringing 26:10
brought 5:1,22 8:22 17:15 19:21 20:19 24:16
Brown 30:4
burden 15:6 18:18,18 19:10

C

C 1:2
calendar 4:14,14 6:21 11:1 13:19 13:21 19:8
call 3:17 10:12
Cancila 2:7 3:16
care 29:13
careful 18:1
carry 19:10
case 3:4 4:16,20 5:13 6:3 8:4,15 9:19 11:12 12:1 12:22 14:1,4,15 14:15,16,17 15:6 16:3,16,17 16:18,24 17:12 17:17 19:8,8,16 19:20 20:1,10 20:18 21:10,21 21:24 22:13,16 22:23 23:3,9 27:4,11 29:7
cases 8:21 11:13 14:12,18 27:6
Catholic 14:1
cause 1:13 8:11 17:4 30:7
caused 27:16
certainly 3:12 4:11 9:11 12:19 22:14 23:11 27:18 28:17
certainty 7:8
certification 30:16
Certified 30:24
certify 30:5,12
challenges 3:21 3:22
chancery 4:15
Chicago 2:4,9
chose 23:12,12
chosen 22:4
circuit 1:3 20:7 21:3 27:13
circulate 28:17
circumstance 22:21 26:22
circumstances 9:13 12:21 22:22 23:2
cite 13:24
cited 11:14 14:12 22:13
claim 10:18 13:3 24:3 25:4,7,12
claims 19:9,11 25:8,9
clarification 9:23
clarify 4:23
clarity 10:9 17:14
clear 9:10 16:18 18:6 20:13 21:4 21:7 23:23
clearly 12:7 26:15
client 13:1
closer 11:22
collateral 23:24
come 14:17 24:6 29:3
commencing 1:14
comments 20:3
commercial 4:20 6:21 7:1 11:1 13:19,21 19:8 23:5,9
company 1:9 3:4

Purchased from re:SearchIL

FILED DATE: 2/22/2021 3:45 PM 2020L004183

complaint 7:1,14 12:4,5 15:14,23 16:11,13 19:3 20:22 21:13 23:5 24:11 25:15 26:12 27:17,23 28:7
complete 30:9
completely 6:5,8 22:7
computer 11:22
concern 18:21,23
concerned 26:18
conclude 29:16
considering 7:10
consistent 7:23
conspiracy 25:7
contained 4:17
contend 22:17
content 7:17
continue 11:14 13:16 22:6
continued 13:11
continuing 11:6
control 9:13 30:18
Cook 1:3 4:21 27:14
copies 30:17,19
copy 7:4
corporation 1:5 3:2
correct 26:16 30:9
counsel 11:9 12:14 14:23 21:20 30:12
counsels 4:11 7:4
counsel's 23:15
count 12:5 20:19
County 1:2,3,3 4:21 27:14 30:2
couple 22:10
court 1:3,14 3:1 3:10,14,19,20 4:4,6,7 5:20 6:6 6:17,18 7:5,9 7:23 8:10,15,17 8:24 9:3,20,22 10:7,17 11:3,20 12:2,9,24 13:7 13:18 14:8,12 14:14 16:8,17 17:3,3 18:2,5 19:11,19,23 20:7,7,11,12,15 21:3,4,7,16 22:8,21 23:5,20 23:23 24:2,7,9 24:9,14 25:20 25:24,24 26:2 26:18 27:8,13 27:21,24 28:4,8 28:15 29:16,20
courts 5:17 10:21 14:19 18:16 26:1 27:2,6
Court's 5:22 7:14 7:21 14:7 16:18
COVID-19 10:21
co-counsel 3:9
criticizing 15:12
CSR 30:4

D

damages 15:4 16:22 26:8
date 29:5
day 30:22
dealt 12:3,4
decide 21:23
decision 10:14,16 15:13
defamation 4:20 6:19 7:13,17 9:1,18 15:13,23 19:3,9 20:2,9 24:3 25:4,8,9 25:12
defamatory 9:8 20:3 25:6,12,18 25:19
default 19:16,17
defendant 11:11 17:7,8 20:18
defendants 9:6
defensive 23:24
Delaware 1:5,8 3:2,3
delays 27:15 29:6
denied 19:3
Dent 8:4,10,11 8:12,12,18,20 8:20 11:12 14:15 16:16,16 16:17 22:13 27:7
DEPARTMENT 1:3
depend 24:22
designed 26:3
desktop 7:2
determination 9:3 28:21
determine 20:8 21:24
difference 8:11
different 7:22,23 14:18,19 17:9
Diocese 14:1
direction 30:18
directly 30:14
discovery 9:5,6 9:12 12:6,12 13:4 16:3,12 17:19,20 18:8 18:10 19:5 20:8 20:9,16 22:1,19 22:24 26:6,9,13 27:11,20 28:6
discussed 22:16
dismiss 13:21,22 15:24 19:2 21:21 23:7,8,13 24:5,6,17,24
dismissed 13:3 19:10 20:23 24:18
dismisses 25:14
dismissing 28:9 29:1,9
dispose 23:16
disposition 12:8
division 1:3 4:15 4:20 19:7
Doe 3:16 5:12 11:9 13:20 14:1 14:4,11 23:6,7 23:9,11,17 24:12,13 25:17 25:23
Doug 2:3 3:9
drop 11:17
DU 30:2

E

Edgemark 8:14
effect 21:13,15
effectively 13:14
Ehrlich 5:3
eight 23:8
either 5:12 9:5 25:5,15
elevate 22:23
emails 7:15,17 9:1,8 24:4 25:2 25:4,5,11,18 26:13
emergency 5:19 9:24 10:1,3,13
enable 16:20
encountered 29:7
engage 26:6
engaging 11:18 18:13
enter 29:4
entered 29:1
entity 12:12 16:20 26:5
equally 25:16
erred 21:5
erroneous 21:5
essentially 8:21
estimation 7:22
estoppel 23:24
eventually 16:23
exact 9:1
exactly 18:8 19:5 26:9
example 17:21
expedition 11:19 18:13,16
expeditiously 29:11
explain 8:23
extenuating 23:1

F

face 22:19
fact 16:10 21:10
facts 12:1
failing 7:3
Fairly 7:20
February 1:15 30:22
federal 8:16
feel 3:24
file 15:13 16:23 20:11 21:9 26:8
filed 4:13,18,19 6:12,17 7:1 8:12 9:11 12:5 15:23 16:13 17:5 20:2,4 21:7,11,12,14 23:5,7 27:23
filing 16:20 27:3 27:17
find 20:10 24:19
finds 27:8,24 28:4
fine 22:5
firm 3:13
first 4:8 7:8 10:23 21:11 28:24
fishing 11:19 18:13,16
fit 29:11
Floor 2:3

Purchased from re:SearchIL

focused 18:3
followed 26:16
foregoing 30:7
form 22:23
forth 12:17
forward 10:19 11:15 12:9,15 13:16 21:24 22:1 29:10
found 12:10 17:3
FourKites 11:10 15:24 19:9 23:6 23:6,13,16 24:10,15,24 25:17
free 3:24
front 6:20 16:13 21:21
fully 5:16 6:11 9:15 10:20
further 25:20 28:4,10 29:18 30:12

G

general 10:2 12:21
getting 22:15 27:16
Gillespie 5:9
given 7:12 12:11 12:21 29:6
go 10:19 11:1 12:9,15 22:5,24
goes 21:24 22:1
going 4:2 8:6 11:14 14:3,5,20 21:22,23,23 22:17 23:16,17
good 3:1,19 6:6 22:12
Google 5:2
grant 5:11
granted 5:10
grounds 25:15

H

Hadley 10:16 12:1,22 14:16 14:18 19:20,24 20:1 21:5 22:16 22:23
hand 30:22
handle 20:5,5
happens 18:3 19:1
harsh 20:16 21:2
hate 23:21
Hawkins 2:2 3:7 3:7,12 6:4 8:5,8 9:9 10:5,11 11:18,21 13:1,6 18:12 22:8,10 28:15 29:12,15 29:18
hear 3:23
heard 5:3,19 9:24 10:9 13:2
hearing 1:12 5:6 5:23 7:6 9:20 29:17 30:6
Hemeryck 2:7 3:15,15 6:13,13 6:15,16,17 8:3 8:4 14:8,10 17:11 23:18,21 24:18 25:22 28:11 29:14
hereunto 30:21
hesitate 4:3
highlighted 11:13
history 4:12,16 4:24 6:3
Holmes 2:7 3:16
Hon 1:13
honestly 27:15
Honor 6:4,16 8:9 9:9,20 10:5,12 10:15 11:4,8,13 11:24 12:18 13:6,10,17 14:10,22 15:10 15:22 17:12 22:10 23:4,18 25:23 28:11 29:12,14,19

I

idea 24:1
identical 7:15 13:24 26:13 28:5
identifiable 12:13
identification 17:6
identified 7:16
identify 3:5 15:3 16:21
identity 16:2 17:22 20:11 26:7
Illinois 1:1,3 2:4 2:9 10:16 12:2 18:8 19:23 22:21 23:23 27:1 30:1
Ill.App 8:14
important 14:21 19:21
inaccurate 6:1
inappropriate 21:16
inclusive 30:8
inconsistency 14:5
inconsistent 13:18 18:22 28:1
incorporate 28:17,19,22 29:3
incorrect 4:23
incredibly 21:1
independent 26:8
indicated 27:4
indicates 26:4
indirectly 30:15
individual 12:11 20:2
indulge 19:19
inflexible 26:1
information 9:2 18:9 27:9,9
instructive 12:23
intend 27:18
intent 16:18
intention 9:11
interested 30:15
internet 4:1 20:5
interpreted 7:21
interpreting 8:18
interruption 11:16
intervened 5:13
intervenor 3:16 6:13 14:11 25:22
invested 11:3 13:7
involving 10:4
IP 16:2
ISP 20:10
issuance 28:1
issue 4:1 11:1,7 12:2 15:14,16 16:9 25:3,21 26:19 27:20
issues 13:14 14:20 22:15 25:10

J

Jane 3:16 5:12 11:9 13:20 14:4 14:11 23:6,7,9 23:11,17 24:12 24:13 25:17,22
Janet 30:4
John 24:12,13
join 23:7,12
judge 1:14 4:9,13 4:15 5:3,9,10 5:14 6:20 11:5 13:10 16:13 19:2,15 21:22 24:5,10 25:14 26:12,23 27:12 27:23 28:2
judged 13:23
judgment 10:12
judicial 21:18
juncture 27:21
June 5:20 9:21

K

K 1:2
Karen 1:13 4:9
kindly 7:4
know 3:20 4:4 8:13 11:8,10 13:10 14:22 16:11 18:11,15 20:6

L

L 1:7,14 3:4 30:4
Lake 2:3
late 4:14
latest 29:9
law 1:3 2:2 3:12 3:13 19:7 22:12
lawsuit 8:12,16 13:5 16:20,24 17:1 18:4,5
lead 14:3,5
led 9:13
LEGAL 1:17
letting 12:15
liability 1:9 3:4 17:23
liable 15:3
limitations 9:18 10:4 20:24
limited 1:8 3:4 10:8
litigation 4:19 7:20 27:7

FILED DATE: 2/22/2021 3:45 PM 2020L004183

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little 11:22
LLC 1:8 3:3,13 5:8
LLP 2:7
long 11:15,18 18:12
longer 16:24
look 15:19 16:15 18:16
looking 16:15 17:17 18:9 19:6
lot 8:19 17:13,14

M

Madam 3:20
Madison 2:8
MAGNA 1:17
making 9:3 28:3
March 5:18
matter 4:9 5:21 5:23 25:16
matters 5:16
maximize 14:6
mean 19:8 24:12
means 11:6 20:22
mechanism 16:19
mentioned 18:24
merely 27:20
method 19:16,17
Mobility 1:8 3:3 5:8
moment 4:24 19:19
months 5:23 23:8
morning 3:1,8,19 7:3,5
motion 10:13 13:20,22 15:24 16:1 19:2,4,12 21:21 23:7,8,13 24:4,17,24
motions 5:19 9:21,24 10:1
movant 6:22
move 29:10
moved 4:15
multiple 18:24

N

name 6:14 17:20 20:6
named 5:5 11:10 23:6,6
naming 5:2 9:5,6
nature 28:6
necessarily 7:23 23:14
necessary 15:8,9 15:21 18:19 21:15
need 17:1 20:11
never 10:1
nevertheless 20:15
newspaper's 20:4
nonmutual 23:24
Nope 24:5
normal 16:3 18:9 19:5 22:4
normally 7:2,19 16:4
note 18:11
noted 9:20
notes 30:10
notice 12:11 15:18
noticed 9:15
notified 23:8
number 8:20
numerous 13:14

O

O 1:2,2
object 23:11
obtain 4:4
obtainable 27:10
obtained 27:10
obviously 11:23 14:11 19:12
Okay 6:6,17
once 21:8
one-year 9:17
operating 3:22
operation 7:3
operations 5:18 10:8
option 10:17 16:6 16:6
order 9:17 10:3 15:3 28:13,16 28:18,24 29:2,3 29:4,8
original 20:22 30:17
originally 5:2
outcome 30:15
outdated 22:14
outlined 10:2
outset 15:10
outside 20:23
O'Malley 1:14 4:9

P

PAGE 30:2
Pages 30:8
pandemic 10:22 27:16
part 10:12,14,15
particular 26:3
particularly 8:14 18:4
parties 11:2 12:11,13 13:7 14:6 16:21 24:16 28:12 30:13
party 13:20 15:1 25:5,13
pendency 23:9
pending 4:19 6:19,20 7:13 8:16 13:3,11 14:15 15:24 17:5 19:1 26:12 26:22,23 27:11 27:23
period 5:18 20:24
person 16:20 17:22 26:5
Peter 2:2 3:7
pete.hawkins... 2:5
petition 4:12,18 5:1,4,10,11,16 6:11,23 7:11,16 8:17 9:11 10:19 11:11,15 13:2,9 13:11,23 15:2 15:10 19:13 20:12 21:8,11 21:14 22:7 26:14,17,19,20 28:2,9,16 29:1 29:9
petitioner 1:6 2:5 3:3,8 14:13 15:6 17:6
place 22:3 30:10
plaintiff 15:2 20:1 21:2
plan 28:22
pleading 8:2
pleadings 4:10 4:17
please 3:5,11,24 4:3 6:14
point 3:23 6:19 9:23 14:2,14 15:11,16,22 16:8 17:11 18:20 23:19
pointed 21:19
points 22:11
position 10:23
post 27:3
posted 20:3
posture 19:24
potential 15:2 17:23 28:1
precedent 8:13
preclude 17:5
prefer 28:18
prefiling 15:2
prejudice 12:14 13:1,6 14:4,22 14:23
prejudiced 27:19
prepare 28:12,16
preposterous 23:22
PRESENT 2:1
presenting 8:8
presents 3:21,22
preserve 10:17
presuit 7:20 8:22 9:12 22:18
presumably 9:16
prevails 19:9
previously 4:13 6:24
principally 10:15
prior 4:18 9:17 9:21 26:10 27:17
procedural 4:24 6:3 27:20
procedure 16:5 18:14 22:4
procedures 18:10 26:16
proceed 8:17
proceeding 7:10 13:16 28:6,19
proceedings 1:12 6:8 28:23 30:6 30:8
produced 30:17 30:20
Project44 1:4 3:2 3:8 5:2 13:2 15:7,13,20 16:10 17:10 18:6,23 19:10 19:20 26:10,15 27:15,18 28:5
Project44's 8:2 14:23 21:19

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promulgating 16:19
pronounce 6:14
proponents 9:8
provide 16:19
provided 4:11 8:3
provider 20:10
published 25:5 25:13
purpose 11:12 15:4,5,5,11 17:15 19:14 22:18 26:3,7
purposeless 22:7
pursuant 13:4 26:14 27:10
pursue 13:4 22:6
pursuing 21:6 26:16
pursuit 27:19
put 23:21

Q

qualified 10:13
question 7:9 14:13,24 15:15 15:16 18:3,17 28:11
questions 28:10
quite 27:15
quote 16:16

R

raise 14:1
read 18:1
really 9:20 11:2 17:18 19:21
reargue 24:7
reason 12:10 13:20 16:7,8 19:13
reasons 28:8
received 6:21
recognizes 26:1,2
record 3:6 4:5 9:23 28:18 29:3 29:8,8,20
reference 28:18 29:2
regardless 25:2
reinventing 13:13
related 7:15 9:1 30:13
relates 26:13
relationship 17:21
relevant 22:14
relied 27:6
relief 5:13 15:7 21:6
relies 8:13
rely 8:10
remaining 24:11 24:16
remedy 28:5
remote 5:17 7:2 28:14
remotely 3:21
renoticed 5:21
Report 1:12 30:7
reported 30:5
Reporter 3:10,14 3:20 4:6 11:16 11:20 30:24
represented 12:13
requirements 26:19
resolution 13:11 27:17
resolved 13:15 13:15
resolving 11:4 13:8,14
resources 11:2,3 13:8 14:7 21:19 22:2
respond 22:9,11 23:19
respondent 1:10 2:10 9:6
respondents 5:5
response 15:19 15:20
responsibility 30:19
responsible 16:21 26:8
responsive 8:2
result 21:2
results 28:1
reversed 5:12
review 7:14
reviewed 6:23,24
reviewing 4:10
ridiculous 24:8
right 19:1 20:5 21:22 24:23 25:20,24
Riley 2:7 3:15
risk 13:18
Rochester 14:1
route 22:5
rule 10:19 11:11 12:6,8,21 13:23 15:1,17 16:3,5 16:7,19 17:1,15 17:17,19 18:14 18:15 20:12,19 21:6,8,11,14,17 21:20 22:7,18 22:24 25:21 26:2,5,17
rules 18:8
ruling 16:8 21:12 22:3 23:15 24:22 28:2
rulings 7:24 13:18

S

Safer 2:7 3:15
sanction 20:17
sat 4:13
saying 4:9 21:4,5
says 7:19 16:18 24:5
schedule 5:15
Schneider 6:20 16:14 19:2,16 21:22 24:10 25:14 26:12,23 27:12,24 28:3
scope 17:18
scratch 13:13
screen 4:3
se 25:6,12
section 21:20
see 4:2,12,16 29:10
seeking 9:2 15:7 17:6,10 28:5
sent 7:4 25:3
separate 20:20 20:21
served 11:11
serves 15:11 19:13
service 23:10
SERVICES 1:17
set 5:14,23 11:24 12:7,17 30:21
share 16:17
shemeryck@rs... 2:10
shorthand 30:5 30:10,24
show 15:7 18:18 19:11
showing 15:22
shown 22:22
shut 10:21
significant 13:8
similar 13:23
simply 19:13
sitting 5:9
situation 9:14 11:24 12:4,18 12:20 14:19
sole 15:4 26:6
someone's 4:1
Sondra 2:7 3:15
sorry 24:19 27:2
sought 5:13 12:12 17:22 20:9 26:14 27:9 27:9
speak 3:24
speaks 12:2
special 16:5
specific 12:21
speed 6:9
SS 1:1 30:1
standards 13:24
start 4:8 10:24 13:12
starts 4:1
state 1:1 18:5 30:1
stated 18:7
states 16:10 26:5
statute 9:17 10:4 22:19
stay 11:21
stead 5:10
Street 2:3,8
subject 5:6 9:4,7
submit 28:24
subpoena 13:9
subsequent 4:18 5:4 29:2,4
subsequently 5:11
substance 7:10 7:11 22:24
sufficiency 5:15
suggested 18:12
suggestion 23:15
suing 25:17
suit 20:2 21:6,9 26:10,11 27:3 30:14
Suite 2:8
summarized 6:2
summarizes 6:5
supplemental 6:12,18,22 8:2
support 25:4,11

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supposed 20:20
Supreme 10:17 12:2,9 16:18 19:23 20:12 21:4 22:21 23:23
sure 6:7,8 8:6 23:20 28:13
surprise 12:16
survive 19:11 24:4,6,11,15 26:21
survives 15:24 19:4 24:15
suspension 10:1
sustain 18:18

T

take 19:4 22:3 29:13
taken 30:10
talk 8:5 19:18,20
talks 8:4
target 5:7
tell 3:10 6:14
terms 21:18
terribly 18:2
test 14:24 24:2
Thank 3:14 4:6,7 9:9 11:20 14:10 29:14,15
themself 3:6
thereof 30:15
thing 14:21 18:15 18:20
things 10:2,3
think 17:14 18:21,22 19:21 22:13,15 24:8 24:13,22
third 25:5,13
time 5:18 10:18 10:21 17:15 30:10
times 9:24
title 7:20
titled 12:6
today 5:7,24 9:14 28:23 29:8
told 21:3
tomorrow 29:9
top 11:8
transcript 28:23 30:9
transcripts 30:17
treated 20:21
tried 20:8
true 9:22 30:9
two 5:5 7:22 14:18,19
typed-up 28:19

U

understand 4:22 5:1 19:22,23
understood 10:5
undue 12:15
unfortunately 9:13,19
unique 11:23,24 12:3,19 22:21 22:22
unusual 26:22
usage 14:6
use 16:7 18:7,14
users 16:2

V

vacated 5:12
viewing 27:21
virtually 25:1
vs 1:7 3:3 8:14 14:1

W

W 2:3,8
Walker 4:13,15 5:14 11:5 13:10
Walker's 5:10
want 4:8 6:6,8 8:5 9:23 14:16 19:18,19
wanted 16:17
warrant 23:2
warranted 12:19
wasn't 9:19,20
waste 11:2,3 21:18 22:2
water 17:13
wave 3:24
way 23:22 27:19 29:10 30:13,14
ways 7:22
website 20:4
Wednesday 1:15
welcome 4:7
went 5:17 21:12
weren't 25:13
we're 3:1 12:20 15:12 22:17 28:13 29:20
we've 18:4 25:1
wheel 13:13
WHEREOF 30:21
wishes 26:6
WITNESS 30:21
working 3:21
works 28:13
wrong 20:13,14
www.MagnaL... 1:18

Y

years 17:13

Z

Z 4:14,14
Zoom 1:15 3:22

1

1 30:8
10520 1:7 3:4
11:00 1:15
16th 5:18
19 3:4 4:17
1996 8:15

2

2 12:5
2-6 27:2
2-615 16:1 19:1 19:12 21:21 24:4 26:21,23
20 24:13
201 9:5 13:4 16:3 27:11
2019 1:7 5:3
2020 4:14 8:20 9:21 22:13
2021 1:15 5:20 30:22
224 4:12 5:4,7 7:16,19 8:17 9:2,4 10:19 11:11 12:6,8 13:23 15:1,17 16:5,7,19 17:2 17:15,17,19 18:14 20:12,19 21:6,8,11,14 22:7,18,24 26:2 26:17 27:2,10 28:2
224s 8:21
242 8:15
261 21:20
279 8:14
2900 2:8

3

3 1:15
3d 8:14
30 30:8
312 2:4,9

4

471-8724 2:9

5

5th 2:3
579-3009 2:4

6

60602 2:9
60661 2:4
615 28:2
641 2:3

7

70 2:8

8

8th 30:22
84-002176 30:4
866)624-6221 1:17

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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2020-L-4183
	)	
FOURKITES, INC., et al.,	)	Calendar Y
	)	
Defendants.	)	
	)	
	)	

NOTICE OF FILING

To: Counsel of Record

PLEASE TAKE NOTICE that on **February 22, 2021**, the undersigned caused the attached **Plaintiff Project44, Inc.'s Response in Opposition to Defendant FourKites, Inc.'s Motion to Dismiss Plaintiff's Complaint, a copy of which is hereby served upon you.**

Dated: February 22, 2021

Respectfully Submitted,

By: /s/Peter G. Hawkins
One of the Attorneys for project44, Inc.

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<u>CERTIFICATE OF SERVICE</u>

The undersigned, an attorney, hereby certifies that on February 22, 2021, he caused a copy of the foregoing **NOTICE OF FILING** and **PLAINTIFF PROJECT44, INC.'S RESPONSE IN OPPOSITION TO DEFENDANT FOURKITES, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT** to be served upon counsel of record through the Court's efiling system.

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**IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION**

PROJECT44, INC.,	
Plaintiff,	**No. 2020-L-4183**
v.	**Calendar C**
FOURKITES, INC., et al.,	
Defendants.	

DEFENDANT FOURKITES, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Defendant FourKites, Inc. ("**FourKites**"), by and through its undersigned counsel, Polsinelli PC, submits this Reply in Support of its Motion to Dismiss and states:

A false statement must be shared with a third party to become defamatory. Absent such a publication, no defamation claim exists. The two emails at issue here were sent to three members of Plaintiff's leadership, and therefore to Plaintiff itself. Without publication, even when Plaintiff's allegations are accepted as true, Plaintiff has failed to state a claim for defamation or civil conspiracy. Since the recipients of the emails were two members of Plaintiff's Board and its Chief Revenue Officer ("**CRO**"), nothing in Plaintiff's Complaint or Response can establish the critical element of "publication." Even if Plaintiff could overcome this threshold hurdle, the statements at issue were not defamatory as a matter of law. Without a valid defamation claim to underpin Plaintiff's civil conspiracy claim, it fails as well. Further, it fails for the separate and distinct reason that Plaintiff has not pled facts to support any of the elements of a conspiracy claim. In particular, Plaintiff's Complaint does not allege facts to establish a conspiratorial agreement, a tortious act, or damages. Therefore, FourKites' Motion to Dismiss should be granted in its entirety.

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I. The Statements Were Not Published

To state a defamation claim, a plaintiff must establish that the allegedly false statement at issue was made to a third party, i.e. that it was "published." Without publication there can be no defamation. *Emery v. Ne. Illinois Reg'l Commuter R.R. Corp.*, 377 Ill. App. 3d 1013, 1021 (2007). *Id.* at 1022. Proving publication requires a plaintiff to show that allegedly slanderous remarks were communicated to someone other than the plaintiff. *Id*. (citing RESTATEMENT (SECOND) OF TORTS § 577, Comment m, at 206 (1977) ("[o]ne who communicates defamatory matter directly to the defamed person, who himself communicates it to a third person, has not published the matter to the third person")). Here, the publication requirement is not satisfied because the communications were made to the person allegedly defamed.

In its Motion to Dismiss, FourKites provided persuasive authority from courts outside of Illinois for the position that communications with a corporation's management constitutes communication with the corporation itself, rather than a third person. *See Hoch v. Loren*, 273 So. 3d 56, 58 (Fla. App. 2019) (finding no publication where "a defamatory statement about a plaintiff corporation is made to a managerial employee of the corporation" because "a statement to an executive/managerial employee of a corporation is a statement to the corporation itself"); *see also Fausett v. American Resolution Management Corp.*, 542 F. Supp. 1234, 1241 (D. Utah 1982) (finding that "the management *is* the corporation for purposes of communication" and "communication to corporate management of alleged defamation of the corporation does not constitute publication").

Plaintiff's reliance on RESTATEMENT (SECOND) OF TORTS § 577, Comment *e*, to refute the *Hoch* and *Fausett* decisions is misplaced because that provision does not speak to the issue raised here – whether an officer, director or manager of a corporation personifies the corporation such

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FILED DATE: 3/5/2021 3:18 PM 2020L004183

that a communication to one of those individuals is the equivalent of a communication to the corporation itself. The rule that is stated and applied in the only cases identified by the parties to have addressed the pertinent issue – *Hoch* and *Fausett* – is that the individual and the corporation are one in the same. In fact, the Restatement supports the conclusion reached in these cases, noting that the only interest protected by a defamation claim is that of reputation. RESTATEMENT (SECOND) OF TORTS § 577, Comment *b*. Plaintiff's reputation could not be impacted by comments directed to its leadership "since reputation is the estimation in which one's character is held by [its] neighbors or associates." *Id*.

Additionally, Plaintiff's citation to cases analyzing publication between employees of the same corporation is irrelevant. *Popko*, for example, concerns whether a supervisor's comments to another supervisor in the workplace about a subordinate can amount to publication. *Popko v. Cont'l Cas. Co.*, 355 Ill. App. 3d 257, 258 (2005). This is in no way analogous to the case at bar because the alleged defamatory statements were made to someone *other* than the defamed person. Here, the statements were made directly to the Plaintiff in the form of its leadership.

Finally, Plaintiff's argument that accepting FourKites' position "would insulate senders of even maliciously defamatory communications … designed solely to damage a company's reputation" is unrelated to the issue of publication as the sender's intent has no bearing on whether or not a statement has been communicated to a third party. The sole issue here is whether Plaintiff's board members and CRO are to be considered third parties. The only case law on point has found that they are not. Simply put, statements made to a party – about that party – are not defamatory statements under the law.

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II. The Statements Are Not *Per Se* Defamatory

Plaintiff asserts that FourKites fails to consider the emails as a whole, as it claims is required by *Tuite v. Corbitt*, 224 Ill. 2d 490 (2006). *Tuite* held that a book containing allegedly defamatory statements had to be considered in its entirety to determine whether the statements at issue were capable of an innocent construction. *Id.* at 512. *Tuite* does not require that a court draw a connection between different statements in a writing when that connection is not supported by a fair reading of the writing itself – which is what Plaintiff attempts to do here. For instance, Plaintiff asserts that the statement in the May 19 email about "accounting improprieties" is related to a statement that a customer ("Estes") cancelled a contract with Plaintiff. But considering the email as a whole and reading each statement in that email in context, the statement about "accounting improprieties" and the statement about Estes' contract are not in any way connected. The email contains three numbered paragraphs, each reflecting a different topic. The statement about accounting improprieties appears in paragraph 2, while the statement about Estes' contract is in paragraph 3. Moreover, the complete statement about the Estes contract reads: "Estes cancelled the contract. It was only $5K a month, and they are not even willing to pay this." The email does not, on its face, link Estes' contract cancellation to any "accounting improprieties." Rather, if anything, it reflects dissatisfaction with the product. Plaintiff cannot state a *per se* defamation claim by rewriting the statements at issue.

Plaintiff also asserts that the statement regarding "accounting improprieties" rises above unverified hyperbole because of the narrative that immediately follows: "I encourage you to take a look at the contracts (pilots, out clauses, rev rec etc.). Recent CFO departure must tell you everything." But Plaintiff does not contest the facts of these contracts or of the CFO's departure. The statement regarding accounting improprieties is not actionable because it is merely the

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FILED DATE: 3/5/2021 3:18 PM 2020L004183

speaker's interpretation of those uncontested facts. *See, e.g.*, *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) ("The facts about Kevin's condition and about the respective financial circumstances of Ruby and Dorothy were uncontested, and Ruby and Lemann were entitled to their interpretation of them."); *Gosling v. Conagra, Inc.*, No. 95 C 6745, 1996 WL 199738, at *6 (N.D. Ill. Apr. 23, 1996) (where defendant states a conclusion he reached from facts that are not in dispute, the stated conclusion is "not objectively verifiable, and cannot form the basis for a defamation action").

In addition, Plaintiff violates its own rule about looking at the email as a whole when it ignores "the broader social context [which] signals usage as … opinion." *Mittelman v. Witous*, 135 Ill. 2d 220, 243 (1989). Both emails begin with introductions that are "written in the first person with the writer stating his beliefs." *Barry Harlem Corp. v. Kraff*, 273 Ill. App. 3d 388, 394, 1082 (1995). It is therefore apparent on their face that they are *not* "the report of some factual event which transpired." *Id.; see also Saenz v. Playboy Enters., Inc.*, 653 F. Supp. 552, 565 (N.D. Ill. 1987) (court should look to the "tone and style" of the writing for "signal[s] … that [it] [is] [a] vehicle[] for criticism and so for opinion"), *aff'd*, 841 F.2d 1309 (7th Cir. 1988).

Plaintiff makes similar mistakes in discussing the statement in the May 27 email that: "You don't want to be part of the next Ponzi scheme or next theranos." *See* Complaint, Ex. F. Plaintiff asserts that this statement "is elevated beyond the realm of opinion or hyperbole by other statements in the email," but fails to identify any other statements that actually provide further factual content or detail regarding why the author believes joining Plaintiff could result in the email recipient becoming "part of the next Ponzi scheme or next theranos."[1]

[1] The other statements project44 cites include "calling on the newly-hired CRO of project44 to resign, inviting the CRO to '[t]alk to ex CFO Bruns … Talk to ex Sales people, talk to customers .. talk to prospects, talk to investors outside p44,' and comparing project44's services to excrement."

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In addition, the fact that Plaintiff feels the need to cite evidence outside the email itself to *explain* what "theranos" means undermines any claim that the statement is *per se* defamatory. *See Dubinsky v. United Airlines Master Exec. Council*, 303 Ill. App. 3d 317, 327 (1999) (where "no direct accusation of crime" is made, plaintiffs' assertion that reference to extrinsic matters "would make it 'totally clear to the reader' … preclude[s] the publication from being considered defamatory *per se*, as only statements that are defamatory *per quod* may rely on extrinsic facts"). The use of the disjunctive in the statement—"the next Ponzi scheme *or* next theranos"—further demonstrates its hyperbolic, imprecise, nonspecific nature.

Plaintiff's reliance on *Hadley v. Doe*, 2015 IL 118000, ¶ 37, is likewise misplaced. The statement at issue there was one of *present* fact: that "Hadley *is* a Sandusky waiting to be exposed" (emphasis added). Here, in contrast, the statements about theranos and Ponzi schemes are nothing more than vague speculations about something that might occur in the future: "it's just a matter of time *before* people go public and another Theranos happen in Chicago" (May 17 email), and "You don't want to be part of the *next* Ponzi scheme or next theranos" (May 29 email). Indeed, Plaintiff omits the first part of the May 17 statement, leaving out the words "it's just a matter of time before …," to make it appear that the statement asserts a present fact when it does not. In addition, in finding that the statement at issue in *Hadley* "imputed the commission of a crime," the court relied heavily on both the fact that the statement was made "while the [Sandusky] scandal dominated the national news," *and* that it was "coupled with" a reference to the view from the plaintiff's house of an elementary school. 2015 IL 118000, ¶ 37. No such facts exist or are alleged here.

Finally, Plaintiff's arguments about the May 19 email's statement concerning intimidating ex-employees are without merit. Plaintiff asserts that the statement imputes the commission of a crime to Plaintiff, but it does not identify what crime that might be. In its opening brief, Plaintiff

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FILED DATE: 3/5/2021 3:18 PM 2020L004183

offered a number of possible crimes to which the statement might refer, including murder, but this variety only supports the view that the statement is too vague to constitute a factual statement regarding the commission of an actual crime.

Nor does the intimidation statement in the May 19 email defame Plaintiff in its trade or business. To satisfy this category of defamation *per se*, a statement "must assail the corporation's financial position or business methods, or accuse it of fraud or mismanagement." *Vee See Constr. Co. v. Jensen & Halstead, Ltd.*, 79 Ill. App. 3d 1084, 1088–89 (1979). The intimidation statement relates to corporate relations with ex-employees, not Plaintiff's financial position, business methods, fraud, or mismanagement. *See, e.g.*, *Am. Int'l Hosp. v. Chi. Tribune Co.*, 136 Ill. App. 3d 1019, 1024, 1025 (1985) (finding statements that plaintiff "has lost standing in the community and its public image is marred … not actionable *per se*, as they do not assail plaintiff's business or financial methods, or accuse it of fraud or mismanagement"); *Garber-Pierre Food Prods., Inc. v. Crooks* 78 Ill. App. 3d 356, 360-61 (1979) ("[D]efendant's language essentially amounted to criticism of plaintiff's policy decision regarding prices and delivery of goods…rather than an impugning of plaintiff's business reputation").

III. Plaintiff's Allegations of Civil Conspiracy Are Insufficient

Plaintiff's civil conspiracy claim is based on insufficient, conclusory allegations. Merely characterizing a combination of acts as a conspiracy is insufficient to withstand a motion to dismiss. *Reuter v. MasterCard Int'l, Inc.*, 397 Ill. App. 3d 915, 928 (2010). Plaintiff claims that it has properly pled a conspiratorial agreement between FourKites and the email sender(s) "because, among other reasons, the complaint alleges that the Google email accounts were set up with a recovery phone number that traces to Defendant FourKites, a FourKites computer network accessed the emails, and third-party Jane Doe used a device belonging to her (or him) to access

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FILED DATE: 3/5/2021 3:18 PM 2020L004183

those email accounts." These allegations do not show FourKites ***knowingly*** entering into a scheme with the sender(s) to commit an unlawful act. *See Adcock v. Brakegate, Ltd.*, 206 Ill.Dec. 636, 645 N.E.2d 888 (1994) ("conspiracy requires proof that a defendant knowingly and voluntarily participates in a common scheme to commit an unlawful act or a lawful act in an unlawful manner").

Additionally, Plaintiff argues that a corporation can conspire with its own agents, yet the case Plaintiff cites – *Bilut v. Nw. Univ.*, 296 Ill. App. 3d 42, 50 (1998) – held that "the circuit court did not err in finding in accordance with the general rule, as a matter of law, that defendants as employer and employee were legally incapable of conspiring with one another." *Bilut* does recognize that "the exception to this rule is where the interests of a separately incorporated agent diverge from the interests of the corporate principal and the agent at the time of the conspiracy is acting beyond the scope of his authority or for his own benefit, rather than that of the principal. *Id*. However, *Bilut* held that facts supporting this exception must be pled in the complaint in order to survive dismissal. *Id.*

Finally, Plaintiff has not pled any facts showing an injury caused by FourKites or even the conspiracy. Plaintiff's sole allegation on this point is it "has been injured by the Conspiracy and the tortious acts undertaken pursuant to the Conspiracy." *See* Complaint, at ¶ 78. Plaintiff's Complaint is devoid of any factual allegations setting forth the injury it suffered and how such injury was caused by FourKites. *See Reuter,* 397 Ill. App. 3d at 928 (dismissing complaint when "the plaintiff failed to allege that he suffered any damages as a result of a tort committed in furtherance of the alleged conspiracy") and *Recio v. GR-MHA Corp.*, 366 Ill. App. 3d 48, 61 (1st Dist. 2006) ("[P]roximate cause is still a required element of the cause of action for conspiracy."). Count III must be dismissed because Plaintiff has not pled injury or causation.

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CONCLUSION

Wherefore, FourKites respectfully requests that the Court grant its Motion to Dismiss and dismiss Plaintiff's Complaint with prejudice.

Date: March 5, 2021

Respectfully submitted,

/s/ Scott M. Gilbert

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2021, a copy of the foregoing was served upon counsel of record through the Court's efiling system and by e-mail to:

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/s/ Scott M. Gilbert

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**IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION**

PROJECT44, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2020-L-4183
	)	
FOURKITES, INC., et al.,	)	Calendar Y
	)	
Defendants.	)	
	)	
	)	

PLAINTIFF PROJECT44, INC.'S SUR-REPLY TO DEFENDANT FOURKITES, INC.'S MOTION TO DISMISS

project44 submits this Sur-Reply to address incorrect statements of fact and law made in FourKites's Reply, so as to avoid confusion of the issues before the Court.

project44 has Identified a Crime.

FourKites's Reply states that "Plaintiff asserts that the statement [in the May 19th email] imputes the commission of a crime to Plaintiff, but it does not identify what crime that might be." (Reply at 6.) This is simply untrue, as paragraph 18 of project44's Complaint states that:

> The reference to "Chicago Mafia" conveys the idea that when project44 "silence[s] folks," they do so with threats of violence or other intimidation, a crime in Illinois. (*See* 720 ILCS 5/12-6) (stating that, *inter alia*, "[i]ntimidation is a Class 3 felony.")

(Complaint at ¶¶ 18; 48.; *see also* Opposition at 9.)

FourKites Misapplies the *Vee See* Case.

FourKites claims – for the first time in its Reply – that the holding in *Vee See Constr. Co. v. Jensen & Halsted, Ltd.*, 79 Ill. App. 3d 1084 (1st Dist. 1979), confirms that statements that project44 intimidated its employees are not defamatory. (*See* Reply at 7.) However, *Vee See* relies on *Garber-Pierre Food Prod., Inc. v. Crooks*, 78 Ill. App. 3d 356, 359 (1st Dist. 1979), which makes clear that this limitation applies only to statements "defaming the plaintiff in its trade or

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FILED DATE: 3/31/2021 5:27 PM 2020L004183

business," and that "words imputing the commission of a criminal offense" are separately actionable. *Vee See*, 79 Ill. App. 3d at 1089; *See also Solaia Tech., LLC v. Specialty Pub. Co.*, 221 Ill. 2d 558, 594 (2006).

project44 Makes no Reference to Murder in their Opposition.

FourKites's Reply states that "[i]n its opening brief, Plaintiff offered a number of possible crimes to which the statement might refer, including murder," yet the only crime identified in the Opposition is intimidation. (Reply at 6-7; *see also* Opposition at 9.) FourKites's reference to project44's "opening brief" is also puzzling, since this is Defendant's motion. (Reply at 6-7.)

The "Evidence Outside the Email" Confirms Theranos is Well-Known to the Public.

FourKites's claim that the emails' references to Theranos are not defamatory, because project44 "need[s] to cite evidence outside the email itself to *explain* what 'theranos' means" is a red herring. (Reply at 6.) The outside citations to Theranos in the Complaint were included not because the matter required explanation, but rather to show that the Theranos case is well-known to the public. (*See* Complaint at ¶¶ 23; 30.) As project44 explained in its Opposition, comparisons to a "national story of this magnitude" need not be ignored by the Court and are defamatory. (Opposition at 8-9.) Given this, as well as the fact that, in reviewing a motion to dismiss, all allegations in the complaint must be accepted as true, FourKites's argument must be rejected.

project44 Does Contest the References to "Contracts" and "CFO departure."

FourKites's assertion that "Plaintiff does not contest the facts of these contracts or of the CFO's departure" referenced in the May 19th email is patently false. project44's Complaint and Opposition directly contest the factual inaccuracies made in these statements. (Reply at 4; *see also* Complaint at ¶¶ 20-21; 48; 58; Opposition at 10-11.)

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FILED DATE: 3/31/2021 5:27 PM 2020L004183

The Multiple Statements Made in the May 19th Email are Related.

FourKites's claim that the statements made in the May 19th email are "not in any way connected" is also incorrect. (Reply at 4.) This argument – raised for the first time in FourKites's Reply – ignores the detailed explanation provided by project44 in its Complaint as to why these statements are connected, including, *inter alia*, the fact that the statements were made in an email titled "Accounting improprieties at P44." (Complaint at ¶¶ 14-24; Ex. A.)

CONCLUSION

WHEREFORE, for these reasons, as well as the reasons set forth in its Response in Opposition, project44 respectfully requests that FourKites's Motion to Dismiss be DENIED.

Dated: March 31, 2021

Respectfully Submitted,

By: /s/ Peter G. Hawkins
One of the Attorneys for project44, Inc.

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☐ **THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION UNDER RULE 311(a).**

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY **DEPARTMENT,** LAW **DIVISION/DISTRICT**

PROJECT44, INC.

Plaintiff/ ◉ Appellant ○ Appellee

v.

FOURKITES, INC., and JANE DOE, and JOHN DOE #1, and JOHN DOE #2, and JOHN DOES #3-25

Defendant/ ○ Appellant ◉ Appellee

Reviewing Court No.: ____________

Circuit Court No.: 2020-L-004183

PLAINTIFF/APPELLANT PROJECT44, INC.'S **NOTICE OF APPEAL**

(Check if applicable. See IL Sup. Ct. Rule 303(a))(3).

☐ Joining Prior Appeal ☐ Separate Appeal ☐ Cross Appeal

Appellant's Name: project44, Inc.

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○ Pro Se 99500

Name: Actuate Law LLC/Douglas A. Albritton

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City: Chicago

State: IL Zip: 60661

Telephone: 312-579-3108

Primary Email: doug.albritton@actuatelaw.com

Appellee's Name: FourKites, Inc.

◉ Atty. No.: 47375
○ Pro Se 99500

Name: Polsinelli PC/Scott M. Gilbert

Address: 150 North Riverside Plaza, Suite 3000

City: Chicago

State: IL Zip: 60606

Telephone: 312-819-1900

Primary Email: sgilbert@polsinelli.com

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An appeal is taken from the order or judgment described below:

Date of the judgment/order being appealed: 4/26/21

Name of judge who entered the judgment/order being appealed: Hon. James E. Snyder

Relief sought from Reviewing Court:

P a nt ff/Appe ant pro ect44, Inc. w ask the Appe ate Court to reverse the C rcu t Court's Apr 26, 2021 order grant ng

Defendant/Appe ee FourK tes Inc.'s Mot on to D sm ss P a nt ff's Comp a nt and d sm ss ng a counts of pro ect44 Inc.'s

comp a nt w th pre ud ce, vacate the udgment, and for such other and further re ef as the Appe ate Court deems proper.

I understand that a *"Request for Preparation of Record on Appeal"* form (CCA 0025) must be completed and the initial payment of $70 made prior to the preparation of the Record on Appeal. The Clerk's Office will <u>not</u> begin preparation of the ROA until the Request form and payment are received. Failure to request preparation of the ROA in a timely manner, i.e., at least 30 days before the ROA is due to the Appellate Court, may require the Appellant to file a request for extension of time with the Appellate Court. A *"Request for Preparation of Supplemental Record on Appeal"* form (CCA 0023) must be completed prior to the preparation of the Supplemental ROA.

/s/ Douglas A. Albritton

To be signed by Appellant or
Appellant's Attorney

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No. 1-21-0575

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PROJECT44, INC.,	)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellant,	)	Cook County, Illinois, County
	)	Department, Law Division
v.	)	
	)	Circuit Court No. 2020-L-004183
FOURKITES, INC.,	)	
	)	The Honorable James E. Snyder
Defendant-Appellee.	)	Judge Presiding
	)	
	)	Notice of Appeal Filed:
	)	May 20, 2021

TABLE OF CONTENTS

RECORD ON APPEAL

Tab	Document	Filed/Entered	Record Page
1	Docket List		C 6 V1
2	Affidavit Pursuant to Illinois Supreme Court Rule 222 (B)	April 13, 2020	C 14 V1
3	Exhibit A to Complaint	April 13, 2020	C 16 V1
4	Exhibit B to Complaint	April 13, 2020	C 18 V1
5	Exhibit C to Complaint	April 13, 2020	C 21 V1
6	Exhibit D to Complaint	April 13, 2020	C 24 V1
7	Exhibit E to Complaint	April 13, 2020	C 28 V1
8	Exhibit F to Complaint	April 13, 2020	C 32 V1
9	Exhibit G to Complaint	April 13, 2020	C 34 V1

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Tab	Document	Filed/Entered	Record Page
10	Exhibit H to Complaint	April 13, 2020	C 42 V1
11	Exhibit I to Complaint	April 13, 2020	C 46 V1
12	Exhibit J to Complaint	April 13, 2020	C 50 V1
13	Exhibit K to Complaint	April 13, 2020	C 55 V1
14	Exhibit L to Complaint	April 13, 2020	C 61 V1
15	Exhibit M to Complaint	April 13, 2020	C 64 V1
16	Exhibit N to Complaint	April 13, 2020	C 66 V1
17	Exhibit O to Complaint	April 13, 2020	C 70 V1
18	Exhibit P to Complaint	April 13, 2020	C 79 V1
19	Exhibit Q to Complaint	April 13, 2020	C 81 V1
20	Exhibit R to Complaint	April 13, 2020	C 88 V1
21	Exhibit S to Complaint	April 13, 2020	C 94 V1
22	Civil Cover Sheet to Complaint	April 13, 2020	C 114 V1
23	Exhibit T to Complaint	April 13, 2020	C 115 V1
24	Exhibit U to Complaint	April 13, 2020	C 133 V1
25	Exhibit V to Complaint	April 13, 2020	C 135 V1
26	Complaint	April 13, 2020	C 137 V1
27	Summons	April 13, 2020	C 156 V1
28	E Notice	April 15, 2020	C 159 V1
29	Summons	April 15, 2020	C 160 V1
30	Affidavit of Service	April 22, 2020	C 163 V1
31	Notice of Filing for Affidavit of Service	April 22, 2020	C 164 V1
32	Appearance of Scott M. Gilbert for Defendant Fourkites Inc.	May 15, 2020	C 166 V1

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Tab	Document	Filed/Entered	Record Page
33	Defendant Fourkites Inc.'s Agreed Motion for Extension	May 15, 2020	C 168 V1
34	Order Granting Defendant's Agreed Motion for Extension	May 18, 2020	C 173 V1
35	E Notice	May 27, 2020	C 174 V1
36	Order Granting Defendant's Unopposed Motion for Extension	June 05, 2020	C 175 V1
37	Defendant Fourkites Inc.'s Unopposed Motion for Extension	May 15, 2020	C 176 V1
38	Cook County Sheriff's Affidavit of Service	June 12, 2020	C 181 V1
39	Plaintiff's Motion to Transfer an Action Properly Filed	June 18, 2020	C 183 V1
40	Notice of Motion for Motion to Transfer	June 18, 2020	C 186 V1
41	Order Granting Defendant's Unopposed Motion for Extension	June 22, 2020	C 189 V1
42	Defendant Fourkites Inc.'s Unopposed Motion for Extension	June 22, 2020	C 190 V1
43	E Notice	June 23, 2020	C 195 V1
44	Order Granting Defendant's Unopposed Motion for Extension	July 06, 2020	C 196 V1
45	Defendant's Unopposed Motion for Extension	July 06, 2020	C 197 V1
46	Order Granting Defendant's Unopposed Motion for Extension	Aug. 05, 2020	C 202 V1
47	Defendant's Unopposed Motion for Extension	Aug. 05, 2020	C 203 V1
48	Order Granting Defendant's Unopposed Motion for Extension	Sept. 21, 2020	C 208 V1

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Tab	Document	Filed/Entered	Record Page
49	Defendant's Unopposed Motion for Extension	Sept. 21, 2020	C 209 V1
50	Defendant's Motion to Dismiss Plaintiff's Complaint	Oct. 13, 2020	C 214 V1
51	Order	Oct. 15, 2020	C 227 V1
52	Order	Oct.16, 2020	C 228 V1
53	Exhibit A to Defendant's Unopposed Motion for Extension	Nov. 5, 2020	C 229 V1
54	Defendant's Unopposed Motion for Extension	Nov. 5, 2020	C 231 V1
55	Order	Nov. 09, 2020	C 234 V1
56	Exhibit A to Defendant's Unopposed Motion for Extension	Nov. 19, 2020	C 236 V1
57	Defendant's Unopposed Motion for Extension	Nov. 19, 2020	C 238 V1
58	Order	Nov. 24, 2020	C 241 V1
59	Exhibit A to Defendant's Unopposed Motion for Extension	Dec. 21, 2020	C 243 V1
60	Defendant's Unopposed Motion for Extension	Dec. 21, 2020	C 245 V1
61	Order	Dec. 28, 2020	C 248 V1
62	Exhibits to Defendant's Motion to Dismiss Plaintiff's Complaint	Jan. 20, 2021	C 249 V1
63	Defendant's Motion to Dismiss Plaintiff's Complaint	Jan. 20, 2021	C 268 V1
64	Order	Feb. 03, 2021	C 281 V1
65	Notice of Filing for Subpoena in a Civil Matter	Feb. 04, 2021	C 283 V1

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Tab	Document	Filed/Entered	Record Page
66	Jane Doe's Motion to Appear Under a Fictitious Name	Feb. 17, 2021	C 285 V1
67	Jane Doe's Petition for Intervention	Feb. 17, 2021	C 329 V1
68	Notice of Motion for Jane Doe's Motion to Appear Under Fictitious Name	Feb. 17, 2021	C 428 V1
69	Exhibit 1 to Plaintiff's Response in Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint	Feb. 22, 2021	C 432 V1
70	Notice of Filing for Plaintiff's Response in Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint	Feb. 22, 2021	C 532 V1
71	Plaintiff's Response in Opposition to Defendant's Motion to Dismiss Plaintiff's Complaint	Feb. 22, 2021	C 534 V1
72	Notice of Motion for Jane Doe's Motion to Appear Under Fictitious Name	Mar. 02, 2021	C 550 V1
73	Order	Mar. 03, 2021	C 553 V1
74	Defendant's Reply in Support of Its Motion to Dismiss	Mar. 05, 2021	C 555 V1
75	Notice of filing for Plaintiff's Response in Opposition to Jane Doe's Petition for Intervention	Mar. 08, 2021	C 565 V1
76	Plaintiff Project44 Inc.'s Response in Opposition to Jane Doe's Petition for Intervention	Mar. 08, 2021	C 567 V1
77	Agreed Order	Mar. 09, 2021	C 581 V1
78	Plaintiff's Motion for Leave to File A Sur-Reply to Defendant's Motion to Dismiss and Sur-Reply	Mar. 11, 2021	C 583 V1
79	Defendant's Unopposed Motion for Leave to File Oversized Brief	Mar. 12, 2021	C 588 V1

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Tab	Document	Filed/Entered	Record Page
80	Intervenor Jane Doe's Reply to Plaintiff's Opposition to Jane Doe's Petition for Intervention	Mar. 26, 2021	C 591 V1
81	Notice of filing for Intervenor Jane Doe's Reply to Plaintiff's Opposition to Jane Doe's Petition for Intervention	Mar. 26, 2021	C 601 V1
82	Agreed Order	Mar. 26, 2021	C 604 V1
83	Plaintiff's Sur-Reply to Defendant's Motion to Dismiss	Mar. 31, 2021	C 606 V1
84	Notice of filing for Plaintiff's Sur-Reply to Defendant's Motion to Dismiss	Mar. 31, 2021	C 609 V1
85	Order of the Court	March 31, 2021	C 611 V1
86	Notice of Filing for Report of Proceedings	May 18, 2021	C 612 V1
87	Notice of Appeal	May 20, 2021	C 614 V1
88	Notice of Filing for Notice of Appeal and Request for Preparation of Record on Appeal	May 20, 2021	C 616 V1
89	Request for Preparation of Record on Appeal	May 20, 2021	C 618 V1
90	Notice of Filing for Request of Proceedings (Transcripts)	May 26, 2021	C 620 V1
91	Request of Proceedings (Transcripts)	May 26, 2021	C 622 V1

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REPORT OF PROCEEDINGS

Tab	Document	Filed/Entered	Record Page
92	Transcript of April 21, 2021 Hearing	July 1, 2021	R 2 – R 60 V2

SUPPLEMENT TO RECORD ON APPEAL

Tab	Document	Filed/Entered	Record Page
93	Request for Preparation of Supplement Record on Appeal	Aug. 11, 2021	SUP C 4
94	Stipulation to Supplement Record on Appeal	Aug. 11, 2021	SUP C 6
95	Order Granting Defendant's Motion to Dismiss Plaintiff's Complaint	April 26, 2021	SUP C 8

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No. 1-21-0575

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PROJECT44, INC.,	)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellant,	)	Cook County, Illinois, County
	)	Department, Law Division
v.	)	
	)	Circuit Court No. 2020-L-004183
FOURKITES, INC.,	)	
	)	The Honorable James E. Snyder
Defendant-Appellee.	)	Judge Presiding
	)	
	)	Notice of Appeal Filed:
	)	May 20, 2021

NOTICE OF FILING

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PLEASE TAKE NOTICE that on August 25, 2021, the undersigned filed the **BRIEF AND ARGUMENT OF PLAINTIFF-APPELLANT PROJECT44, INC., and APPENDIX TO BRIEF OF PLAINTIFF-APPELLANT PROJECT44, INC**. of Plaintiff-Appellant project44, Inc. with the Clerk of the Illinois Appellate Court, First District, a copy of which is hereby served upon you.

Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

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Dated: August 25, 2021

/s/ Peter G. Hawkins
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One of the Attorneys for project44, Inc.

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No. 1-21-0575

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PROJECT44, INC.,	)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellant,	)	Cook County, Illinois, County
	)	Department, Law Division
v.	)	
	)	Circuit Court No. 2020-L-004183
FOURKITES, INC.,	)	
	)	The Honorable James E. Snyder
Defendant-Appellee.	)	Judge Presiding
	)	
	)	Notice of Appeal Filed:
	)	May 20, 2021

CERTIFICATE OF SERVICE

TO: Scott M. Gilbert
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I, Peter G. Hawkins, an attorney, certify that on August 25, 2021, I served the foregoing Plaintiff-Appellant project44, Inc.'s **BRIEF AND ARGUMENT OF PLAINTIFF-APPELLANT PROJECT44, INC., and APPENDIX TO BRIEF OF PLAINTIFF-APPELLANT PROJECT44, INC**. upon counsel listed above by e-mail and by the Odyssey eFileIL Electronic Filing Service Provider.

Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

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/s/ Peter G. Hawkins
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No. 1-21-0575

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

Project44, Inc.,	)	On Appeal from the Circuit Court of
	)	Cook County, Illinois, County
Plaintiff-Appellant,	)	Department, Law Division
	)	
v.	)	Case No. 2020-L-4183
	)	
FourKites, Inc.,	)	The Honorable James E. Snyder,
	)	Judge Presiding
Defendant -Appellee.	)	

BRIEF AND ARGUMENT OF DEFENDANT-APPELLEE FOURKITES, INC.

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

PRELIMINARY STATEMENT **1**

Restatement (Second) of Torts 1

ISSUE PRESENTED FOR REVIEW **2**

STATEMENT OF FACTS **2**

735 ILCS 5/2-615 3

STANDARD OF REVIEW **3**

735 ILCS 5/2-615 3

Marshall v. Burger King Corp.,
222 Ill.2d 422, 856 N.E.2d 1048 (2006) 3

Wakulich v. Mraz,
203 Ill.2d 223, 785 N.E.2d 1155 (2005) 4

Vernon v. Schuster,
179 Ill.2d 338, 688 N.E.2d 1172 (1997) 4

Napleton v. Village of Hinsdale,
229 Ill.2d 296, 891 N.E.2d 839 (2008) 4

Kilburg v. Mohiuddin,
2013 IL App (1st) 113408, 990 N.E.2d 292 4

Sheffler v. Commonwealth Edison Co.,
399 Ill.App.3d 51, 923 N.E.2d 1259 (2010) 4

Geick v. Kay,
236 Ill.App.3d 868, 603 N.E.2d 121 (1992) 4

ARGUMENT **4**

I. Statements About A Corporation Made Solely To An Officer And/Or Director Of The Corporation Have Not Been Published 4

Restatement (Second) of Torts
§ 577, cmt. b (1977) 4, 5

Stone v. Paddock Publications, Inc.,
2011 IL App (1st) 093386, 961 N.E.2d 380 4

Restatement (Second) of Torts
§ 577, cmt. a (1977) 5

Emery v. Ne. Ill. Reg'l Commuter R.R. Corp.,
377 Ill.App.3d 1013, 800 N.E.2d 1002 (1st Dist. 2007)....................5

Small v. Sussman,
306 Ill.App.3d 639, 713 N.E.2d 1216 (1st Dist. 1999)....................5

Manufacturers' Exhibition Bldg. Co. v. Landay,
219 Ill. 168, 76 N.E. 146 (1905)....................5

TABFG, LLC v. Pfeil,
746 F.3d 820 (7th Cir. 2014) 5

Bryson v. News Am. Publications, Inc.,
174 Ill.2d 77, 672 N.E.2d 1207 (1996)....................6

II. The Only Case Law Directly Addressing This Specific Issue Reaches The Same Conclusion....................7

Fausett v. American Resolution Management Corp.,
542 F. Supp. 1234 (D. Utah 1982)....................7, 8, 9, 12

Hoch v. Loren,
273 So.3d 56 (Fla. Dist. Ct. App. 2019) 8, 9

Advantage Personnel Agency, Inc. v. Hicks & Grayson, Inc.,
447 So.2d 330 (Fla. Dist. Ct. App. 1984) 9, 10, 12

805 ILCS 5/8.05....................10

Del. Code Ann. tit. 8, § 141(a)....................11

Kolin v. Leitch,
351 Ill. App. 66, 113 N.E.2d 806 (1st Dist. 1953)....................11

30 River Ct. E. Urb. Renewal Co. v. Capograsso,
383 N.J. Super. 470, 892 A.2d 711 (App. Div. 2006) 11, 12

Jones v. Golden Spike Corporation,
623 P.2d 970 (Nev. 1981)....................12

III. Appellant's Authorities Are Inapposite And Readily Distinguishable 12

Fausett v. American Resolution Management Corp.,
542 F. Supp. 1234 (D. Utah 1982)....................12, 16, 17, 18

Popko v. Continental Casualty Company,
355 Ill.App.3d 257 (1st Dist. 2005) 13, 15

Missner v. Clifford,
393 Ill.App.3d 751, 914 N.E.2d 540 (1st Dist. 2009).............13, 14, 15

Simpson v. Mars, Inc.,
929 P.2d 966 (Nev. 1997) 14, 15

Sleepy's LLC v. Select Comfort Wholesale Corp.,
909 F.3d 519 (2d Cir. 2018)...14, 15

Teichner v. Bellan,
7 A.D.2d 247, 181 N.Y.S.2d 842 (4th Dept. 1959) 15

Penn Warranty Corp. v. DiGiovanni,
10 Misc.3d 998, 810 N.Y.S.2d 807 (2005)...................................15, 16

Kennedy v. James Butler, Inc.,
245 N.Y. 204, 156 N.E. 666 (1927)..16

Jones v. Britt Airways, Inc.,
622 F. Supp. 389 (N.D. Ill. 1985) 16

Jones v. Golden Spike Corporation,
623 P.2d 970 (Nev. 1981) 16

W. Prosser & W. Keeton, Torts
§ 113 (5th ed. 1984)..17

Restatement (Second) of Torts
§ 577, cmt. b (1977). 18

IV. Appellant's Focus On The Sender's Intent Is A Red Herring 18

Restatement (Second) of Torts
§ 577, cmt. b (1977)...19

Devooght v. Iowa Health Systems,
No. 18-cv-4197, 2021 WL 2021437 (C.D. Ill. May 20, 2021) 19

Solaia Tech., LLC v. Specialty Pub. Co.,
221 Ill.2d 558, 852 N.E.2d 825 (2006) 19

V. Accepting Appellant's Position Would Needlessly Extend The Scope Of Defamation Claims For Corporate Plaintiffs 19

Emery v. Ne. Ill. Reg'l Commuter R.R. Corp.,
377 Ill.App.3d 1013, 800 N.E.2d 1002 (1st Dist. 2007)................20, 22

Cweklinsky v. Mobil Chemical Co.,
267 Conn. 210, 837 A.2d 759 (2004) 20, 22

Van Horne v. Muller,
185 Ill.2d 299, 705 N.E.2d 898 (1998) 21

CONCLUSION 22

PRELIMINARY STATEMENT

Plaintiff-Appellant project-44, Inc. ("**Appellant**") asks this Court to eliminate the publication requirement for defamation cases involving corporate plaintiffs. This Court should decline the invitation, and instead preserve the critical threshold function the publication requirement plays regarding the possibility of reputational harm.

There is no dispute that a statement made solely to the subject of the statement has not been "published," and therefore cannot be defamatory. This is because, in such instance, there can be no harm to the target's reputation – the sole interest the tort of defamation seeks to protect. There is similarly no dispute that a corporation can act only through its officers and directors. Therefore, when a corporation is the subject of allegedly defamatory statements, and the statements are made solely to that corporation's officers or directors, the statements cannot be considered "published" because there has been no reputational harm. Certainly, such statements may cause anger, distress, or self-doubt, but the corporation's standing in the community cannot possibly have been diminished. As a result, no defamation can have occurred.

In its appeal, Appellant tries to blur this otherwise clear line of reasoning by focusing its argument on portions of the Restatement (Second) of Torts and case law addressing communications between individuals who were *not* the subject of the communications at issue. However, this analysis misses the mark and fails to address the issue before this Court. This is not an intra-company communication case. Rather, it is a case about whether communications regarding a corporation made to those individuals who serve as the human embodiment of that corporation have been published for purposes of a defamation claim.

If this case involved comments made about a single-member LLC to the sole member of that LLC, the answer would be obvious – no publication has occurred. The answer should be no less obvious in this instance where the statements were made to members of Appellant's C-Suite and Board of Directors. To hold otherwise would effectively eliminate the publication requirement in any defamation case involving a corporate plaintiff, and thereby remove any meaningful consideration as to whether statements at issue could possibly have injured the corporation's reputation. Such a holding would expand the tort of defamation well beyond its intended purpose – protection of one's reputation – and this Court should refuse to do so.

ISSUE PRESENTED FOR REVIEW

Whether statements about a corporation made to officers and directors of the corporation are "published" such that those statements can serve as the basis for a defamation claim by the corporation.

STATEMENT OF FACTS

This litigation ultimately revolves around two anonymous emails that were sent to three members of Appellant's leadership regarding Appellant's business practices. The first was sent to two members of Appellant's Board of Directors from the email address "kenadams8558@gmail.com" on May 19, 2019 ("**Adams Email**"). (C 17 V1).[1] The second was sent to Appellant's Chief Revenue Officer ("**CRO**") from the email address "jshort5584@gmail.com" on May 27, 2019 ("**Short Email**" and collectively with the Adams Email, the "**Emails**"). (C 33 V1). Appellant initially filed a Verified Petition for

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[1] Citations herein to "C" are to materials contained in the Record on Appeal, while citations to "SUP C" are to materials contained in the Supplemental Record on Appeal.

Discovery (the "**Petition**") in the Circuit Court of Cook County on May 30, 2019 in order to subpoena AT&T and Google to disclose information regarding the identity of the individual(s) who sent the Emails. (C 35–41 V1).

While the Petition was pending, and with the applicable statute of limitations close to expiring, Appellant filed the underlying action against Appellee and unknown individuals in the Circuit Court of Cook County (the "**Complaint**"). (C 137–55 V1). The Complaint consisted of three counts: Counts I and II – Defamation Per Se, and Count III – Civil Conspiracy. (*Id.*at ¶¶ 48–68). Appellee filed a Motion to Dismiss pursuant to 735 ILCS 5/2-615 on January 20, 2021 (the "**Motion**"). (C 268–80 V1). The Motion argued that Appellant's defamation claims failed because (i) the statements at issue were not published and (ii) the statements were not defamatory. (*Id.* at 270–76). The Motion also argued that Appellant's civil conspiracy claim failed because (i) there was no evidence of a conspiratorial act, (ii) a company cannot conspire with itself, and (iii) there was no underlying tortious act because the defamation claims failed. (*Id.* at 276–78).

Although FourKites has challenged, and continues to challenge, whether the underlying statements were defamatory and its involvement in any conspiratorial activity, those issues became moot because Judge Snyder ultimately agreed that the statements at issue were not published to a third party, and therefore could not support a claim for defamation. Without any underlying tortious act, the civil conspiracy claim also failed. Based on those conclusions, the Motion was granted on April 26, 2021 and this appeal followed. (SUP C 8–9).

STANDARD OF REVIEW

This Court reviews *de novo* the Circuit Court's dismissal of Appellant's complaint under 735 ILCS 5/2-615. *Marshall v. Burger King Corp.*, 222 Ill.2d 422, 429, 856 N.E.2d

1048 (2006) (*citing Wakulich v. Mraz*, 203 Ill.2d 223, 228, 785 N.E.2d 1155 (2005)). "A section 2-615 motion attacks the legal sufficiency of a complaint." *Vernon v. Schuster*, 179 Ill.2d 338, 344, 688 N.E.2d 1172 (1997). Even though in reviewing a complaint a court must take "all well-pleaded facts and all reasonable inferences" as true and "in the light most favorable to the plaintiff," because Illinois is "a fact-pleading jurisdiction, a plaintiff must allege facts, not mere conclusions, to establish…a viable cause of action." *Napleton v. Village of Hinsdale*, 229 Ill.2d 296, 305, 891 N.E.2d 839 (2008) (*citing Vernon*, 179 Ill.2d at 344). A claim should be dismissed where "it appears that plaintiff cannot recover under any set of facts." *Kilburg v. Mohiuddin*, 2013 IL App (1st) 113408, ¶ 20, 990 N.E.2d 292 (*citing Sheffler v. Commonwealth Edison Co.*, 399 Ill.App.3d 51, 59, 923 N.E.2d 1259 (2010)). Additionally, this Court may affirm a correct decision for any reason appearing in the record regardless of the basis relied upon by the trial court. *Geick v. Kay*, 236 Ill. App. 3d 868, 873, 603 N.E.2d 121, 125 (1992).

ARGUMENT

I. Statements About A Corporation Made Solely To An Officer And/Or Director Of The Corporation Have Not Been Published

The primary issue before this Court is one of publication. The tort of defamation is intended to protect against reputational harm caused by false statements. *See* Restatement (Second) of Torts (the "**Restatement**") § 577, Comment *b* (1977) ("The law of defamation primarily protects *only* the interest in reputation.") (emphasis added). As Illinois courts have explained, a statement is defamatory if it harms an individual's reputation by lowering the individual in the eyes of his community or deters the community from associating with him. *Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 093386, ¶ 24, 961 N.E.2d 380, 391. It is publication that creates the possibility of reputational harm.

Consequently, publication of the defamatory matter to a third-party is essential to liability. Restatement § 577, Comment *a*. This makes sense because "unless the defamatory matter is communicated to a third person there has been no loss of reputation, since reputation is the estimation in which one's character is held by his neighbors or associates." *Id.*, Comment *b*; *Emery v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 377 Ill.App.3d 1013, 1022, 800 N.E.2d 1002 (1st Dist. 2007) (The publication requirement is *not* satisfied, however, when the communication is made *to the person defamed*).

To properly evaluate the issue of publication where the allegedly defamed party is a corporation rather than an individual, the Court should remember the truism long recognized by Illinois courts: "It is axiomatic that a corporation can act only through its agents." *See Small v. Sussman*, 306 Ill.App.3d 639, 647, 713 N.E.2d 1216 (1st Dist. 1999). If this case involved a single-member limited liability company, there would be no question that a communication to the lone member about the company would not constitute a publication even though the member is an agent of the company because there could be no reputational harm.

While a larger company like the Appellant in this case presents a different picture at first blush, the legal standing of a corporation dictates the same result. This is because in Illinois a corporation acts through its managing principals and governing board. *See, e.g.*, *Manufacturers' Exhibition Bldg. Co. v. Landay*, 219 Ill. 168, 174-75, 76 N.E. 146 (1905) (a corporation is an "artificial being[]," which "can act only through its board of directors and officers"); *TABFG, LLC v. Pfeil*, 746 F.3d 820, 825 (7th Cir. 2014) (only managers, directors and officers of a corporation are authorized to act on the corporation's

behalf). As a result, a communication to an officer or member of a company's board is the same as a communication to the company itself.

Here, the two Emails at issue were sent to P44's Chief Revenue Officer and two members of its Board of Directors. *See* Appellant Brief, p. 1. Appellant's position begs the question: If members of a company's C-Suite and Board of Directors are not the company, then who is? They are neither the company's neighbor nor its associate. They are not some outside member of the community – they *are* the company. To accept the Appellant's position would be to hold that even comments to a company's senior leadership constitute publication, and thereby eliminate the publication requirement altogether in defamation claims brought by legal entities.

That clearly is not the correct result as it would render meaningless the fundamental issue at the core of a defamation claim – whether reputational harm occurred. That is the crux of what is before this court – whether the communications at issue could have caused reputational harm. If the publication requirement is to have any meaning in defamation cases related to corporate plaintiffs, the answer to that question must be no. Otherwise, this Court would eliminate the threshold requirement that the communication create some basis for reputational harm.

This conclusion is even clearer in a defamation *per se* case like this one. In a claim for defamation *per se*, reputational harm is presumed and there is no need to plead or prove actual damage. *Bryson v. News Am. Publications, Inc.*, 174 Ill.2d 77, 87, 672 N.E.2d 1207, 1214 (1996). As a result, the publication analysis in cases involving corporate plaintiffs is critical – without it, any *per se* defamation claim by a corporate plaintiff would slingshot past the fundamental issue of reputational harm straight to damages. It is no answer to

assert that reputational harm is a given in *per se* claims because that presumption makes little sense in a scenario like the one now presented to this Court.

Think again of the single-member LLC. Imagine a frustrated customer tells the sole member of the LLC that it applies fraudulent charges and cheats its customers. Because the statement was made exclusively to the sole member of the LLC, no reputational harm could possibly have occurred. Nevertheless, because the statements fall within a *per se* category, reputational harm is presumed, the question of liability consequently falls away and the case proceeds directly to the issue of damages. As a result, the tort of defamation no longer just protects corporate plaintiffs from reputational harm, it protects them from any negative comments.

II. The Only Case Law Directly Addressing This Specific Issue Reaches The Same Conclusion

While, as the Appellant acknowledges, no Illinois court had squarely addressed this issue until Judge Snyder entered the opinion below, courts from other jurisdictions have. Their reasoning is compelling, consistent with the logic of the Restatement on which Appellant focuses the bulk of its argument, and should be adopted here.

The issue was well-articulated by a federal court in Utah in *Fausett v. American Resolution Management Corp.*, 542 F. Supp. 1234 (D. Utah 1982). There, the alleged defamation related to actions of the plaintiff corporation ARMCOR's management and was communicated to two of the company's chief principals. The *Fausett* court correctly recognized that distinctions must be made in the application of the principles of defamation between individuals and corporations "growing largely out of the differences between natural and artificial persons." *Id.* at 1241. In holding that there was no publication, the court reasoned:

> The law of defamation protects against the impugning of one's reputation or causing his alienation from his peers. There simply exists no potential for ARMCOR's reputation to be reduced or for ARMCOR to be alienated from its managers, customers, shareholders, institutional lenders, etc., when the defamatory statements are made to its management. In essence the management is the corporation for purposes of communication. *Id.*

In reaching that conclusion, the *Fausett* court considered both § 113 of Prosser's treatise and Comment *e* to § 577 of the Restatement, on which the Appellant focuses. It did not, as Appellant contends, reject Prosser or Comment *e*; rather it found them to be inapplicable and explained why. Specifically, the court determined that Prosser's statement that publication "may be made to the defendant's own agent, employee or officer, even where the defendant is a corporation" was inapposite because the cases cited in support of this statement relate to corporate defendants where there has been intra-corporation communication. *Id.* at 1242. Likewise, it recognized that cases cited by or relying on Comment *e* of the Restatement and holding that communications to servants or agents of the defamed person or corporation constitute publication were inapplicable because these cases (some of which are detailed later in this brief) discuss the issue of whether statements *from one corporate employee to another employee of the same corporation* constitute publication. Neither of those scenarios were at issue in *Fausett* and they are not at issue here.

More recently, in *Hoch v. Loren*, a 2019 case from the Florida appellate court, the court considered the issue of what constitutes a "publication" for purposes of a defamation claim. 273 So.3d 56 (Fla. App. 2019). In so doing, the court considered a number of scenarios that all coalesce around the issue of who qualifies as a third-party. One of those scenarios was the intra-company communication circumstance on which the Appellant

focuses so much of its argument before this Court, and the *Hoch* court held that intra-company communications are not published. However, there is no need to spend time on whether that portion of its opinion was correct because that is not the scenario before this Court. Critically, on the relevant issue of statements made about a corporate entity to its leadership, the court held there is no publication where "a defamatory statement about a plaintiff corporation is made to a managerial employee of the corporation," because "a statement to an executive/managerial employee of a corporation is a statement to the corporation itself." *Hoch*, 273 So.3d at 58. As a result, "the essential element of publication to a third party is lacking." *Id.*

In reaching its holding, the *Hoch* court cited *Advantage Personnel Agency, Inc. v. Hicks & Grayson, Inc.*, 447 So.2d 330 (Fla. Dist. Ct. App. 1984), another Florida appellate opinion that is concise, but instructive. There, the court addressed a defamation claim based on the assertion that the defendant's corporate president uttered certain slanderous statements concerning the business practices of the plaintiff company in relation to paying its bills. *Advantage Personnel Agency, Inc.*, 447 So.2d at 331. These statements were allegedly made at the conclusion of a business conference to the plaintiff corporation's sales manager. In its opinion, the *Advantage Personnel* court recognized an important factor in this analysis – the role played within the corporation by the individual to whom the allegedly defamatory statements were made. Specifically, the court noted that the outcome might be different in dealing with a lower echelon employee, but that "the rule must necessarily be different where, as here, the statements complained of are made to a corporate executive or managerial employee, such as a sales manager, at the conclusion of a business conference with the said employee. In such a case, the statements are, in effect,

being made to the management of the corporation and thus to the corporation itself in the person of one of its executive or managerial employees." *Id.*

Here, the analysis is even clearer than in *Advantage Personnel*. The statements at issue were not made to a sales manager – they were made to members of Appellant's executive leadership. There may well be room for discussion as to what level of leadership an employee must hold before becoming one-in-the-same with the corporation for purpose of publication, but the Court need not address that issue here. If members of a corporation's C-Suite and Board of Directors are deemed third parties for purposes of the publication analysis, there remains no daylight in which any other corporate representative could be seen differently.

While these opinions are not binding precedent in Illinois, the same logic applies, and they are therefore instructive. If comments to Plaintiff's executive leadership do not constitute statements to the company, then the third-party publication requirement is eviscerated. That result would eliminate the focus on whether there could possibly be reputational harm, thereby rendering any negative comments made to a company subject to a defamation claim by the company.

Contrary to Appellant's assertion, the fact that the two Board members to whom one of the Emails was sent were non-employees is irrelevant to this analysis. This conclusion is made plain by the statutory role of a corporation's board of directors. Specifically, "the business and affairs of the corporation shall be managed by or under the direction of the board of directors." 805 ILCS 5/8.05.[2] As a result, "a corporation acts

[2] While Illinois law is particularly relevant to this analysis, the fact that Appellant is a Delaware corporation does not alter the conclusion, as Delaware law provides: "The business and affairs of every corporation organized under this chapter shall be managed by

only through its officers, and in its dealings with third persons the power of a corporation is lodged in its board of directors." *Kolin v. Leitch*, 351 Ill. App. 66, 70, 113 N.E.2d 806 (1st Dist. 1953). Therefore, the employment status of the Directors in this case is simply irrelevant.

Moreover, because the power of a corporation is "lodged" in its Board members, complaints about the corporation are "implicitly if not explicitly invited." *30 River Ct. E. Urb. Renewal Co. v. Capograsso*, 383 N.J. Super. 470, 480, 892 A.2d 711, 717 (App. Div. 2006). In *Capograsso*, the allegedly defamatory statements came in the form of complaints about a building landlord made to the building concierge by a tenant. *Id.* at 472, 892 A.2d at 713. In finding that there was no publication, the court held that "because the [concierge] is merely a stand-in or conduit for the landlord, the [concierge] is not a 'third party' for defamation purposes. Communications to the [concierge] are in effect communications to the landlord and are not 'published' to a third party." *Id.* at 480, 892 A.2d at 717.

Although *Capograsso* involved a scenario in which the landlord expressly designated the concierge to receive tenant complaints, because the power of a company is "lodged" in its board, the same logic applies here. It defies reason to pretend that members of a corporation's executive leadership who are statutorily authorized to "manage the business affairs" of the corporation would somehow not be authorized to receive complaints about the corporation. Appellant attempts to side-step this conclusion by asserting that the *Capograsso* court did not reach its conclusion until after a factual record had been developed. *See* Appellant Brief, p. 23. This is an accurate statement, but also

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or under the direction of a board of directors, except as may be otherwise provided in this chapter or in its certificate of incorporation." Del. Code Ann. tit. 8, § 141(a).

irrelevant. A record may understandably need to be developed in order to determine whether a concierge qualifies as a third party for publication purposes, but no such record is necessary here given the roles played by those who received the Emails. Again, if a member of a corporation's C-Suite or Board is deemed to be a separate third party from the corporation for purposes of the publication analysis, then there simply is no longer a publication requirement in defamation cases involving a corporate plaintiff.

Appellant's assertions that these opinions rest on "shaky" ground is inaccurate. Plaintiff attempts to undercut the logic underpinning these cases by incorrectly asserting that the holding in *Fausett* was based on *Jones v. Golden Spike Corporation*, 623 P.2d 970, 971 (Nev. 1981), a case from the Supreme Court of Nevada that was subsequently overruled. However, *Fausett* does not cite *Golden Spike* as a basis for its conclusion that Comment *e* is inapplicable to a communication about a corporation made to the corporation's management. Rather, as the *Fausett* court recognized, *Golden Spike* discussed "whether statements from one corporate employee to another employee of the same corporation constitute publication." *Fausett*, 542 F. Supp. at 1242. That is a different issue altogether than the one currently before this Court.

Ultimately, the reasoning of *Fausett*, *Hoch*, *Advantage Personnel* and *Capograsso* makes sense, and operates to maintain rather than eviscerate the third-party publication requirement for defamation claims brought by corporate plaintiffs. The cases relied on by Appellant, on the other hand, are not on-point and are readily distinguishable.

III. Appellant's Authorities Are Inapposite And Readily Distinguishable

Appellant's argument presents this Court with a false choice between the reasoning of *Fausett* on the one hand, and Comment *e* and its "progeny" on the other, asserting that this Court must choose one or the other. In reality, however, the authorities are fully

reconcilable, and the Court is not required to choose between two irreconcilable legal theories to resolve the matter. Instead, this case requires the Court to recognize the salient differences between the circumstance presented here and the scenarios addressed by Comment *e* so that the publication requirement can continue to serve its important role in defamation claims involving corporate plaintiffs.

This is not, as Appellant's repeatedly claim, a case about a corporation "talking to itself." It is a case about someone talking to a corporation about itself. This is a material distinction. Nor does FourKites's argument confuse publication for privilege. Appellant's argument, however, relies on cases involving individual plaintiffs to employ circular logic that avoids the central issue before the Court entirely – who constitutes a "third party" in defamation cases involving a corporate plaintiff.

For example, Appellant's reliance on *Popko v. Continental Casualty Company*, 355 Ill.App.3d 257, 823 N.E.2d 184 (1st Dist. 2005), is misplaced because the case is not analogous. *Popko* concerned whether a supervisor's comments to another supervisor in the workplace about a subordinate can amount to publication. *Popko*, 355 Ill.App.3d at 259, 823 N.E.2d at 186. In other words, the case did not address whether comments about a company made to an officer of the company constitute a publication. Comments about an individual present an entirely different situation from the case at bar because in that instance there is no question that the comments were made to someone other than the party who was allegedly defamed.

Appellant's reliance on *Missner v. Clifford*, 393 Ill.App.3d 751, 914 N.E.2d 540 (1st Dist. 2009), is similarly misplaced. Ultimately, *Missner* is not a case about *whether* a publication occurred, it is a case about *who* published the allegedly defamatory statements.

Missner, 393 Ill.App.3d at 763, 914 N.E.2d at 551. The court referenced Comment *e* in passing, stating: "Additionally, the communication of defamatory material *from a principal to his agent*, as in an attorney-client relationship, also may be a publication." *Id.* That is once again not what is before the Court here. Precisely the opposite of how the power of a corporation is "lodged" in its board, an attorney is *only* authorized to act at the direction of the client – the lawyer is not the human embodiment of the client. In that instance, there is a possibility of reputational harm because the lawyer and the client are two separate individuals. A corporation and its officers are not. As a result, *Missner* offers no guidance here.

The cases Appellant relies on from outside Illinois are similarly inapplicable for the same reason. For example, *Simpson v. Mars, Inc.*, 929 P.2d 966 (Nev. 1997), was brought by an individual whose defamation claim was based on allegations that the defendants told Simpson's co-workers she had sexually harassed co-workers and was dismissed for sexual harassment. *Simpson*, 929 P.2d at 967. Again, there were clearly separate individuals at issue in *Simpson*, where that is not the case here.

The same is true for the Second Circuit's opinion in *Sleepy's LLC v. Select Comfort Wholesale Corp.*, 909 F.3d 519 (2d Cir. 2018). There, the statements at issue were made to "secret shoppers" who had no clear relationship with the plaintiff, with the limited exception of a district manager. *Id.* at 523. However, the Second Circuit did not analyze whether the district manager was of such a position as to be the legal equivalent of the plaintiff corporation, but instead took issue with the district court's more sweeping conclusion that statements "made only to Sleepy's representatives" were not published. *Id.* at 528.

The question before this Court is not so broad. Contrary to Appellant's contention, Judge Snyder did not rule that statements made to *any* executive or managerial employee of the Appellant would not meet the publication standard. *See* Appellant Brief, p. 10, § I. Rather, he held that these specific Emails, which were sent to a member of Appellant's C-Suite and two members of its Board of Directors, were not published. Again, while there may be situations where the position of the employee to whom the statement was made require that it be deemed a publication, this is not that case.

Additionally, as the Second Circuit noted in *Sleepy's*, "the New York Court of Appeals does not appear to have addressed whether statements to a *plaintiff's* agent constitute publication." *Id.* (emphasis in original). The Second Circuit therefore based its opinion on a 1959 decision from a New York appellate court – *Teichner v. Bellan*, 7 A.D.2d 247, 181 N.Y.S.2d 842 (4th Dept. 1959). The issue in *Teichner*, however, was the same as in *Popko*, *Missner* and *Mars*, and therefore irrelevant to the analysis of the issue here. Specifically, the comments at issue were not made to the legal equivalent of the corporation. Rather, they were made to a debt collection company that had been hired by the plaintiff corporation to recover a debt from the defendant on the plaintiff's behalf. *Teichner*, 7 A.D.2d at 248, 181 N.Y.S.2d at 844. As a result, when the *Teichner* Court asserted that the "agent is, in fact, a different entity from the principal," that was literally correct, yet in no way instructive in this matter because the agent was an unaffiliated, separate legal entity from the principal. *Id.* at 249, 845.

Appellant's reliance on *Penn Warranty Corp. v. DiGiovanni*, 10 Misc.3d 998, 810 N.Y.S.2d 807 (2005), is similarly misplaced. There, the statements were published to a website accessible to third parties and to "many of plaintiff's employees." *Penn Warranty*

Corp., 10 Misc.3d at 1004, 810 N.Y.S.2d at 814. While these authorities may discuss the impact of publication to an "agent," the Appellant's reliance on them pays no attention to the context in which the term "agent" is used.

This lack of contextual relevance is further demonstrated by Appellant's reliance on *Kennedy v. James Butler, Inc.*, 245 N.Y. 204, 156 N.E. 666 (1927). Appellant cites *Kennedy* in an effort to undercut the logic of *Fausett*, when in fact the decision does the opposite. As Appellant notes, *Kennedy* is cited by Prosser in support of his assertion that statements to an agent constitute a publication. *See* Appellant Brief, p. 20. But the communication at issue in *Kennedy* was from the company to its agents about an unaffiliated third party. Specifically, the defendant corporation sent a memorandum to each store manager asserting that two brothers of a deceased employee were attempting to profit off their brother's death. *Kennedy.*, 245 N.Y. 204 at 205, 156 N.E.at 666–67. Once again, the case does not evaluate who constitutes a third party where the subject of the communication is a plaintiff corporation, and is therefore irrelevant.

The lack of context underpinning Appellant's argument is also shown by its reliance on *Jones v. Britt Airways, Inc.*, 622 F. Supp. 389 (N.D. Ill. 1985), to support the assertion that the "First District expressly rejected the claim that intra-corporate speech merely constituted 'a corporation talking to itself.'" *See* Appellant Brief, p. 13. This claim demonstrates again that the Appellant is attempting to fight this battle on different facts that those presented by the record. In *Jones*, the plaintiff was an individual and the allegedly defamatory statements were shared with other employees, which is what constituted the publication. *Jones v. Britt Airways, Inc.*, 622 F. Supp. at 391.

Appellant's reliance on Comment *e* of the Restatement to refute the logic of *Fausett* and other cases cited by Appellee is misplaced for the same reason. As recognized by the court in *Fausett*, that provision does not speak to the issue raised here – whether an officer or director of a corporation personifies the corporation such that a communication to one of those individuals is the equivalent of a communication to the corporation itself. Appellant's focus on Comment *e* to the Restatement grossly expands the meaning of the provision, as illustrated by the case law citing to it. No opinion cited by Appellant relying on Comment *e* presents facts comparable to those before this Court. Rather, in each instance, the court was considering the impact of intra-company communications about an *individual*. As a result, they do not address whether the communication was made only to the person who was defamed.

The same is true for Appellant's reliance on Prosser's statement that a publication may be made to "the plaintiff's own agent or employee," which is based on the thinnest of supporting authority, and none of which is comparable to the facts before this Court. *See* W. Prosser & W. Keeton, Torts § 113, n. 14. Notably, however, Prosser does appear to draw the same distinction drawn by the court in *Fausett*. Specifically, while publication is limited to a plaintiff's agent or employee, publication with respect to defendants extends to an "agent, employee *or officer*." *Id.* at p. 798. Appellant argues that "there is no reason why…this same logic would not apply to statements made to the *plaintiff's* agent, employee, or officer." *See* Appellant Brief, p. 20, emphasis in original. Ignoring the fact that Prosser obviously drew a distinction between the two, there is a reason why the same logic does not apply – the identity of the party defamed is materially different. Statements made to the officer of a corporate defendant have been made by the corporation about some

other third party, so the connection between the officer and corporation does not prevent publication capable of reputational harm. The opposite is true where the statement is made to an officer of a plaintiff corporation – in that instance, the connection is critical because it means there is no third-party publication that could cause reputational harm.

As Appellant recognizes, there "is no denying that [*Fausett* and *Hoch*] hold that defamatory communications made to a company's executives and managers are not published." *See* Appellate Brief, p. 19. Further, as the discussion above makes plain, the cases cited by Appellant do not actually address the issue before this Court at all. Consequently, the rule that has been applied in the only cases identified by the parties to have squarely addressed the pertinent issue – *Fausett, Hoch, Advantage Personnel* and *Capograsso* – is that, in cases involving a corporate plaintiff, an officer or director is one and the same as the plaintiff corporation for purposes of publication. In fact, the Restatement supports the conclusion reached in these cases by recognizing that the only interest protected by a defamation claim is that of reputation. Restatement (Second) of Torts § 577, Comment *b*. Appellant's reputation could not be impacted by comments directed to its leadership "since reputation is the estimation in which one's character is held by [its] neighbors or associates," and a corporation's executive leadership is neither. *Id.*

IV. Appellant's Focus On The Sender's Intent Is A Red Herring

Appellant makes much of the hypothetical concern that upholding the reasoned conclusion of Judge Snyder would lead to all manner of vicious attacks incapable of redress. Leaving aside the fact that this assertion ignores the narrow scope of the publication issue, the concern is squarely addressed by the Restatement. Specifically, Comment *b* provides:

> The communication of disparaging matter only to the person to whom it refers is not actionable defamation, irrespective of the vile or scandalous character of the communication and its effects upon the feelings of that person. If the conduct is intended or likely to result in severe emotional distress, or in illness or other bodily harm on the part of the person thus vilified and if it does so result, the actor may be liable under the rules stated in §§ 46 and 48, and in §§ 312 and 313. He is not liable, however, for defamation under any of the rules stated in this Chapter. Restatement (Second) of Torts § 577, Comment *b* (1977).

Appellant's argument that accepting FourKites's position "would insulate senders of even maliciously defamatory communications" is unrelated to the issue of publication as the sender's intent has no bearing on whether or not a statement has been communicated to a third party, and thereby created reputational harm. *See* Appellant Brief, p. 24. Moreover, the argument assumes reputational harm, something that cannot exist in the absence of disclosure to that third party. *Devooght v. Iowa Health Systems*, No. 18-cv-4197, 2021 WL 2021437, at *5 (C.D. Ill. May 20, 2021) ("Without a publication to a third party, [the plaintiff] has *no* defamation claim.") (emphasis added); *citing Solaia Tech., LLC v. Specialty Pub. Co.*, 221 Ill.2d 558, 579, 852 N.E.2d 825, 839 (2006). The sole issue here is whether Appellant's board members and CRO are to be considered third parties. The only case law on point has held that they are not. Consequently, as Judge Snyder recognized, the statements at issue are not defamatory as a matter of law, regardless of the intent of their maker. While there may be remedies for intentionally malicious conduct, absent publication, defamation is not among them.

V. Accepting Appellant's Position Would Needlessly Extend The Scope Of Defamation Claims For Corporate Plaintiffs

The implications of accepting Appellant's position on this point are staggering. If an individual cannot contact the chief executives or board members of a company to express their concerns about the company, who *can* they contact? If an employee wants to

report concerns about how the company is operating, the employee cannot raise those concerns even to those ultimately responsible for the company's conduct without fear of being named as a plaintiff in a defamation claim.

It is no answer to point to whistleblower protections, as not all concerns rise to the level of protected activity. Similarly, this concern is not resolved by pointing to the defenses of privilege or truth. As the *Emery* Court recognized, even though truth is an absolute defense to defamation, "it is no protection against the incredibly high cost of litigation and the distraction from business that accompanies that cost." *Emery v. Ne. Illinois Reg'l Commuter R.R. Corp.*, 377 Ill.App.3d 1013, 1030, 880 N.E.2d 1002, 1015 (2007). In illustrating this point, the *Emery* court quoted the Supreme Court of Connecticut, which recognized:

> As a defense, truth provides protection against liability, but not against the expense and inconvenience of being sued. A successful defense is small comfort to an employer that must pay attorney's fees to defend a defamation claim and have the employer's attention diverted from its business to the defense of the suit. We are persuaded that most employers will likely choose a 'culture of silence.'" *Emery*, 377 Ill.App.3d at 1030, 880 N.E.2d at 1015 (2007); *citing Cweklinsky v. Mobil Chemical Co.*, 267 Conn. 210, 229, 837 A.2d 759, 770 (2004).

While *Emery* and *Cweklinsky* were addressing the issue of self-publication, the underlying concerns are equally applicable here. If *any* communication to a corporation constitutes a publication regardless of to whom it is made, as Appellant's position would require, better to err on the side of caution and not raise concerns regarding a corporation's conduct at all then to incur the financial and emotional costs of litigation, which would be even more pronounced for individuals than for the companies being considered in *Emery* and *Cweklinsky*. As the *Cweklinsky* court recognized, the defenses of truth or privilege are "small comfort" when staring down the costs of protracted litigation.

The likely harm of providing corporations with such unnecessary insulation grossly outweighs the potential harm posed by holding that communications about a corporation to officers and directors of the corporation is not a publication. This is because, as noted throughout this brief, there is no reputational harm in this instance.

Moreover, such a rule would unnecessarily shackle free speech. As the Illinois Supreme Court has recognized, "[t]he law of defamation must not only protect the individual's interest in vindicating his good name and reputation, but also allow the first amendment guarantees the 'breathing space essential to their fruitful exercise.'" *Van Horne v. Muller*, 185 Ill.2d 299, 315–16, 705 N.E.2d 898, 907 (1998). The balance of these concerns tips heavily in favor of upholding Judge Snyder's decision in this instance due to the utter lack of reputational harm the tort is intended to protect against.

Appellant asserts that upholding Judge Snyder's decision would "lead to policies inconsistent with the rationale of the First District." *See* Appellant Brief, p. 23. In reality, neither the First District nor any other district of the Illinois Appellate Court has spoken on this issue. More importantly, accepting Appellant's position could lead to policies inconsistent with the underlying rationale of the tort of defamation. Cases involving corporate plaintiffs would no longer bother with protecting reputational harm and as a result any complaint directed to a corporation could serve as a basis for a defamation claim, regardless of the position held by the recipient of the complaint. Of course, the impact of such a rule would not stop with corporations; it would march on all the way to the sole member of a single member LLC. The absurdity of that extension would crescendo in *per se* defamation cases like this one, where harm to reputation is assumed as a matter of law. Without a publication requirement to check whether reputational harm occurred in

reality rather than merely in theory, such a case slingshots immediately to the issue of damages. Of course, even if there are no damages in such an instance, as noted by the courts in *Emery* and *Cweklinsky*, that is cold comfort given the extensive costs of litigation. As a result, defendants in such cases will be pressed to settle, and corporations can bludgeon their detractors into submission or, more likely, silence them entirely. The Court should avoid this result, and instead hold that statements made to the executive leadership of a corporation constitute statements to the corporation itself, and have therefore not been published for purposes of defamation.

CONCLUSION

An allegedly defamatory statement must be published to a third party to be actionable because unless the statement is received by someone other than the target of the statement, the target's reputation in the eyes of the community has not been impacted. The sole interest the tort of defamation seeks to protect is reputational harm. Appellant asks this Court to create a rule that ignores that interest entirely. It asks the Court to ignore the fact that the statements at issue in this litigation were made to those serving as the human embodiment of the Appellant. Doing so will eliminate the publication requirement in defamation cases brought by corporate plaintiffs. The Court should reject the offer, and instead recognize that statements made about a corporation to the corporation's C-Suite and Board of Directors are made to the corporation itself and have not published. Such a holding preserves the important role the publication requirement plays in defamation claims, and avoids creating an unnecessary exception for corporate plaintiffs. In reaching that conclusion, this Court should uphold Judge Snyder's decision on the Motion and affirm the dismissal of the Complaint with prejudice.

WHEREFORE, Defendant-Appellee FourKites, Inc. respectfully requests that the judgement of the Circuit Court of Cook County granting its Motion to Dismiss and dismissing Plaintiff-Appellant project44, Inc.'s Complaint with prejudice be AFFIRMED.

Date: October 29, 2021

Respectfully submitted,

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No. 1-21-0575
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Project44, Inc.,	)	On Appeal from the Circuit Court of
	)	Cook County, Illinois, County
Plaintiff-Appellant,	)	Department, Law Division
	)	
v.	)	Case No. 2020-L-4183
	)	
FourKites, Inc.,	)	The Honorable James E. Snyder,
	)	Judge Presiding
Defendant-Appellee	)	

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PLEASE TAKE NOTICE that on the 29th day of October 2021 I filed with the Clerk of the Illinois Appellate Court for the First District Appellee FourKites Appellee Brief and Argument, a copy of which is attached hereto and is hereby served upon you.

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I hereby certify that on October 29, 2021 a copy of the foregoing was served upon counsel of record through the Court's e-filing system and by e-mail to:

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No. 1-21-0575
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	)	Cook County, Illinois, County
Plaintiff-Appellant,	)	Department, Law Division
	)	
v.	)	Case No. 2020-L-4183
	)	
FourKites, Inc.,	)	The Honorable James E. Snyder,
	)	Judge Presiding
Defendant-Appellee	)	

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I certify that this brief conforms to the requirements of Rule 341 (a) and (b). The length of this brief, excluding the pages containing the Rule 341 (d) cover, the Rule 341 (c) certificate of compliance, and the certificate of service, is twenty-three (23) pages.

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No. 1-21-0575

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PROJECT44, INC.,	)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellant,	)	Cook County, Illinois, County
	)	Department, Law Division
v.	)	
	)	Circuit Court No. 2020-L-004183
FOURKITES, INC.,	)	
	)	The Honorable James E. Snyder
Defendant-Appellee.	)	Judge Presiding
	)	
	)	Notice of Appeal Filed:
	)	May 20, 2021

REPLY BRIEF OF PLAINTIFF-APPELLANT PROJECT44, INC.

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ORAL ARGUMENT REQUESTED

POINTS AND AUTHORITIES

ARGUMENT 1

People v. Stanley,
397 Ill.App.3d 598 (1st Dist. 2009) 1

Largosa v. Ford Motor Co.,
303 Ill.App.3d 751 (1st Dist. 1999) 1

Upchurch v. Indus. Comm'n,
261 Ill.App.3d 104 (5th Dist. 1994) 1

I. THE COURT SHOULD REJECT FOURKITES'S BASELESS ATTACKS ON PROJECT44'S ILLINOIS CORPORATE PUBLICATION AUTHORITIES 1

Popko v. Continental Cas. Co.,
355 Ill.App.3d 257 (1st Dist. 2005) 2, 3

Jones v. Britt Airways, Inc.,
622 F.Supp. 389 (N.D. Ill. 1985) 2

Hoch v. Loren,
273 So.3d 56 (Fla. 4th Dist. 2019) 2, 3

Am. Airlines, Inc. v. Geddes,
960 So.2d 830 (Fla. 3d Dist. 2007) 2, 3

Advantage Pers. Agency, Inc. v. Hicks & Grayson, Inc.,
447 So.2d 330 (Fla. 3d Dist. 1984) 3

II. FOURKITES INACCURATELY DESCRIBES THE *SLEEPY'S* CASE 3

Penn Warranty Corp. v. DiGiovanni,
810 N.Y.S.2d 807 (Sup. Ct. 2005) 3

Missner v. Clifford,
393 Ill.App.3d 751 (1st Dist. 2009) 3

Kennedy v. James Butler, Inc.,
245 N.Y. 204 (1927) 3

Sleepy's LLC v. Select Comfort Wholesale Corp.,
909 F.3d 519 (2d Cir. 2018)....................4, 5

Sleepy's LLC v. Select Comfort Wholesale Corp.,
133 F.Supp.3d 483 (E.D.N.Y. 2015),
aff'd in part, vacated in part, remanded,
909 F.3d 519 (2d Cir. 2018)....................4, 5

Fausett v. American Resolution Management Corp.,
542 F.Supp. 1234 (D. Utah 1982)....................5

Advantage Pers. Agency, Inc. v. Hicks & Grayson, Inc.,
447 So.2d 330 (Fla. 3d Dist. 1984)....................5

Popko v. Continental Cas. Co.,
355 Ill.App.3d 257 (1st Dist. 2005)....................5

III. FOURKITES'S STRAW MAN ARGUMENTS MUST ALSO BE REJECTED....................6

Popko v. Continental Cas. Co.,
355 Ill.App.3d 257 (1st Dist. 2005)....................6, 7

Kuwik v. Starmark Star Mktg. & Admin., Inc.,
156 Ill.2d 16 (1993)....................7

IV. FOURKITES'S EMPHASIS ON REPUTATION IN THE COMMUNITY IS MISPLACED....................8

Luttrell v. United Tel. Sys., Inc.,
9 Kan.App.2d 620 (1984),
aff'd, 236 Kan. 710 (1985)....................8

Popko v. Continental Cas. Co.,
355 Ill.App.3d 257 (1st Dist. 2005)....................8

V. FOURKITES'S BRIEF FAILS TO RESOLVE THE INCONSISTENCIES IN *FAUSETT* AND ITS PROGENY....................9

Diplomat Electric, Inc. v. Westinghouse Electric Supply Co.,
378 F.2d 377 (5th Cir. 1967)....................9, 10

Fausett v. American Resolution Management Corp.,
542 F.Supp. 1234 (D. Utah 1982)....................9

Jones v. Golden Spike Corp.,
97 Nev. 24 (1981) 10

Popko v. Continental Cas. Co.,
355 Ill.App.3d 257 (1st Dist. 2005) 10

Prins v. Holland–North America Mortgage Co.,
107 Wash. 206 (1919)...10

Hoch v. Loren,
273 So.3d 56 (Fla. 4th Dist. 2019)..11

RESTATEMENT (SECOND) OF TORTS
§ 577, cmt. e (1977) 11

VI. REVERSAL OF THE CIRCUIT COURT'S ORDER WILL NOT ELIMINATE THE PUBLICATION REQUIREMENT FOR DEFAMATION CASES INVOLVING CORPORATE PLAINTIFFS 12

RESTATEMENT (SECOND) OF TORTS
§ 577, cmt. e (1977) 12

30 River Court East Urban Renewal Co. v. Capograsso,
383 N.J.Super. 470 (2006) 12

CONCLUSION 13

Popko v. Continental Cas. Co.,
355 Ill.App.3d 257 (1st Dist. 2005) 14

ARGUMENT

The circuit court's dismissal order represents an unprecedented shift in Illinois defamation law regarding the element of publication, and essentially adopts a black-line rule that would bar future, otherwise meritorious defamation cases based upon the triviality of the titles chosen for corporate employees (and non-employee directors) without factual development of the underlying circumstances. The circuit court below found that the communications at issue were defamatory but, with nothing further, ruled that the titles of the people the communications were sent to resolved the issue of publication as a matter of law. The parties agree that this holding is unprecedented (*see* Appellant Brief at 12, n. 12, Appellee Brief at 7), and other cases detail that when such matters are presented, this Court may address them by drawing analogies to "other Illinois cases, as well as decisions from other jurisdictions." *People v. Stanley*, 397 Ill.App.3d 598, 607 (1st Dist. 2009); *see also Largosa v. Ford Motor Co.*, 303 Ill.App.3d 751, 754 (1st Dist. 1999) (resolving matter of first impression by comparing to analogous Illinois caselaw); *Upchurch v. Indus. Comm'n*, 261 Ill.App.3d 104, 106 (5th Dist. 1994) (same).

project44 respectfully submits that undertaking that exercise here demonstrates that FourKites's efforts to justify the circuit court's ruling are deeply flawed, and that this Court should not adopt a new rule in such an important area of the law based upon a factually undeveloped record.

I. THE COURT SHOULD REJECT FOURKITES'S BASELESS ATTACKS ON PROJECT44'S ILLINOIS CORPORATE PUBLICATION AUTHORITIES.

FourKites would have this Court believe that none of the Illinois authorities project44 cited are analogous to the issue at hand. Yet, FourKites's principal complaint with these cases – that they do not "address whether comments about a company made to

an officer of the company constitute a publication" – does nothing but restate the obvious. Appellee Brief at 13. These opinions are of course not factually identical to the matter at hand, *since this a matter of first impression in Illinois*. This distinction alone cannot disqualify these authorities from being relevant to this appeal.

Rather, because the cited Illinois authorities are directed towards publication within a company (*i.e.*, "intra-corporate communications"), they are pertinent to many of the same issues currently before this Court, such as communications involving corporate management and executives, as well as Illinois courts' general approach to issues of publication in the corporate context. *See, e.g., Popko v. Continental Cas. Co.*, 355 Ill.App.3d 257 (1st Dist. 2005); *see also Jones v. Britt Airways, Inc.*, 622 F.Supp. 389, 391 (N.D. Ill. 1985) (stating that "Illinois slander and libel cases rarely concern the issue of publication because communication to *any third party* satisfies the Illinois publication requirement. Only a qualified privilege can render such statements protected.") In particular, *Popko* is the *only* First District case cited by either party that considers the issue of publication within the confines of a corporation. And as project44 explained in its opening brief, the principles set forth in *Popko* are based upon the same reasoning that a court should follow in addressing whether the communications at issue in this case were published.

FourKites's legal legs are further undercut by the very case law it cites. For instance, in *Hoch v. Loren*, 273 So.3d 56 (Fla. 4th Dist. 2019), the Florida court deemed it necessary to discuss in the same breath the holding from *Am. Airlines, Inc. v. Geddes*, 960 So.2d 830 (Fla. 3d Dist. 2007), which stated that "Florida courts have found no publication where a corporation is sued for defamation and the defamatory statement *was made by one*

managerial employee of the corporation to another," and the holding from *Advantage Pers. Agency, Inc. v. Hicks & Grayson, Inc.*, 447 So.2d 330 (Fla. 3d Dist. 1984), which stated that "Florida courts have found no publication when a defamatory statement about a plaintiff corporation is made to a managerial employee of the corporation." *Hoch*, 273 So.3d at 58; *Geddes*, 960 So.2d at 833; *Hicks & Grayson,* 447 So.2d at 331 (emphasis added). The *Hoch* court's pairing of these opinions not only confirms the interrelatedness of these concepts, but in the case of *Geddes*, shows that Florida law is in direct conflict with Illinois law as set forth in *Popko*.

Specifically, whereas *Geddes* found communications between managers not published, *Popko* held that defamatory statements were actionable even when they were communicated solely by a supervisor (*i.e.*, a manager) to his superior (also a manager), who in turn relayed the communication to the company's vice president (*i.e.*, an executive). 355 Ill.App.3d at 258. If *Geddes* and *Hicks & Grayson* are based on the same underlying reasoning, and *Geddes* contradicts Illinois law, then it stands to reason that Florida's black-line rule that there is no publication when third party communications about a company are made to a company's executives is contrary to Illinois law.

II. FOURKITES INACCURATELY DESCRIBES THE *SLEEPY'S* CASE.

FourKites makes similar irrelevant distinctions when discussing project44's cited caselaw from outside of Illinois.[1] However, FourKites goes one step further in its attempts

[1] For example, while FourKites correctly observes that *Penn Warranty Corp. v. DiGiovanni*, 810 N.Y.S.2d 807 (Sup. Ct. 2005), does not address communications made to executives or management, it concedes the point for which this case was cited, namely that § 577, comment (e) of the Restatement (Second) of Torts applies equally to the agents of the defamed as it does to agents of the defamer. *Compare* Appellee Brief at 15-16 *with* Appellant Brief at 12. FourKites's distinctions of *Missner v. Clifford,* 393 Ill.App.3d 751 (1st Dist. 2009), and *Kennedy v. James Butler, Inc.*, 245 N.Y. 204 (1927), likewise do not

to distinguish *Sleepy's LLC v. Select Comfort Wholesale Corp.,* 909 F.3d 519 (2d Cir. 2018), as it erroneously recounts key facts from the opinion. Specifically, while FourKites admits that the third party communications made in *Sleepy*'s included statements made to a "district manager," FourKites wrongly claims that the other "statements at issue were made to 'secret shoppers' *who had no clear relationship with the plaintiff*," and that because of this "the Second Circuit did not analyze whether the district manager was of such a position as to be the legal equivalent of the plaintiff corporation." Appellee Brief at 14 (emphasis added).

Not only does the *Sleepy's* court make no mention of the relation of the "secret shoppers" to the plaintiff, but as confirmed by the underlying district court case, all recipients of the defamatory communications held titles of either "Regional Manager," "District Manager," "Regional Sales Manager," or "District Sales Manager" with the plaintiff. *Sleepy's LLC v. Select Comfort Wholesale Corp.*, 133 F.Supp.3d 483, 491-494 (E.D.N.Y. 2015), *aff'd in part, vacated in part, remanded*, 909 F.3d 519 (2d Cir. 2018). There can be no doubt that the Second Circuit, having reviewed the district court's holding and referencing it at length in its own opinion, was aware that the recipients of these communications were management-level employees within plaintiff company. *See Sleepy's*, 909 F.3d at 523-529 (referencing the *Sleepy's* district court opinion more than ten times).

FourKites's error as to the operative facts in *Sleepy's* highlights the similarities between that opinion and the Florida *Hicks & Grayson* case FourKites relies upon. That

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address the points for which these cases were referenced. *Compare* Appellant Brief at 11-12, 20-21 *with* Appellee Brief at 13-14, 16.

case, which as discussed above is cited by *Hoch*, is based on *Fausett v. American Resolution Management Corp.*, 542 F.Supp. 1234 (D. Utah 1982), another of FourKites's key cases, and held that communications "made to a corporate executive or managerial employee, such as a *sales manager* . . . are in effect, being made to the management of the corporation and thus to the corporation itself." *Hicks & Grayson*, 447 So.2d at 331 (emphasis added). In contrast, the court in *Sleepy's reversed* a holding finding no publication of communications made to a cadre of managers of the plaintiff company, including sales managers. *Sleepy's*, 909 F.3d at 528-529; *see also Sleepy's*, 133 F.Supp.3d at 491-494. *Sleepy's* thus stands as a direct counterpoint to FourKites's cited authority.

Beyond this, both *Sleepy's* and *Popko* acknowledge that courts throughout the country are split on issues involving publication in corporate defamation claims. *Sleepy*'s, 909 F.3d at 528; *Popko*, 355 Ill.App.3d at 261-262 (acknowledging that "courts remain badly split"). Perhaps aware of this, FourKites's Appellee Brief advocates for a standard even more narrow than that set forth in *Hoch* and *Fausett*, contending that:

> Judge Snyder did not rule that statements made to *any* executive or managerial employee of the Appellant would not meet the publication standard. *See* Appellant Brief, p. 10, § I. Rather, he held that these specific Emails, which were sent to a member of Appellant's C-Suite and two members of its Board of Directors, were not published. Again, while there may be situations where the position of the employee to whom the statement was made require that it be deemed a publication, this is not that case.

Appellee Brief at 15 (emphasis in original). The importance of this admission cannot be understated, as FourKites asks this Court to adopt a wholly unprecedented standard applicable only to so-called "C-suite" executives and board members. That FourKites cannot reconcile its own out-of-state caselaw with Illinois precedent and other jurisdictions is telling. This Court should therefore reject FourKites's contention that the

communications at issue are not published based solely on the titles of the recipients of said communications.

III. FOURKITES'S STRAW MAN ARGUMENTS MUST ALSO BE REJECTED.

To paraphrase the musical *The Will Rogers Follies*, it appears that FourKites has never met a straw man that it didn't like. Rather than address the facts before this Court, FourKites, for the first time in this matter, now asserts that this case is no different than that of "single-member limited liability company," and that this somehow justifies the circuit court's ruling that no publication occurred. Appellee Brief at 5, 7, 21. This is a textbook straw man fallacy, and should be rejected because, *inter alia*, there of course cannot be publication where the business entity and the person are literally one in the same. That is not the posture of this case, and the fact that corporations may vary in size and organization does not warrant an "absolute privilege" against all communications made to a company's managers and executives. *Popko*, 355 Ill.App.3d at 265. Rather, consistent with the measured approach previously employed by this Court, such matters must be evaluated on a case-by-case basis, and a factual record must be developed.

Expanding FourKites's single-member LLC hypothetical to publication in other corporate contexts further exposes the flaws in its analogy. For instance, under the same logic, intra-corporate speech likewise could not be considered published, since the corporation would literally be talking to itself. Yet the First District, following the Restatement, holds to the contrary, finding that such intra-corporate communications are actionable, even when made between managers and executives. *Popko*, 355 Ill.App.3d at 258.

Beyond this, FourKites claims that if the circuit court's holding were reversed, it would have a chilling effect on whistleblowers, as the ruling would subject such persons to drawn-out and expensive litigation. Appellee Brief at 20. In support, FourKites focuses solely on the defense of truth, citing to caselaw stating that it "is no protection against the incredibly high cost of litigation." *Id*. While FourKites may have defeated this straw man, it glosses over the multiple other defenses and privileges available to a defamation defendant.[2] And, FourKites is no whistleblower here.

For instance, FourKites neglects to acknowledge that Illinois courts recognize defenses such as qualified (or conditional) privilege, and contrary to FourKites's claims, such privileges prevent bad faith defamation lawsuits from "slingshot[ting] past the fundamental issue of reputational harm straight to damages." Appellee Brief at 6; *see also Kuwik v. Starmark Star Mktg. & Admin., Inc.*, 156 Ill.2d 16, 25 (1993) (discussing elements of the qualified privilege defense). In fact, FourKites's argument is identical to one previously rejected by the court in *Popko*, which held that qualified privilege "adequately protects" defendants "from unwarranted defamation liability" (which in *Popko* was a corporate defendant) and that "this approach properly balances competing interests rather than granting what would amount to an absolute privilege . . . ." *Popko*, 355 Ill.App.3d 265.

In short, FourKites has provided no persuasive explanation for why this Court should disturb the *Popko* court's reasoning and enact a transformative and arbitrary black-line rule regarding publication.

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[2] Notably, FourKites uses the term "privilege" only three times in its brief. Appellee Brief at 13, 20.

IV. FOURKITES'S EMPHASIS ON REPUTATION IN THE COMMUNITY IS MISPLACED.

FourKites's Brief focuses on the concept of reputation in the "community," suggesting that defamatory statements are only actionable if they damage a corporation's reputation outside the confines of a company. Appellee Brief at 6. This is a red herring. Once again, if this were true, then the First District's jurisprudence as to intra-corporate communications set forth in *Popko* would be eviscerated. Indeed, a case relied on by the *Popko* court, *Luttrell v. United Tel. Sys., Inc.*, 9 Kan.App.2d 620 (1984), *aff'd*, 236 Kan. 710 (1985), directly rejected this reasoning, stating "[c]ertainly, damage to one's reputation within a corporate community may be just as devastating as that effected by defamation spread to the outside." *Luttrell*, 9 Kan.App.2d at 622; *see Popko*, 355 Ill.App.3d at 265.

And that is the exact issue that project44 faces here. For instance, it is undeniable that the sender of the May 27th communication assaults project44's reputation with the intent that project44's newly-hired Chief Revenue Officer "should go find another job." Appellant Brief at 5. FourKites misses the point when it argues that "the sender's intent has no bearing on whether or not a statement has been communicated to a third party." Appellee Brief at 19. project44 does not contend that intent is an element to be considered when determining whether a communication is published. Rather, the sender's intent in making the May 27th communication *confirms* that there is a distinct reputation in the first place to damage, which FourKites freely admits is "the fundamental issue at the core of a defamation claim," and which gives the "publication requirement . . . meaning." Appellee Brief at 6.

FourKites cannot seriously contend that a newly hired employee would never hold its employer in less regard if they received communications – like the ones set forth in the

May 27th email – stating that the company they just began working for engages in fraudulent practices. This is no less true for a newly hired entry-level employee than it is for a newly hired "C-suite" executive, and directly contradicts FourKites's claim that this is a "communication of disparaging matter only to the person to whom it refers [*i.e.*, the corporation itself]." Appellee Brief at 19. And if there exists a distinct reputation that can be damaged by the May 27th communication, then it likewise follows that the same is true for the statements sent to project44's outside board members in the May 19th communication. The extent of this reputational damage cannot be resolved on the pleadings alone, and thus, for this reason as well, FourKites's claim that this case is ripe for dismissal fails.

V. FOURKITES'S BRIEF FAILS TO RESOLVE THE INCONSISTENCIES IN *FAUSETT* AND ITS PROGENY.

FourKites's attempts to justify the *Fausett* case – as well as the Florida cases that follow it – highlight the inconsistencies in these courts' holdings. Take for example FourKites's reliance on the *Fausett* court's pronouncement that:

> There simply exists no potential for ARMCOR's reputation to be reduced or for ARMCOR to be alienated from its managers, customers, shareholders, institutional lenders, etc., when the defamatory statements are made to its management. In essence the management is the corporation for purposes of communication.

Appellee Brief at 8. This statement is literally unprecedented, as the *Fausett* court cites to no case in support of such a blanket conclusion. It instead claims that "[t]his was at least impliedly recognized . . . in *Diplomat Electric, Inc. v. Westinghouse Electric Supply Co.,* 378 F.2d 377, 384 (5th Cir. 1967)," yet a plain reading of *Diplomat*, which *reversed* summary judgment dismissing a defamation claim, fails to provide such support. *Fausett* 542 F. Supp. at 1241; *see also Diplomat*, 378 F.2d at 386 (stating "[w]e merely hold that

the district court, having found that the complaint sufficiently alleged falsity and malice, erred in concluding that proof of special damage was necessary to support the allegations of the complaint"). And as project44 has discussed elsewhere, the *Fausett* court – which devotes only a single paragraph to the issue before this Court in a seven-plus page opinion – inexplicably dismisses both Prosser and the Restatement, claiming that these authorities apply only to intra-corporate statements, when, on their face, the treatises encompass broader forms of communications. *See* Appellant Brief at 21-22. That the *Fausett* court cites to *Jones v. Golden Spike Corp.*, 97 Nev. 24 (1981), in (albeit unclear) support of its conclusions, only for that decision to later be overturned for a holding consistent with *Popko*, is but icing on the cake. *See id.* at 22-23.

Compare this to *Popko*, which cited to no less than fifteen authorities in support of its finding that intra-corporate communications are published, and both analyzed and rejected prior caselaw holding to the contrary. *See, e.g., Popko*, 355 Ill.App.3d at 261-262 (analyzing and rejecting *Prins v. Holland–North America Mortgage Co.,* 107 Wash. 206 (1919)). Again, for the reasons discussed above, as well as those set forth in project44's opening Appellant Brief, the fact that *Popko* does not directly address the issue presently before the Court is of little relevance. Rather, the principles espoused in *Popko* are directly applicable to the instant matter, and warrant a finding that the communications were published. *See* Appellant Brief at 15. Further, and as also discussed above, the Second Circuit's holding in *Sleepy's* also offers a well-reasoned counterpoint to the *Fausett* opinion.

The Florida courts following *Fausett* have attempted to backfill the threadbare conclusions made by the Utah district court, however their justifications remain inapposite

to the reasoning of the First District, and in fact contradict the arguments made by FourKites in its Appellee Brief. For instance, the court in *Hoch* asserted that the reason why defamatory statements about a corporation could never be published to executives and management arose from:

> the context of an agency relationship where the interests of the principal and agent were unified, so that statements to an employee or agent of the principal did not constitute statements to a third party, a necessary element of defamation.

Hoch, 273 So.3d at 58. Yet, this contradicts FourKites's claims that managers and executives are not distinct from their corporations, and instead that "they *are* the company." Appellee Brief at 6. The *Hoch* court does not go so far as to conflate the principal/agent relationship, but instead asserts that a distinct agent and a distinct principal simply have interests that are "unified."

Illinois courts, on the other hand, and in particular the First District, follow the reasoning of § 577, comment e, of the Restatement (Second) of Torts, which states, in relevant part, that:

> the communication to a servant or agent of the person defamed is a publication although if the communication is in answer to a letter or a request from the other or his agent, the publication may not be actionable in defamation.

RESTATEMENT (SECOND) OF TORTS § 577, cmt. e (1977). The Restatement makes no distinction between the closeness of the "interests" of the principal and agent. Thus, FourKites's attempts to sidestep the reasoning of the Restatement – by claiming no principal/agent relationship exists – are undone by its own cited caselaw. Moreover, this is further proof that *Hoch,* along with *Fausett* and its other progeny, are flawed authorities that this Court should not adopt.

VI. REVERSAL OF THE CIRCUIT COURT'S ORDER WILL NOT ELIMINATE THE PUBLICATION REQUIREMENT FOR DEFAMATION CASES INVOLVING CORPORATE PLAINTIFFS.

FourKites repeatedly claims that reversing the circuit's court's dismissal order would "eliminate the publication requirement for defamation cases involving corporate plaintiffs." Appellee Brief at 1-2, 22. Nothing could be further from the truth. While §577, comment e of the Restatement (Second) of Torts is the controlling standard in Illinois, the Restatement's position that communications to an agent of the party defamed may be published is not absolute. Rather, comment e states that such publication "may not be actionable" when "the communication is in answer to a letter or request from the other or his agent." RESTATEMENT (SECOND) OF TORTS § 577, cmt. e (1977). Such "invited" communications are precisely what was at issue in *30 River Court East Urban Renewal Co. v. Capograsso*, 383 N.J.Super. 470 (2006), which is cited with approval by FourKites, and in which (as project44 explained in its opening Appellant Brief) the court only found communications made to a concierge not published after a factual record had been developed. *See* Appellant Brief at 23.

FourKites claims that project44's focus on this last point is misplaced, arguing "[a] record may understandably need to be developed in order to determine whether a concierge qualifies as a third party for publication purposes, but no such record is necessary here given the roles played by those who received the Emails." Appellant Brief at 12. However, FourKites has cited to no Illinois authority stating that, under all circumstances, managers or executives (including C-suite executives and board members), by virtue of their title alone, "invite" all communications directed to them, or otherwise serve as a "conduit" for communications made to a corporation. Instead, FourKites's cited Illinois caselaw only generally discusses the role of executives and boards in corporations. *See*

Appellant Brief at 17-18. project44 explained why these cases were distinguishable in its opening Appellant Brief. *See id.*

This is not a case where the communications at issue were provided to a "customer complaint" line, a general project44 email address, or even to project44's legal department. FourKites instead chose to levy its accusations at specific individuals and, in the case of the May 27th email, couched its defamatory "complaints" under the auspices of convincing project44's Chief Revenue Officer to resign. Appellant Brief at 5. While the question of whether the recipients of these emails were designated to receive such communications (or otherwise invited them) is a factual question that cannot be resolved on the pleadings, this does not "eliminate the publication requirement for defamation cases involving corporate plaintiffs," as FourKites erroneously claims. Appellee Brief at 1-2, 22.

CONCLUSION

FourKites devotes much of its Appellee Brief to predictions that reversal of the circuit court would eviscerate the ability of third parties to openly communicate with corporations, and in doing so FourKites focuses solely on extremes. Yet, it is the outcome advanced by FourKites that would lead to an extreme and absolute result, namely a complete ban on a company's ability to stop attacks on its reputation, tactically levied at its executive employees and outside directors, no matter how disruptive or malicious said attacks may be. As project44 has explained above, third parties are protected in their communications to corporations should the circuit court's dismissal be reversed. FourKites, however, has failed to explain how companies could *ever* respond to defamatory attacks directed towards their managers and executives if the position advocated by FourKites is adopted by this Court. This Court must once again "properly balance[]

competing interests rather than grant[] what would amount to an absolute privilege," and reverse the circuit court's dismissal of project44's complaint. *Popko*, 355 Ill.App.3d at 265.

WHEREFORE, for the foregoing reasons, as well the reasons set forth in its opening Appellant Brief, Plaintiff-Appellant project44, Inc. respectfully requests that the judgment of the Circuit Court of Cook County granting Defendant-Appellee FourKites, Inc.'s Motion to Dismiss and dismissing project44, Inc.'s complaint with prejudice be REVERSED, and that this case be REMANDED to the circuit court for further proceedings consistent herewith.

Dated: December 3, 2021

Respectfully Submitted,

By: /s/ Douglas A. Albritton
One of the Attorneys for project44, Inc.

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No. 1-21-0575

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PROJECT44, INC.,	)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellant,	)	Cook County, Illinois, County
	)	Department, Law Division
v.	)	
	)	Circuit Court No. 2020-L-004183
FOURKITES, INC.,	)	
	)	The Honorable James E. Snyder
Defendant-Appellee.	)	Judge Presiding
	)	
	)	Notice of Appeal Filed:
	)	May 20, 2021

CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is fourteen (14) pages.

Dated: December 3, 2021

/s/ Douglas A. Albritton
One of the Attorneys for project44, Inc.

No. 1-21-0575

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

PROJECT44, INC.,	)	
	)	Appeal from the Circuit Court of
Plaintiff-Appellant,	)	Cook County, Illinois, County
	)	Department, Law Division
v.	)	
	)	Circuit Court No. 2020-L-004183
FOURKITES, INC.,	)	
	)	The Honorable James E. Snyder
Defendant-Appellee.	)	Judge Presiding
	)	
	)	Notice of Appeal Filed:
	)	May 20, 2021

CERTIFICATE OF SERVICE

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I, Peter G. Hawkins, an attorney, certify that on December 3, 2021, I served the foregoing Plaintiff-Appellant project44, Inc.'s **REPLY BRIEF OF PLAINTIFF-APPELLANT PROJECT44, INC**. upon counsel listed above by e-mail and by the Odyssey eFileIL Electronic Filing Service Provider.

Under penalties as provided by law pursuant to section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Dated: December 3, 2021

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COOK COUNTY, IL
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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC.,	
Plaintiff,	**No. 2020-L-4183**
v.	**Calendar Y**
FOURKITES, INC., et al.,	
Defendants.	

DEFENDANT FOURKITES, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Defendant FourKites, Inc. ("**FourKites**"), by and through its undersigned counsel, Polsinelli PC, hereby moves pursuant to 735 ILCS 5/2-615 to dismiss Plaintiff Project44, Inc.'s ("**Plaintiff**" or "**P44**") Complaint. In support of its Motion, FourKites states:

INTRODUCTION

Plaintiff's defamation claims (Counts I and II), as well as its conspiracy claim (Count III), are based on two emails sent to three individuals affiliated with P44 in May 2019. *See* Plaintiff's Complaint, attached hereto as **Exhibit A**. Plaintiff claims that the first email was sent from Defendant "John Doe #1" to two members of Plaintiff's Board of Directors from a sender using the pseudonym "Ken Adams." The second email was allegedly sent from "John Doe #2" to Plaintiff's Chief Revenue Officer ("**CRO**") from a sender using the pseudonym "Jason Short" (these emails are referred to collectively in this Motion as the "**Emails**").

Plaintiff's allegations, even if accepted as true, fail to state a defamation claim against FourKites. Defamation requires that the alleged defamatory statements are published to a third-party. Here, Plaintiff cannot establish publication because both emails were sent to members of

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Plaintiff's organization. Moreover, the statements within the two emails do not rise to the level of defamation *per se*. As such, Counts I and II must be dismissed.

Similarly, the Civil Conspiracy claim set forth in Count III of the Complaint should be dismissed because Plaintiff has not pled any elements of a conspiracy claim. The Complaint contains no facts establishing an "agreement" between FourKites and the sender(s) of the Emails, and instead relies solely on conclusory allegations. There are no facts alleged that establish a conspiratorial agreement between the sender(s) and FourKites. Plaintiff alleges, in the alternative, that the sender(s) are employees of FourKites; however, this route also fails to state a claim because it is well established that a corporation cannot engage in a conspiracy with its own agents. In addition, any actionable conspiracy claim requires a "tortious act," but as explained below, Plaintiff cannot make such a showing because the predicate defamation counts fail. Finally, Plaintiff has not pled any facts to show that it was damaged by the alleged conspiracy. Therefore, Count III must be dismissed.

ARGUMENT

I. Legal Standard

A motion to dismiss under section 2-615 attacks the legal sufficiency of a complaint. *Joseph T. Ryerson & Son, Inc. v. Travelers Indem. Co. of Am.*, 2020 IL App (1st) 182491, ¶ 50. The critical inquiry is whether the allegations of the complaint, when construed in the light most favorable to the plaintiff, are sufficient to establish a cause of action upon which relief may be granted. *Id.* All facts apparent from the face of the pleadings, including the exhibits attached thereto, are considered. *Id.* A court considering such a motion accepts as true all well-pleaded facts in the complaint and all reasonable inferences that may be drawn from those facts. *Id.*

FILED DATE: 1/20/2021 2:23 PM 2020L004183

II. Counts I and II Fail to State a Claim of Defamation *Per Se*

Plaintiff's defamation *per se* claims fail for two reasons. First, there was no third-party publication. Second, the statements at issue do not qualify as *per se* defamatory. As a result, Plaintiff's complaint fails to make the necessary *prima facie* showing required to establish the claim. *Anderson v. Beach*, 386 Ill. App. 3d 246, 249 (1st Dist. 2008) (elements of defamation are: (1) a false statement about the plaintiff; (2) unprivileged publication of that statement to a third party; and (3) damages resulting from publication).

Claims of defamation *per se* apply to statements deemed to be so obviously and materially harmful that injury to the plaintiff's reputation is presumed, including words that impute: (1) the commission of a crime, (2) a person is unable to perform or lacks integrity in performing his or her employment duties, and (3) a person lacks ability or otherwise prejudices that person in her or his profession. *Green v. Rogers,* 234 Ill. 2d 478, 491-92 (2009). While it is true that a plaintiff need not plead actual damage to his or her reputation when a statement is defamatory *per se*, such a claim must be pled with a heightened level of precision and particularity. *Id.*

However, even if a statement fits into one of the *per se* categories, this fact, standing alone, "has no bearing on whether the alleged defamatory statement is actionable." *Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 518 (1st Dist. 1998). A statement that falls into one of the *per se* categories will not be actionable if it is reasonably capable of an innocent construction. *Green*, 234 Ill. 2d at 499. Pursuant to this principle, "a court must consider the alleged statement *in context* and give the words of the statement, and any implications arising from them, their natural and obvious meaning." *Id.* (emphasis in original). "If the actual words do not alone denote criminal or unethical conduct and have a broader meaning in common usage than the meaning ascribed by the plaintiff,

FILED DATE: 1/20/2021 2:23 PM 2020L004183

the words are not actionable as defamation *per se*." *Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 093386, ¶ 30.

Additionally, actions for defamation based on loose and figurative language that no person would reasonably believe presented a fact are prohibited by the First Amendment. *Id.* at ¶ 26. Such statements are considered as nothing more than "an expression of opinion," and "[h]owever pernicious an opinion may seem, [society] depend[s] for its correction not on the conscience of judges and juries but on the competition of other ideas." *Solaia Tech., LLC v. Specialty Pub. Co.*, 221 Ill. 2d 558, 581 (2006) (internal quotation marks and citation omitted). "[T]he court itself must determine as a question of law whether the statement is a factual assertion that could support a defamation claim." *Stone*, 2011 IL App (1st) 093386, ¶ 26.

Applying these principles to the two emails at issue, it is clear that Plaintiff does not have a legally sufficient defamation claim against the sender(s) of the Emails.

A. The Emails Were Not Published

The Emails were not "published" as that term is defined under the law, preventing Plaintiff from raising a valid claim for defamation. "'Publication' is a term of art in defamation law and is an essential element of any defamation claim." *Missner v. Clifford*, 393 Ill. App. 3d 751, 763 (1st Dist. 2009). "Any act by which defamatory matter is communicated to someone other than the person defamed is a publication." *Missner*, 393 Ill. App. 3d at 763 (citing *Anderson*, 386 Ill. App. 3d at 249; Restatement (Second) of Torts § 577, Comment a, at 201-02 (1977)). The publication requirement is *not* satisfied, however, when the communication is made *to the person defamed*. *Emery v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 377 Ill. App. 3d 1013, 1022 (1st Dist. 2007). Here, the "person defamed" is Plaintiff, a corporation, which is only capable of communication through *persons* acting on its behalf. *See Small v. Sussman*, 306 Ill. App. 3d 639, 647 (1st Dist. 1999) ("It

FILED DATE: 1/20/2021 2:23 PM 2020L004183

is axiomatic that a corporation can act only through its agents."). The question for the Court, therefore, is which persons associated with the corporation speak for the corporation such that communication with those persons constitutes communication with the corporation itself, rather than a third person.

That very question was answered in two cases outside Illinois. In *Hoch v. Loren*, 273 So. 3d 56, 58 (Fla. App. 2019), the court found there was no publication where "a defamatory statement about a plaintiff corporation is made to a managerial employee of the corporation," because "a statement to an executive/managerial employee of a corporation is a statement to the corporation itself." Similarly, in *Fausett v. American Resolution Management Corp.*, 542 F. Supp. 1234, 1241 (D. Utah 1982), the court found that "the management *is* the corporation for purposes of communication," and as a result "communication to corporate management of alleged defamation of the corporation does not constitute publication." *Id.* at 1242 (emphasis added).

While there is not an Illinois case that squarely addresses this issue, the rulings set forth above are consistent with basic principles of Illinois corporate law, and are therefore instructive. As in Florida and Utah, a corporation in Illinois acts through its managing principals and governing board. *See, e.g.*, *Manufacturers' Exhibition Bldg. Co. v. Landay*, 219 Ill. 168, 174-75 (1905) (a corporation is an "artificial being[]," which "can act only through its board of directors and officers"); *TABFG, LLC v. Pfeil*, 746 F.3d 820, 825 (7th Cir. 2014) (only managers, directors and officers of a corporation are authorized to act on the corporation's behalf). Consequently, because the Emails at issue here were sent to two of Plaintiff's board members and its CRO—all individuals with authority to bind the corporation and through whom Plaintiff acts—the Emails were effectively sent to Plaintiff, and no publication occurred. Stated differently, Plaintiff's board members and CRO are "merely a stand-in or conduit for" Plaintiff itself, such that

FILED DATE: 1/20/2021 2:23 PM 2020L004183

"[c]ommunications to [them] are in effect communications to [Plaintiff] and are not 'published' to a third party." *30 River Ct. E. Urb. Renewal Co. v. Capograsso*, 892 A.2d 711, 717 (N.J. Super. 2006).

B. The Statements Were Not Defamatory

1. The May 19, 2019 Email to the Board Members

As already noted, an allegedly defamatory statement is not actionable "if it cannot be reasonably interpreted as stating actual fact." *Solaia Tech., LLC*, 221 Ill. 2d at 581. In determining whether a statement is one of opinion or fact, a court should consider "whether the statement has a precise and readily understood meaning; whether the statement is verifiable; and whether the statement's literary or social context signals that it has factual content." *Id.* Thus, for example, in *Solaia*, the Supreme Court held that the statement that plaintiffs were "deeply greedy people" fell "within the bounds of constitutionally protected opinion," and was therefore not actionable, because it had "no precise meaning" and was not "verifiable." *Id.* at 583.

The statements in the May 19 email that there is "widespread discontent brewing" and "it's just a matter of time before people go public and another Theranos happen in Chicago" similarly have no precise and readily understood meaning, much less one that is *per se* defamatory. *See, e.g.*, *Wilkow v. Forbes, Inc.*, 241 F.3d 552, 555 (7th Cir. 2001) ("If it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable."); *see also Madison v. Frazier*, 539 F.3d 646, 655 (7th Cir. 2008) (applying Illinois law and finding that, where the defendant's statements implicated subjective judgment, her "speculations fail to amount to verifiable assertions of fact, lacking precise and readily understood meaning").

FILED DATE: 1/20/2021 2:23 PM 2020L004183

The statement in the May 19 email that "[e]x-employees are silenced with legal threats and defamation suits" does not fall within any of the categories of *per se* defamation—it does not impute the commission of a crime by Plaintiff, impute that Plaintiff is unable to perform or lacks integrity in performing its employment duties, or impute that Plaintiff lacks ability or otherwise prejudices Plaintiff in its profession. And the further statement that "[redacted] dad used to be the book keeper for a Chicago Mafia and they are using that to silence folks" is too vague and lacking in precise meaning to support a defamation claim. *See, e.g.*, *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶¶ 50-52 ("Whether [the plaintiff] was corrupt, used bully tactics, or operated a fraud machine cannot be shown to be true or false[.]"); *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 728 (1st Cir. 1992) ("'rip-off," "fraud," "scandal," and "snake-oil job" are adjectives that "admit of numerous interpretations"); *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987) ("The lack of precision [in the meaning of the word 'scam'] makes the assertion 'X is a scam' incapable of being proven true or false."). Indeed, Plaintiff's suggestion that "silencing" refers to "threats of violence or other intimidation" (*see* Complaint, at ¶ 18) proves the point, as many people would likely *not* interpret the statement that way. It also demonstrates that the statement is non-actionable hyperbole. *See Phantom Touring, Inc.*, 953 F.2d at 728 (calling play "'a rip-off, a fraud, a scandal, a snake-oil job'" mere hyperbole). That it is hyperbole is further demonstrated by the lack of any specific facts supporting it.

The May 19 email's use of the term "rampant accounting improprieties" is likewise too vague and imprecise to be actionable. *See, e.g.*, *Doherty v. Kahn*, 289 Ill. App. 3d 544, 556 (1st Dist. 1997) (statements that plaintiff was "incompetent," "lazy," "dishonest," "cannot manage a business," and/or "lacks the ability to perform landscaping services" were nonactionable opinion because there were no specific facts at the root of the statements); *Piersall v. SportsVision of Chi.*,

FILED DATE: 1/20/2021 2:23 PM 2020L004183

230 Ill. App. 3d 503, 511 (1st Dist. 1992) (statement that plaintiff is a "liar" is a nonactionable opinion because it lacks a factual basis surrounding the statement). As the Court of Appeals noted in *Hopewell*, 299 Ill. App. 3d at 521, "in one sense all opinions imply facts; however, the question of whether a statement is actionable is one of degree," and "[t]he *vaguer and more generalized the opinion the more likely the opinion is non-actionable as a matter of law*." *Id.* at 521 (emphasis added) (internal quotation marks and citations omitted) (holding that "the alleged defamatory statement – 'fired because of incompetence' – is too vague and general to support an action for defamation as a matter of law"). In addition, here, as in *Solaia*, "the context in which [the statement] appeared indicates that it may have been judgmental, but it was not factual." *Id.*

2. The May 27 Email to Project44's CRO

The statements in the May 27 email are likewise not actionable. Plaintiff focuses on statements in the email's first paragraph that "[t]here is one ingredient you missed —a great product" and that Plaintiff has to "stop selling shit." These are plainly statements of subjective opinion, not verifiable fact. *See, e.g.*, *J. Maki Constr. Co. v. Chi. Reg'l Council of Carpenters*, 379 Ill. App. 3d 189, 200-201 (2d Dist. 2008) (statement that plaintiffs' houses were "crappy" was not actionable); *Pompa v. Swanson*, 2013 IL App (2d) 120911, ¶ 23 (statement that plaintiff "performed his job unsatisfactorily" was not actionable). Moreover, these statements suggest at most a "fail[ure] to provide the contracted-for" service, and thus "d[o] not amount to an allegation that [the plaintiff] … lacks integrity or is unable to perform [its] employment or professional duties." *Coghlan*, 2013 IL App (1st) 120891, ¶ 50; *see also Cohen*, 2015 WL 3609689, at *6 (statement focused on business's product, as opposed to misconduct of the business entity itself, does not constitute defamation of the business).

FILED DATE: 1/20/2021 2:23 PM 2020L004183

The only other allegedly defamatory statement in the May 27 email is "You don't want to be part of the next Ponzi scheme or next theranos." The reference to "theranos," as previously discussed, lacks the precise and readily understood meaning necessary for it to be defamatory *per se*. Moreover, the statement as whole is a warning about something the author believes might come to pass, not a factual statement capable of verification. *See, e.g.*, *Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. Ct. App. 2001) ("Delander's remark that appellant was going to 'f--- [other drivers] over' is a prediction of a future event and is not a fact capable of verification."); *see also Green*, 234 Ill. 2d at 499 (a statement "will not be actionable *per se* if it is reasonably capable of an innocent construction."); *Stone*, 2011 IL App (1st) 093386, ¶ 30 ("If the actual words do not alone denote criminal or unethical conduct … the words are not actionable as defamation *per se*."). Plaintiff has not alleged a legally sufficient defamation claim against FourKites, and its Complaint must therefore be dismissed.

III. Plaintiff Has Not Pled a Conspiracy Claim

FourKites, like P44, can only act through its employees, and a company cannot conspire with itself. *Kovac v. Barron*, 2014 IL App (2d) 121100, ¶ 105. Therefore, even if accepted as true, P44's allegations fail to state a conspiracy claim. To state a claim for civil conspiracy, a plaintiff must allege facts showing (1) an agreement to accomplish by concerted action either an unlawful purpose or a lawful purpose by unlawful means, (2) a tortious act committed in furtherance of that agreement, and (3) an injury caused by the defendant. *Reuter v. MasterCard International, Inc.*, 397 Ill. App. 3d 915, 927-28 (2010). Conclusory allegations that the defendants agreed with others to achieve some illicit purpose are not sufficient. *Id.* at 928 (citing *Pawlikowski v. Toyota Motor Credit Corp.*, 309 Ill.App.3d 550, 555 (1999)). Here, Plaintiff has not pled the facts necessary to establish any of these elements.

FILED DATE: 1/20/2021 2:23 PM 2020L004183

Plaintiff has not pled any facts showing an "agreement" between FourKites and the email sender(s). In conclusory fashion, Plaintiff alleges that FourKites "knowingly and voluntarily entered into an agreement (the 'Conspiracy') to … unlawfully defame [Plaintiff] via the May 19th communication and the May 27th communication." *See* Complaint, at ¶ 75. Plaintiff has not alleged any other facts to show an agreement with FourKites and another party to defame Plaintiff. "Merely alleging that a party knows that the acts of another are illegal is not enough to show a conspiracy and merely characterizing 'a combination of acts as a conspiracy is insufficient to withstand a motion to dismiss.'" *Id.* (citing *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill.2d 102, 134 (1999) and *Buckner v. Atlantic Plant Maintenance, Inc.*, 182 Ill.2d 12, 23 (1998)). Plaintiff has not sufficiently pled the "agreement" element of a conspiracy claim and therefore Count III must be dismissed.

Perhaps recognizing this deficiency, Plaintiff alleges in the alternative that the email sender(s) are FourKites' employees. (*See* Complaint, at ¶ 77). This allegation defeats, rather than supports, Plaintiff's conspiracy claim because a corporation cannot engage in a conspiracy with its own agents. *See, e.g.*, *Kovac*, at ¶ 105 ("[T]here can be no conspiracy between a principal and an agent, because the acts of an agent are considered in law to be the acts of the principal."); *Davis v. Times Mirror Magazines, Inc.*, 297 Ill. App. 3d 488, 499 (1st Dist. 1998) ("[B]ecause the individual defendants were [the corporate defendant's] agents, there could have been no conspiracy among the individual defendants and [the corporate defendant]."). Therefore, even if accepted as true, this allegation defeats, rather than supports, Plaintiff's conspiracy claim.

Similarly, a civil conspiracy cannot exist between a corporation's own officers or employees. *Van Winkle v. Owens-Corning Fiberglas Corp.*, 291 Ill. App. 3d 165, 173 (4th Dist. 1997). It is not clear whether Plaintiff is claiming that FourKites conspired ***with*** its employees, or

FILED DATE: 1/20/2021 2:23 PM 2020L004183

is merely responsible for a conspiracy ***between*** its employees. Ultimately, the distinction does not matter because neither scenario is a conspiracy under Illinois law.

Plaintiff's conspiracy claim also fails because it cannot show a tortious act. Plaintiff alleges that FourKites "entered into an agreement to … unlawfully defame [Plaintiff.]" *See*, Complaint, at ¶ 75. As explained above, Plaintiff's allegations do not amount to defamation, and Plaintiff therefore lacks a tortious act to support a conspiracy claim. Where, as here, a plaintiff fails to state an independent cause of action underlying its conspiracy allegations, the claim for a conspiracy also fails. *Indeck N. Am. Power Fund, L.P. v. Norweb PLC*, 316 Ill. App. 3d 416, 432 (1st Dist. 2000).

Finally, Plaintiff has not pled any facts showing an injury caused by FourKites or even the conspiracy. Plaintiff's sole allegation on this point is it "has been injured by the Conspiracy and the tortious acts undertaken pursuant to the Conspiracy." *See*, Complaint, at ¶ 78. Plaintiff's Complaint is devoid of any factual allegations setting forth the injury it suffered and how such injury was caused by FourKites. *See*, *Reuter*, 397 Ill. App. 3d at 928 (dismissing complaint when "the plaintiff failed to allege that he suffered any damages as a result of a tort committed in furtherance of the alleged conspiracy") and *Recio v. GR-MHA Corp.*, 366 Ill. App. 3d 48, 61 (1st Dist. 2006) ("[P]roximate cause is still a required element of the cause of action for conspiracy.").

Count III must be dismissed because Plaintiff has not pled injury or causation.

WHEREFORE, Defendant FourKites, Inc. respectfully requests that the Court grant Defendant's Motion, dismiss Plaintiff's Complaint with prejudice, and grant any other relief that the Court deems equitable and just.

FILED DATE: 1/20/2021 2:23 PM 2020L004183

Date: January 20, 2021

Respectfully submitted,

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FILED DATE: 1/20/2021 2:23 PM 2020L004183

CERTIFICATE OF SERVICE

I hereby certify that on January 20, 2021, a copy of the foregoing was served upon counsel of record through the Court's e-filing system and by e-mail to:

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12-Person Jury

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FILED DATE: 1/20/2021 2:23 PM 2020L004183
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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC., a Delaware corporation,

Plaintiff,

v.

FOURKITES, INC., a Delaware corporation,

and

JANE DOE, an individual, corporation, organization, or other legal entity whose name is presently unknown,

and

JOHN DOE #1, aka "Ken Adams," an individual, corporation, organization, or other legal entity whose name is presently unknown, using the email address "kenadams8558 @gmail.com,"

and

JOHN DOE #2, aka "Jason Short," an individual, corporation, organization, or other legal entity whose name is presently unknown, using the email address "jshort5584@gmail. com,"

and

JOHN DOES #3-25, individuals, corporations, organizations, or other legal entities whose names are presently unknown,

Defendants.

2020L004183

Case No. ____________

COMPLAINT

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

Plaintiff PROJECT44, INC. ("project44"), complains against Defendants FOUR KITES, INC. ("FourKites"), JANE DOE ("Jane Doe") an individual, corporation, organization, or other legal entity whose name is presently unknown, JOHN DOE #1, aka "Ken Adams" ("Ken Adams") an individual, corporation, organization, or other legal entity whose name is presently unknown, JOHN DOE #2, aka "Jason Short," ("Jason Short") an individual, corporation, organization, or other legal entity whose name is presently unknown, and JOHN DOES #3-25 ("John Does #3-25"), individuals, corporations, organizations, or other legal entities whose names are presently unknown, as follows:

NATURE OF ACTION

1. This is an action for defamation *per se*, arising from two email communications sent on May 19, 2019 and May 27, 2019 from the accounts "kenadams8558@gmail.com," and "jshort5584@gmail.com," respectively. In each communication, the sender(s) - using the pseudonyms "Ken Adams" and "Jason Short," respectively - levied knowingly false and defamatory statements against Plaintiff project44. In particular, the sender(s) accused project44 of lacking ability in their business, of lacking integrity in their business conduct, and engaging in criminal activity. The defamatory statements were directed to both outside members of project44's board of directors, as well as project44's Chief Revenue officer, with the intent to disrupt project44's business activities.

2. project44 is in the highly competitive shipping logistics industry. Over 25,000 different carriers have tracked shipments in project44's system, and it supports all transportation modes and shipping types. project44 has more than 200 employees.

3. The kenadams8558 and jshort5584 e-mail addresses from which the defamatory communications were sent both have an "@gmail" domain name. This signifies that the email

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

accounts were set up via Google, LLC ("Google"). Prior to filing this Complaint, project44 obtained an order for pre-suit discovery from Google. Information received from Google identified Defendant FourKites, a competitor of project44, as either an owner or user of the kenadams8558@gmail.com and jshort5584@gmail.com email addresses. Additionally, one or more unknown co-users or co-owners of these email addresses has been identified as accessing these accounts through IP addresses operated by, *inter alia*, AT&T Mobility, LLC ("AT&T"). These unknown co-users or co-owners conspired with Defendant FourKites to send the defamatory communications, and themselves sent the defamatory communications.

4. project44 has filed a petition for discovery, naming AT&T as a respondent, in Cook County Circuit Court to identify the unknown co-users or co-owners. (*See project44, Inc. v. AT&T Mobility, LLC, et al.*, Case No. 2019-L-10520). However, an intervenor appearing anonymously as "Jane Doe," by and through their attorneys, has sought to quash the petition.

5. As of the filing date of this Complaint, no order has been entered on project44's petition for discovery of AT&T. Since the statute of limitations for defamation actions is one year from publication (735 ILCCS 5/13-201), and given that the hearing on project44's petition of AT&T has now been rescheduled to less than a week before project44's claims become time-barred (due to the COVID-19 coronavirus epidemic), project44 has filed this Complaint now before its petition for discovery on AT&T has been resolved.

THE PARTIES

6. Plaintiff project44, Inc. is a Delaware corporation with its principal place of business in Chicago, Illinois.

7. Defendant FourKites, Inc., is a Delaware corporation with its principal place of business in Chicago, Illinois.

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

8. Defendant Jane Doe is an unknown individual, corporation, organization, or other legal entity proceeding as intervenor under the fictitious name "Jane Doe" in the related petition for discovery, *project44, Inc. v. AT&T Mobility, LLC, et al.* (Case No. 2019-L-10520), currently pending before the Hon. Allen P. Walker in the Circuit Court of Cook County, Law Division.

9. The true names of the following Defendants are unknown to Plaintiff, who therefore sues these Defendants under such fictitious names:

- John Doe #1, aka "Ken Adams," using the email address kenadams8558@gmail.com;
- John Doe #2, aka "Jason Short," using the email address jshort5584@gmail.com; and
- John Does #3-25, affiliated with or otherwise related to Defendants FourKites, Jane Doe, John Doe #1, or John Doe #2.

project44 alleges that each of the aforementioned Defendants Jane Doe and John Does #1-25 conspired with Defendant FourKites to publish false and defamatory statements concerning project44. project44 will seek leave of court to amend this Complaint and insert their true names in place of their fictitious names when the same have become known to project44.

JURISDICTION AND VENUE

10. Jurisdiction is proper in this Court pursuant to 735 ILCS 5/2-209 because, among other reasons, the defamatory material published by Defendants was published in Illinois representing the commission of a tort within Illinois and, thus, has caused project44 to suffer injury in Illinois. Separately, Defendant FourKites both does business in Illinois and maintains a principal place of business in Illinois.

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

11. Venue is proper in this Court pursuant to 735 ILCS 5/2-101 and 735 ILCS 5/102(a) as, *inter alia*, Cook County is where Defendant FourKites maintains its principal place of business.

FACTUAL BACKGROUND

12. project44 is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois. project44 is commonly referred to in its industry by the abbreviation "p44." project44 is in the highly competitive shipping logistics industry, where it provides goods and services which permit its customers to connect with, automate, and provide visibility into key transportation processes which, in turn, permits its customers to increase operational efficiencies, reduce costs, improve shipping performance, and deliver an exceptional experience to their own customers. Over 25,000 different carriers have tracked shipments in project44's system, and it supports all transportation modes and shipping types including "parcel," "final-mile," "less-than-truckload," "volume less-than-truckload," "truckload," rail, intermodal, and ocean. project44 has more than 200 employees.

13. Defendant FourKites is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois. Like project44, FourKites is in the highly competitive shipping logistics industry. FourKites is a competitor of project44.

The May 19th Defamatory Communication

14. On May 19, 2019, one or more individuals, corporations, organizations, or other legal entities using the email address kenadams8558@gmail.com and the name "Ken Adams" transmitted an email communication titled "Accounting improprieties at P44" ("the May 19th communication"). A true and correct redacted copy of the May 19th communication is attached hereto as Exhibit A (the name of a project44 employee not a party to this litigation has been redacted).

15. The May19th communication was sent to email addresses belonging to Jim Baum (jim@ov.vc) and Kevin Dietsel (kevin@sapphireventures.com), who are both non-employee, outside members of project44's Board of Directors. (*See* Exhibit A.) Thus, the May 19th communication was published to one or more third parties, without privilege.

16. The May 19th communication is divided into five paragraphs, three of which are numbered. (*Id.*). The May 19th communication is defamatory *per se* as it, *inter alia*, falsely imputes the commission of one or more crimes by project44, a want of integrity in project44's business conduct, and a lack of ability in project44's business.

17. For example, the first numbered paragraph alleges that that "Ex employees [of project44] are silenced with legal threats and defamation suits." (*Id.*). Immediately thereafter, the paragraph states that one of project44's employee's family members "used to be the book keeper for a Chicago Mafia and they are using that to silence folks." (*Id.*) Given the context of the paragraph, the word "they" can only refer to project44.

18. These statements are defamatory *per se* because, not only do they falsely allege that project44 maintains connections with organized crime, but they also assert that project44 uses those connections to "silence" persons such as project44's ex-employees. (*Id.*) The reference to "Chicago Mafia" conveys the idea that when project44 "silence[s] folks," they do so with threats of violence or other intimidation, a crime in Illinois. (*See* 720 ILCS 5/12-6) (stating that, *inter alia*, "[i]ntimidation is a Class 3 felony.")

19. The first sentence of the second numbered paragraph in the May 19th communication states that "[t]here is rampant accounting improprieties" at project44. (Exhibit A.) Either viewed by itself, or taken in conjunction with the next two sentences, this statement is defamatory *per se* because it falsely imputes both a want of integrity in project44's business

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

conduct, as well as a lack of ability in project44's business (such as the ability to comply with generally accepted accounting procedures). "Impropriety" is commonly understood to mean "dishonest behavior, or a dishonest act." (*See*, https://dictionary.cambridge.org/us/dictionary/english/impropriety, a screenshot of which is attached hereto as Exhibit B.) As such, by using the phrase "accounting improprieties," the sender(s) of the email accuses project44 of dishonest financial practices. The sender(s) further use the term "rampant" to convey that the alleged dishonest financial practices occur frequently. (*See, e.g.*, https://dictionary.cambridge.org/us/dictionary/english/rampant, a screenshot of which is attached hereto as Exhibit C.)

20. The next sentence in the second numbered paragraph of the May 19th communication encourages the recipients "to take a look at the contracts (pilots , [*sic*] out clauses, rev rec etc.)." (Exhibit A.) The fact that this sentence: (1) immediately follows the sender(s) accusation of "accounting improprieties;" (2) is grouped in the same numbered paragraph; and (3) is part of an email titled "Accounting improprieties at P44," means that it, too, is defamatory *per se* because it conveys the false idea that these specific "contracts" contain "accounting improprieties," also imputing both a want of integrity in project44's business conduct, as well as a lack of ability in project44's business. (*Id.*)

21. For the same reasons, the third sentence in the second numbered paragraph ("Recent CFO Departure must tell you everything") is also defamatory *per se*, as it also conveys the false idea that project44's CFO left due to alleged accounting improprieties, again imputing both a want of integrity in project44's business conduct, as well as a lack of ability in project44's business. (*Id.*)

22. The third numbered paragraph of the May 19th communication states that a client of project44 ("Estes") "cancelled the contract [with project44]," and that the contract "was only

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

$5k a month and they [Estes] are not even willing to pay this." This, too, is defamatory *per se* as it falsely imputes a lack of ability in project44's business. Moreover, as the sender(s) chose to convey this information in an email with the subject line "Accounting improprieties at P44," the statement also falsely conveys the idea that the cancelled contract was due to project44's alleged "accounting improprieties," again imputing a want of integrity in project44's business conduct.

23. Finally, the last paragraph of the May 19th communication is unnumbered and states that "there is widespread discontent brewing and it's just a matter of time before people go public and another Theranos happen [*sic*] in Chicago." (*Id.*) This is also defamatory *per se* as it falsely conveys the idea that project44 has committed the crime of fraud. The sender(s)' comparison to "Theranos" refers to Theranos Inc., a now-defunct company that (along with its founder Elizabeth Holmes) was charged by the U.S. Securities and Exchange Commission with securities fraud. (*See, e.g.*, Dkt No. 1 in *SEC v. Holmes, et al.*, Case No. 5:18-CV-01602 (N.D. Cal. March 14, 2018), available at https://www.sec.gov/litigation/complaints/2018/comp-pr2018-41-theranos-holmes.pdf., an excerpt of which is attached hereto as Exhibit D.) Ms. Holmes and Theranos's former president, Ramesh Balwani, have also been indicted on multiple counts of wire fraud and conspiracy to commit wire fraud (their cases are currently pending). (*See, e.g.*, https://www.justice.gov/usao-ndca/pr/theranos-founder-and-former-chief-operating-officer-charged-alleged-wire-fraud-schemes, a screenshot of which is attached hereto as Exhibit E.) Thus, the May 19th email's reference to Theranos falsely conveys the idea that, like Theranos, project44 is allegedly involved in fraudulent activity.

24. Whether viewed individually or as a whole, the statements made in the May 19th communication are defamatory *per se*. The fact that the sender(s) published these false statements

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

to project44's outside board members confirms that the sender(s) intent was to disrupt project44's business activities.

25. "Ken Adams" is a pseudonym, as project44 has not previously employed anyone named "Ken Adams," nor has it ever worked with any persons having this name. The sender(s)' need to conceal their identity speaks to the defamatory nature of this communication.

26. The May 19th communication was either sent by project44's competitor Defendant FourKites, or by one or more unknown entities acting in concert with Defendant FourKites. project44 is thus reasonably concerned that similar information has been published to other parties.

The May 27th Defamatory Communication

27. On May 27, 2019, one or more individuals using the email address jshort5584@gmail.com and the name "Jason Short" transmitted an untitled email communication to an email address belonging to Tim Bertrand (tbertrand@project44.com), project44's Chief Revenue Office ("the May 27th communication"). (A true and correct copy of the May 27th communication is attached hereto as Exhibit F.) Thus, the May 27th communication was published to one or more third parties, without privilege.

28. The May 27th communication is defamatory *per se* as it, *inter alia*, falsely imputes the commission of one or more crimes by project44.

29. For example, the May 27th communication begins by addressing Mr. Bertrand as "Tim" and saying, *inter alia*, "I wanted to shed some light so you can fled [*sic*] ASAP and go find another job." (Exhibit F.) The second paragraph of the May 27th communication states that "[y]ou don't want to be part of the next Ponzi scheme or next theranos [*sic*]." (*Id.*) This is immediately followed by an invitation to "[t]alk to ex [project44] CFO Bruns. Talk to ex [project44] Sales

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

people, talk to customers.. [*sic*] talk to prospects, talk to investors outside p44 [project44]. They will tell you the truth." (*Id.*)

30. Not only does the May 27, 2019 email falsely convey the idea that project44 is liable for criminal conduct by way of its reference to "theranos [*sic*]," the email flat-out falsely accuses project44 of being a criminal enterprise by calling it a "Ponzi scheme." As such, the May 27th communication is defamatory *per se*. (*Id.*) The fact that the sender(s) published these false statements to project44's newly hired Chief Revenue Officer - and encouraged the CRO to resign - confirms that the sender(s) intent was to disrupt project44's business activities.

31. "Jason Short" is a pseudonym, as project44 has not previously employed anyone named "Jason Short," nor has it ever worked with any persons having this name. The sender(s)' need to conceal their identity speaks to the defamatory nature of this communication.

32. The May 27th communication was either sent by project44's competitor Defendant FourKites, or by one or more unknown entities acting in concert with Defendant FourKites. project44 is thus reasonably concerned that similar information has been published to other parties.

project44's Efforts to Identify the Sender(s) of the Defamatory Communications

33. Google, LLC ("Google") hosts and runs one of the world's largest free e-mail systems, known as Gmail. The "@gmail" domain name in the kenadams8558 and jshort5584 e-mail addresses signifies that the emails are set up with Gmail.

34. In the process of creating a free Gmail e-mail account, the creator may leave behind actual contact information (another e-mail address, a real name, a real phone number) to be assured of continued access to the account. Similarly, when the creator logs in to create the account, and thereafter logs in to send and receive e-mail, the internet protocol address (or "IP address") of the device the user utilizes to connect will be recorded. The IP address permits insight into the location

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

where the user is located because it identifies the specific network the user was on when he or she logged into the Gmail account, including what Internet Service Provider (or "ISP") provided the internet connection to the user. Once the ISP is known, a subpoena can also be sent to it to obtain identifying information. The IP address also offers insight into what device was used to log into the account and, thus, can also aid in identifying the person who sent the communication.

35. On May 30, 2019, project44 filed a verified petition for discovery, pursuant to Ill. S. Ct. R. 224, naming Google as respondent (the "Google Petition") in the Circuit Court of Cook County, Law Division. (*See* May 30, 2019 Petition, attached hereto as Exhibit G.) The Google Petition requested that Google provide project44 with, *inter alia*, the IP address information for the kenadams8558 and jshort5584 email accounts. (*See* Exhibit G.)

36. The Google Petition was assigned to the Hon. John M. Ehrlich. On July 25, 2019, Judge Ehrlich entered an order in which Google agreed to provide, *inter alia*, "internet protocol (IP) address(es) assigned to the computer or network connection used by the person or persons who established the above user account at the time the account was established, and reasonably available login IP addresses (with dates and times) assigned to the computer or network connection used by the person or persons who have accessed such user account from the date of the account's establishment to the date of the subpoena." (*See* July 25, 2019 Order, attached hereto as Exhibit H.)

37. On September 18, 2019, Google produced two text documents containing "subscriber and recent login information for the Google Accounts JSHORT5584@GMAIL.COM and KENADAMS8558@GMAIL.COM." (*See* September 18, 2019 Google Correspondence, attached hereto as Exhibit I.) Copies of the produced documents are attached hereto as Exhibit J.

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

38. Exhibit J provides a series of IP addresses used to access both the kenadams8558 and jshort5584 email accounts. (*See* Exhibit J.) In particular, Exhibit J indicates that the IP addresses "78.133.216.228" and "162.234.8.247" were used to access both the kenadams8558 and jshort5584 email accounts, including on May 19, 2019 (the date the first defamatory email was sent). (Exhibit J.) As such, the same entity or entities are responsible for sending both the May 19th and May 27th defamatory communications.

39. With respect to the kenadams8558 account, the "subscriber . . . information" provided by Google includes the following entry: "SMS: +18476443564 [US]." (Exhibit I; Exhibit J.) This entry is a phone number that was provided to Google by the kenadams8558 account owner for identification purposes.

40. The phone number "847-644-3564" is identical to the phone number used by Defendant FourKites in Securities and Exchange Commission filings. (See Notice of Exempt Offering of Securities, retrieved from https://www.sec.gov/Archives/edgar/data/1625230/000162523015000001/xslFormDX01/primary_doc.xml, a copy of which is attached hereto as Exhibit K.) Thus, Defendant FourKites is an owner and/or user of the kenadams8558 account. Furthermore, by virtue of the fact that the same IP addresses were used to access both email accounts-at-issue, Defendant FourKites is also an owner and/or user of the jshort5584 account.

41. Exhibit J further confirms FourKites's involvement by disclosing that the IP address "182.74.119.134" was used to access the jshort5584 account. (*See* Exhibit J.) Using the publicly available "WHOIS IP Lookup Tool," https://www.ultratools.com/tools/ipWhoisLookup, this IP address was identified as belonging to "FOURKITES INDIA PRIVATE L." (*See* screenshot of WHOIS IP Lookup Tool, attached hereto as Exhibit L.) "FOURKITES INDIA PRIVATE L" refers to "FourKites India Private Limited," a subsidiary of Defendant FourKites.

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

(*See, e.g.*, https://www.quickcompany.in/company/fourkites-india-private-limited, a screenshot excerpt of which is attached hereto as Exhibit M (listing Sriram Nagaswamy and Rashi Jain as directors of FourKites India Private Limited); *compare with* https://www.fourkites.com/about/sriram-nagaswamy/ and https://www.fourkites.com/about/rashi-jain, screenshots of which are attached hereto as Exhibit N (listing Sriram Nagaswamy and Rashi Jain as employees of Defendant FourKites).)

42. Exhibit J also contains IP addresses belonging to AT&T Mobility, LLC ("AT&T") for both the kenadams8558 and jshort5584 email accounts. AT&T is a provider of wireless communication services as well as an Internet Service Provider ("ISP"). Each time a user utilizes AT&T's internet services, AT&T assigns the user an IP address. Many ISPs maintain internal logs which record the date, time, and customer identity for each IP address assignment made by that ISP. Upon information and belief, AT&T maintains such logs.

43. The AT&T IP addresses listed in Exhibit J will identify anonymous co-owners or co-users of the kenadams8558 and jshort5584 email accounts (*i.e.* Defendants Jane Doe, John Doe #1, John Doe #2, and John Does #3-25). These anonymous co-owners or co-users of the kenadams8558 and jshort5584 email accounts acted in concert with Defendant FourKites to send the defamatory May19th communication and May 27th communication.

44. Given this, on September 24, 2019, project44 filed another petition for discovery in Cook County Circuit Court, naming, *inter alia*, AT&T as a respondent in discovery. (*See* September 24, 2019 Petition for Discovery (the "AT&T Petition"), attached hereto as Exhibit O.) The AT&T Petition was assigned to the Hon. Alan P. Walker.

45. On November 25, 2019, AT&T sent correspondence to the subscriber(s) associated with the IP addresses identified in the AT&T Petition, notifying them as to the existence of

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

project44's petition. (*See* November 25, 2019 AT&T Correspondence, attached hereto as Exhibit P.) On December 16, 2019, the subscriber(s) intervened in the AT&T Petition, proceeding under the fictitious name "Jane Doe," and by and through their counsel, expressed their intention to oppose and dismiss the petition. (*See* December 16, 2019 Petition for Intervention, and December 16, 2019 Motion Pursuant to 735 ILCS 5/2-401(e) to Appear under Fictitious Name, attached hereto as Exhibit Q and Exhibit R, respectively.) Thus, there is an actual person or entity involved in sending these defamatory communications, and that person or entity does not want their identity known.

46. On February 21, 2020, project44 filed a Motion for Judgment on the Pleadings with respect to the AT&T Petition. (*See* February 21, 2020 Motion for Judgment on the Pleadings, attached hereto as Exhibit S.) Jane Doe opposed project44's Motion and filed their own Motion seeking to dismiss the AT&T Petition. (*See* March 3, 2020 Motion for Post-Hearing Final Relief on project44's Rule 224 Petition for Discovery, attached hereto as Exhibit T.) The motions were fully briefed and a hearing on the motions was set for April 20, 2020. (*See* March 13, 2020 order, attached hereto as Exhibit U.) However, in light of the COVID-19 coronavirus epidemic, the hearing was subsequently rescheduled to May 12, 2020. (*See* March 24, 2020 Cook County electronic notice, attached hereto as Exhibit V.)

47. The statute of limitations for project44's defamation claims is one year from publication, *i.e.* May 19, 2020. (*See* 735 ILCCS 5/13-201.) As such, there is a high likelihood that project44's defamation claims will become time-barred before an order in the AT&T Petition is entered, let alone before project44 receives the information requested from AT&T. This action is therefore proper to preserve project44's claims and to complete the discovery identified herein (whether through this action, or in giving the pending discovery petition time to complete).

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

COUNT I
DEFAMATION *PER SE* – THE MAY 19TH COMMUNICATION

48. project44 hereby reincorporates and restates the above paragraphs as if specifically set forth and re-alleged herein.

49. Defendants conspired with and aided and abetted each other in making the defamatory May 19th communication, which greatly harmed project44's reputation in their trade and business.

50. Defendants each knowingly and voluntarily participated in this common scheme to harm project44's reputation.

51. Defendants did so for the purpose of accomplishing, by concerted action and common design, a harm to the business reputation of project44, to which Defendants agreed.

52. Each Defendant committed overt tortious acts in concert with each other and in furtherance of this conspiracy by making the May 19th communication, and each substantially participated and assisted in such a scheme to defame project44.

53. Each Defendant also accepted and ratified each other's defamatory statements.

54. The May 19th communication constituted defamation *per se* in that such statements concerned project44's reputation in its trade and business by lowering such reputation in the eyes the community and, upon information and belief, deterred the community from associating with project44. Therefore, damages are presumed.

55. The May 19th communication imputed a lack of integrity of project44's business conduct, imputed the commission of one or more crimes, conveyed a lack of ability by project44 in its business, and prejudiced project44 in its business.

56. Defendants knew that the May 19th communication was false, or at the very least, Defendants acted in a reckless disregard of whether the May 19th communication was false or not.

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

57. Accordingly, Defendants acted with malice and made the May 19th communication for the purpose of harming project44's reputation.

58. The May 19th communication contained factual statements, in that: (a) the specific language at issue (*i.e.* statements that project44 was affiliated with the Chicago Mafia and used that affiliation to intimidate persons such as ex-employees; that project44 had engaged in accounting improprieties, that its contracts reflected these improprieties, and that project44's former CFO left because of these improprieties; that a customer had cancelled their contract due to project44's lack of ability and/or accounting improprieties; and that project44 had committed fraud in the same manner as Theranos) have precise meanings which are readily understood; (b) the defamatory statements are capable of being proven true or false; and (c) the full context of the defamatory statements in which they appear in the above-referenced media and in the broader social context and surrounding circumstances are such as to communicate to the readers of these statements that what was read is not opinion, but a statement of fact.

59. As a direct and proximate result of Defendants' defamatory statements, project44 has suffered presumed damages in the form of, *inter alia*, impairment of its business reputation and standing in the community.

60. Additionally, due to the malicious nature of the May 19th communication and the highly egregious conduct of Defendants detailed above, project44 also demands punitive damages.

COUNT II
DEFAMATION *PER SE* – THE MAY 27TH COMMUNICATION

61. project44 hereby reincorporates and restates the above paragraphs as if specifically set forth and re-alleged herein.

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

62. Defendants conspired with and aided and abetted each other in making the defamatory May 27th communication, which greatly harmed project44's reputation in their trade and business.

63. Defendants each knowingly and voluntarily participated in this common scheme to harm project44's reputation.

64. Defendants did so for the purpose of accomplishing, by concerted action and common design, a harm to the business reputation of project44, to which Defendants agreed.

65. Each Defendant committed overt tortious acts in concert with each other and in furtherance of this conspiracy by making the May 27th communication, and each substantially participated and assisted in such a scheme to defame project44.

66. Each Defendant also accepted and ratified each other's defamatory statements.

67. The May 27th communication constituted defamation *per se* in that such statements concerned project44's reputation in its trade and business by lowering such reputation in the eyes the community and, upon information and belief, deterred the community from associating with project44. Therefore, damages are presumed.

68. The May 27th communication imputed the commission of one or more crimes, and thus prejudiced project44 in its business.

69. Defendants knew that the May 27th communication was false, or at the very least, Defendants acted in a reckless disregard of whether the May27th communication was false or not.

70. Accordingly, Defendants acted with malice and made the May 27th communication for the purpose of harming project44's reputation.

71. The May 27th communication contained factual statements, in that (a) the specific language at issue (*i.e.* statements that project44 was a Ponzi scheme and had committed fraud in

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

the same manner as Theranos) have precise meanings which are readily understood; (b) the defamatory statements are capable of being proven true or false; and (c) the full context of the defamatory statements in which they appear in the above-referenced media and in the broader social context and surrounding circumstances are such as to communicate to the readers of these statements that what was read is not opinion, but a statement of fact.

72. As a direct and proximate result of Defendants' defamatory statements, project44 has suffered presumed damages in the form of, *inter alia*, impairment of its business reputation and standing in the community.

73. Additionally, due to the malicious nature of the May 27th communication and the highly egregious conduct of Defendants detailed above, project44 also demands punitive damages.

COUNT III
CIVIL CONSPIRACY

74. project44 hereby reincorporates and restates the above paragraphs as if specifically set forth and re-alleged here in.

75. Defendants knowingly and voluntarily entered into an agreement (the "Conspiracy") to, as described above, unlawfully defame project44 via the May 19th communication and the May 27th communication.

76. Defendant FourKites entered into the Conspiracy directly through either Jane Doe, John Doe #1, John Doe #2, or John Does #3-25.

77. In the alternative, Defendant FourKites is liable for Jane Doe's, John Doe #1's, John Doe #2's, and/or John Does #3-25's participation in the Conspiracy under the doctrine of *respondeat superior*. Upon information and belief, one or more of Jane Doe, John Doe #1, John Doe #2, and John Does #3-25 are employees of FourKites, and said Defendants made the

FILED DATE: 1/20/2021 2:23 PM 2020L004183
FILED DATE: 4/13/2020 10:19 PM 2020L004183

defamatory statements to both damage the reputation of project44 and to provide Defendant FourKites with a competitive advantage.

78. project44 has been injured by the Conspiracy and the tortious acts undertaken pursuant to the Conspiracy as described above.

WHEREFORE, Plaintiff project44, Inc. respectfully requests that the Court grant it the following relief:

1. Judgment in project44, Inc.'s favor against Defendants FourKites, Inc., Jane Doe, John Doe #1, John Doe #2, and John Does #3-25, for presumed and actual damages in an amount to be determined at trial;

2. An award of all costs of this suit;

3. An award of punitive damages; and

4. Such other relief this Court deems just.

JURY DEMAND

project44, Inc. requests a trial by jury on all issues permitted to be tried to a jury.

Dated: April 13, 2020

Respectfully submitted,

PROJECT44, INC.

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FILED DATE: 2/22/2021 3:45 PM 2020L004183

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CIRCUIT CLERK
COOK COUNTY, IL
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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2020-L-4183
	)	
FOURKITES, INC., et al.,	)	Calendar Y
	)	
Defendants.	)	
	)	
	)	

PLAINTIFF PROJECT44, INC.'S RESPONSE IN OPPOSITION TO DEFENDANT FOURKITES, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

The emails at the heart of this lawsuit were more than just playground banter or hyperbolic claims that Plaintiff project44, Inc. ("project44") is a "rip-off, a fraud, a scandal, [or] a snake-oil job," as Defendant FourKites, Inc. ("FourKites") asserts. Rather, they were calculated attacks on project44's reputation, designed to sow discord within the company, which we now know were sent by one of its chief competitors.

In the first email, the sender – purporting to be a former employee of project44 – directs project44's board members to accusations that the company is affiliated with organized crime, and that project44 allegedly uses these connections to "silence" people. The email also accuses project44 of "rampant accounting improprieties," and compares project44's business practices to that of Theranos, a company at the center of one of the largest fraud investigations in U.S. history. The second email flat-out accuses project44 of being a Ponzi scheme, and directs those attacks to project44's Chief Revenue Officer, encouraging him to resign.

To add legitimacy to their claims, the sender dresses up untruths as facts, citing to specific individuals in project44's organization whom the sender claims are affiliated with organized crime.

FILED DATE: 2/22/2021 3:45 PM 2020L004183

The sender also cites to specific persons and documents that they claim can prove project44's financial "improprieties." They even call out project44's former customers, implying that project44's business practices have caused it to lose clients.

As explained in the Complaint, prior to filing this action, we obtained information from Google, LLC about the email accounts that sent these communications. This information included a recovery telephone number that matches the number used on SEC filings for FourKites. Separately, IP address data shows that these accounts were accessed using FourKites's network.

Caught red-handed, FourKites does not deny that it was involved in sending these emails, but instead attempts to downplay the severity of the statements. Yet FourKites's arguments fail to show that these emails were truthful, could be innocently construed, or are otherwise legitimized or protected opinion. In short, FourKites has *failed* to prove that, under no set of facts, the allegations made in the May 19th and May 27th emails (especially when read in their entirety) would entitle project44 to the recovery it seeks.

Likewise, it is clear on the face of these emails that they are published. Yet FourKites asks this Court to engage in a fiction and hold that defamatory communications about a corporation that are sent to that company's executives and managers can never give rise to a claim of defamation by that company. For the Court to adopt FourKites's proposed exception would rewrite Illinois law, which follows the Restatement and holds that such communications are published.

Finally, since project44 has set forth a claim for defamation, and has pled facts showing that the defendants, who include unknown parties currently sought to be discovered, were co-owners or co-users of the email accounts at-issue, its conspiracy claim must stand.

For these reasons, project44 respectfully requests that FourKites's Motion to Dismiss be denied.

FILED DATE: 2/22/2021 3:45 PM 2020L004183

RELEVANT LAW

While FourKites's statements regarding the standards for a Motion to Dismiss are accurate, it fails to acknowledge the fact that "[a] circuit court should not dismiss a complaint under section 2-615 unless it is clearly apparent no set of facts can be proved that would entitle the plaintiff to recovery." *Hadley v. Doe*, 2015 IL 118000, ¶ 29.

FourKites also sets forth the correct elements of a defamation claim, as well as the appropriate categories of *per se* defamatory statements. And while FourKites is correct that a *per se* defamatory statement must not be reasonably capable of an innocent construction, the Illinois Supreme Court in *Hadley* further instructed that:

> courts must give the allegedly defamatory words their natural and obvious meaning. Courts must therefore interpret the allegedly defamatory words as they appeared to have been used and according to the idea they were intended to convey to the reasonable reader. When a defamatory meaning was clearly intended and conveyed, this court will not strain to interpret allegedly defamatory words in their mildest and most inoffensive sense in order to hold them nonlibellous under the innocent construction rule.

Id. at ¶ 31 (citations omitted). The Court in *Hadley* also stated that:

> The innocent construction rule "does not require courts 'to espouse a naïveté unwarranted under the circumstances.'" "[I]f the likely intended meaning of a statement is defamatory, a court should not dismiss the plaintiff's claim under the innocent construction rule. In those circumstances, an innocent construction of the statement would necessarily be strained and unreasonable because the likely intended meaning is defamatory.

Id. at ¶ 32 (citations omitted). As to whether a statement comprises an opinion, *Hadley* stated the following:

> there is no artificial distinction between opinion and fact: a false assertion of fact can be defamatory even when couched within apparent opinion or rhetorical hyperbole. Indeed, '[i]t 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.' Similarly, '[a] defendant cannot escape liability for defamatory factual assertions simply by claiming that the statements were a form of ridicule, humor or sarcasm.' The test is restrictive: a defamatory

FILED DATE: 2/22/2021 3:45 PM 2020L004183

> statement is constitutionally protected only if it cannot be reasonably interpreted as stating actual fact. Several considerations aid our analysis: whether the statement has a precise and readily understood meaning; whether the statement is verifiable; and whether the statement's literary or social context signals that it has factual content. If a statement is factual, and it is false, it is actionable.

Id. at ¶ 32 (citations omitted).

ARGUMENT

A. The Sender's Defamatory Statements Were Published.

There is no doubt that the emails at-issue in this litigation were published. Exhibits A and F of the Complaint show that they were sent to Jim Baum and Kevin Dietsel (outside board members of project44), as well as Tim Bertrand (project44's Chief Revenue Officer ("CRO")). (*See* Complaint, attached – along with its Exhibits A and F – as Ex. 1, at Exs. A and F.) While FourKites suggests that the transmission of these communications do not count as publications, Defendant's only support for this claim are two non-Illinois cases, *Hoch v. Loren*, 273 So. 3d 56 (Fla. App. 2019) and *Fausett v. American Resolution Management Corp.*, 542 F. Supp. 1234 (D. Utah 1982). (*See* Motion to Dismiss at 5.) Defendant's failure to cite any Illinois caselaw is telling, since Illinois courts follow the "better reasoned and defensible view" espoused by, *inter alia*, the Restatement (Second) of Torts. § 1:23 Publication to plaintiff's agent, Defamation: A Lawyer's Guide § 1:23, attached hereto as Ex. 2 (characterizing the *Fausett* case relied upon by FourKites as "exceptionally dubious"); *see also Missner v. Clifford,* 393 Ill.App.3d 751 (1st Dist. 2009); Restatement (Second) of Torts § 577, cmt. e. In *Missner*, which admittedly did not directly address the issue presently before this Court, the First District nevertheless expressly adopted comment (e) to the Restatement (Second) of Torts § 577, which states that defamatory statements provided to an agent or employee of the defamed party constitute a publication, so long as said statements are not subject to a conditional privilege:

> *e. Publication to agent.* The fact that the defamatory matter is communicated to an

FILED DATE: 2/22/2021 3:45 PM 2020L004183

> agent of the defamer does not prevent it from being a publication sufficient to constitute actionable defamation. The publication may be privileged, however, under the rule stated in § 593. *So too, the communication to a servant or agent of the person defamed is a publication* although if the communication is in answer to a letter or a request from the other or his agent, the publication may not be actionable in defamation.

Restatement (Second) of Torts § 577, cmt. e (emphasis added); *Missner*, 393 Ill.App.3d at 763.

While also not addressing the exact issue before this Court, the analysis provided in *Popko v. Continental Casualty Company*, 355 Ill.App.3d 257 (1st Dist. 2005) is instructive. There, the court rejected the similar *intracorporate* nonpublication rule (involving communications between two agents of the same company), and instead adopted the rule set forth in Restatement (Second) of Torts § 577, comment (i), which – analogous to comment (e) – states that that "[t]he communication within the scope of his employment by one agent to another agent of the same principal is a publication not only by the first agent but also by the principal and this is true whether the principal is an individual, a partnership or a corporation." *Popko*, 355 Ill.App.3d at 263; 265-266 (citing Restatement (Second) of Torts § 577, cmt. i.) The reasoning in *Missner* and *Popko* instructs this Court to similarly hold that communications of a third party, to an agent of a corporation, may give rise to a claim of defamation by that corporation, so long as the statements are not subject to a conditional privilege.

While FourKites claims that their non-Illinois cases merely highlight an exception for executives and managers, no such exception is acknowledged by the Restatement. Moreover, the cases relied on by FourKites are at best on shaky ground. For instance, the holding in *Hoch* is taken directly from another Florida case, *Advantage Pers. Agency, Inc. v. Hicks & Grayson, Inc.*, 447 So. 2d 330 (Fla. 3d DCA 1984) which, in turn, is based on the *Fausett* case. *See Hoch*, 273 So. 3d at 58; *Hicks & Grayson*, 447 So. 2d at 331. In direct contrast to *Missner, Fausett* expressly rejects comment (e) to Section 577 of the Restatement, claiming it is "inapplicable." *Fausett*, 542

FILED DATE: 2/22/2021 3:45 PM 2020L004183

F. Supp. at 1242. However, the *Fausett* court peculiarly claimed that comment (e) applied only to speech of "one corporate employee to another employee of the same corporation." *Id.* This is simply not true, as intracorporate communications are discussed in comment (i) to section 577 of the Restatement. *Compare* Restatement (Second) of Torts § 577, cmt. e *with* cmt. i; *see also Popko*, 355 Ill.App.3d at 266.

In addition to rejecting comment (e), the *Fausett* court also cited to *M.F. Patterson Dental Supply Co. v. Wadley*, 401 F.2d 167 (10th Cir. 1968) and *Jones v. Golden Spike Corp.* 623 P.2d 970, 971 (Nev. 1981) – both of which upheld the intracorporate *nonpublication* rule – in an apparent attempt to justify the "management" nonpublication rule by way of analogy. *See Fausett*, 542 F. Supp. at 1242. Yet, if the same analogy were applied in Illinois courts, the holding in *Popko* would dictate the opposite result. *See Popko*, 355 Ill.App.3d at 263; 265-266. *Fausett* and its progeny are further undercut by the fact that the Nevada Supreme Court later overruled the *Golden Spike* case. *See Simpson v. Mars Inc.*, 113 Nev. 188, 192 (Nev. 1997). The *Simpson* court expressly rejected the holding in *Golden Spike*, and instead adopted the "better rule," namely § 577 of the Restatement, holding that, like the Illinois court in *Popko* (as well as *Missner*), said communications are published but may be subject to a privilege. *Id.* at 191-192. For this reason, the Westlaw online reporter service lists the *Fausett* case as being possibly overruled. (*See* excerpt of Westlaw *Fausett* opinion, attached hereto as Ex. 3.)

Practically, the exception advocated by FourKites makes little sense, especially at the motion to dismiss stage. For instance, who qualifies as executives and management? Every company defines their positions differently, and this inquiry cannot be definitively resolved on the face of a complaint. Even if FourKites is correct and certain company employees qualify as "a stand-in or conduit" for a company, the case FourKites relied on for that proposition, *30 River Ct.*

FILED DATE: 2/22/2021 3:45 PM 2020L004183

E. Urb. Renewal Co. v. Capograsso, 892 A.2d 711 (N.J. Super. 2006), reached that conclusion only after a factual record had been developed. *See Capograsso*, 892 A.2d at 717 (stating "*[b]ased on the undisputed record*, we have no hesitation concluding that Lefrak was the landlord and that Class was the landlord's agent") (emphasis added). Moreover, that case addressed a unique situation where it was found that the "landlord . . . [had] designated an agent to accept tenant complaints." *Id.* No such facts exist here (let alone are apparent from the face of the complaint).

Finally, if Illinois were to adopt FourKites's proposed exception, it would insulate senders of even maliciously defamatory communications. While we do not want to chill the dissemination of legitimate concerns about a company, at the same time we cannot sanction the unbridled dissemination of malicious, purposely false communications designed solely to damage a company's reputation.[1] To adopt the exception advocated by FourKites would allow the pendulum to swing too far in this direction. For this reason, as well as the reasons discussed above, the emails at-issue in this matter were published, and FourKites's insistence on a nonpublication rule for corporate management and executives must be rejected.

B. The Statements-At-Issue Are *Per Se* Defamatory.

FourKites improperly focuses on each individual statement made in the May 19th and May 27th emails. In *Tuite v. Corbitt*, 224 Ill.2d 490 (2006), the Illinois Supreme Court rejected such

[1] In contrast, under the rubric adopted by Illinois courts, even speech that is otherwise protected by a conditional privilege loses that protection if it can be shown that it was disseminated maliciously. *See, e.g.*, *Kuwik v. Starmark Star Mktg. & Admin., Inc.*, 156 Ill. 2d 16, 26 (1993). Should this case proceed to discovery, we believe evidence will come to light showing that the May 19th and May 27th emails were sent with malice.

FILED DATE: 2/22/2021 3:45 PM 2020L004183

divide and conquer tactics, and instead required "a writing 'to be read as a whole.'" *Tuite*, 224 Ill.2d at 512. Here, the May 19th email – when read in its entirety – shows the deliberate intent of the sender (who claims to be a former employee of project44) to alert project44's "Board members," to knowingly false contentions of project44's criminal activities and lack of integrity and/or lack of ability in its profession. (Ex. 1 at Ex. A.) Similarly, the May 27th email reflects the intent of the sender (claiming to be a "Friend" seeking to "shed some light" on project44), to alert project44's Chief Revenue Officer to false claims that project44 is a "Ponzi scheme," and that specific individuals, such as "ex CFO Bruns," allegedly have knowledge of such activities. (Ex. 1 at Ex. F.) These statements are offered by the sender as evidence why project44's Chief Revenue Officer should "go find another job." (*Id.*)

Thus, while we respond to each of FourKites' individual attacks in our argument below, we ask the Court to consider whether, *under no set of facts*, that the May 19th and May 27th emails – *when read in their entirety* – would entitle project44 to the recovery it seeks. Contrary to FourKites's claims, the answer to this inquiry is a resounding "No."

1. The May 19, 2019 Email.

The reference in the May 19th email to "Theranos" has a precise and readily understood meaning, namely that project44, like Theranos, has allegedly committed the crime of fraud. There can be no doubt that the sender's comparison to "Theranos" refers to Theranos Inc., a now-defunct company that (along with its founder Elizabeth Holmes) was charged by the U.S. Securities and Exchange Commission with securities fraud. (*See* Ex. 1 at ¶23.) For this reason, the name "Theranos" has become synonymous with fraud.

Thus, the sender's pronouncement that project44 is the "next Theranos" is no better than the assertion in *Hadley* that the plaintiff was "a Sandusky waiting to be exposed," which the Illinois Supreme Court found actionable for defamation *per se*. *Hadley v. Doe*, 2015 IL 118000, ¶¶ 37-

FILED DATE: 2/22/2021 3:45 PM 2020L004183

42. In *Hadley,* the Illinois Supreme Court reasoned that "[t]o ignore the reference to a national story of this magnitude would be to 'espouse a naïveté unwarranted under the circumstances.'" *Hadley* 2015 IL 118000, ¶ 37 (internal citations omitted.) The Court found that when the statements made by the defendant were given:

> their natural and obvious meaning, and considering the timing of the comment, we find the idea [defendant] Fuboy intended to convey to the reasonable reader by his statement, 'Hadley is a Sandusky waiting to be exposed. Check out the view he has of Empire from his front door,' was that Hadley was a pedophile or had engaged in sexual acts with children.

Id. Similarly, when given its natural and obvious meaning, the idea that the sender of May 19th email intended to convey to the reader by stating project44 was the "next Theranos," was that project44 was guilty of the crime of fraud.

Similarly, the May 19th email's allegations that: (a) project44 threatens their former employees; (b) that project44 is in league with the "Chicago Mafia"; and (c) that project44 uses said connections "to silence folks [i.e. former employees]" at a minimum comprise an accusation that project44 has engaged in the crime of intimidation, and are thus defamatory *per se*.[2] (*See, e.g.*, Ex. 1 at ¶ 18; Ex. A.) These statements go beyond the naked assertions of "bully tactics" in *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶¶ 50-52, claims of being a "rip-off," "fraud," etc. as in *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 728 (1st Cir. 1992), or a scam as in *McCabe v. Rattiner*, 814 F.2d 839, 842 (1st Cir. 1987).

Importantly, the cases cited by Defendant all emphasize the importance of context when determining whether a statement is defamatory. *See Coghlan*, 2013 IL App (1st) 120891, ¶¶ 41,

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[2] FourKites baselessly claims that "many people would likely not interpret" the word "silence" as synonymous with "intimidate." To support such a claim would require evidence outside the Complaint, which is not appropriate at the motion to dismiss stage.

FILED DATE: 2/22/2021 3:45 PM 2020L004183

50-52; *Phantom Touring*, 953 F.2d at 727; *McCabe,* 814 F.2d at 842-843. *Coghlan* also distinguishes statements found defamatory in *Barakat v. Matz,* 271 Ill.App.3d 662 (1st Dist. 1995) and *Tunca v. Painter,* 2012 IL App (1st) 093384, holding that, in *Barakat* and *Tunca*, "the court held that the defendant's comments implied an underlying factual basis that could have been verified." *Coghlan*, 2013 IL App (1st) 120891, ¶ 52. Here, the context of these emails was not to express an opinion or some other protected speech, but rather to "bring to your [*i.e.* the "Board members"] attention" falsely alleged conduct that the sender asserted was, *inter alia*, criminal. The sender's claim that project44 is affiliated with organized crime, by way of an employee whose relative was a "book keeper for a Chicago Mafia," is verifiable (and false), and is central to the sender's assertion that project44 is using its connections to organized crime to "silence folks." Given such context, these statements cannot be considered hyperbole and are actionable.

Finally, the claim of "rampant accounting improprieties" in the May 19, 2019 email is also defamatory *per se*, as contrary to FourKites's claims, this phrase, too, has a precise and readily understood meaning. *See, e.g., Antell v. Arthur Anderson LLP,* No. 97 C 3456, 1998 WL 245878[3], *1 (N.D. Ill. May 4, 1998) (equating "accounting improprieties" to "accounting manipulations" and "misrepresentations"). Again, the cases Defendant relies on contain only naked statements that lack verifiable assertions of fact. (*See* Motion to Dismiss at 7-8) (observing that, in cited cases, "there were no specific facts at the root of the statements.") Yet here, the sender sought to add legitimacy to their claims by encouraging the board members to "take a look at the contracts (pilots, out clauses rev rec etc)," the implication being that these documents contain evidence of accounting improprieties. (Ex. 1 at ¶ 20.) The sender also tells the recipients that "[r]ecent CFO departure must tell you everything," which conveys the idea that project44's CFO left due to

[3] Cases with Westlaw cites have been attached hereto as group Ex. 4.

FILED DATE: 2/22/2021 3:45 PM 2020L004183

alleged accounting improprieties. (Ex. 1 at ¶ 21.) The sender's reference to a cancelled contract (with "Estes") also suggests that the former customer ("Estes") ceased doing business with project44 due to project44's alleged improprieties. (Ex. 1 at ¶ 22). The sender's claim that the above documents contain evidence of project44's accounting improprieties is verifiable (and false). Likewise, the sender's claim that project44's CFO left due to accounting improprieties is verifiable (and false). And whether Estes ceased working with project44 because of accounting improprieties is also verifiable (and false). As such, project44 has adequately set forth a claim for defamation based on these statements.

Not surprisingly, other courts have refused to dismiss similar claims for defamation, and affirmed findings that similar statements are defamatory. For instance, in *DSC Logistics, Inc. v. Innovative Movements, Inc.*, No. 03 C 4050, 2004 WL 421977 (N.D. Ill. Feb. 17, 2004), the Northern District of Illinois, applying Illinois law, refused to dismiss a defamation claim where defendants accused plaintiff via email of poor business practices and acting in "utter bad faith," finding that "[t]hese statements are undoubtably [*sic*] criticisms of . . . [plaintiff's] business methods and, as such, fall into a category of statements that are defamatory *per se."* *DSC Logistics*, 2004 WL 421977, at *1. Similarly, in *Vasquez v. Whole Foods Market Inc.*, 302 F.Supp.3d 36 (D.D.C. 2018) the U.S. District Court for the District of Columbia found plaintiffs sufficiently stated claims for defamation where defendants accused plaintiffs of, *inter alia*, "manipulating a bonus program to their benefit." *Vasquez*, 302 F.Supp.3d at 63. Separately, the Illinois Supreme Court found accusations that plaintiff would "commit bribery or other criminal conduct" contained in a nonfiction book about organized crime to be defamatory *per se*. *Tuite*, 224 Ill.2d at 497. Looking to the context of the statement (as part of a nonfiction book concerning "story after story of corruption"), the Illinois Supreme Court found that there was no reasonable

FILED DATE: 2/22/2021 3:45 PM 2020L004183

innocent construction for the statement, and although defendants did not explicitly accuse the plaintiff of criminal activity, their statement was nonetheless defamatory. *Id.* at 514-515. Finally, courts have allowed defamation *per se* claims to proceed for comparisons to Madoff Investment Securities LLC (another notorious fraud case). *See, e.g., Cohen v. Hansen*, No. 2:12-CV-1401 JCM (PAL), 2015 WL 3609689, *9 (D. Nev. June 9, 2015).

2. The May 27, 2019 Email.

Not only does the May 27, 2019 email convey the idea that project44 is liable for criminal conduct by way of its reference to "theranos [*sic*]," the email flat-out accuses project44 of being a criminal enterprise by calling it a "Ponzi scheme." (Ex. 1 at Ex. F.) This, combined with the fact that the May 27th email is both directed to and calls on the newly-hired CRO of project44 (Tim Bertrand) to resign, and invites Mr. Bertrand to reach out to specific former employees of project44 to confirm the sender's baseless claims, confirms that the statements in the email cannot be innocently construed or are otherwise an opinion. (*Id.*) Whether project44 is being run as a Ponzi scheme, and whether its specific former employees have evidence of such a scheme, are verifiable (and again false).

Multiple courts have found the use of the term "Ponzi scheme" to be defamatory. For instance, in *Mann v. Swigett*, No. 5:10-CV-172-D, 2012 WL 1579323 (E.D.N.C. May 4, 2012), the court found statements accusing plaintiff of "running a 'Ponzi scheme' and engaging in 'fraudulent transactions' to be defamatory *per se*. *Mann*¸ 2012 WL 1579323, at *4. Similarly, in *Finance Ventures, LLC v. King*, Civil Action No. 4:15-cv-00028-JHM, 2016 WL 9460307 (W.D. Ky. Aug. 8, 2016) the court found statements that plaintiffs were "'crooks,' 'thieves,' operators of a '*Ponzi scheme*,'" etc. to be defamatory *per se*. *Finance Ventures,* 2016 WL 9460307, at *2. Further, in *Cohen v. Hansen*, the court refused to dismiss a claim for defamation *per se* where the

FILED DATE: 2/22/2021 3:45 PM 2020L004183

defendant accused plaintiff of running a Ponzi scheme and (as discussed above) compared the defendant to Bernard Madoff. *Cohen,* 2015 WL 3609689, at *9.

FourKites's claim that the statements in the May 27th email only warn "about something the author believes might come to pass" borders on the absurd. (Motion to Dismiss at 9.) Is it truly FourKites contention that the sender is encouraging Mr. Bertrand to resign simply because project44 may someday become a "Ponzi scheme" or someday become Theranos? The context of the May 27th email in its entirety confirms this is not the case, and thus this argument by FourKites is frivolous.

C. project44 Has Alleged A Civil Conspiracy.

To state a claim for conspiracy sufficient to survive a motion to dismiss, project44 must allege "(1) the existence of an agreement between two or more persons (2) to participate in an unlawful act or a lawful act in an unlawful manner, (3) that an overt act was performed by one of the parties pursuant to and in furtherance of a common scheme, and (4) an injury caused by the unlawful overt act." *Lewis v. Lead Indus. Ass'n*, 2020 IL 124107, ¶ 20. project44's complaint meets each of those elements here. Defendant's singular concern is that project44 has not yet alleged the identity of the Jane Doe or John Doe defendants, which leads it to make the arguments that project44 has not sufficiently alleged an agreement, and that a corporation cannot conspire with its own agents, yet both of these arguments are premature at this pleading stage.

Relevant to both arguments is that project44 had a pending petition, against AT&T, and was set to learn the identify of Jane Doe, but the court dismissed the petition because of the pendency of this case, which was filed after the Covid pandemic set in and the petition hearing was pushed back until after the statute of limitations on project44's claim had run. (*See* Ex. 1 at ¶¶ 46-47; *see also* Transcript of February 3, 2021 Hearing in *project44, Inc. v. AT&T Mobility*

FILED DATE: 2/22/2021 3:45 PM 2020L004183

LLC, No. 2019 L 10520, Cir. Ct. Cook Cty., attached hereto as Ex. 5, at 25:24-28:9.) Upon dismissal, project44 promptly issued a verbatim subpoena to AT&T in this action on February 3, 2021, and Jane Doe has once again sought to delay AT&T's disclosure to project44 of the identity of Jane Doe – who is the owner of at least one AT&T Wireless account used to access the Google email accounts from whence the offending emails were sent.

As to the first argument, the complaint adequately alleged an agreement among FourKites and one or more of the Doe defendants because, among other reasons, the complaint alleges that the Google email accounts were set up with a recovery phone number that traces to Defendant FourKites, a FourKites computer network accessed the emails, and third-party Jane Doe used a device belonging to her (or him) to access those email accounts. (*See* Ex. 1 at ¶¶ 37-45.) Only the anonymity of the internet and free Google email accounts is stopping project44 from learning additional information right now, and discovery will resolve this matter. At this stage, the above facts reflect an agreement among FourKites and Jane Doe to access anonymous email accounts that were set up to publish defamatory emails about project44.

As to the second argument, FourKites simply misstates Illinois law to claim that a corporation cannot conspire with its own agents – which is not true. A company can conspire with its own agent where the agent acts beyond his authority or for his own benefit. *See Bilut v. Northwestern Univ.*, 296 Ill.App.3d 42, 48-49 (1st Dist. 1998); *see also Boloun v. Williams*, No. 00 C 7584, 2002 WL 31426647, * 15 (N.D. Ill. Oct. 25, 2002) (conspiracy sufficiently alleged among principles and agents where agents were motivated by a personal interest "to get" the plaintiff; e.g. to "harass, coerce, intimidate . . . and destroy Baloun and his business"). project44's complaint reasonably pleads a basis for the Court to make such an inference here, such as the use of multiple avenues to access the Google email accounts, including two FourKites assets (the

FILED DATE: 2/22/2021 3:45 PM 2020L004183

recovery number and the internet account), as well as an AT&T Wireless Account belonging to Jane Doe (to whom discovery as to their identity remains and is a simple matter). Unless FourKites is conceding that one of its employees oversaw all that is alleged in the complaint, with FourKites's authority, then project44 has alleged, with permissible inferences drawn in its favor, that FourKites conspired with an unknown third party which is unaffiliated with FourKites, or which was acting outside of its authority or for its own benefit in some manner, to defame project44.

Lastly, for the reasons stated above, project44 has set forth a claim for defamation *per se*, and by the nature of that claim has shown that it was damaged. *See, e.g.*, *Weber v. Cueto*, 253 Ill. App. 3d 509, 518 (5th Dist. 1993) (involving a claim for libel *per se* and stating "in order to recover damages pursuant to count III [conspiracy] of the first-amended complaint, plaintiff would be required to prove that either Cueto or Darling libeled her. In such a case, the liability would be imposed upon all co-conspirators"). project44 has thus met all of the requirements for pleading a civil conspiracy claim.

CONCLUSION

Wherefore, for the foregoing reasons, project44 respectfully requests that Defendant FourKites's Motion to Dismiss be DENIED.

Dated: February 4, 2021

Respectfully Submitted,

By: /s/Peter G. Hawkins
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FILED DATE: 2/22/2021 3:45 PM 2020L004183

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused a copy of the foregoing **PLAINTIFF PROJECT44, INC.'S RESPONSE IN OPPOSITION TO DEFENDANT FOURKITES, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT** to be served on February 14, 2021 via email and certified mail upon:

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC.,	
Plaintiff,	**No. 2020-L-4183**
v.	**Calendar C**
FOURKITES, INC., et al.,	
Defendants.	

DEFENDANT FOURKITES, INC.'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Defendant FourKites, Inc. ("**FourKites**"), by and through its undersigned counsel, Polsinelli PC, submits this Reply in Support of its Motion to Dismiss and states:

A false statement must be shared with a third party to become defamatory. Absent such a publication, no defamation claim exists. The two emails at issue here were sent to three members of Plaintiff's leadership, and therefore to Plaintiff itself. Without publication, even when Plaintiff's allegations are accepted as true, Plaintiff has failed to state a claim for defamation or civil conspiracy. Since the recipients of the emails were two members of Plaintiff's Board and its Chief Revenue Officer ("**CRO**"), nothing in Plaintiff's Complaint or Response can establish the critical element of "publication." Even if Plaintiff could overcome this threshold hurdle, the statements at issue were not defamatory as a matter of law. Without a valid defamation claim to underpin Plaintiff's civil conspiracy claim, it fails as well. Further, it fails for the separate and distinct reason that Plaintiff has not pled facts to support any of the elements of a conspiracy claim. In particular, Plaintiff's Complaint does not allege facts to establish a conspiratorial agreement, a tortious act, or damages. Therefore, FourKites' Motion to Dismiss should be granted in its entirety.

FILED DATE: 3/5/2021 3:18 PM 2020L004183

I. The Statements Were Not Published

To state a defamation claim, a plaintiff must establish that the allegedly false statement at issue was made to a third party, i.e. that it was "published." Without publication there can be no defamation. *Emery v. Ne. Illinois Reg'l Commuter R.R. Corp.*, 377 Ill. App. 3d 1013, 1021 (2007). *Id.* at 1022. Proving publication requires a plaintiff to show that allegedly slanderous remarks were communicated to someone other than the plaintiff. *Id*. (citing RESTATEMENT (SECOND) OF TORTS § 577, Comment m, at 206 (1977) ("[o]ne who communicates defamatory matter directly to the defamed person, who himself communicates it to a third person, has not published the matter to the third person")). Here, the publication requirement is not satisfied because the communications were made to the person allegedly defamed.

In its Motion to Dismiss, FourKites provided persuasive authority from courts outside of Illinois for the position that communications with a corporation's management constitutes communication with the corporation itself, rather than a third person. *See Hoch v. Loren*, 273 So. 3d 56, 58 (Fla. App. 2019) (finding no publication where "a defamatory statement about a plaintiff corporation is made to a managerial employee of the corporation" because "a statement to an executive/managerial employee of a corporation is a statement to the corporation itself"); *see also Fausett v. American Resolution Management Corp.*, 542 F. Supp. 1234, 1241 (D. Utah 1982) (finding that "the management *is* the corporation for purposes of communication" and "communication to corporate management of alleged defamation of the corporation does not constitute publication").

Plaintiff's reliance on RESTATEMENT (SECOND) OF TORTS § 577, Comment *e*, to refute the *Hoch* and *Fausett* decisions is misplaced because that provision does not speak to the issue raised here – whether an officer, director or manager of a corporation personifies the corporation such

FILED DATE: 3/5/2021 3:18 PM 2020L004183

that a communication to one of those individuals is the equivalent of a communication to the corporation itself. The rule that is stated and applied in the only cases identified by the parties to have addressed the pertinent issue – *Hoch* and *Fausett* – is that the individual and the corporation are one in the same. In fact, the Restatement supports the conclusion reached in these cases, noting that the only interest protected by a defamation claim is that of reputation. RESTATEMENT (SECOND) OF TORTS § 577, Comment *b*. Plaintiff's reputation could not be impacted by comments directed to its leadership "since reputation is the estimation in which one's character is held by [its] neighbors or associates." *Id*.

Additionally, Plaintiff's citation to cases analyzing publication between employees of the same corporation is irrelevant. *Popko*, for example, concerns whether a supervisor's comments to another supervisor in the workplace about a subordinate can amount to publication. *Popko v. Cont'l Cas. Co.*, 355 Ill. App. 3d 257, 258 (2005). This is in no way analogous to the case at bar because the alleged defamatory statements were made to someone *other* than the defamed person. Here, the statements were made directly to the Plaintiff in the form of its leadership.

Finally, Plaintiff's argument that accepting FourKites' position "would insulate senders of even maliciously defamatory communications … designed solely to damage a company's reputation" is unrelated to the issue of publication as the sender's intent has no bearing on whether or not a statement has been communicated to a third party. The sole issue here is whether Plaintiff's board members and CRO are to be considered third parties. The only case law on point has found that they are not. Simply put, statements made to a party – about that party – are not defamatory statements under the law.

FILED DATE: 3/5/2021 3:18 PM 2020L004183

II. The Statements Are Not *Per Se* Defamatory

Plaintiff asserts that FourKites fails to consider the emails as a whole, as it claims is required by *Tuite v. Corbitt*, 224 Ill. 2d 490 (2006). *Tuite* held that a book containing allegedly defamatory statements had to be considered in its entirety to determine whether the statements at issue were capable of an innocent construction. *Id.* at 512. *Tuite* does not require that a court draw a connection between different statements in a writing when that connection is not supported by a fair reading of the writing itself – which is what Plaintiff attempts to do here. For instance, Plaintiff asserts that the statement in the May 19 email about "accounting improprieties" is related to a statement that a customer ("Estes") cancelled a contract with Plaintiff. But considering the email as a whole and reading each statement in that email in context, the statement about "accounting improprieties" and the statement about Estes' contract are not in any way connected. The email contains three numbered paragraphs, each reflecting a different topic. The statement about accounting improprieties appears in paragraph 2, while the statement about Estes' contract is in paragraph 3. Moreover, the complete statement about the Estes contract reads: "Estes cancelled the contract. It was only $5K a month, and they are not even willing to pay this." The email does not, on its face, link Estes' contract cancellation to any "accounting improprieties." Rather, if anything, it reflects dissatisfaction with the product. Plaintiff cannot state a *per se* defamation claim by rewriting the statements at issue.

Plaintiff also asserts that the statement regarding "accounting improprieties" rises above unverified hyperbole because of the narrative that immediately follows: "I encourage you to take a look at the contracts (pilots, out clauses, rev rec etc.). Recent CFO departure must tell you everything." But Plaintiff does not contest the facts of these contracts or of the CFO's departure. The statement regarding accounting improprieties is not actionable because it is merely the

FILED DATE: 3/5/2021 3:18 PM 2020L004183

speaker's interpretation of those uncontested facts. *See, e.g.*, *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) ("The facts about Kevin's condition and about the respective financial circumstances of Ruby and Dorothy were uncontested, and Ruby and Lemann were entitled to their interpretation of them."); *Gosling v. Conagra, Inc.*, No. 95 C 6745, 1996 WL 199738, at *6 (N.D. Ill. Apr. 23, 1996) (where defendant states a conclusion he reached from facts that are not in dispute, the stated conclusion is "not objectively verifiable, and cannot form the basis for a defamation action").

In addition, Plaintiff violates its own rule about looking at the email as a whole when it ignores "the broader social context [which] signals usage as … opinion." *Mittelman v. Witous*, 135 Ill. 2d 220, 243 (1989). Both emails begin with introductions that are "written in the first person with the writer stating his beliefs." *Barry Harlem Corp. v. Kraff*, 273 Ill. App. 3d 388, 394, 1082 (1995). It is therefore apparent on their face that they are *not* "the report of some factual event which transpired." *Id.; see also Saenz v. Playboy Enters., Inc.*, 653 F. Supp. 552, 565 (N.D. Ill. 1987) (court should look to the "tone and style" of the writing for "signal[s] … that [it] [is] [a] vehicle[] for criticism and so for opinion"), *aff'd*, 841 F.2d 1309 (7th Cir. 1988).

Plaintiff makes similar mistakes in discussing the statement in the May 27 email that: "You don't want to be part of the next Ponzi scheme or next theranos." *See* Complaint, Ex. F. Plaintiff asserts that this statement "is elevated beyond the realm of opinion or hyperbole by other statements in the email," but fails to identify any other statements that actually provide further factual content or detail regarding why the author believes joining Plaintiff could result in the email recipient becoming "part of the next Ponzi scheme or next theranos."[1]

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[1] The other statements project44 cites include "calling on the newly-hired CRO of project44 to resign, inviting the CRO to '[t]alk to ex CFO Bruns … Talk to ex Sales people, talk to customers .. talk to prospects, talk to investors outside p44,' and comparing project44's services to excrement."

FILED DATE: 3/5/2021 3:18 PM 2020L004183

In addition, the fact that Plaintiff feels the need to cite evidence outside the email itself to *explain* what "theranos" means undermines any claim that the statement is *per se* defamatory. *See Dubinsky v. United Airlines Master Exec. Council*, 303 Ill. App. 3d 317, 327 (1999) (where "no direct accusation of crime" is made, plaintiffs' assertion that reference to extrinsic matters "would make it 'totally clear to the reader' … preclude[s] the publication from being considered defamatory *per se*, as only statements that are defamatory *per quod* may rely on extrinsic facts"). The use of the disjunctive in the statement—"the next Ponzi scheme *or* next theranos"—further demonstrates its hyperbolic, imprecise, nonspecific nature.

Plaintiff's reliance on *Hadley v. Doe*, 2015 IL 118000, ¶ 37, is likewise misplaced. The statement at issue there was one of *present* fact: that "Hadley *is* a Sandusky waiting to be exposed" (emphasis added). Here, in contrast, the statements about theranos and Ponzi schemes are nothing more than vague speculations about something that might occur in the future: "it's just a matter of time *before* people go public and another Theranos happen in Chicago" (May 17 email), and "You don't want to be part of the *next* Ponzi scheme or next theranos" (May 29 email). Indeed, Plaintiff omits the first part of the May 17 statement, leaving out the words "it's just a matter of time before …," to make it appear that the statement asserts a present fact when it does not. In addition, in finding that the statement at issue in *Hadley* "imputed the commission of a crime," the court relied heavily on both the fact that the statement was made "while the [Sandusky] scandal dominated the national news," *and* that it was "coupled with" a reference to the view from the plaintiff's house of an elementary school. 2015 IL 118000, ¶ 37. No such facts exist or are alleged here.

Finally, Plaintiff's arguments about the May 19 email's statement concerning intimidating ex-employees are without merit. Plaintiff asserts that the statement imputes the commission of a crime to Plaintiff, but it does not identify what crime that might be. In its opening brief, Plaintiff

FILED DATE: 3/5/2021 3:18 PM 2020L004183

offered a number of possible crimes to which the statement might refer, including murder, but this variety only supports the view that the statement is too vague to constitute a factual statement regarding the commission of an actual crime.

Nor does the intimidation statement in the May 19 email defame Plaintiff in its trade or business. To satisfy this category of defamation *per se*, a statement "must assail the corporation's financial position or business methods, or accuse it of fraud or mismanagement." *Vee See Constr. Co. v. Jensen & Halstead, Ltd.*, 79 Ill. App. 3d 1084, 1088–89 (1979). The intimidation statement relates to corporate relations with ex-employees, not Plaintiff's financial position, business methods, fraud, or mismanagement. *See, e.g.*, *Am. Int'l Hosp. v. Chi. Tribune Co.*, 136 Ill. App. 3d 1019, 1024, 1025 (1985) (finding statements that plaintiff "has lost standing in the community and its public image is marred … not actionable *per se*, as they do not assail plaintiff's business or financial methods, or accuse it of fraud or mismanagement"); *Garber-Pierre Food Prods., Inc. v. Crooks* 78 Ill. App. 3d 356, 360-61 (1979) ("[D]efendant's language essentially amounted to criticism of plaintiff's policy decision regarding prices and delivery of goods…rather than an impugning of plaintiff's business reputation").

III. Plaintiff's Allegations of Civil Conspiracy Are Insufficient

Plaintiff's civil conspiracy claim is based on insufficient, conclusory allegations. Merely characterizing a combination of acts as a conspiracy is insufficient to withstand a motion to dismiss. *Reuter v. MasterCard Int'l, Inc.*, 397 Ill. App. 3d 915, 928 (2010). Plaintiff claims that it has properly pled a conspiratorial agreement between FourKites and the email sender(s) "because, among other reasons, the complaint alleges that the Google email accounts were set up with a recovery phone number that traces to Defendant FourKites, a FourKites computer network accessed the emails, and third-party Jane Doe used a device belonging to her (or him) to access

FILED DATE: 3/5/2021 3:18 PM 2020L004183

those email accounts." These allegations do not show FourKites ***knowingly*** entering into a scheme with the sender(s) to commit an unlawful act. *See Adcock v. Brakegate, Ltd.*, 206 Ill.Dec. 636, 645 N.E.2d 888 (1994) ("conspiracy requires proof that a defendant knowingly and voluntarily participates in a common scheme to commit an unlawful act or a lawful act in an unlawful manner").

Additionally, Plaintiff argues that a corporation can conspire with its own agents, yet the case Plaintiff cites – *Bilut v. Nw. Univ.*, 296 Ill. App. 3d 42, 50 (1998) – held that "the circuit court did not err in finding in accordance with the general rule, as a matter of law, that defendants as employer and employee were legally incapable of conspiring with one another." *Bilut* does recognize that "the exception to this rule is where the interests of a separately incorporated agent diverge from the interests of the corporate principal and the agent at the time of the conspiracy is acting beyond the scope of his authority or for his own benefit, rather than that of the principal. *Id*. However, *Bilut* held that facts supporting this exception must be pled in the complaint in order to survive dismissal. *Id.*

Finally, Plaintiff has not pled any facts showing an injury caused by FourKites or even the conspiracy. Plaintiff's sole allegation on this point is it "has been injured by the Conspiracy and the tortious acts undertaken pursuant to the Conspiracy." *See* Complaint, at ¶ 78. Plaintiff's Complaint is devoid of any factual allegations setting forth the injury it suffered and how such injury was caused by FourKites. *See Reuter,* 397 Ill. App. 3d at 928 (dismissing complaint when "the plaintiff failed to allege that he suffered any damages as a result of a tort committed in furtherance of the alleged conspiracy") and *Recio v. GR-MHA Corp.*, 366 Ill. App. 3d 48, 61 (1st Dist. 2006) ("[P]roximate cause is still a required element of the cause of action for conspiracy."). Count III must be dismissed because Plaintiff has not pled injury or causation.

FILED DATE: 3/5/2021 3:18 PM 2020L004183

CONCLUSION

Wherefore, FourKites respectfully requests that the Court grant its Motion to Dismiss and dismiss Plaintiff's Complaint with prejudice.

Date: March 5, 2021

Respectfully submitted,

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FILED DATE: 3/5/2021 3:18 PM 2020L004183

CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2021, a copy of the foregoing was served upon counsel of record through the Court's efiling system and by e-mail to:

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FILED DATE: 3/31/2021 5:27 PM 2020L004183

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COOK COUNTY, IL
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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC.,	)
	)
Plaintiff,	)
	)
v.	) Case No. 2020-L-4183
	)
FOURKITES, INC., et al.,	) Calendar Y
	)
Defendants.	)
	)
	)

PLAINTIFF PROJECT44, INC.'S SUR-REPLY TO DEFENDANT FOURKITES, INC.'S MOTION TO DISMISS

project44 submits this Sur-Reply to address incorrect statements of fact and law made in FourKites's Reply, so as to avoid confusion of the issues before the Court.

project44 has Identified a Crime.

FourKites's Reply states that "Plaintiff asserts that the statement [in the May 19th email] imputes the commission of a crime to Plaintiff, but it does not identify what crime that might be." (Reply at 6.) This is simply untrue, as paragraph 18 of project44's Complaint states that:

> The reference to "Chicago Mafia" conveys the idea that when project44 "silence[s] folks," they do so with threats of violence or other intimidation, a crime in Illinois. (*See* 720 ILCS 5/12-6) (stating that, *inter alia*, "[i]ntimidation is a Class 3 felony.")

(Complaint at ¶¶ 18; 48.; *see also* Opposition at 9.)

FourKites Misapplies the *Vee See* Case.

FourKites claims – for the first time in its Reply – that the holding in *Vee See Constr. Co. v. Jensen & Halsted, Ltd.*, 79 Ill. App. 3d 1084 (1st Dist. 1979), confirms that statements that project44 intimidated its employees are not defamatory. (*See* Reply at 7.) However, *Vee See* relies on *Garber-Pierre Food Prod., Inc. v. Crooks*, 78 Ill. App. 3d 356, 359 (1st Dist. 1979), which makes clear that this limitation applies only to statements "defaming the plaintiff in its trade or

FILED DATE: 3/31/2021 5:27 PM 2020L004183

business," and that "words imputing the commission of a criminal offense" are separately actionable. *Vee See*, 79 Ill. App. 3d at 1089; *See also Solaia Tech., LLC v. Specialty Pub. Co.*, 221 Ill. 2d 558, 594 (2006).

project44 Makes no Reference to Murder in their Opposition.

FourKites's Reply states that "[i]n its opening brief, Plaintiff offered a number of possible crimes to which the statement might refer, including murder," yet the only crime identified in the Opposition is intimidation. (Reply at 6-7; *see also* Opposition at 9.) FourKites's reference to project44's "opening brief" is also puzzling, since this is Defendant's motion. (Reply at 6-7.)

The "Evidence Outside the Email" Confirms Theranos is Well-Known to the Public.

FourKites's claim that the emails' references to Theranos are not defamatory, because project44 "need[s] to cite evidence outside the email itself to *explain* what 'theranos' means" is a red herring. (Reply at 6.) The outside citations to Theranos in the Complaint were included not because the matter required explanation, but rather to show that the Theranos case is well-known to the public. (*See* Complaint at ¶¶ 23; 30.) As project44 explained in its Opposition, comparisons to a "national story of this magnitude" need not be ignored by the Court and are defamatory. (Opposition at 8-9.) Given this, as well as the fact that, in reviewing a motion to dismiss, all allegations in the complaint must be accepted as true, FourKites's argument must be rejected.

project44 Does Contest the References to "Contracts" and "CFO departure."

FourKites's assertion that "Plaintiff does not contest the facts of these contracts or of the CFO's departure" referenced in the May 19th email is patently false. project44's Complaint and Opposition directly contest the factual inaccuracies made in these statements. (Reply at 4; *see also* Complaint at ¶¶ 20-21; 48; 58; Opposition at 10-11.)

FILED DATE: 3/31/2021 5:27 PM 2020L004183

The Multiple Statements Made in the May 19th Email are Related.

FourKites's claim that the statements made in the May 19th email are "not in any way connected" is also incorrect. (Reply at 4.) This argument – raised for the first time in FourKites's Reply – ignores the detailed explanation provided by project44 in its Complaint as to why these statements are connected, including, *inter alia*, the fact that the statements were made in an email titled "Accounting improprieties at P44." (Complaint at ¶¶ 14-24; Ex. A.)

CONCLUSION

WHEREFORE, for these reasons, as well as the reasons set forth in its Response in Opposition, project44 respectfully requests that FourKites's Motion to Dismiss be DENIED.

Dated: March 31, 2021

Respectfully Submitted,

By: /s/ Peter G. Hawkins
One of the Attorneys for project44, Inc.

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**IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION**

PROJECT44, INC., a Delaware corporation, Plaintiff, v. FOURKITES, INC., a Delaware corporation, and JANE DOE, an individual, corporation, organization, or other legal entity whose name is presently unknown, and JOHN DOE #1, aka "Ken Adams," an individual, corporation, organization, or other legal entity whose name is presently unknown, using the email address "kenadams8558 @gmail.com," and JOHN DOE #2, aka "Jason Short," an individual, corporation, organization, or other legal entity whose name is presently unknown, using the email address "jshort5584@gmail. com," and JOHN DOES #3-25, individuals, corporations, organizations, or other legal entities whose names are presently unknown, Defendants.	)	2020L004183 Case No. ______________

COMPLAINT

FILED DATE: 4/13/2020 10:19 PM 2020L004183

Plaintiff PROJECT44, INC. ("project44"), complains against Defendants FOUR KITES, INC. ("FourKites"), JANE DOE ("Jane Doe") an individual, corporation, organization, or other legal entity whose name is presently unknown, JOHN DOE #1, aka "Ken Adams" ("Ken Adams") an individual, corporation, organization, or other legal entity whose name is presently unknown, JOHN DOE #2, aka "Jason Short," ("Jason Short") an individual, corporation, organization, or other legal entity whose name is presently unknown, and JOHN DOES #3-25 ("John Does #3-25"), individuals, corporations, organizations, or other legal entities whose names are presently unknown, as follows:

NATURE OF ACTION

1. This is an action for defamation *per se*, arising from two email communications sent on May 19, 2019 and May 27, 2019 from the accounts "kenadams8558@gmail.com," and "jshort5584@gmail.com," respectively. In each communication, the sender(s) - using the pseudonyms "Ken Adams" and "Jason Short," respectively - levied knowingly false and defamatory statements against Plaintiff project44. In particular, the sender(s) accused project44 of lacking ability in their business, of lacking integrity in their business conduct, and engaging in criminal activity. The defamatory statements were directed to both outside members of project44's board of directors, as well as project44's Chief Revenue officer, with the intent to disrupt project44's business activities.

2. project44 is in the highly competitive shipping logistics industry. Over 25,000 different carriers have tracked shipments in project44's system, and it supports all transportation modes and shipping types. project44 has more than 200 employees.

3. The kenadams8558 and jshort5584 e-mail addresses from which the defamatory communications were sent both have an "@gmail" domain name. This signifies that the email

FILED DATE: 4/13/2020 10:19 PM 2020L004183

accounts were set up via Google, LLC ("Google"). Prior to filing this Complaint, project44 obtained an order for pre-suit discovery from Google. Information received from Google identified Defendant FourKites, a competitor of project44, as either an owner or user of the kenadams8558@gmail.com and jshort5584@gmail.com email addresses. Additionally, one or more unknown co-users or co-owners of these email addresses has been identified as accessing these accounts through IP addresses operated by, *inter alia*, AT&T Mobility, LLC ("AT&T"). These unknown co-users or co-owners conspired with Defendant FourKites to send the defamatory communications, and themselves sent the defamatory communications.

4. project44 has filed a petition for discovery, naming AT&T as a respondent, in Cook County Circuit Court to identify the unknown co-users or co-owners. (*See project44, Inc. v. AT&T Mobility, LLC, et al.*, Case No. 2019-L-10520). However, an intervenor appearing anonymously as "Jane Doe," by and through their attorneys, has sought to quash the petition.

5. As of the filing date of this Complaint, no order has been entered on project44's petition for discovery of AT&T. Since the statute of limitations for defamation actions is one year from publication (735 ILCCS 5/13-201), and given that the hearing on project44's petition of AT&T has now been rescheduled to less than a week before project44's claims become time-barred (due to the COVID-19 coronavirus epidemic), project44 has filed this Complaint now before its petition for discovery on AT&T has been resolved.

THE PARTIES

6. Plaintiff project44, Inc. is a Delaware corporation with its principal place of business in Chicago, Illinois.

7. Defendant FourKites, Inc., is a Delaware corporation with its principal place of business in Chicago, Illinois.

FILED DATE: 4/13/2020 10:19 PM 2020L004183

8. Defendant Jane Doe is an unknown individual, corporation, organization, or other legal entity proceeding as intervenor under the fictitious name "Jane Doe" in the related petition for discovery, *project44, Inc. v. AT&T Mobility, LLC, et al.* (Case No. 2019-L-10520), currently pending before the Hon. Allen P. Walker in the Circuit Court of Cook County, Law Division.

9. The true names of the following Defendants are unknown to Plaintiff, who therefore sues these Defendants under such fictitious names:

- John Doe #1, aka "Ken Adams," using the email address kenadams8558@gmail.com;
- John Doe #2, aka "Jason Short," using the email address jshort5584@gmail.com; and
- John Does #3-25, affiliated with or otherwise related to Defendants FourKites, Jane Doe, John Doe #1, or John Doe #2.

project44 alleges that each of the aforementioned Defendants Jane Doe and John Does #1-25 conspired with Defendant FourKites to publish false and defamatory statements concerning project44. project44 will seek leave of court to amend this Complaint and insert their true names in place of their fictitious names when the same have become known to project44.

JURISDICTION AND VENUE

10. Jurisdiction is proper in this Court pursuant to 735 ILCS 5/2-209 because, among other reasons, the defamatory material published by Defendants was published in Illinois representing the commission of a tort within Illinois and, thus, has caused project44 to suffer injury in Illinois. Separately, Defendant FourKites both does business in Illinois and maintains a principal place of business in Illinois.

FILED DATE: 4/13/2020 10:19 PM 2020L004183

11. Venue is proper in this Court pursuant to 735 ILCS 5/2-101 and 735 ILCS 5/102(a) as, *inter alia*, Cook County is where Defendant FourKites maintains its principal place of business.

FACTUAL BACKGROUND

12. project44 is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois. project44 is commonly referred to in its industry by the abbreviation "p44." project44 is in the highly competitive shipping logistics industry, where it provides goods and services which permit its customers to connect with, automate, and provide visibility into key transportation processes which, in turn, permits its customers to increase operational efficiencies, reduce costs, improve shipping performance, and deliver an exceptional experience to their own customers. Over 25,000 different carriers have tracked shipments in project44's system, and it supports all transportation modes and shipping types including "parcel," "final-mile," "less-than-truckload," "volume less-than-truckload," "truckload," rail, intermodal, and ocean. project44 has more than 200 employees.

13. Defendant FourKites is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois. Like project44, FourKites is in the highly competitive shipping logistics industry. FourKites is a competitor of project44.

The May 19th Defamatory Communication

14. On May 19, 2019, one or more individuals, corporations, organizations, or other legal entities using the email address kenadams8558@gmail.com and the name "Ken Adams" transmitted an email communication titled "Accounting improprieties at P44" ("the May 19th communication"). A true and correct redacted copy of the May 19th communication is attached hereto as Exhibit A (the name of a project44 employee not a party to this litigation has been redacted).

FILED DATE: 4/13/2020 10:19 PM 2020L004183

15. The May19th communication was sent to email addresses belonging to Jim Baum (jim@ov.vc) and Kevin Dietsel (kevin@sapphireventures.com), who are both non-employee, outside members of project44's Board of Directors. (*See* Exhibit A.) Thus, the May 19th communication was published to one or more third parties, without privilege.

16. The May 19th communication is divided into five paragraphs, three of which are numbered. (*Id.*). The May 19th communication is defamatory *per se* as it, *inter alia*, falsely imputes the commission of one or more crimes by project44, a want of integrity in project44's business conduct, and a lack of ability in project44's business.

17. For example, the first numbered paragraph alleges that that "Ex employees [of project44] are silenced with legal threats and defamation suits." (*Id.*). Immediately thereafter, the paragraph states that one of project44's employee's family members "used to be the book keeper for a Chicago Mafia and they are using that to silence folks." (*Id.*) Given the context of the paragraph, the word "they" can only refer to project44.

18. These statements are defamatory *per se* because, not only do they falsely allege that project44 maintains connections with organized crime, but they also assert that project44 uses those connections to "silence" persons such as project44's ex-employees. (*Id.*) The reference to "Chicago Mafia" conveys the idea that when project44 "silence[s] folks," they do so with threats of violence or other intimidation, a crime in Illinois. (*See* 720 ILCS 5/12-6) (stating that, *inter alia*, "[i]ntimidation is a Class 3 felony.")

19. The first sentence of the second numbered paragraph in the May 19th communication states that "[t]here is rampant accounting improprieties" at project44. (Exhibit A.) Either viewed by itself, or taken in conjunction with the next two sentences, this statement is defamatory *per se* because it falsely imputes both a want of integrity in project44's business

FILED DATE: 4/13/2020 10:19 PM 2020L004183

conduct, as well as a lack of ability in project44's business (such as the ability to comply with generally accepted accounting procedures). "Impropriety" is commonly understood to mean "dishonest behavior, or a dishonest act." (*See*, https://dictionary.cambridge.org/us/dictionary/english/impropriety, a screenshot of which is attached hereto as Exhibit B.) As such, by using the phrase "accounting improprieties," the sender(s) of the email accuses project44 of dishonest financial practices. The sender(s) further use the term "rampant" to convey that the alleged dishonest financial practices occur frequently. (*See, e.g.,* https://dictionary.cambridge.org/us/dictionary/english/rampant, a screenshot of which is attached hereto as Exhibit C.)

20. The next sentence in the second numbered paragraph of the May 19th communication encourages the recipients "to take a look at the contracts (pilots, [*sic*] out clauses, rev rec etc.)." (Exhibit A.) The fact that this sentence: (1) immediately follows the sender(s) accusation of "accounting improprieties;" (2) is grouped in the same numbered paragraph; and (3) is part of an email titled "Accounting improprieties at P44," means that it, too, is defamatory *per se* because it conveys the false idea that these specific "contracts" contain "accounting improprieties," also imputing both a want of integrity in project44's business conduct, as well as a lack of ability in project44's business. (*Id.*)

21. For the same reasons, the third sentence in the second numbered paragraph ("Recent CFO Departure must tell you everything") is also defamatory *per se*, as it also conveys the false idea that project44's CFO left due to alleged accounting improprieties, again imputing both a want of integrity in project44's business conduct, as well as a lack of ability in project44's business. (*Id.*)

22. The third numbered paragraph of the May 19th communication states that a client of project44 ("Estes") "cancelled the contract [with project44]," and that the contract "was only

FILED DATE: 4/13/2020 10:19 PM 2020L004183

$5k a month and they [Estes] are not even willing to pay this." This, too, is defamatory *per se* as it falsely imputes a lack of ability in project44's business. Moreover, as the sender(s) chose to convey this information in an email with the subject line "Accounting improprieties at P44," the statement also falsely conveys the idea that the cancelled contract was due to project44's alleged "accounting improprieties," again imputing a want of integrity in project44's business conduct.

23. Finally, the last paragraph of the May 19th communication is unnumbered and states that "there is widespread discontent brewing and it's just a matter of time before people go public and another Theranos happen [*sic*] in Chicago." (*Id.*) This is also defamatory *per se* as it falsely conveys the idea that project44 has committed the crime of fraud. The sender(s)' comparison to "Theranos" refers to Theranos Inc., a now-defunct company that (along with its founder Elizabeth Holmes) was charged by the U.S. Securities and Exchange Commission with securities fraud. (*See, e.g.*, Dkt No. 1 in *SEC v. Holmes, et al.*, Case No. 5:18-CV-01602 (N.D. Cal. March 14, 2018), available at https://www.sec.gov/litigation/complaints/2018/comp-pr2018-41-theranos-holmes.pdf., an excerpt of which is attached hereto as Exhibit D.) Ms. Holmes and Theranos's former president, Ramesh Balwani, have also been indicted on multiple counts of wire fraud and conspiracy to commit wire fraud (their cases are currently pending). (*See, e.g.*, https://www.justice.gov/usao-ndca/pr/theranos-founder-and-former-chief-operating-officer-charged-alleged-wire-fraud-schemes, a screenshot of which is attached hereto as Exhibit E.) Thus, the May 19th email's reference to Theranos falsely conveys the idea that, like Theranos, project44 is allegedly involved in fraudulent activity.

24. Whether viewed individually or as a whole, the statements made in the May 19th communication are defamatory *per se*. The fact that the sender(s) published these false statements

FILED DATE: 4/13/2020 10:19 PM 2020L004183

to project44's outside board members confirms that the sender(s) intent was to disrupt project44's business activities.

25. "Ken Adams" is a pseudonym, as project44 has not previously employed anyone named "Ken Adams," nor has it ever worked with any persons having this name. The sender(s)' need to conceal their identity speaks to the defamatory nature of this communication.

26. The May 19th communication was either sent by project44's competitor Defendant FourKites, or by one or more unknown entities acting in concert with Defendant FourKites. project44 is thus reasonably concerned that similar information has been published to other parties.

The May 27th Defamatory Communication

27. On May 27, 2019, one or more individuals using the email address jshort5584@gmail.com and the name "Jason Short" transmitted an untitled email communication to an email address belonging to Tim Bertrand (tbertrand@project44.com), project44's Chief Revenue Office ("the May 27th communication"). (A true and correct copy of the May 27th communication is attached hereto as Exhibit F.) Thus, the May 27th communication was published to one or more third parties, without privilege.

28. The May 27th communication is defamatory *per se* as it, *inter alia*, falsely imputes the commission of one or more crimes by project44.

29. For example, the May 27th communication begins by addressing Mr. Bertrand as "Tim" and saying, *inter alia*, "I wanted to shed some light so you can fled [*sic*] ASAP and go find another job." (Exhibit F.) The second paragraph of the May 27th communication states that "[y]ou don't want to be part of the next Ponzi scheme or next theranos [*sic*]." (*Id.*) This is immediately followed by an invitation to "[t]alk to ex [project44] CFO Bruns. Talk to ex [project44] Sales

people, talk to customers.. [*sic*] talk to prospects, talk to investors outside p44 [project44]. They will tell you the truth." (*Id.*)

30. Not only does the May 27, 2019 email falsely convey the idea that project44 is liable for criminal conduct by way of its reference to "theranos [*sic*]," the email flat-out falsely accuses project44 of being a criminal enterprise by calling it a "Ponzi scheme." As such, the May 27th communication is defamatory *per se*. (*Id.*) The fact that the sender(s) published these false statements to project44's newly hired Chief Revenue Officer - and encouraged the CRO to resign - confirms that the sender(s) intent was to disrupt project44's business activities.

31. "Jason Short" is a pseudonym, as project44 has not previously employed anyone named "Jason Short," nor has it ever worked with any persons having this name. The sender(s)' need to conceal their identity speaks to the defamatory nature of this communication.

32. The May 27th communication was either sent by project44's competitor Defendant FourKites, or by one or more unknown entities acting in concert with Defendant FourKites. project44 is thus reasonably concerned that similar information has been published to other parties.

project44's Efforts to Identify the Sender(s) of the Defamatory Communications

33. Google, LLC ("Google") hosts and runs one of the world's largest free e-mail systems, known as Gmail. The "@gmail" domain name in the kenadams8558 and jshort5584 e-mail addresses signifies that the emails are set up with Gmail.

34. In the process of creating a free Gmail e-mail account, the creator may leave behind actual contact information (another e-mail address, a real name, a real phone number) to be assured of continued access to the account. Similarly, when the creator logs in to create the account, and thereafter logs in to send and receive e-mail, the internet protocol address (or "IP address") of the device the user utilizes to connect will be recorded. The IP address permits insight into the location

FILED DATE: 4/13/2020 10:19 PM 2020L004183

FILED DATE: 4/13/2020 10:19 PM 2020L004183

where the user is located because it identifies the specific network the user was on when he or she logged into the Gmail account, including what Internet Service Provider (or "ISP") provided the internet connection to the user. Once the ISP is known, a subpoena can also be sent to it to obtain identifying information. The IP address also offers insight into what device was used to log into the account and, thus, can also aid in identifying the person who sent the communication.

35. On May 30, 2019, project44 filed a verified petition for discovery, pursuant to Ill. S. Ct. R. 224, naming Google as respondent (the "Google Petition") in the Circuit Court of Cook County, Law Division. (*See* May 30, 2019 Petition, attached hereto as <u>Exhibit G</u>.) The Google Petition requested that Google provide project44 with, *inter alia*, the IP address information for the kenadams8558 and jshort5584 email accounts. (*See* Exhibit G.)

36. The Google Petition was assigned to the Hon. John M. Ehrlich. On July 25, 2019, Judge Ehrlich entered an order in which Google agreed to provide, *inter alia*, "internet protocol (IP) address(es) assigned to the computer or network connection used by the person or persons who established the above user account at the time the account was established, and reasonably available login IP addresses (with dates and times) assigned to the computer or network connection used by the person or persons who have accessed such user account from the date of the account's establishment to the date of the subpoena." (*See* July 25, 2019 Order, attached hereto as <u>Exhibit H</u>.)

37. On September 18, 2019, Google produced two text documents containing "subscriber and recent login information for the Google Accounts JSHORT5584@GMAIL.COM and KENADAMS8558@GMAIL.COM." (*See* September 18, 2019 Google Correspondence, attached hereto as <u>Exhibit I</u>.) Copies of the produced documents are attached hereto as <u>Exhibit J</u>.

FILED DATE: 4/13/2020 10:19 PM 2020L004183

38. Exhibit J provides a series of IP addresses used to access both the kenadams8558 and jshort5584 email accounts. (*See* Exhibit J.) In particular, Exhibit J indicates that the IP addresses "78.133.216.228" and "162.234.8.247" were used to access both the kenadams8558 and jshort5584 email accounts, including on May 19, 2019 (the date the first defamatory email was sent). (Exhibit J.) As such, the same entity or entities are responsible for sending both the May 19th and May 27th defamatory communications.

39. With respect to the kenadams8558 account, the "subscriber . . . information" provided by Google includes the following entry: "SMS: +18476443564 [US]." (Exhibit I; Exhibit J.) This entry is a phone number that was provided to Google by the kenadams8558 account owner for identification purposes.

40. The phone number "847-644-3564" is identical to the phone number used by Defendant FourKites in Securities and Exchange Commission filings. (See Notice of Exempt Offering of Securities, retrieved from https://www.sec.gov/Archives/edgar/data/1625230/000162523015000001/xslFormDX01/primary_doc.xml, a copy of which is attached hereto as Exhibit K.) Thus, Defendant FourKites is an owner and/or user of the kenadams8558 account. Furthermore, by virtue of the fact that the same IP addresses were used to access both email accounts-at-issue, Defendant FourKites is also an owner and/or user of the jshort5584 account.

41. Exhibit J further confirms FourKites's involvement by disclosing that the IP address "182.74.119.134" was used to access the jshort5584 account. (*See* Exhibit J.) Using the publicly available "WHOIS IP Lookup Tool," https://www.ultratools.com/tools/ipWhoisLookup, this IP address was identified as belonging to "FOURKITES INDIA PRIVATE L." (*See* screenshot of WHOIS IP Lookup Tool, attached hereto as Exhibit L.) "FOURKITES INDIA PRIVATE L" refers to "FourKites India Private Limited," a subsidiary of Defendant FourKites.

FILED DATE: 4/13/2020 10:19 PM 2020L004183

(*See, e.g.*, https://www.quickcompany.in/company/fourkites-india-private-limited, a screenshot excerpt of which is attached hereto as Exhibit M (listing Sriram Nagaswamy and Rashi Jain as directors of FourKites India Private Limited); *compare with* https://www.fourkites.com/about/sriram-nagaswamy/ and https://www.fourkites.com/about/rashi-jain, screenshots of which are attached hereto as Exhibit N (listing Sriram Nagaswamy and Rashi Jain as employees of Defendant FourKites).)

42. Exhibit J also contains IP addresses belonging to AT&T Mobility, LLC ("AT&T") for both the kenadams8558 and jshort5584 email accounts. AT&T is a provider of wireless communication services as well as an Internet Service Provider ("ISP"). Each time a user utilizes AT&T's internet services, AT&T assigns the user an IP address. Many ISPs maintain internal logs which record the date, time, and customer identity for each IP address assignment made by that ISP. Upon information and belief, AT&T maintains such logs.

43. The AT&T IP addresses listed in Exhibit J will identify anonymous co-owners or co-users of the kenadams8558 and jshort5584 email accounts (*i.e.* Defendants Jane Doe, John Doe #1, John Doe #2, and John Does #3-25). These anonymous co-owners or co-users of the kenadams8558 and jshort5584 email accounts acted in concert with Defendant FourKites to send the defamatory May19th communication and May 27th communication.

44. Given this, on September 24, 2019, project44 filed another petition for discovery in Cook County Circuit Court, naming, *inter alia*, AT&T as a respondent in discovery. (*See* September 24, 2019 Petition for Discovery (the "AT&T Petition"), attached hereto as Exhibit O.) The AT&T Petition was assigned to the Hon. Alan P. Walker.

45. On November 25, 2019, AT&T sent correspondence to the subscriber(s) associated with the IP addresses identified in the AT&T Petition, notifying them as to the existence of

FILED DATE: 4/13/2020 10:19 PM 2020L004183

project44's petition. (*See* November 25, 2019 AT&T Correspondence, attached hereto as Exhibit P.) On December 16, 2019, the subscriber(s) intervened in the AT&T Petition, proceeding under the fictitious name "Jane Doe," and by and through their counsel, expressed their intention to oppose and dismiss the petition. (*See* December 16, 2019 Petition for Intervention, and December 16, 2019 Motion Pursuant to 735 ILCS 5/2-401(e) to Appear under Fictitious Name, attached hereto as Exhibit Q and Exhibit R, respectively.) Thus, there is an actual person or entity involved in sending these defamatory communications, and that person or entity does not want their identity known.

46. On February 21, 2020, project44 filed a Motion for Judgment on the Pleadings with respect to the AT&T Petition. (*See* February 21, 2020 Motion for Judgment on the Pleadings, attached hereto as Exhibit S.) Jane Doe opposed project44's Motion and filed their own Motion seeking to dismiss the AT&T Petition. (*See* March 3, 2020 Motion for Post-Hearing Final Relief on project44's Rule 224 Petition for Discovery, attached hereto as Exhibit T.) The motions were fully briefed and a hearing on the motions was set for April 20, 2020. (*See* March 13, 2020 order, attached hereto as Exhibit U.) However, in light of the COVID-19 coronavirus epidemic, the hearing was subsequently rescheduled to May 12, 2020. (*See* March 24, 2020 Cook County electronic notice, attached hereto as Exhibit V.)

47. The statute of limitations for project44's defamation claims is one year from publication, *i.e.* May 19, 2020. (*See* 735 ILCCS 5/13-201.) As such, there is a high likelihood that project44's defamation claims will become time-barred before an order in the AT&T Petition is entered, let alone before project44 receives the information requested from AT&T. This action is therefore proper to preserve project44's claims and to complete the discovery identified herein (whether through this action, or in giving the pending discovery petition time to complete).

FILED DATE: 4/13/2020 10:19 PM 2020L004183

COUNT I
DEFAMATION *PER SE* – THE MAY 19TH COMMUNICATION

48. project44 hereby reincorporates and restates the above paragraphs as if specifically set forth and re-alleged herein.

49. Defendants conspired with and aided and abetted each other in making the defamatory May 19th communication, which greatly harmed project44's reputation in their trade and business.

50. Defendants each knowingly and voluntarily participated in this common scheme to harm project44's reputation.

51. Defendants did so for the purpose of accomplishing, by concerted action and common design, a harm to the business reputation of project44, to which Defendants agreed.

52. Each Defendant committed overt tortious acts in concert with each other and in furtherance of this conspiracy by making the May 19th communication, and each substantially participated and assisted in such a scheme to defame project44.

53. Each Defendant also accepted and ratified each other's defamatory statements.

54. The May 19th communication constituted defamation *per se* in that such statements concerned project44's reputation in its trade and business by lowering such reputation in the eyes the community and, upon information and belief, deterred the community from associating with project44. Therefore, damages are presumed.

55. The May 19th communication imputed a lack of integrity of project44's business conduct, imputed the commission of one or more crimes, conveyed a lack of ability by project44 in its business, and prejudiced project44 in its business.

56. Defendants knew that the May 19th communication was false, or at the very least, Defendants acted in a reckless disregard of whether the May 19th communication was false or not.

FILED DATE: 4/13/2020 10:19 PM 2020L004183

57. Accordingly, Defendants acted with malice and made the May 19th communication for the purpose of harming project44's reputation.

58. The May 19th communication contained factual statements, in that: (a) the specific language at issue (*i.e.* statements that project44 was affiliated with the Chicago Mafia and used that affiliation to intimidate persons such as ex-employees; that project44 had engaged in accounting improprieties, that its contracts reflected these improprieties, and that project44's former CFO left because of these improprieties; that a customer had cancelled their contract due to project44's lack of ability and/or accounting improprieties; and that project44 had committed fraud in the same manner as Theranos) have precise meanings which are readily understood; (b) the defamatory statements are capable of being proven true or false; and (c) the full context of the defamatory statements in which they appear in the above-referenced media and in the broader social context and surrounding circumstances are such as to communicate to the readers of these statements that what was read is not opinion, but a statement of fact.

59. As a direct and proximate result of Defendants' defamatory statements, project44 has suffered presumed damages in the form of, *inter alia*, impairment of its business reputation and standing in the community.

60. Additionally, due to the malicious nature of the May 19th communication and the highly egregious conduct of Defendants detailed above, project44 also demands punitive damages.

COUNT II
DEFAMATION *PER SE* – THE MAY 27TH COMMUNICATION

61. project44 hereby reincorporates and restates the above paragraphs as if specifically set forth and re-alleged herein.

62. Defendants conspired with and aided and abetted each other in making the defamatory May 27th communication, which greatly harmed project44's reputation in their trade and business.

63. Defendants each knowingly and voluntarily participated in this common scheme to harm project44's reputation.

64. Defendants did so for the purpose of accomplishing, by concerted action and common design, a harm to the business reputation of project44, to which Defendants agreed.

65. Each Defendant committed overt tortious acts in concert with each other and in furtherance of this conspiracy by making the May 27th communication, and each substantially participated and assisted in such a scheme to defame project44.

66. Each Defendant also accepted and ratified each other's defamatory statements.

67. The May 27th communication constituted defamation *per se* in that such statements concerned project44's reputation in its trade and business by lowering such reputation in the eyes the community and, upon information and belief, deterred the community from associating with project44. Therefore, damages are presumed.

68. The May 27th communication imputed the commission of one or more crimes, and thus prejudiced project44 in its business.

69. Defendants knew that the May 27th communication was false, or at the very least, Defendants acted in a reckless disregard of whether the May27th communication was false or not.

70. Accordingly, Defendants acted with malice and made the May 27th communication for the purpose of harming project44's reputation.

71. The May 27th communication contained factual statements, in that (a) the specific language at issue (*i.e.* statements that project44 was a Ponzi scheme and had committed fraud in

FILED DATE: 4/13/2020 10:19 PM 2020L004183

FILED DATE: 4/13/2020 10:19 PM 2020L004183

the same manner as Theranos) have precise meanings which are readily understood; (b) the defamatory statements are capable of being proven true or false; and (c) the full context of the defamatory statements in which they appear in the above-referenced media and in the broader social context and surrounding circumstances are such as to communicate to the readers of these statements that what was read is not opinion, but a statement of fact.

72. As a direct and proximate result of Defendants' defamatory statements, project44 has suffered presumed damages in the form of, *inter alia*, impairment of its business reputation and standing in the community.

73. Additionally, due to the malicious nature of the May 27th communication and the highly egregious conduct of Defendants detailed above, project44 also demands punitive damages.

COUNT III
CIVIL CONSPIRACY

74. project44 hereby reincorporates and restates the above paragraphs as if specifically set forth and re-alleged here in.

75. Defendants knowingly and voluntarily entered into an agreement (the "Conspiracy") to, as described above, unlawfully defame project44 via the May 19th communication and the May 27th communication.

76. Defendant FourKites entered into the Conspiracy directly through either Jane Doe, John Doe #1, John Doe #2, or John Does #3-25.

77. In the alternative, Defendant FourKites is liable for Jane Doe's, John Doe #1's, John Doe #2's, and/or John Does #3-25's participation in the Conspiracy under the doctrine of *respondeat superior*. Upon information and belief, one or more of Jane Doe, John Doe #1, John Doe #2, and John Does #3-25 are employees of FourKites, and said Defendants made the

FILED DATE: 4/13/2020 10:19 PM 2020L004183

defamatory statements to both damage the reputation of project44 and to provide Defendant FourKites with a competitive advantage.

78. project44 has been injured by the Conspiracy and the tortious acts undertaken pursuant to the Conspiracy as described above.

WHEREFORE, Plaintiff project44, Inc. respectfully requests that the Court grant it the following relief:

1. Judgment in project44, Inc.'s favor against Defendants FourKites, Inc., Jane Doe, John Doe #1, John Doe #2, and John Does #3-25, for presumed and actual damages in an amount to be determined at trial;

2. An award of all costs of this suit;

3. An award of punitive damages; and

4. Such other relief this Court deems just.

JURY DEMAND

project44, Inc. requests a trial by jury on all issues permitted to be tried to a jury.

Dated: April 13, 2020

Respectfully submitted,

PROJECT44, INC.

By: /s/ Douglas A. Albritton
One of Its Attorneys

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Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

FILED
4/13/2020 10:19 PM
DOROTHY BROWN
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2020L004183

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

**IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION**

PROJECT44, INC., a Delaware corporation,

Plaintiff,

v.

FOURKITES, INC., a Delaware corporation,

and

JANE DOE, an individual, corporation, organization, or other legal entity whose name is presently unknown,

and

JOHN DOE #1, aka "Ken Adams," an individual, corporation, organization, or other legal entity whose name is presently unknown, using the email address "kenadams8558 @gmail.com,"

and

JOHN DOE #2, aka "Jason Short," an individual, corporation, organization, or other legal entity whose name is presently unknown, using the email address "jshort5584@gmail. com,"

and

JOHN DOES #3-25, individuals, corporations, organizations, or other legal entities whose names are presently unknown,

Defendants.

Case No. 2020L004183

AFFIDAVIT PURSUANT TO ILLINOIS SUPREME COURT RULE 222 (B)

FILED
4/13/2020 10:19 PM
DOROTHY BROWN
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COOK COUNTY, IL
2020L004183

9069711

FILED DATE: 4/13/2020 10:19 PM 2020L004183

EXHIBIT A

FILED DATE: 4/13/2020 10:19 PM 2020L004183

From: Ken Adams <kenadams8558@gmail.com>
Sent: Sunday, May 19, 2019 9:03 AM
To: jim@ov.vc; Kevin Diestel <kevin@sapphireventures.com>
Subject: Accounting improprieties at P44

Board members,
I recently left P44 and wanted to bring to your attention certain things.

1. Ex employees are silenced with legal threats and defamation suits. Redacted used to be the book keeper for a Chicago Mafia and they are using that to silence folks.

2. There is rampant accounting improprieties. I encourage you to take a look at the contracts (pilots , out clauses, rev rec etc). Recent CFO departure must tell you everything.

3. Estes cancelled the contract. It was only $5K a month and they are not even willing to pay this.

There is a widespread discontent brewing and it's just a matter of time before people go public and another Theranos happen in Chicago.

Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

FILED
4/13/2020 10:19 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2020L004183

9069711

FILED DATE: 4/13/2020 10:19 PM 2020L004183

EXHIBIT B

FILED DATE: 4/13/2020 10:19 PM 2020L004163

dishonest behavior, or a dishonest act:

- [U] *He said he regretted the appearance of impropriety and resigned.*
- [C] *There have been charges of financial improprieties.*

---

*(Definition of **impropriety** from the __Cambridge Academic Content Dictionary__ © Cambridge University Press)*

impropriety | BUSINESS ENGLISH

impropriety

noun [C or U]

UK /ˌɪmprəˈpraɪəti/ US

plural **improprieties**

---

behaviour that is dishonest or not acceptable in a particular situation:

- ***accounting/financial improprieties***
- *The company denies **allegations of impropriety** involving its copper trades.*

---

*(Definition of **impropriety** from the __Cambridge Business English Dictionary__ © Cambridge University Press)*

EXAMPLES of **impropriety**

impropriety

Tumusiime was taken to court, but to the utter chagrin of parliamentarians he was acquitted of charges of running down the corporation and financial *impropriety*.

From __Cambridge English Corpus__

The others were found guilty of financial *impropriety* or negligence causing losses of revenue to the state.

From __Cambridge English Corpus__

These examples are from the Cambridge English Corpus and from sources on the web. Any opinions in the examples do not represent the opinion of the Cambridge Dictionary editors or of Cambridge University Press or its licensors.

FILED DATE: 4/13/2020 10:19 PM 2020L004183

*Meaning of **impropriety** in English*

impropriety

noun [C or U] • formal

US /ˌɪm.prəˈpraɪ.ə.t̬i/ UK /ˌɪm.prəˈpraɪ.ə.ti/

behavior that is dishonest, socially unacceptable, or unsuitable for a particular situation:

- *financial/legal impropriety*
- *allegations of **sexual** impropriety*

Opposites

decorum formal

propriety formal

+ Thesaurus: synonyms and related words

Want to learn more?

Improve your vocabulary with **English Vocabulary in Use** from Cambridge.
Learn the words you need to communicate with confidence.

*(Definition of **impropriety** from the **Cambridge Advanced Learner's Dictionary & Thesaurus** © Cambridge University Press)*

impropriety | INTERMEDIATE ENGLISH

impropriety

Contents

To top

FILED
4/13/2020 10:19 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2020L004183

9069711

FILED DATE: 4/13/2020 10:19 PM 2020L004183

EXHIBIT C

FILED DATE: 4/13/2020 10:19 PM 2020L004183

(Definition of **rampant** from the **Cambridge Advanced Learner's Dictionary & Thesaurus** © Cambridge University Press)

rampant | INTERMEDIATE ENGLISH

rampant

adjective [not gradable]

US /ˈræm·pənt/

happening a lot or becoming worse, usually in a way that is out of control:

- *Weeds are growing rampant in the garden.*

(Definition of **rampant** from the **Cambridge Academic Content Dictionary** © Cambridge University Press)

rampant | BUSINESS ENGLISH

rampant

adjective

UK /ˈræmpənt/ **US**

used to describe something bad that gets worse very quickly and in an uncontrolled way:

- *Corruption and fraud are rampant in the war-stricken area.*
- ***rampant inflation/commercialism/consumerism***

(Definition of **rampant** from the **Cambridge Business English Dictionary** © Cambridge University Press)

EXAMPLES of **rampant**

rampant

With starvation *rampant*, disease soon festered, and cholera and typhoid epidemics added to the already high fatalities.

FILED DATE: 4/15/2020 10:19 PM 2020L004183

This is your 365

Office 365 lets you create from anywhere, so you can work from where you love

Meaning of ***rampant*** *in English*

rampant

adjective

US 🔊 /ˈræm.pᵊnt/ **UK** 🔊 /ˈræm.pᵊnt/

rampant ***adjective*** **(INCREASING)**

(of something bad) getting worse quickly and in an uncontrolled way:

- *rampant corruption*
- *Rampant inflation means that our wage increases soon become worth nothing.*
- *He said that he had encountered rampant prejudice in his attempts to get a job.*
- *Disease is rampant in the overcrowded city.*

+ Thesaurus: synonyms and related words

Want to learn more?

Improve your vocabulary with **English Vocabulary in Use** from Cambridge.
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rampant ***adjective*** **(STANDING)**

[after noun]

(of an animal represented on a coat of arms) standing on its back legs with its front legs raised:

FILED
4/13/2020 10:19 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2020L004183

9069711

FILED DATE: 4/13/2020 10:19 PM 2020L004183

EXHIBIT D

FILED DATE: 4/13/2020 10:19 PM 2020L004183

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. ELIZABETH HOLMES and THERANOS, INC. Defendants.	Case No. **COMPLAINT**

Plaintiff Securities and Exchange Commission (the "Commission") alleges:

SUMMARY OF THE ACTION

1. This case involves the fraudulent offer and sale of securities by Theranos, Inc. ("Theranos"), a California company that aimed to revolutionize the diagnostics industry, its Chairman and Chief Executive Officer Elizabeth Holmes, and its former President and Chief Operating Officer, Ramesh "Sunny" Balwani. The Commission has filed a separate action against Balwani.

FILED DATE: 4/13/2020 10:19 PM 2020L004183

2. Holmes, Balwani, and Theranos raised more than $700 million from late 2013 to 2015 while deceiving investors by making it appear as if Theranos had successfully developed a commercially-ready portable blood analyzer that could perform a full range of laboratory tests from a small sample of blood. They deceived investors by, among other things, making false and misleading statements to the media, hosting misleading technology demonstrations, and overstating the extent of Theranos' relationships with commercial partners and government entities, to whom they had also made misrepresentations.

3. Holmes, Balwani, and Theranos also made false or misleading statements to investors about many aspects of Theranos' business, including the capabilities of its proprietary analyzers, its commercial relationships, its relationship with the Department of Defense ("DOD"), its regulatory status with the U.S. Food and Drug Administration ("FDA"), and its financial condition. These statements were made with the intent to deceive or with reckless disregard for the truth.

4. Investors believed, based on these representations, that Theranos had successfully developed a proprietary analyzer that was capable of conducting a comprehensive set of blood tests from a few drops of blood from a finger. From Holmes' and Balwani's representations, investors understood Theranos offered a suite of technologies to (1) collect and transport a fingerstick sample of blood, (2) place the sample on a special cartridge which could be inserted into (3) Theranos' proprietary analyzer, which would generate the results that Theranos could transmit to the patient or care provider. According to Holmes and Balwani, Theranos' technology could provide blood testing that was faster, cheaper, and more accurate than existing blood testing laboratories, all in one analyzer that could be used outside traditional laboratory settings.

5. At all times, however, Holmes, Balwani, and Theranos were aware that, in its clinical laboratory, Theranos' proprietary analyzer performed only approximately 12 tests of the over 200 tests on Theranos' published patient testing menu, and Theranos used third-party

FILED DATE: 4/13/2020 10:19 PM 2020L004183

1 commercially available analyzers, some of which Theranos had modified to analyze fingerstick
2 samples, to process the remainder of its patient tests.
3 6. In this action, the Commission seeks an order enjoining Holmes and Theranos
4 from future violations of the securities laws, requiring Holmes to pay a civil monetary penalty,
5 prohibiting Holmes from acting as an officer or director of any publicly-listed company,
6 requiring Holmes to return all of the shares she obtained during this period, requiring Holmes to
7 relinquish super-majority voting shares she obtained during this period, and providing other
8 appropriate relief.

9 **JURISDICTION AND VENUE**

10 7. The Commission brings this action pursuant to Sections 20(b), 20(d), and 22(a)
11 of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77t(b), 77t(d), and 77v(a)] and
12 Sections 21(d), 21(e), and 27 of the Securities Exchange Act of 1934 ("Exchange Act")
13 [15 U.S.C. §§ 78u(d), 78u(e), and 78aa].
14 8. This Court has jurisdiction over this action pursuant to Sections 20(b), 20(d)(1)
15 and 22(a) of the Securities Act [15 U.S.C. §§ 77t(b), 77t(d)(1), and 77v(a)] and Sections 21(d),
16 21(e) and 27 of the Exchange Act [15 U.S.C. §§ 78u(d), 78u(e) and 78aa].
17 9. Defendants, directly or indirectly, made use of the means and instrumentalities of
18 interstate commerce or of the mails in connection with the acts, transactions, practices, and
19 courses of business alleged in this complaint.
20 10. Venue is proper in this District pursuant to Section 22(a) of the Securities Act
21 [15 U.S.C. § 77v(a)] and Section 27(a) of the Exchange Act [15 U.S.C. § 78aa(a)]. Theranos is
22 headquartered in Newark, California, and Holmes resides in the District. In addition, acts,
23 transactions, practices, and courses of business that form the basis for the violations alleged in
24 this complaint occurred in this District. Defendants met with and solicited prospective Theranos
25 investors in this District, and the relevant offers or sales of securities took place in this District.
26
27
28

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Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

FILED
4/13/2020 10:19 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2020L004183

9069711

FILED DATE: 4/13/2020 10:19 PM 2020L004183

EXHIBIT E

FILED DATE: 4/13/2020 10:19 PM 2020L004163

THE UNITED STATES ATTORNEY'S OFFICE
NORTHERN DISTRICT of CALIFORNIA

Department of Justice

U.S. Attorney's Office

Northern District of California

FOR IMMEDIATE RELEASE

Friday, June 15, 2018

Theranos Founder and Former Chief Operating Officer Charged In Alleged Wire Fraud Schemes

Elizabeth Holmes and Ramesh "Sunny" Balwani Are Alleged To Have Perpetrated Multi-million Dollar Schemes To Defraud Investors, Doctors, and Patients.

SAN JOSE - A federal grand jury has indicted Elizabeth A. Holmes and Ramesh "Sunny" Balwani, announced Acting United States Attorney Alex G. Tse, Federal Bureau of Investigation (FBI) Special Agent in Charge John F. Bennett; Food and Drug Administration (FDA) Commissioner Scott Gottlieb; and U.S. Postal Inspection Service (USPIS) Inspector in Charge Rafael Nuñez. The defendants are charged with two counts of conspiracy to commit wire fraud and nine counts of wire fraud. According to the indictment returned yesterday and unsealed today, the charges stem from allegations Holmes and Balwani engaged in a multi-million dollar scheme to defraud investors, and a separate scheme to defraud doctors and patients. Both schemes involved efforts to promote Palo Alto, Calif.-based Theranos.

Holmes, 34, of Los Altos Hills, Calif., founded Theranos in 2003. Theranos is a private health care and life sciences company with the stated mission to revolutionize medical laboratory testing through allegedly innovative methods for drawing blood, testing blood, and interpreting the resulting patient data. Balwani, 53, of Atherton, Calif., was employed at Theranos from September of 2009 through 2016. At times during that period, Balwani worked in several capacities including as a member of the company's board of directors, as its president, and as its chief operating officer.

According to the indictment, Holmes and Balwani used advertisements and solicitations to encourage and induce doctors and patients to use Theranos's blood testing laboratory services, even though the defendants knew Theranos was not capable of consistently producing accurate and reliable results for certain blood tests. The tests performed on Theranos technology, in addition, were likely to contain inaccurate and unreliable results.

The indictment alleges that the defendants used a combination of direct communications, marketing materials, statements to the media, financial statements, models, and other information to defraud potential investors. Specifically, the defendants claimed that Theranos developed a revolutionary and proprietary analyzer that the defendants referred to by various names, including as the TSPU, Edison, or minilab. The defendants claimed the analyzer was able to perform a full range of clinical tests using small blood samples drawn from a finger stick. The defendants also represented that the analyzer could produce results that

FILED DATE: 4/13/2020 10:19 PM 2020L004183

were more accurate and reliable than those yielded by conventional methods—all at a faster speed than previously possible.

The indictment further alleges that Holmes and Balwani knew that many of their representations about the analyzer were false. For example, allegedly, Holmes and Balwani knew that the analyzer, in truth, had accuracy and reliability problems, performed a limited number of tests, was slower than some competing devices, and, in some respects, could not compete with existing, more conventional machines.

"This district, led by Silicon Valley, is at the center of modern technological innovation and entrepreneurial spirit; capital investment makes that possible. Investors large and small from around the world are attracted to Silicon Valley by its track record, its talent, and its promise. They are also attracted by the fact that behind the innovation and entrepreneurship are rules of law that require honesty, fair play, and transparency. This office, along with our other law enforcement partners in the Bay Area, will vigorously investigate and prosecute those who do not play by the rules that make Silicon Valley work. Today's indictment alleges that through their company, Theranos, CEO Elizabeth Holmes and COO Sunny Balwani not only defrauded investors, but also consumers who trusted and relied upon their allegedly-revolutionary blood-testing technology."

"This indictment alleges a corporate conspiracy to defraud financial investors," said Special Agent in Charge Bennett. "This conspiracy misled doctors and patients about the reliability of medical tests that endangered health and lives."

"The conduct alleged in these charges erodes public trust in the safety and effectiveness of medical products, including diagnostics. The FDA would like to extend our thanks to our federal law enforcement partners for sending a strong message to Theranos executives and others that these types of actions will not be tolerated," said Catherine A. Hermsen, Acting Director, FDA Office of Criminal Investigations.

"The United States Postal Inspection Service has a long history of successfully investigating complex fraud cases," said Inspector in Charge Rafael E. Nuñez. "Anyone who engages in deceptive practices should know they will not go undetected and will be held accountable. The collaborative investigative work on this case conducted by Postal Inspectors, our law enforcement partners, and the United States Attorney's Office illustrates our efforts to protect both consumers and investors."

The Indictment Alleges That Doctors And Patients Were Defrauded

The indictment alleges Holmes and Balwani defrauded doctors and patients by making false claims concerning Theranos's ability to provide accurate, fast, reliable, and cheap blood tests and test results, and through omissions concerning the limits of and problems with Theranos's technologies. The defendants knew Theranos was not capable of consistently producing accurate and reliable results for certain blood tests, including the tests for calcium, chloride, potassium, bicarbonate, HIV, Hba1C, hCG, and sodium. The defendants nevertheless used interstate electronic wires to purchase advertisements intended to induce individuals to purchase Theranos blood tests at Walgreens stores in California and Arizona. Through these advertisements, the defendants explicitly represented to individuals that Theranos's blood tests were cheaper than blood tests from conventional laboratories to induce individuals to purchase Theranos's blood tests.

Further, the indictment alleges that based on the defendants' misrepresentations and omissions, many hundreds of patients paid, or caused their medical insurance companies to pay, Theranos, or Walgreens acting on behalf of Theranos, for blood tests and test results, sometimes following referrals from their defrauded doctors. In addition, the defendants delivered to doctors and patients blood results that were inaccurate, unreliable, and improperly validated. The defendants also delivered to doctors and patients blood test results from which critical results were improperly removed.

The indictment describes a number of schemes that defendants allegedly employed to mislead investors, doctors, and patients. For example, with respect to investors, defendants performed technology demonstrations during which defendants intended to cause potential investors to believe blood tests were being conducted on Theranos's proprietary analyzer when, in fact, the analyzer really was running a "null protocol" and was not testing the potential investor's blood. Similarly, defendants purchased and used commercially-available analyzers to test patient blood, while representing to investors that Theranos conducted its patients' tests using Theranos-manufactured analyzers.

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The Indictment Alleges That Investors Were Defrauded

According to the indictment, the defendants also allegedly made numerous misrepresentations to potential investors about Theranos's financial condition and its future prospects. For example, the defendants represented to investors that Theranos conducted its patients' tests using Theranos-manufactured analyzers; when, in truth, Holmes and Balwani knew that Theranos purchased and used for patient testing third party, commercially-available analyzers. The defendants also represented to investors that Theranos would generate over $100 million in revenues and break even in 2014 and that Theranos expected to generate approximately $1 billion in revenues in 2015 when, in truth, the defendants knew Theranos would generate only negligible or modest revenues in 2014 and 2015.

Further, defendants allegedly represented to investors that Theranos had a profitable and revenue-generating business relationship with the United States Department of Defense and that Theranos's technology had deployed to the battlefield when, in truth, Theranos had limited revenue from military contracts and its technology was not deployed in the battlefield. In addition, the defendants represented to investors that Theranos would soon dramatically increase the number of Wellness Centers within Walgreens stores when, in truth, Holmes and Balwani knew by late 2014 that Theranos's retail Walgreens rollout had stalled because of several issues, including that Walgreens's executives had concerns with Theranos's performance.

An indictment merely alleges that crimes have been committed, and the defendants are presumed innocent until proven guilty beyond a reasonable doubt.

The indictment charges each defendant with two counts of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349, and nine counts of wire fraud, in violation of 18 U.S.C. § 1343. If convicted, the defendants face a maximum sentence of twenty (20) years in prison, and a fine of $250,000, plus restitution, for each count of wire fraud and for each conspiracy count. However, any sentence following conviction would be imposed by the court after consideration of the U.S. Sentencing Guidelines and the federal statute governing the imposition of a sentence, 18 U.S.C. § 3553.

Both defendants appeared today before U.S. Magistrate Judge Susan van Keulen for their initial appearances. The matter was assigned to the Honorable Lucy H. Koh, U.S. District Judge, for further proceedings.

Assistant U.S. Attorneys Jeff Schenk, Robert S. Leach, and John C. Bostic are prosecuting the case with the assistance of Laurie Worthen and Bridget Kilkenny. The prosecution is the result of an investigation by the FDA Office of Criminal Investigations, the FBI, and the US Postal Inspection Service.

Attachment(s):
Download balwani_holmes_indictment.pdf

Topic(s):
Financial Fraud

Component(s):

Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

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FILED DATE: 4/13/2020 10:19 PM 2020L004183

EXHIBIT F

FILED DATE: 4/13/2020 10:19 PM 2020L004183

4:38 LTE

Jason Short
jshort5584@gmail.com

To: You tbertrand@project44.com

Monday, May 27, 4:03 PM

Tim,
I happened to read your post about joining project44.
Congrats!
I wanted to shed some light so you can fled ASAP and go find another job. You mention about people, investors etc in your email. There is one ingredient you missed- a great product. At some point you have to stop selling shit and start delivering.

You don't want to be part of the next Ponzi scheme or next theranos. Talk to ex CFO Bruns. Talk to ex Sales people, talk to customers.. talk to prospects, talk to investors outside p44. They will tell you the truth. If you decide to forward this to broker Jett and move on, you are making a mistake.

I sincerely wish you the best. You seem like a nice guy, you deserve better..

Friend

Reply

27

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Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

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EXHIBIT G

FILED
5/30/2019 4:44 PM
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COOK COUNTY, IL
2019L005907

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC., a Delaware corporation,)
)
Petitioner,)
)
v.) Case No. 2019 L - 2019L005907
)
GOOGLE, LLC, a Delaware corporation,)
)
)
Respondent.)
)

VERIFIED PETITION FOR DISCOVERY

project44, Inc. ("project44"), by its undersigned counsel, alleges upon verification as follows for its petition for discovery.

NATURE OF PETITION

1. project44 is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois. It is in the highly competitive shipping logistics industry, and there it provides goods and services which permit its customers to connect with, automate, and provide visibility into key transportation processes which, in turn, permits its customers to increase operational efficiencies, reduce costs, improve shipping performance, and deliver an exceptional experience to their own customers. Over 25,000 different carriers have tracked shipments in project44's system, and it supports all transportation modes and shipping types including "parcel," "final-mile," "less-than-truckload," "volume less-than-truckload," "truckload," rail, intermodal, and ocean. project44 has more than 200 employees.

2. Starting on May 19, 2019, and then again on May 27, 2019, (collectively "the Defamatory Communications"), one or more individuals sent defamatory communications regarding project44 to its Board of Directors (the May 19th communication) and a new employee

(the May 27th communication) using the fake names "Ken Adams" and "Jason Short" from the email addresses kenadams8558@gmail.com and jshort5584@gmail.com, respectively. project44 has not previously employed anyone named Ken Adams or Jason Short, nor has it ever worked with any persons having these names. As such the names appear to be made up.

3. The "@gmail" domain name in the kenadams8558 and jshort5584 e-mail addresses signifies that the emails are set up with Respondent Google, LLC ("Google").

4. The Defamatory Communications are defamatory because, among other reasons, they falsely state (a) that one of project44's executives' family is affiliated with the Chicago mafia and "they are using that to silence folks," (b) project44 engages in accounting "improprieties," (c) project44 is akin to "Theranos," the blood-test company that collapsed as a result of the highly publicized securities fraud allegations made against it, (d) project44's goods and services do not perform as stated, and (e) project44 is a "Ponzi scheme."

5. Accordingly, project44 is pursuing this petition for discovery in order to identify the individual(s) responsible for these defamatory postings so that it may seek relief against them. As set forth below, project44 has valid claims for defamation *per se* against these unknown persons which warrant the granting of this petition.

THE PETITION PARTIES AND RESPONDENTS

6. project44 is a Delaware corporation with its principal place of business in Chicago, Illinois.

7. Google, LLC is a Delaware corporation with an office in Chicago located at 320 North Morgan Street, #600, and a registered agent located at Corporation Service Company, 2710 Gateway Oaks Drive, Suite 150N, Sacramento, CA 95833.

JURISDICTION AND VENUE

8. Illinois is a proper forum for project44 to litigate its defamation claims against the unknown individual(s) described below because the defamatory material they published was sent to project44 in Illinois and, thus, has caused project44 to suffer injury in Illinois.

9. The Respondent Google is a non-party third party that is subject to summons and subpoena process to respond to discovery concerns in Illinois cases, just like any third party, including because of Supreme Court Rule 224.

FACTUAL BACKGROUND

Google

10. Google hosts the world's most used internet search engine, and similarly hosts and runs one of the world's largest free e-mail systems. Anyone can log in to the Google website (www.google.com), click on the link to "Gmail" on the top right corner of the webpage, and proceed from there to create a free e-mail account that will permit the user to send and receive e-mail for free.

11. In the process of creating a free Gmail e-mail account, the creator may leave behind actual contact information (another e-mail address, a real name, a real phone number) in order to be assured of continued access to the account. Similarly, when the creator logs in to create the account, and thereafter logs in to send and receive e-mail, the internet protocol address (or "IP Address") of the device the user utilizes to connect will be recorded. The IP Address permits insight into the location where the user is located because it identifies the specific network the user was on when he or she logged into the Gmail account, including what Internet Service Provider (or "ISP") provided the internet connection to the user. Once the ISP is known, a subpoena can also be sent to it to obtain identifying information. The IP address also offers insight into what

device was used to log into the account and, thus, can also aid in identifying the person who sent the communication.

The Defamatory Statements

12. For purposes of this Verified Petition, and pursuant to Ill. S. Ct. R. 224, project44 need only provide allegations about its underlying claims which suffice to demonstrate that it has one or more claims that pass muster pursuant to 735 ILCS 5/2-615. *See, e.g., Maxon v. Ottawa Pub. Co.*, 402 Ill. App. 3d 704, 712 (3d Dist. 2010).

13. project44 has valid claims for defamation *per se* against the sender(s) of the Defamatory Statements.

14. First, each of the Defamatory Statements is false.

15. Second, each of the Defamatory Statements were published to one or more third parties, without privilege.

16. Third, each of the Defamatory Statements constitute defamation *per se* because each affirmatively states that project44 and/or individuals in its management have (a) engaged in malfeasance or misfeasance in the discharge of employment duties, (b) unfitness or a lack of ability in their trade, profession or business, and (c) been involved in or affiliated with criminal activity. The Defamatory Statements attack the integrity of project44's conduct, goods and services in the marketplace. Accordingly, project44 has been damaged.

THE DEFAMATORY STATEMENTS WARRANT THE GRANTING OF THIS PETITION

17. Based upon the foregoing, project44 has sufficiently alleged a basis pursuant to Ill. S. Ct. R. 224 for the Court to have a hearing and grant the following discovery:

a. Permitting project44 to issue a subpoena to Google requiring it to provide all information known about the user(s) behind the e-mail addresses kenadams8558@gmail.com and

jshort5584@gmail.com including, but not limited to, their actual names and other information shared with Google when the e-mail accounts were created, dates and times of e-mail activity, and the internet protocol ("IP") addresses that were used to log in and send the e-mail communications, as set forth in Exhibit A.

WHEREFORE, project44 respectfully requests that, after service of this Verified Petition on Google, that the Court schedule a hearing to consider the relief requested herein.

Dated: May 29, 2019

PROJECT44, Inc.

By: /s/ Douglas A. Albritton
One of Its Attorneys

Douglas A. Albritton
Peter G. Hawkins
Actuate Law LLC
FIRM ID No. 62266
641 West Lake, 5th Floor
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312-579-3108
doug.albritton@actuatelaw.com
peter.hawkins@actuatelaw.com

Counsel for project44, Inc.

VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that statements of fact set forth in the foregoing Verified Petition are true and correct, except as to matter therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Cherie Camp

Director, Executive Operations

EXHIBIT A

Document Requests to Google, LLC

Please produce the records requested below regarding the following email addresses:

(1) kenadams8558@gmail.com

(2) jshort5584@gmail.com

(a) Sign in and log in records for the accounts;

(b) Account creation records, including any other information shared in connection with the account creation including secondary email addresses, phone numbers, and individual or emergency contact information; and

(c) Any and all internet protocol ("IP") addresses and/or ISP records that are connected to or are otherwise affiliated with the above email addresses from any account activity.

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EXHIBIT H

FILED DATE: 4/15/2020 10:19 PM 2020L004183

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC., a Delaware corporation,	)	
	)	
Petitioner,	)	
	)	Case No. 2019-L-005907
v.	)	
	)	Judge John H. Ehrlich
GOOGLE, LLC, a Delaware corporation,	)	
	)	
Respondents.	)	

AGREED ORDER REGARDING
PRODUCTION OF GOOGLE ACCOUNT INFORMATION

This cause coming to be heard on the above-captioned Petition for Pre-Suit Discovery ("Petition") filed pursuant to Illinois Supreme Court Rule 224, counsel for Petitioner and Respondent Google LLC ("Google") agreeing to the below and the Court being fully advised in the premises,

WHEREAS, Petitioner project44, Inc. ("Petitioner") seeks pre-action discovery under Illinois Supreme Court Rule 224 regarding the identity of the owner of the Google Accounts associated with the Gmail addresses kenadams8558@gmail.com and jshort5584@gmail.com (the "Accounts") described in the Petition filed in this matter on May 30, 2019;

WHEREAS, Petitioner agrees to serve upon Google a subpoena properly domesticated in in the Superior Court of Santa Clara County, California (the "Subpoena");

WHEREAS, Google asserts that pre-action disclosure is inappropriate in the absence of a determination by the Court that Petitioner has made the requisite showing pursuant to Rule 224 of the existence of a meritorious cause of action and the necessity of the information sought;

FILED DATE: 4/13/2020 10:19 PM 2020L004183

AND WHEREAS, subject to consideration of any objections raised by the owner(s) of the Accounts as further described in paragraphs 2 and 5 below, the Court HEREBY FINDS that Petitioner has made the requisite showing pursuant to Rule 224 concerning the existence of a meritorious cause of action and the necessity of the pre-action disclosure, issues upon which Google takes no position;

IT IS HEREBY ORDERED:

1. Petitioner's Rule 224 Verified Petition for pre-suit discovery is granted;

2. Absent an objection or motion for protective order filed prior to the expiration of Google's 21-day notice period regarding the Petition and/or Subpoena served on Google, in response to the Subpoena, Google shall produce to Petitioner's counsel reasonably available non-content basic subscriber information ("BSI") that it may have, if any, for the Accounts.

3. For purposes of clarity, BSI shall be limited to the name, phone number, alternative email addresses, internet protocol (IP) address(es) assigned to the computer or network connection used by the person or persons who established the above user account at the time the account was established, and reasonably available login IP addresses (with dates and times) assigned to the computer or network connection used by the person or persons who have accessed such user account from the date of the account's establishment to the date of the Subpoena.

4. Upon Google's production of BSI or certification that no responsive information exists, Petitioner shall dismiss the Petition as to Google with prejudice within 14 days.

5. If any objections or motions to quash are filed within the 21-day period subsequent to issuing notice, Google shall not be obligated to produce BSI pending resolution of the motions or objections, and then only to the extent ordered by the Court.

FILED DATE: 4/13/2020 10:19 PM 2020L004183

6. Google's production of BSI shall satisfy and fully discharge any and all of its obligations in connection with this Petition, absent agreement of the parties or a further court order to the contrary.

7. This Matter is continued for subsequent case management conference on September 26, 2019, at 9:30 a.m./p.m., in Room 2209. re status of discovery.

ENTER:

Judge John H. Ehrlich

JUL 25 2019

JUDGE Circuit Court 2075

AGREED AS TO FORM AND CONTENTS:

Google LLC

By: /s/ Jeremy L. Buxbaum
One of Its Attorneys
Jeremy L. Buxbaum
Perkins Coie LLP
131 South Dearborn Street
Suite No. 1700
Chicago, Illinois 60603-5559
Tel: (312) 324-8400

project44, Inc.

By: /s/ Douglas A. Albritton
One of Its Attorneys
Douglas A. Albritton
Peter G. Hawkins
Actuate Law LLC
641 West Lake, 5th Floor
Chicago, Illinois 60661
Tel: (312) 579-3108

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EXHIBIT I

Google LLC
1600 Amphitheatre Parkway
Mountain View, California 94043

google-legal-support@google.com
www.google.com

September 18, 2019

Via Email Only
doug.albritton@actuatelaw.com

Douglas A. Albritton
Actuate Law LLC
641 West Lake, 5th Floor
Chicago, Illinois 60661
312-579-3108

Re: *Project44, Inc. v. Google LLC*, Superior Court of California, County of Santa Clara, 19CV352463 (Internal Ref. No. 2716278)

Dear Douglas A. Albritton:

Pursuant to the subpoena issued in the above-referenced matter, we have conducted a diligent search for documents and information accessible on Google's systems that are responsive to your request. Without waiving, and subject to its objections, Google hereby produces the attached documents. Our response is made in accordance with state and federal law, including the Electronic Communications Privacy Act. See 18 U.S.C. § 2701 et seq. By this response, Google does not waive any objection to further proceedings in this matter.

We understand that you have requested customer information regarding the user account(s) specified in the subpoena, which includes the following information: (1) subscriber and recent login information for the Google Accounts JSHORT5584@GMAIL.COM and KENADAMS8558@GMAIL.COM.

Accompanying this letter is responsive information to the extent reasonably accessible from our system, a list of hash values corresponding to each file, and a signed Certificate of Authenticity. Google may not retain a copy of this production but does endeavor to keep a list of the files and their respective hash values.

Finally, Google requests reimbursement in the amount of $125 for reasonable costs incurred in processing your request. Please forward your payment to Google Custodian of Records, at the address above and please write the Internal Reference Number (2716278) on your check. The federal tax ID number for Google is 77-0493581.

Very truly yours,

Mattingly Messina
Legal Investigations Support

Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

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9069711

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EXHIBIT J

Google LLC
1600 Amphitheatre Parkway
Mountain View, California 94043

google-legal-support@google.com
www.google.com

Hash Values for Production Files (Internal Ref. No. 2716278)

jshort5584.AccountInfo.txt:

MD5- d18c4b3b56e5f4377fe48c0fc3511b94
SHA512-
c6d03c9f7142b07d86e67626db8feb09e61d6c1bd2201da246eeb6557ae402b740f38acc5499adc360b4e25
75bad7ea1dbf5498e787a3416fd0edf89b29897bd

kenadams8558.AccountInfo.txt:

MD5- b1c3f4bb04def35492f7ed2248b64eda
SHA512-
8d6fa8e37de268c9b0ad853e32c71a6e337256246e088fffcfc0da25f8d2c29fdf4c4c7f89d756ab7a8ee000d1
c92ad20a897910c11128e149d4f8a221c945e8

Google LLC
1600 Amphitheatre Parkway
Mountain View, California 94043

google-legal-support@google.com
www.google.com

CERTIFICATE OF AUTHENTICITY

I, Mattingly Messina, certify:

1. I am a Custodian of Records for Google LLC ("Google"), located in Mountain View, California. I am authorized to submit this Certificate of Authenticity on behalf of Google in response to a subpoena dated August 05, 2019 (Google LLC Internal Reference No. 2716278) in the matter of *Project44, Inc. v. Google LLC*. I have personal knowledge of the following facts and could testify competently thereto if called as a witness.

2. The accompanying 2 files contain true and correct copies of records pertaining to the email address JSHORT5584@GMAIL.COM and KENADAMS8558@GMAIL.COM ("Document").

3. The documents attached hereto reflect records made and retained by Google. The records were made at or near the time the data was acquired, entered, or transmitted to or from Google; the records were kept in the course of a regularly conducted activity of Google; and the making of the records were a regular practice of that activity.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: September 18, 2019

Mattingly Messina, Custodian of Records for Google LLC

############## * Google Confidential and Proprietary * ###############

GOOGLE SUBSCRIBER INFORMATION

Name: Ken Adams

e-Mail: kenadams8558@gmail.com

Created on: 2019/05/19-13:54:06-UTC

Terms of Service IP: http://162.234.8.247, on 2019/05/19-13:54:06-UTC

SMS: +18476443564 [US]

Google Account ID: 1084341775642

Last Logins: 2019/05/30-12:39:14-UTC, 2019/05/26-07:34:30-UTC, 2019/05/20-23:48:00-UTC

Time	IP Address	Type
2019/05/30-12:40:08-UTC	http://78.133.216.228	Logout
2019/05/30-12:39:14-UTC	http://78.133.216.228	Login
2019/05/26-07:34:30-UTC	http://107.77.221.123	Login
2019/05/20-23:48:00-UTC	2600:387:b:9::5c	Login
2019/05/19-18:27:33-UTC	http://162.234.8.247	Login
2019/05/19-13:54:07-UTC	http://162.234.8.247	Login
2019/05/19-13:54:07-UTC	http://162.234.8.247	Login

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| 2019/04/09-23:56:52-UTC | http://75.104.82.7                | Login
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| 2019/04/09-03:31:33-UTC | http://162.234.8.247              | Login
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| 2019/04/07-18:39:17-UTC | http://162.234.8.247              | Login
|
| 2019/04/02-03:26:57-UTC | http://162.234.8.247              | Login
|
| 2019/03/02-21:56:48-UTC | 2600:387:b:3::4b           | Login  |
| 2019/02/28-00:26:27-UTC | 2600:387:b:5::25           | Login  |
| 2019/02/13-08:22:37-UTC | 2600:387:8:11::96          | Login  |
| 2019/02/11-03:44:19-UTC | http://162.234.8.247              | Logout
|
| 2019/02/11-03:42:55-UTC | http://162.234.8.247              | Login
|
| 2019/02/07-04:33:21-UTC | http://162.234.8.247              | Login
|
| 2019/01/31-22:07:04-UTC | http://38.142.190.154             | Login
|
| 2019/01/31-03:02:22-UTC | http://162.234.8.247              | Login
|
| 2019/01/28-21:46:20-UTC | http://38.142.190.154             | Login
|
| 2019/01/24-19:48:22-UTC | http://78.133.216.232             | Login
|
| 2019/01/19-20:06:35-UTC | http://162.234.8.247              | Login
|
| 2019/01/15-02:46:04-UTC | http://162.234.8.247              | Login
|
| 2019/01/13-17:00:52-UTC | http://162.234.8.247              | Login
|
| 2019/01/08-10:41:08-UTC | http://162.234.8.247              | Login
|
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GOOGLE SUBSCRIBER INFORMATION

Name: Jason Short

e-Mail: jshort5584@gmail.com

Created on: 2018/10/05-17:52:43-UTC

Terms of Service IP: http://38.140.193.202, on 2018/10/05-17:52:43-UTC

Google Account ID: 1045318078530

Last Logins: 2019/05/30-12:40:36-UTC, 2019/05/28-02:26:18-UTC, 2019/05/27-19:56:03-UTC

Time	IP Address	Type
2019/05/30-12:40:36-UTC	http://78.133.216.228	Login
2019/05/28-02:26:18-UTC	http://46.83.196.113	Login
2019/05/27-19:56:03-UTC	http://46.83.196.113	Login
2019/05/19-13:48:37-UTC	http://162.234.8.247	Login
2019/05/03-02:47:01-UTC	http://162.234.8.247	Login
2019/04/20-12:44:26-UTC	http://75.104.88.198	Login
2019/04/20-03:39:10-UTC	http://162.234.8.247	Login
2019/04/12-19:34:37-UTC	2600:387:1:809::36	Login

```
| 2019/01/01-12:15:11-UTC | http://103.240.101.5                    | Login
|

| 2018/12/21-06:52:53-UTC | http://182.74.119.134                   | Login
|

| 2018/12/20-04:42:28-UTC | 2600:387:6:803::96               | Login  |

| 2018/12/19-07:08:45-UTC | http://182.74.119.134                   | Login
|

| 2018/12/01-11:26:09-UTC | 2600:1700:7c50:6d80:e4e8:f4b6:e714:753b | Login  |

+-------------------------+-----------------------------------------+--------+


############## * Google Confidential and Proprietary * ###############
```

Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

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The Securities and Exchange Commission has not necessarily reviewed the information in this filing and has not determined if it is accurate and complete.
The reader should not assume that the information is accurate and complete.

UNITED STATES SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM D

Notice of Exempt Offering of Securities

OMB APPROVAL	
OMB Number:	3235-0076
Estimated average burden hours per response:	4.00

1. Issuer's Identity

CIK (Filer ID Number)
0001625230

Previous Names ☐ None
CloudQwest, Inc.

Entity Type
☒ Corporation
☐ Limited Partnership
☐ Limited Liability Company
☐ General Partnership
☐ Business Trust
☐ Other (Specify)

Name of Issuer
FourKites, Inc.

Jurisdiction of Incorporation/Organization
DELAWARE

Year of Incorporation/Organization
☐ Over Five Years Ago
☒ Within Last Five Years (Specify Year) 2013
☐ Yet to Be Formed

2. Principal Place of Business and Contact Information

Name of Issuer
FourKites, Inc.

Street Address 1		Street Address 2	
1165 N Clark St, Ste 700			
City	**State/Province/Country**	**ZIP/PostalCode**	**Phone Number of Issuer**
CHICAGO	ILLINOIS	60610	847-644-3564

3. Related Persons

Last Name	First Name	Middle Name
Elenjickal	Mathew	
Street Address 1	**Street Address 2**	
1165 N Clark St, Ste 700		
City	**State/Province/Country**	**ZIP/PostalCode**
Chicago	ILLINOIS	60610

Relationship: ☒ Executive Officer ☒ Director ☐ Promoter

Clarification of Response (if Necessary):

Chief Executive Officer, President, Secretary, Treasurer and Director.

4. Industry Group

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- [ ] Agriculture
- Banking & Financial Services
  - [ ] Commercial Banking
  - [ ] Insurance
  - [ ] Investing
  - [ ] Investment Banking
  - [ ] Pooled Investment Fund

    Is the issuer registered as an investment company under the Investment Company Act of 1940?

    [ ] Yes [ ] No
  - [ ] Other Banking & Financial Services
- [ ] Business Services
- Energy
  - [ ] Coal Mining
  - [ ] Electric Utilities
  - [ ] Energy Conservation
  - [ ] Environmental Services
  - [ ] Oil & Gas
  - [ ] Other Energy
- Health Care
  - [ ] Biotechnology
  - [ ] Health Insurance
  - [ ] Hospitals & Physicians
  - [ ] Pharmaceuticals
  - [ ] Other Health Care
- [ ] Manufacturing
- Real Estate
  - [ ] Commercial
  - [ ] Construction
  - [ ] REITS & Finance
  - [ ] Residential
  - [ ] Other Real Estate
- [ ] Retailing
- [ ] Restaurants
- Technology
  - [ ] Computers
  - [ ] Telecommunications
  - [X] Other Technology
- Travel
  - [ ] Airlines & Airports
  - [ ] Lodging & Conventions
  - [ ] Tourism & Travel Services
  - [ ] Other Travel
- [ ] Other

5. Issuer Size

Revenue Range	OR	Aggregate Net Asset Value Range
[ ] No Revenues		[ ] No Aggregate Net Asset Value
[ ] $1 - $1,000,000		[ ] $1 - $5,000,000
[ ] $1,000,001 - $5,000,000		[ ] $5,000,001 - $25,000,000
[ ] $5,000,001 - $25,000,000		[ ] $25,000,001 - $50,000,000
[ ] $25,000,001 - $100,000,000		[ ] $50,000,001 - $100,000,000
[ ] Over $100,000,000		[ ] Over $100,000,000
[X] Decline to Disclose		[ ] Decline to Disclose
[ ] Not Applicable		[ ] Not Applicable

6. Federal Exemption(s) and Exclusion(s) Claimed (select all that apply)

- [ ] Rule 504(b)(1) (not (i), (ii) or (iii))
- [ ] Rule 504 (b)(1)(i)
- [ ] Rule 504 (b)(1)(ii)
- [ ] Rule 504 (b)(1)(iii)
- [ ] Rule 505
- [ ] Investment Company Act Section 3(c)
  - [ ] Section 3(c)(1)
  - [ ] Section 3(c)(2)
  - [ ] Section 3(c)(3)
  - [ ] Section 3(c)(9)
  - [ ] Section 3(c)(10)
  - [ ] Section 3(c)(11)

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- [X] Rule 506(b)
- [ ] Rule 506(c)
- [ ] Securities Act Section 4(a)(5)
- [ ] Section 3(c)(4)
- [ ] Section 3(c)(5)
- [ ] Section 3(c)(6)
- [ ] Section 3(c)(7)
- [ ] Section 3(c)(12)
- [ ] Section 3(c)(13)
- [ ] Section 3(c)(14)

7. Type of Filing

- [ ] New Notice Date of First Sale 2014-11-12 [ ] First Sale Yet to Occur
- [X] Amendment

8. Duration of Offering

Does the Issuer intend this offering to last more than one year? [ ] Yes [X] No

9. Type(s) of Securities Offered (select all that apply)

- [ ] Equity
- [X] Debt
- [ ] Option, Warrant or Other Right to Acquire Another Security
- [ ] Security to be Acquired Upon Exercise of Option, Warrant or Other Right to Acquire Security
- [ ] Pooled Investment Fund Interests
- [ ] Tenant-in-Common Securities
- [ ] Mineral Property Securities
- [ ] Other (describe)

10. Business Combination Transaction

Is this offering being made in connection with a business combination transaction, such as a merger, acquisition or exchange offer? [ ] Yes [X] No

Clarification of Response (if Necessary):

11. Minimum Investment

Minimum investment accepted from any outside investor $1 USD

12. Sales Compensation

Recipient

Recipient CRD Number [X] None

(Associated) Broker or Dealer [X] None

(Associated) Broker or Dealer CRD Number [X] None

Street Address 1

Street Address 2

City

State/Province/Country

ZIP/Postal Code

State(s) of Solicitation (select all that apply)
Check "All States" or check individual States [ ] All States

[ ] Foreign/non-US

13. Offering and Sales Amounts

Total Offering Amount $1,250,000 USD or [ ] Indefinite

Total Amount Sold $1,235,000 USD

Total Remaining to be Sold $15,000 USD or [ ] Indefinite

Clarification of Response (if Necessary):

The company and the lenders agreed to increase the maximum aggregate principal amount of convertible notes to $1,250,000, of which $1,235,000 has been sold.

14. Investors

☐ Select if securities in the offering have been or may be sold to persons who do not qualify as accredited investors, and enter the number of such non-accredited investors who already have invested in the offering.

Regardless of whether securities in the offering have been or may be sold to persons who do not qualify as accredited investors, enter the total number of investors who already have invested in the offering: 12

15. Sales Commissions & Finder's Fees Expenses

Provide separately the amounts of sales commissions and finders fees expenses, if any. If the amount of an expenditure is not known, provide an estimate and check the box next to the amount.

Sales Commissions $0 USD ☐ Estimate

Finders' Fees $0 USD ☐ Estimate

Clarification of Response (if Necessary):

16. Use of Proceeds

Provide the amount of the gross proceeds of the offering that has been or is proposed to be used for payments to any of the persons required to be named as executive officers, directors or promoters in response to Item 3 above. If the amount is unknown, provide an estimate and check the box next to the amount.

$0 USD ☐ Estimate

Clarification of Response (if Necessary):

None, other than indirectly, through the payment of salaries.

Signature and Submission

Please verify the information you have entered and review the Terms of Submission below before signing and clicking SUBMIT below to file this notice.

Terms of Submission

In submitting this notice, each issuer named above is:

- Notifying the SEC and/or each State in which this notice is filed of the offering of securities described and undertaking to furnish them, upon written request, in the accordance with applicable law, the information furnished to offerees.*
- Irrevocably appointing each of the Secretary of the SEC and, the Securities Administrator or other legally designated officer of the State in which the issuer maintains its principal place of business and any State in which this notice is filed, as its agents for service of process, and agreeing that these persons may accept service on its behalf, of any notice, process or pleading, and further agreeing that such service may be made by registered or certified mail, in any Federal or state action, administrative proceeding, or arbitration brought against the issuer in any place subject to the jurisdiction of the United States, if the action, proceeding or arbitration (a) arises out of any activity in connection with the offering of securities that is the subject of this notice, and (b) is founded, directly or indirectly, upon the provisions of: (i) the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939, the Investment Company Act of 1940, or the Investment Advisers Act of 1940, or any rule or regulation under any of these statutes, or (ii) the laws of the State in which the issuer maintains its principal place of business or any State in which this notice is filed.
- Certifying that, if the issuer is claiming a Regulation D exemption for the offering, the issuer is not disqualified from relying on Regulation D for one of the reasons stated in Rule 505(b)(2)(iii) or Rule 506(d).

Each Issuer identified above has read this notice, knows the contents to be true, and has duly caused this notice to be signed on its behalf by the undersigned duly authorized person.

For signature, type in the signer's name or other letters or characters adopted or authorized as the signer's signature.

Issuer	Signature	Name of Signer	Title	Date
FourKites, Inc.	/s/ Julia Rybakova	Julia Rybakova	Attorney-in-Fact of Mathew Elenjickal, CEO	2015-05-15

Persons who respond to the collection of information contained in this form are not required to respond unless the form displays a currently valid OMB number.

* This undertaking does not affect any limits Section 102(a) of the National Securities Markets Improvement Act of 1996 ("NSMIA") [Pub. L. No. 104-290, 110 Stat. 3416 (Oct. 11, 1996)] imposes on the ability of States to require information. As a result, if the securities that are the subject of this Form D are "covered securities" for purposes of NSMIA, whether in all instances or due to the nature of the offering that is the subject of this Form D, States cannot routinely require offering materials under this undertaking or otherwise and can require offering materials only to the extent NSMIA permits them to do so under NSMIA's preservation of their anti-fraud authority.

FILED DATE: 4/13/2020 10:19 PM 2020L004163

Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

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WHOIS IP Lookup Tool

The IPWHOIS Lookup tool finds contact information for the owner of a specified IP address.

Enter a host name or an IP address:

182.74.119.134 Go »

Related Tools: DNS Traversal Traceroute Vector Trace Ping WHOIS Lookup

```
            Source: whois.apnic.net
        IP Address: 182.74.119.134

% [whois.apnic.net]
% Whois data copyright terms    http://www.apnic.net/db/dbcopyright.html

% Information related to '182.74.119.132 - 182.74.119.135'

% Abuse contact for '182.74.119.132 - 182.74.119.135' is 'ipspamsupport@airtel.com'

inetnum:        182.74.119.132 - 182.74.119.135
netname:        SGFQ-2680130-Kanchipuram
descr:          FOURKITES INDIA PRIVATE L
descr:          n/a
descr:          BLOCK 1A 5TH FLOOR WING IT PARK 1/24 MOUNT POONAMALLE ROAD MANAPAKKAM
descr:          CHENNAI 600089
descr:          Kanchipuram
descr:          TAMIL NADU
descr:
descr:          Contact Person: RISHKESAN M
descr:          Email: rishi@fourkites.com
descr:          Phone: 9884435959
country:        IN
admin-c:        NA40-AP
tech-c:         NA40-AP
mnt-by:         MAINT-IN-BBIL
mnt-irt:        IRT-BHARTI-IN
status:         ASSIGNED NON-PORTABLE
last-modified:  2018-07-13T10:44:19Z
source:         APNIC

irt:            IRT-BHARTI-IN
address:        Bharti Airtel Ltd.
address:        ISP Division - Transport Network Group
address:        234 , Okhla Industrial Estate,
address:        Phase III, New Delhi-110020, INDIA
e-mail:         ipspamsupport@airtel.com
abuse-mailbox:  ipspamsupport@airtel.com
admin-c:        NA40-AP
tech-c:         NA40-AP
auth:           # Filtered
remarks:        ipspamsupport@airtel.com was validated on 2019-12-14
mnt-by:         MAINT-IN-BBIL
last-modified:  2019-12-14T08:39:37Z
source:         APNIC

person:         Network Administrator
nic-hdl:        NA40-AP
e-mail:         noc-dataprov@airtel.com
address:        Bharti Airtel Ltd.
address:        ISP Division - Transport Network Group
address:        Plot no.16 , Udyog Vihar , Phase -IV , Gurgaon - 122015 , Haryana , INDIA
address:        Phase III, New Delhi-110020, INDIA
phone:          +91-124-4222222
fax-no:         +91-124-4244017
country:        IN
mnt-by:         MAINT-IN-BBIL
last-modified:  2018-12-18T12:52:19Z
source:         APNIC

% Information related to '182.74.119.0/24AS9498'

route:          182.74.119.0/24
descr:          BHARTI-IN
```

FILED DATE: 4/13/2020 10:19 PM 2020L004183

```
descr:          Bharti Airtel Limited
descr:          Class A ISP in INDIA .
descr:          Plot No. CP-5,sector-8,
descr:          IMT Manesar
descr:          INDIA
country:        IN
origin:         AS9498
mnt-by:         MAINT-IN-BBIL
last-modified:  2012-04-24T07:25:31Z
source:         APNIC

% This query was served by the APNIC Whois Service version 1.88.15-47 (WHOIS-US3)
```

Domain Health
Domain Health Report

DNS Monitoring
Authoritative Monitoring

DNS Tools
DNS Hosting Speed
DNS Lookup
DNS Query Estimator
DNS Traversal
Zone File Dump
DNS Root Server Speed

Email Tools
Email Test
RBL Database Lookup

IP Tools
Decimal IP Calculator
ASN Information
CIDR/Netmask
What's your IP
IP Geo-location Lookup
IPWHOIS Lookup

IPv6 Tools
IPv4 to IPv6 Conversion
IPv6 CIDR to Range
Range to IPv6 CIDR
IPv6 Compress
IPv6 Expand
IPv6 Info
Local IPv6 Range Generator
IPv6 Compatibility

Website Tools
HTTP Headers
Website META Tags
SSL Examination
Website Server Software
What a Website Knows

WHOIS
WHOIS+

Tracing Tools
Looking Glass
Ping
Ping-IPv6
Traceroute
Traceroute-IPv6
Vector Trace

Informational Tools
RFC Lookup
Your Connection Speed

Domain Statistics

Account
Create Free Account
Login

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Security Solutions
Load Testing
Website Performance Management
DDoS Protection
DNS Services

Risk Solutions
Fraud Detection
IP Intelligence
Compliance

Marketing Solutions
Identity Data Management Platform
Customer intelligence
Marketing Analytics
Audience Activation

Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

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2. Chennai
   Fourkites India Private Limited

Active | Tamil Nadu | ROC Chennai

Fourkites India Private Limited

As on **15 December 2019**

Information Documents Events Contact

Fourkites India Private Limited incorporated with MCA on **19 January 2015**. The **Fourkites India Private Limited** is listed in the class of **pvtltd** company and classified as **Non Govt Company**. This company is registered at Registrar of Companies(ROC), **Chennai** with an Authorized Share Capital of Rs. **3 CR** and its paid up capital is **3 CR**.

Fourkites India Private Limited's last Annual General Meeting(AGM) was held on **23 September 2019**, and date of latest balance sheet available from Ministry of Corporate Affairs(MCA) is **31 March 2019**.

The company has **2** directors/key management personal Sriram Nagaswamy and Rashi Jain **Fourkites India Private Limited** company registration number is **098868** and its Corporate Identification Number(CIN) provided from MCA is **U74900TN2015PTC098868**.

Fourkites India Private Limited company's registered office address is **Block 1 A,5th Floor,Dlf Itsez,1/124,Shivaji Gardens Nandambakkam Post,Mount Poonamallee Rd,Manapakkam Chennai Chennai Tn 600089 In**. Find other contact information for **Fourkites India Private Limited** such as Email, Website and more below.

The company has reportedly **0** charges associated and **66** documents available for download.

Current status of **Fourkites India Private Limited** company is **Active**.

Follow and GET UPDATES for

FOURKITES INDIA PRIVATE LIMITED

GET FREE UPDATES

- Name Change
- Address Change
- Director Change
- Board Meetings

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Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

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2020L004183

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in

Rashi Jain

Vice President, Operations (India)

Rashi leads the Operations team responsible for customer implementations, carrier integrations, product support and customer success for FourKites in Europe, Africa and Asia Pacific.

She comes with 15 years of experience in global logistics, procurement and supply chain management. Prior to FourKites, Rashi worked for Fortune 500 companies, including Corning, Ford and Nike in the US and Asian markets, and most recently at an automotive packaging startup in India.

Rashi holds an MBA in General Management from the Tuck School of Business at Dartmouth College, USA, and an Engineering Management degree from BITS Pilani, India.

Get Gartner's 2020 Market Guide for Real-Time Transportation Visibility Platforms

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in

Sriram Nagaswamy

Director of Software Engineering

Sriram is passionate about building world-class teams, with close to 16 years of experience in building and leading technical and research-oriented teams. His strengths include in-depth technical expertise, a strategic mindset, managing global team engagements to improve operational results, and building research-oriented teams from the ground up.

Sriram's career spans innovation-centric global corporations like Logitech/Lifesize in the US and Samsung R&D in India. His research has been featured in prominent technology publications.

Sriram holds a Master of Science in Electrical and Computer Engineering from the University of Kentucky, Lexington, KY, and a Bachelor of Engineering in Electrical and Electronics Engineering from the University of Madras, Chennai, India.

Get Gartner's 2020 Market Guide for Real-Time Transportation Visibility Platforms

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Start enhancing your supply chain today.

The road to stronger global supply chain management starts with FourKites. Contact our team to learn more.

CONTACT US

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Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

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EXHIBIT O

Hearing Date: 3/5/2020 9:45 AM - 9:45 AM

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3/3/2020 2:05 PM
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COOK COUNTY, IL
2019L010520

8710943

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC., a Delaware corporation,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	2019-L-10520
AT&T MOBILITY LLC, a Delaware limited Liability company,	)	Hon. Allen Price Walker
	)	
Respondent,	)	
	)	
PROJECT44, INC., a Delaware corporation,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	
JANE DOE,	)	
	)	
Intervenor-Respondent.	)	

INTERVENOR JANE DOE'S COMBINED MEMORANDUM OF LAW (1) IN OPPOSITION TO PROJECT44'S MOTION FOR JUDGMENT ON THE PLEADINGS; AND (2) IN SUPPORT OF DOE'S MOTION FOR POST-HEARING FINAL RELIEF ON PROJECT44'S RULE 224 PETITION FOR DISCOVERY

INTRODUCTION

This is a Petition brought pursuant to Illinois Supreme Court Rule 224, which allows for pre-suit discovery in certain limited circumstances. Petitioner project44, Inc. ("project44") seeks to discover from AT&T Mobility ("AT&T") the identity of AT&T's subscriber, Intervenor Jane Doe. Thus, while AT&T is the nominal respondent, the real party in interest is Doe.

Project44 seeks Doe's identity because her subscriber account with AT&T was used by one or more persons to send two emails—one addressed to two of project44's board members, and the other addressed to project44's Chief Revenue Officer ("CRO")—both of which purportedly defamed project44. But speaking anonymously "is a long-protected right of citizenship," which "applies to speech via the Internet." *Stone v. Paddock Publications, Inc.,* 2011 IL App (1st) 093386, ¶ 15 (internal quotation marks and citations omitted). Project44 can override Doe's First Amendment right to remain anonymous only if it can allege a claim for defamation that satisfies the pleadings standards of § 2-615, and it must do so *prior* to obtaining Doe's identity. Because project44's Second Amended Petition fails to meet the § 2-615 pleading standard, as discussed more fully below, the Court should (1) deny project44's Rule 2-615(e) motion for judgment on the pleadings; (2) quash the subpoena previously served on AT&T seeking identifying information about Doe; and (3) enter final judgment against project44 denying the Petition.

ILLINOIS SUPREME COURT RULE 224

Illinois Supreme Court Rule 224(a)(1)(i) provides that a person or entity who wishes to engage in pre-suit discovery for the sole purpose of ascertaining the identity of one who may be responsible to that person in damages may file an "independent action" for such discovery. The action for discovery must be initiated by the filing of a verified petition in the circuit court and must name as respondents the persons or entities from whom discovery is sought. Ill. S. Ct. R. 224(a)(1)(ii). The petitioner is required to serve upon the respondent "a copy of the petition

together with a summons" that contains the date and time for a hearing, and which must be served "at least 14 days before" that date. Ill. S. Ct. R. 224(a)(2); Ill. S. Ct. Art. II. Forms App., R. 224.

A Rule 224 petition for discovery must show that "the proposed discovery is necessary." *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 711 (3d Dist. 2010). "[T]o ascertain whether a petitioner has satisfied Rule 224's necessity requirement, the court must evaluate a defamation complaint to determine whether it will withstand a section 2-615 motion to dismiss." *Hadley v. Doe*, 2015 IL 118000, ¶ 27. To conduct this crucial inquiry, the Illinois Appellate Court has repeatedly held that the petition must be "subjected to a hearing." *Maxon*, 402 Ill. App. 3d at 711; *see also Kamelgard v. Am. College of Surgeons*, 385 Ill. App. 3d 675, 686 (1st Dist. 2008) (reversing order ruling on Rule 224 petition for failure to conduct a hearing). The hearing requirement serves the crucial function of "protect[ing] an[] anonymous individual from any improper inquiry into his or her identity." *Maxon*, 402 Ill. App. 3d at 711. Indeed, the Appellate Court has said that the holding of a hearing on the petition before granting it is the "*most important*[]" protection built into Rule 224. *Id.* (emphasis added).[1] The reason for this is that Rule 224 *depends on* "the abilities of the trial judges of this State ... to refuse to permit 'fishing expeditions' and other abuses" of the discovery process. *Shutes v. Fowler*, 223 Ill. App. 3d 342, 346 (4th Dist. 1991). The court must conduct a 2-615 analysis of the petition regardless of whether a motion is filed by either the respondent named in the petition or the unidentified individual about whom discovery is sought. *See, e.g., Stone*, 2011 IL App (1st) 093386, ¶18 (the "unidentified individual is not required to file such a motion"). Thus, the court in the context of a Rule 224 pre-suit discovery motion must, on its own accord, scrutinize the legal sufficiency of the petition to

[1] The court also must ensure before granting a Rule 224 petition that the petition is verified and that it "seeks only the identity of the potential defendant and no other information necessary to establish the cause of action of defamation." *Maxon*, 402 Ill. App. 3d at 711.

ensure that the petitioner has met its burden to show that the discovery is necessary, *i.e.,* that the petitioner can allege facts supporting a cause of action in a later filed lawsuit that would be able to withstand a 2-615 motion to dismiss. *Id.*

PROCEDURAL HISTORY

Project44 filed its original Petition seeking identifying information from AT&T on September 24, 2019, and its First Amended Petition on December 11, 2019. Notably, neither the original nor the First Amended Petition attached copies of the two allegedly defamatory emails. On or about November 25, 2019, AT&T sent a letter to Jane Doe informing her that AT&T intended to reveal her identity to project44 by December 5, 2019 unless Doe responded before that date. Ex. 1. On November 26, 2019, project44 and AT&T, without Doe's knowledge or consent, obtained an Agreed Order from Judge Daniel Gillespie that recites, among other things, that "the Court HEREBY FINDS that Petitioner has made the requisite showing pursuant to Rule 224 concerning the existence of a meritorious cause of action and the necessity of the pre-action disclosure," and that "Petitioner's Rule 224 Verified Petition for pre-suit discovery is granted." Ex. 2. The same day, project44 issued a subpoena to AT&T seeking identifying information about Doe's subscriber account, with a return date of December 30, 2019. Ex. 3.

Doe, after receiving the November 26, 2019 letter from AT&T, retained counsel and, on December 11, 2019, filed a Motion to Appear Under Fictitious Name and a Petition for Intervention. Those motions were granted by this Court on December 20, 2019. See Ex. 4. The Court also heard argument during the December 20, 2019 motion hearing regarding project44's failure to attach the allegedly defamatory emails to either its original or First Amended Petition, and directed project44 to file a further amended petition. *See* Ex. 4; Ex. 5 (Tr. at 8-9). Finally, the Court vacated the November 26, 2019 Agreed Order to the extent that it had prematurely found

(that is, without the holding of a hearing and independent scrutiny of the petition by the Court) that project44 had met the requirements for pre-suit discovery. *See* Ex. 4.

On January 3, 2020, project44 filed its Second Amended Petition ("Petition"). The Petition did not, however, include copies of the emails that are the subject of project44's defamation claim. Instead, project44 moved for leave to file those emails (Exhibits A and B to the Petition) under seal. This Court denied that motion on January 23, 2020. *See* Ex. 6. At that time, the Court also set a March 17, 2020 status date. *Id.* Doe intended to file a new motion to dismiss addressing the allegations in the Petition, including Exhibits A and B, prior to that status, and Doe's counsel expressly communicated that intention to project44's counsel.[2] But before Doe filed that motion, project44 filed the pending "Rule 2-615(e) Motion for Judgment on the Pleadings and Motion for Hearing Pursuant to Rule 224." Doe accordingly presents her 2-615 arguments for dismissal as part of her response in opposition to project44's Rule 2-615(e) motion for judgment on the pleadings, and also moves separately for entry of an order, following a hearing, which quashes the AT&T subpoena and denies project44's Petition on the merits.

ARGUMENT

The issue before the Court is whether the Petition contains legally sufficient allegations for stating a defamation claim against the sender of the two emails in question. *See Maxon,* 402 Ill. App. 3d 704 at 2-3. "To establish defamation, the plaintiff must show that the defendant: (1) made a false statement about the plaintiff; (2) made an unprivileged publication of that statement to a third party; and (3) damaged the plaintiff by publishing the statement." *Anderson v. Beach*, 386 Ill. App. 3d 246, 249 (1st Dist. 2008). As to the third element, when a statement is defamatory *per*

[2] As discussed previously, however, Doe is under *no obligation* to move to dismiss the Petition. Instead, the court has an independent duty under Rule 224 to ensure that the Petition states facts that would support a legally sufficient claim against Jane Doe.

se, a plaintiff need not plead actual damage to his or her reputation, because the statement is deemed to be so obviously and materially harmful that injury is presumed. *Green v. Rogers,* 234 Ill. 2d 478, 491-92 (2009). A statement is considered defamatory *per se* if it: (1) imputes the commission of a crime, (2) imputes that a person is unable to perform or lacks integrity in performing his or her employment duties, or (3) imputes that a person lacks ability or otherwise prejudices that person in her or his profession. *Id.*; *see also Republic Tobacco, L.P. v. N. Atl. Trading Co.*, 254 F. Supp. 2d 985, 999 n.16 (N.D. Ill. 2002) (discussing *per se* categories that are potentially applicable where the plaintiff is a corporation).

Because a claim of defamation *per se* relieves a plaintiff of the obligation to prove actual damages, it must be pleaded with a heightened level of precision and particularity. *Green,* 234 Ill. 2d at 492. Moreover, although a statement may fit into one of the *per se* categories, this fact, standing alone, "has no bearing on whether the alleged defamatory statement is actionable." *Hopewell v. Vitullo*, 299 Ill. App. 3d 513, 518 (1st Dist. 1998). "[E]ven if an alleged statement falls into one of the categories of words that are defamatory *per se*, it will not be actionable *per se* if it is reasonably capable of an innocent construction." *Green*, 234 Ill. 2d at 499. Pursuant to this principle, "a court must consider the alleged statement *in context* and give the words of the statement, and any implications arising from them, their natural and obvious meaning." *Id.* (emphasis in original). "If the actual words do not alone denote criminal or unethical conduct and have a broader meaning in common usage than the meaning ascribed by the plaintiff, the words are not actionable as defamation *per se.*" *Stone*, 2011 IL App (1st) 093386, ¶ 30.

In addition, "the first amendment prohibits actions for defamation based on loose and figurative language that no person would reasonably believe presented a fact." *Id.* ¶ 26. Such statements are considered as nothing more than "an expression of opinion," and "[h]owever

pernicious an opinion may seem, [society] depend[s] for its correction not on the conscience of judges and juries but on the competition of other ideas." *Solaia Tech., LLC v. Specialty Pub. Co.*, 221 Ill. 2d 558, 581 (2006) (internal quotation marks and citation omitted). "[T]he court itself must determine as a question of law whether the statement is a factual assertion that could support a defamation claim." *Stone*, 2011 IL App (1st) 093386, ¶ 26.

Applying these principles to the two emails at issue, it is clear that project44 does not have a legally sufficient defamation claim against the sender of the emails. The emails were neither published to a third party, nor do they contain any actionable, defamatory *per se* statements. The Petition accordingly should be denied.

I. <u>The Emails Were Not Published.</u>

The first and dispositive reason why project44 does not have a valid defamation claim is that the emails were not "published" as that term is defined under the law. "'Publication' is a term of art in defamation law and is an essential element of any defamation claim." *Missner v. Clifford*, 393 Ill. App. 3d 751, 763 (1st Dist. 2009). "Any act by which defamatory matter is communicated to someone other than the person defamed is a publication." *Id.* The publication requirement is *not* satisfied, however, when the communication is made *to the person defamed*. *Emery v. Ne. Ill. Reg'l Commuter R.R. Corp.*, 377 Ill. App. 3d 1013, 1022 (1st Dist. 2007). Here, the "person defamed" is project44, a corporation, which is only capable of communication through *persons* acting on its behalf. *See Small v. Sussman*, 306 Ill. App. 3d 639, 647 (1st Dist. 1999) ("It is axiomatic that a corporation can act only through its agents."). The question for the Court, therefore, is which persons associated with the corporation speak for the corporation such that communication with those persons constitutes communication with the corporation itself, rather than a third person.

That very question was answered in two cases outside Illinois. In *Hoch v. Loren*, 273 So. 3d 56, 58 (Fla. App. 2019), the court found there was no publication where "a defamatory

statement about a plaintiff corporation is made to a managerial employee of the corporation, because "a statement to an executive/managerial employee of a corporation is a statement to the corporation itself." And in *Fausett v. American Resolution Management Corp.*, 542 F. Supp. 1234, 1241 (D. Utah 1982), the court found that "the management *is* the corporation for purposes of communication," and as a result "communication to corporate management of alleged defamation of the corporation does not constitute publication." *Id.* at 1242 (emphasis added).[3]

Project44 criticizes these cases solely on the grounds that they were not decided by an Illinois court. But project44 does not explain why the logic and reasoning of those cases is wrong. In fact, the rulings in question are consistent with basic principles of corporate law, pursuant to which a corporation acts through its managing principals and governing board. *E.g., Mfr.'s Exhibition Bldg. Co. v. Landay*, 219 Ill. 168, 174-75 (1905) (a corporation is an "artificial being[]," which "can act only through its board of directors and officers"); *TABFG, LLC v. Pfeil*, 746 F.3d 820, 825 (7th Cir. 2014) (only managers, directors and officers of a corporation are authorized to act on the corporation's behalf). The emails at issue here were sent to two board members and the CRO of project44. Because those individuals are directors and managers of the corporation with authority to bind the corporation and through which the corporation acts, the emails in effect were sent to project44, and no publication occurred.

Ignoring the corporate law principles on which this issue turns, Project44 argues that two other principles of law support a different result. The first is the intracorporate communication exception to publication, which, project44 points out, Illinois courts have rejected. Pet'r Br. at 7. The intracorporate non-publication rule applies to "communication[s] *within* a corporate

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[3] Doe is not aware of any Illinois case (and project44 has cited none) that has addressed whether communication of an allegedly defamatory statement about a corporation to officers or directors of the corporation constitutes publication.

environment." *Popko v. Cont'l Cas. Co.*, 355 Ill. App. 3d 257, 262 (1st Dist. 2005) (emphasis added). Thus, in *Popko*, allegedly defamatory statements about the individual plaintiff that had been communicated between employees of the corporation were found to satisfy the publication element of the plaintiff's defamation claim. *Id.* at 264-65. The emails in question here are not *intracorporate* communications about a person other than the corporation itself. They are, instead, communications sent from outside the corporation to individuals inside the corporation that allegedly defamed *the corporation*. That Illinois law rejects the intracorporate non-publication rule, therefore, is irrelevant to this case.

Project44 also cites to the RESTATEMENT (SECOND) TORTS, § 577, comment e, which states in part, "communication to a servant or agent of the person defamed is a publication, although if the communication is in answer to a letter or a request from the other or his agent, the publication may not be actionable in defamation." But nothing in the Restatement suggests that this principle has any application where a communication about a corporation is made not to a third-party agent or employee, but to the directors and officers who, in effect, personify the corporation. Moreover, even if the Court were to look to Comment e for guidance, the authorities cited by the Restatement make clear that, in the circumstances of this case, there is no publication. In particular, "[a]s to publication to the plaintiff's agent," the Restatement cites *Brockman v. Detroit Diesel Allison Div. of Gen. Motors Corp.*, 366 N.E.2d 1201 (Ind. App. 1977), which states that, "a publication to an agent of plaintiff *who is acting at plaintiff's behest and on his behalf* is tantamount to a publication to plaintiff himself, and as such does not fulfill the publication requirement." *Id.* at 1203 (emphasis added); *see also Ning Ye v. Holder*, 667 F. Supp. 2d 103, 105 n.2 (D.D.C. 2009) (same). Illinois cases have applied this rule. *See, e.g., Millsaps v. Bankers Life Co.,* 35 Ill. App. 3d 735, 742 (2d Dist. 1976) ("[T]he June 9 letter was directed to plaintiff's duly authorized agent, his then attorney

… ; as such, that letter is equivalent to a publication to plaintiff himself and therefore … is not actionable.").

The requirement that the communication be invited by the plaintiff or his agent (*i.e.*, in answer to a letter or a request) ensures that the agent has the authority to act on the plaintiff's behalf. But courts have deemed this element satisfied where the communication is to "*an[y] agent whose official responsibilities include receiving such communications*." *30 River Ct. E. Urban Renewal Co. v. Capograsso*, 892 A.2d 711, 715 (N.J. Super. Ct. App. Div. 2006) (emphasis added). It is hardly debatable that the "official responsibilities" of officers, directors, and managers of a corporation include receiving communications on behalf of the company. Applying the rule of no-publication in this context, therefore, is fully "consistent with common sense and with the purpose of the law of defamation to protect reputation." *Id.* at 717.[4] Project44's board members and CRO are "merely a stand-in or conduit for" project44 itself, such that "[c]ommunications to [them] are in effect communications to [project44] and are not 'published' to a third party." *Id.*[5]

II. The Emails Are Not Defamatory.

A. The May 19, 2019 Email to the Board Members

As already noted, an allegedly defamatory statement is not actionable "if it cannot be reasonably interpreted as stating actual fact." *Solaia Technologies,* 221 Ill. 2d at 581. In

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[4] As one court explained, "[w]here an agent's duty includes taking [ ] complaints on behalf of the agent's principal, there is little likelihood that any complaints … about the principal will affect the principal's reputation. This is because the agent's duty of loyalty to the principal makes it most likely that the agent will communicate the complaints to the principal and will not publish them to third parties outside the agent-principal relationship." *30 River Ct. E. Urban Renewal Co.,* 892 A.2d at 717. Project44 has alleged no facts that would suggest the two board members or the CRO who received the allegedly defamatory emails were compelled in any way to re-publish them outside of the corporation, *see* RESTATEMENT (SECOND) TORTS, § 577, comment m, and Illinois does not recognize compelled self-defamation in any event, *see Emery,* 377 Ill. App. 3d at 1029.

[5] Project44's discussion of privilege (Pet'r Br. at 8 and n.1) is inapposite. Doe is not relying on any claim of privilege.

determining whether a statement is one of opinion or factual, a court should consider "whether the statement has a precise and readily understood meaning; whether the statement is verifiable; and whether the statement's literary or social context signals that it has factual content." *Id.* Thus, for example, in *Solaia Technologies,* the Supreme Court held that the statement that plaintiffs were "deeply greedy people" fell "within the bounds of constitutionally protected opinion," and was therefore not actionable, because it had "no precise meaning" and was not "verifiable." *Id.* at 583.

The statements in the May 19 email that there is "widespread discontent brewing" and "it's just a matter of time before people go public and another Theranos happen in Chicago" similarly have no precise and readily understood meaning, much less one that is *per se* defamatory. *See, e.g., Wilkow v. Forbes, Inc.*, 241 F.3d 552, 555 (7th Cir. 2001) ("If it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable."); *see also Madison v. Frazier*, 539 F.3d 646, 655 (7th Cir. 2008) (applying Illinois law and finding that, where the defendant's statements implicated subjective judgment, her "speculations fail to amount to verifiable assertions of fact, lacking precise and readily understood meaning"). In contrast, the website at issue in *Cohen v. Hansen,* No. 2:12-cv-1401, 2015 WL 3609689, at *4 (D. Nev. June 9, 2015), on which project44 relies, included specific and detailed statements about crimes and misconduct in which the plaintiffs allegedly were engaged. *See also Mann v. Swiggett*, No. 5:10-cv-172, 2012 WL 1579323, at *4 (E.D.N.C. May 4, 2012) ("Swiggett's statements accusing Mann of crimes are explicit, unambiguous, and defamatory").

The statement in the May 19 email that "[e]x-employees are silenced with legal threats and defamation suits" does not fall within any of the categories of *per se* defamation—it does not impute the commission of a crime by project44, impute that project44 is unable to perform or lacks

integrity in performing its employment duties, or impute that project44 lacks ability or otherwise prejudice project44 in its profession. And the further statement that "[redacted] dad used to be the book keeper for a Chicago Mafia and they are using that to silence folks" is too vague and lacking in precise meaning to support a defamation claim. *See, e.g., Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶¶ 50-52 ("Whether Coghlan was corrupt, used bully tactics, or operated a fraud machine cannot be shown to be true or false[.]"); *Phantom Touring, Inc. v. Affiliated Publ'ns*, 953 F.2d 724, 728 (1st Cir. 1992) ("'rip-off," "fraud," "scandal," and "snake-oil job" are adjectives that "admit of numerous interpretations"); *McCabe v. Rattiner,* 814 F.2d 839, 842 (1st Cir. 1987) ("The lack of precision [in the meaning of the word 'scam'] makes the assertion 'X is a scam' incapable of being proven true or false."). Indeed, project44's suggestion that "silencing" refers to murder, *see* Pet'r Br. at 10, proves the point, as many people would likely *not* interpret the statement that way. It also demonstrates that the statement is non-actionable hyperbole. *See, e.g., Phantom Touring, Inc.* 953 F.2d at 728 (calling play "'a rip-off, a fraud, a scandal, a snake-oil job'" mere hyperbole). That it is hyperbole is further demonstrated by the lack of any specific facts supporting it. [6]

Project44 asserts, primarily based on *Clemente v. Espinosa,* 749 F. Supp. 672 (E.D. Pa. 1990), that the mere "accusation[] of ... affiliation with organized crime [is] *per se* defamatory." Pet'r Br. at 12. But the May 19 email names an employee of project44 as having a relative who had a connection to the Mafia, which is *not* a statement *about project44 itself. See Anderson*, 386 Ill. App. 3d at 249 (defamation requires a false statement *about the plaintiff*); *Music Grp. Macao Commercial Offshore Ltd. v. Does*, 82 F. Supp. 3d 979, 985 (N.D. Cal. 2015) ("Music Group can

[6] *Compare* the lack of context and specificity in the May 19 email regarding "silenc[ing] folks," with the statement in *Dick v. N. Pac. Ry. Co.*, 150 P. 8, 10 (Wash. 1915) (erroneously attributed by project44 (Pet'r Br. at 12) to *Spangler v. Glover,* 313 P.3d 354 (Wash. 1957)), that the employer discharged an employee because he intimidated other employees "while in the performance of their duties."

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pursue only comments that are made about, or implicate, the company itself—and not those about its CEO, who is not a party to this suit.").[7] In addition, *Clemente* does not hold that any statement alleging a Mafia connection is defamatory *per se*. Rather, the court noted that, "[d]isparagement of a general character, equally discreditable to all persons, is not enough" to state a claim for defamation *per se*. 749 F. Supp. at 678. Thus, whether a statement imputing a connection with organized crime is defamatory *per se* "depends upon both the specific words, the context in which they are spoken, and the person to whom they refer." *Id.* The court found the statement defamatory in that case because it concerned an attorney, thereby "imput[ing]" to him "both a disregard for the law he is charged to uphold, and a character inconsistent with that required of a member of the legal profession." *Id.* (emphasis added).[8]

The May 19 email's use of the term "rampant accounting improprieties" is likewise too vague and imprecise to be actionable. *See, e.g., Doherty v. Kahn,* 289 Ill. App. 3d 544, 556 (1st Dist. 1997) (statements that plaintiff was "incompetent," "lazy," "dishonest," "cannot manage a business," and/or "lacks the ability to perform landscaping services" were nonactionable opinion

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[7] Project44 miscites *Arts4All, Ltd. v. Hancock,* 773 N.Y.S.2d 348 (App. Div. 2004), as "revers[ing] dismissal of a defamation claim where defendant made statements to plaintiff's board of directors accusing *plaintiff* of 'deceptive accounting practices ...'" Pet'r Br. at 11-12 (emphasis added). There were two plaintiffs, however, in that case, the corporation and the chief executive officer (Humphrey), and the libel claim that the court held should not have been dismissed concerned a statement made to the board of directors about *Humphrey*, not the company. *Id.* at 352-53. The court specifically held that "*only Humphrey* [not the company] has standing to assert the [libel] cause of action, since the alleged libelous statements are only about him." *Id.* at 353.

[8] Such generalized reputational harm also was rejected by the court in the *Lega Siciliana Soc. Club, Inc. v. St. Germaine*, 825 A.2d 827, 833 n.3 (Conn. App. 2003), which noted that, ordinarily, a corporation does not have a "reputation in the sense that an individual has," but rather "it is only with respect to its credit, property or business that a corporation can be injured by a false publication." Nevertheless, the court held that because the corporation in that case was a *not for profit club that depended on financial support of the public,* a statement that the club had ties with the Mafia, thereby prejudicing the club in the public's general estimation, necessarily would have the effect of prejudicing the club in its "credit, property or business." *Id.* None of these circumstances exist here.

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because there were no specific facts at the root of the statements); *Piersall v. SportsVision of Chi.*, 230 Ill. App. 3d 503, 511 (1st Dist. 1992) (statement that plaintiff is a "liar" is a nonactionable opinion because it lacks a factual basis surrounding the statement). As the Court of Appeals noted in *Hopewell,* 299 Ill. App. 3d at 521, "in one sense all opinions imply facts; however, the question of whether a statement is actionable is one of degree," and "[t]he *vaguer and more generalized the opinion the more likely the opinion is non-actionable as a matter of law.*" *Id.* at 521 (emphasis added) (internal quotation marks and citations omitted) (holding that "the alleged defamatory statement—'fired because of incompetence'—is too vague and general to support an action for defamation as a matter of law"). In addition, here, as in *Solaia Technologies,* "the context in which [the statement] appeared indicates that it may have been judgmental, but it was not factual." 221 Ill. 2d at 583.

The cases project44 cites are unpersuasive and distinguishable. In particular, unlike the vague, imprecise and hyperbolic statements at issue here, the allegations of criminal conduct in the cases cited by project44 were detailed and specific. For instance, *Tuite v. Corbitt*, 224 Ill. 2d 490 (2006), found the statements in question actionable because, "[i]n the context of this book about crime and widespread corruption, these statements naturally indicate that Tuite was expected to engage in *bribery or payoffs* to secure the acquittals." *Id.* at 513 (emphasis added). There is no such imputation of specific criminal conduct here. Similarly, the defendant in *Finance Ventures, LLC v. King,* No. 4:15-cv-00028-JHM, 2016 WL 9460307, at *2 (W.D. Ky. Aug. 5, 2016), had stated "that Plaintiffs are 'crooks,' 'thieves,' operators of a 'Ponzi scheme,' fraudulent, engaging in 'deceptive trade practices,' engaging in 'criminal' behavior that is 'against the law,' and 'stealing from thousands of consumers.'" Unlike the vague references in the May 19 email to Theranos and the Chicago Mafia, the statements in that case "clearly impute[d] crime." *Id.*

"If the actual words do not alone denote criminal or unethical conduct and have a broader meaning in common usage than the meaning ascribed by the plaintiff, the words are not actionable as defamation *per se.*" *Stone*, 2011 IL App (1st) 093386, ¶ 30. Project44's cases all involve statements denoting specific criminal or unethical conduct.[9] Project44 points to no objectively verifiable factual assertions in the May 19 email that would render the hyperbolic opinion statements capable of forming the basis of a defamation claim.

2. <u>The May 27 Email to Project44's CRO</u>

The statements in the May 27 email (Petition, Ex. B) are likewise not actionable. Project44 focuses on statements that "[t]here is one ingredient you missed—a great product" and that project44 has to "stop selling shit." These are plainly statements of subjective opinion, not verifiable fact. *See, e.g. J. Maki Constr. Co. v. Chi. Reg'l Council of Carpenters*, 379 Ill. App. 3d 189, 200-01 (2d Dist. 2008) (statement that plaintiffs' houses were "crappy" nonactionable); *Pompa v. Swanson*, 2013 IL App (2d) 120911, ¶ 23 (statement that plaintiff "performed his job unsatisfactorily" nonactionable).[10] Moreover, these statements suggest at most a "fail[ure] to provide the contracted-for" service, and thus "d[o] not amount to an allegation that [project44] ... lacks integrity or is unable to perform [its] employment or professional duties." *Coghlan*, 2013 IL

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[9] *E.g., Vasquez v. Whole Foods Mkt., Inc.*, 302 F. Supp. 3d 36, 67 (D.D.C. 2018) (specific statements that the plaintiffs "manipulated a bonus program ... allow[ing] them to benefit from a profit-sharing program at the expense of store employees"); *Thompson v. Bank One of La., NA*, 134 So. 3d 653, 662 (La. Ct. App. 2014) (specific accusations of embezzlement). In fact, *Thompson* specifically distinguished another case where the statements at issue were held *not* to be defamatory as a matter of law because they referred to "misappropriation, conversion, and civil conspiracy, all of which are words used commonly in the area of civil tort litigation." *Kirksey v. New Orleans Jazz & Heritage Found., Inc.*, 116 So. 3d 664, 670 (La. Ct. App. 2013).

[10] *Compare DSC Logistics, Inc. v. Innovative Movements,* No. 03 C 4050, 2004 WL 421977, at *1 (N.D. Ill. Feb. 17, 2004) (Pet'r Br. at 11) (allegedly defamatory statement included specific, verifiable factual content, including, among others, that the plaintiff's procedures were "time consuming and costly, but [also] are tedious and repetitious [and] will create errors").

App (1st) 120891, ¶ 50; *see also Cohen,* 2015 WL 3609689, at *6 (Pet'r Br. at 12-13) (statement about business's product, does not constitute defamation of the business).

The only other allegedly defamatory statement in the May 27 email is "You don't want to be part of the next Ponzi scheme or next theranos." Pet'r Br. at 4; Pet., Ex. B. The reference to Theranos, as previously discussed, lacks the precise and readily understood meaning necessary for it to be defamatory *per se*. Moreover, the statement as a whole is a warning about something the author believes might come to pass, not a factual statement capable of verification. *See, e.g., Bebo v. Delander*, 632 N.W.2d 732, 740 (Minn. Ct. App. 2001) ("Delander's remark that appellant was going to 'f--- [other drivers] over' is a prediction of a future event and is not a fact capable of verification."); *see also Green*, 234 Ill. 2d at 499 (a statement "will not be actionable *per se* if it is reasonably capable of an innocent construction."); *Stone*, 2011 IL App (1st) 093386, ¶ 30 ("If the actual words do not alone denote criminal or unethical conduct ... , the words are not actionable as defamation *per se.*"). Project44 has not alleged a legally sufficient defamation claim against Doe, and its Petition must therefore be denied.

CONCLUSION

Wherefore, Doe respectfully requests that the Court deny Petitioner project44's motion for judgment on the pleadings, quash the AT&T subpoena, and deny and/or dismiss the Petition with prejudice.

Dated: March 3, 2020 Respectfully submitted,

/s/ Sondra A. Hemeryck

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**IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION**

PROJECT44, INC., a Delaware corporation,	)	
Petitioner,	)	
v.	)	Case No. 2019 L -
AT&T MOBILITY LLC, a Delaware limited liability company;	)	
and	)	
MIMECAST NORTH AMERICA, INC., a Delaware corporation,	)	
Respondents.		

VERIFIED PETITION FOR DISCOVERY

project44, Inc. ("project44"), by its undersigned counsel, alleges upon verification as follows for its petition for discovery.

NATURE OF PETITION

1. project44 is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois. project44 is in the highly competitive shipping logistics industry, and there it provides goods and services which permit its customers to connect with, automate, and provide visibility into key transportation processes which, in turn, permits its customers to increase operational efficiencies, reduce costs, improve shipping performance, and deliver an exceptional experience to their own customers. Over 25,000 different carriers have tracked shipments in project44's system, and it supports all transportation modes and shipping types including "parcel," "final-mile," "less-than-truckload," "volume less-than-truckload," "truckload," rail, intermodal, and ocean. project44 has more than 200 employees.

2. Starting on May 19, 2019, and then again on May 27, 2019, (collectively "the Defamatory Communications"), one or more individuals sent defamatory communications regarding project44 to its Board of Directors (the May 19th communication) and a new employee (the May 27th communication) using the fake names "Ken Adams" and "Jason Short" from the email addresses kenadams8558@gmail.com and jshort5584@gmail.com, respectively. project44 has not previously employed anyone named Ken Adams or Jason Short, nor has it ever worked with any persons having these names. As such the names appear to be made up.

3. The "@gmail" domain name in the kenadams8558 and jshort5584 e-mail addresses signifies that the emails are set up with Google, LLC ("Google").

4. The Defamatory Communications are defamatory because, among other reasons, they falsely state (a) that one of project44's executives' family is affiliated with the Chicago mafia and "they are using that to silence folks," (b) project44 engages in accounting "improprieties," (c) project44 is akin to "Theranos," the blood-test company that collapsed as a result of the highly publicized securities fraud allegations made against it, (d) project44's goods and services do not perform as stated, and (e) project44 is a "Ponzi scheme."

5. Accordingly, project44 is pursuing this petition for discovery in order to identify the individual(s) responsible for these defamatory postings so that it may seek relief against them. As set forth below, project44 has valid claims for defamation *per se* against these unknown persons which warrant the granting of this petition.

THE PETITION PARTIES AND RESPONDENTS

6. project44 is a Delaware corporation with its principal place of business in Chicago, Illinois.

7. AT&T Mobility LLC ("AT&T") is a Delaware limited liability company with its headquarters located at 1025 Lenox Park Blvd Northeast Atlanta, GA 30319, and a registered agent located at the Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801. AT&T also accepts service of subpoenas at its Global Legal Demand Center, located at 11760 U.S. Hwy 1, Suite 330, North Palm Beach, FL 33408.

8. Mimecast North America, Inc. ("Mimecast") is a Delaware corporation with its headquarters located at 191 Spring Street, Lexington, MA 02421, and a registered agent located at the Corporation Trust Company, Corporation Trust Center, 1209 Orange Street, Wilmington, DE 19801.

JURISDICTION AND VENUE

9. Illinois is a proper forum for project44 to litigate its defamation claims against the unknown individual(s) described below because the defamatory material they published was sent to project44 in Illinois and, thus, has caused project44 to suffer injury in Illinois.

10. Respondents AT&T and Mimecast are non-defendant third parties that are subject to summons and subpoena process to respond to discovery concerns in Illinois cases, just like any third party, including because of Supreme Court Rule 224.

FACTUAL BACKGROUND

11. On May 30, 2019, project44 filed a verified petition for discovery naming Google as respondent ("Google Petition") in the Circuit Court of Cook County, Law Division. *See* May 30, 2019 Petition, attached hereto as Exhibit A. Google hosts and runs one of the world's largest free e-mail systems, known as Gmail, and both the kenadams8558 and jshort5584 email accounts were registered with Gmail.

12. In the process of creating a free Gmail e-mail account, the creator may leave behind actual contact information (another e-mail address, a real name, a real phone number) to be assured of continued access to the account. Similarly, when the creator logs in to create the account, and thereafter logs in to send and receive e-mail, the internet protocol address (or "IP address") of the device the user utilizes to connect will be recorded. The IP address permits insight into the location where the user is located because it identifies the specific network the user was on when he or she logged into the Gmail account, including what Internet Service Provider (or "ISP") provided the internet connection to the user. Once the ISP is known, a subpoena can also be sent to it to obtain identifying information. The IP address also offers insight into what device was used to log into the account and, thus, can also aid in identifying the person who sent the communication. The Google Petition requested that Google provide project44 with, *inter alia*, the IP address information for the kenadams8558 and jshort5584 email accounts. *See* Exhibit A.

13. The Google Petition was assigned to Judge John M. Ehrlich. On July 25, 2019, Judge Ehrlich entered an order in which Google agreed to provide, *inter alia*, "internet protocol (IP) address(es) assigned to the computer or network connection used by the person or persons who established the above user account at the time the account was established, and reasonably available login IP addresses (with dates and times) assigned to the computer or network connection used by the person or persons who have accessed such user account from the date of the account's establishment to the date of the subpoena." *See* July 25, 2019 Order, attached hereto as Exhibit B.

14. On September 18, 2019, Google produced two text documents containing "subscriber and recent login information for the Google Accounts JSHORT5584@GMAIL.COM and KENADAMS8558@GMAIL.COM." *See* September 18, 2019 Google Correspondence, attached hereto as Exhibit C. Copies of the produced documents are attached hereto as Exhibit D.

15. Exhibit D lists a series of IP addresses linked to, upon information and belief, Mimecast, as well as a series of IPv6 IP addresses registered to AT&T. *See* Exhibit D.

AT&T

16. AT&T is a provider of wireless communication services as well as an Internet Service Provider ("ISP"). Each time a user utilizes AT&T's internet services, AT&T assigns the user an IP address. Many ISPs maintain internal logs which record the date, time, and customer identity for each IP address assignment made by that ISP. Upon information and belief, AT&T maintains such logs. Accordingly, AT&T can use the IP addresses provided by project44 to identify the users responsible for the kenadams8558 and jshort5584 email accounts.

Mimecast

17. Mimecast is a provider of cloud-based email and web security services. Upon information and belief, Mimecast acts as a "middleman" for internet traffic for its subscribers, inspecting incoming and outgoing email and web traffic. As such, when a Mimecast user accesses email and web services through Mimecast's systems, the user's IP address provided by its ISP is replaced with a Mimecast IP address. Upon information and belief, Mimecast maintains logs similar to those believed to be maintained by AT&T. Accordingly, Mimecast can use the Mimecast IP addresses provided by project44 to identify either (1) the original IP address of the users responsible for the kenadams8558 and jshort5584 email accounts; or (2) the identity of the users themselves.

The Defamatory Statements

18. For purposes of this Verified Petition, and pursuant to Ill. S. Ct. R. 224, project44 need only provide allegations about its underlying claims which suffice to demonstrate that it has

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one or more claims that pass muster pursuant to 735 ILCS 5/2-615. *See, e.g., Maxon v. Ottawa Pub. Co.*, 402 Ill. App. 3d 704, 712 (3d Dist. 2010).

19. project44 has valid claims for defamation *per se* against the sender(s) of the Defamatory Statements.

20. First, each of the Defamatory Statements is false.

21. Second, each of the Defamatory Statements were published to one or more third parties, without privilege.

22. Third, each of the Defamatory Statements constitute defamation *per se* because each affirmatively states that project44 and/or individuals in its management have (a) engaged in malfeasance or misfeasance in the discharge of employment duties, (b) unfitness or a lack of ability in their trade, profession or business, and (c) been involved in or affiliated with criminal activity. The Defamatory Statements attack the integrity of project44's conduct, goods and services in the marketplace. Accordingly, project44 has been damaged.

THE DEFAMATORY STATEMENTS WARRANT THE GRANTING OF THIS PETITION

23. Based upon the foregoing, project44 has sufficiently alleged a basis pursuant to Ill. S. Ct. R. 224 for the Court to have a hearing and grant the following discovery:

a. Permitting project44 to issue a subpoena to AT&T requiring it to provide all information known about the user(s) behind the IP addresses at the dates and times set forth in Exhibit E, including, but not limited to, their actual names, addresses, phone numbers, and other information shared with AT&T;

b. Permitting project44 to issue a subpoena to Mimecast requiring it to provide all information known about the user(s) behind the IP addresses at the dates and times set forth in

Exhibit F, including, but not limited to, their actual names, addresses, phone numbers, and other information shared with Mimecast;

WHEREFORE, project44 respectfully requests that, after service of this Verified Petition on AT&T and Mimecast, that the Court schedule a hearing to consider the relief requested herein.

Dated: September 24, 2019

PROJECT44, INC.

By: /s/ Peter G. Hawkins
One of Its Attorneys

Douglas A. Albritton
Peter G. Hawkins
Actuate Law LLC
FIRM ID No. 62266
641 West Lake, 5th Floor
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Counsel for project44, Inc.

VERIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements of fact set forth in the foregoing Verified Petition are true and correct, except as to matter therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that she belies the same to be true.

Cherie Camp

Director, Executive Operations

Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

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COOK COUNTY, IL
2020L004183

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EXHIBIT P

Global Legal Demand Center

AT&T
11760 US HWY 1, SUITE 300
NORTH PALM BEACH FL 33408

(800) 635-6840
(888) 938-4715 (Fax)

November 25, 2019

REDACTED

Re: Notice of Subpoena for Records
REDACTED

Dear Valued AT&T Customer:

The AT&T Global Legal Demand Center responds to subpoenas addressed to AT&T companies ("AT&T"). We have received the enclosed civil subpoena directing AT&T to disclose information about you, your account, or one or more phone numbers associated with you. As a courtesy, we are sending this notice to the billing address for your account to enable you to contest the subpoena if you wish to do so.

You may contest the subpoena in accordance with the rules of the court or agency issuing it. You may also request the attorney or other person responsible for issuing the subpoena to withdraw or modify the subpoena voluntarily. AT&T does not give legal advice to its customers or make filings on their behalf. If you need assistance or have further questions, we recommend that you consult an attorney of your choice. If you are not represented by an attorney and do not wish to retain counsel at this time, you may discuss the subpoena directly with the attorney or other designated contact(s) specified in the subpoena.

AT&T plans to respond to this subpoena on 12/5/2019. If before such response date we receive a copy of your filing contesting the subpoena, AT&T will respond to the subpoena in accordance with the subsequent ruling of the court. Required documentation should be faxed to the AT&T Global Legal Demand Center (fax number 888-938-4715) with the above-referenced AT&T File No. on the transmittal.

We hope you will find this courtesy notice helpful.

Thank you for choosing AT&T.

Sincerely,

Global Legal Demand Center

DAD

Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

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EXHIBIT Q

Return Date: No return date scheduled
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Location: No hearing scheduled

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CIRCUIT CLERK
COOK COUNTY, IL
2019L010520

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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC., a Delaware corporation, Petitioner, v. AT&T MOBILITY LLC, a Delaware limited Liability company, Respondent.	)	2019-L-10520 Hon. Allen Price Walker

PETITION FOR INTERVENTION

Jane Doe, by and through the undersigned counsel, hereby petitions the Court to allow him to intervene pursuant to 735 ILCS 5/2-408. In support thereof, Jane Doe states as follows:

1. Intervention in civil proceedings is governed by section 2-408 of the Code of Civil Procedure (735 ILCS 5/2-408), which provides in relevant part:

> (a) Upon timely application anyone shall be permitted as of right to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant will or may be bound by an order or judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property in the custody or subject to the control or disposition of the court or a court officer.
>
> (b) Upon timely application anyone may in the discretion of the court be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common.

735 ILCS 5/2–408(a), (b).

2. "Intervention statutes are remedial in nature and should be construed liberally to allow a person to protect an interest jeopardized by pending litigation to which he is not a party or

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to avoid relitigation in another suit of issues which are being litigated in a pending suit." *City of Chicago v. John Hancock Mut. Life Ins. Co.*, 127 Ill. App. 3d 140, 143, 468 N.E.2d 428, 431 (1984) (internal quotation marks and citations omitted); *see also Caterpillar Tractor Co. v. Lenckos*, 84 Ill. 2d 102, 111-12, 417 N.E.2d 1343, 1349 (1981) ("The overall design of section 26.1 of the civil Practice Act was to liberalize the practice of intervention so as to avoid, upon timely application, the relitigation of issues in a second suit which were being litigated in a pending action."); *Pate v. Wiseman*, 2019 IL App (1st) 190449, ¶ 21, ___ N.E.3d ___ ("Illinois's intervention statute is remedial in nature and should be construed liberally.")[1].

3. With respect to intervention as of right, the statute directs that a person "shall be permitted as of right to intervene," thereby limiting the trial court's discretion "to determining timeliness, inadequacy of representation and sufficiency of interest; once these threshold requirements have been met, the plain meaning of the statute directs that the petition be granted." *John Hancock Mut. Life Ins. Co.*, 127 Ill. App. 3d at 144, 468 N.E.2d at 431.

Timeliness

4. "The statute has no language that defines 'timeliness' for purposes of filing a petition under this section. Therefore, the determination of whether a petition to intervene has been timely filed is left to the discretion of the trial court. Generally, while a party may not seek to intervene after the rights of the original parties have been determined, and a final decree has been entered, a petition to intervene may be considered timely even after a final judgment has been entered, where it is necessary to protect the interests of the intervenor. Other factors to be considered for determining timeliness include consideration of when the intervenor first became

[1] The *Pate* opinion has not yet been released for publication in the permanent law reports; until released, it is subject to revision or withdrawal.

aware of the litigation, the amount of time that elapsed between initiation of the circuit court proceedings and the filing of the petition to intervene, and the reason for failing to seek intervention at an earlier date." *In re Bailey*, 2016 IL App (5th) 140586, ¶ 18, 58 N.E.3d 646, 652-53; *see also Winders v. People*, 2015 IL App (3d) 140798, ¶ 14, 45 N.E.3d 289, 293.

5. Here, while the Verified Petition (Ex. 4) was filed approximately three months ago, Jane Doe only received notice of these proceedings through a letter from Respondent AT&T Mobility, LLC dated November 25, 2019 (three days before Thanksgiving). *See* Ex. 7 (AT&T Letter, redacted).

6. Doe moved swiftly upon receiving that notice to obtain representation of counsel, who then prepared and filed this motion and a response to the Petition and subpoena three weeks later. Doe's counsel contacted AT&T's counsel on December 3, and contacted project44's counsel on December 4, to confirm that Doe would be moving for a protective order, and obtained their consent to Doe's doing so by December 13, 2019. *See* Ex. 9. Counsel for AT&T and project44 subsequently agreed to extend that deadline to December 16, 2019 due to medical issues of Doe's counsel. Ex. 9.

7. The AT&T Subpoena was issued and served less than three weeks ago, on or about November 27, 2019 (the day before Thanksgiving), and is not due to be answered until December 30, 2019, approximately two weeks *after* the filing by Doe of this petition to intervene. *See* Ex. 2. This Petition to Intervene therefore is timely. *See, e.g.*, *Winders*, 2015 IL App (3d) 140798, ¶ 14, 45 N.E.3d at 293 (trial court abused its discretion in denying as untimely petition to intervene filed by Department of Illinois State Police eight months after petitioner filed suit for relief from Department's decision denying petitioner a Firearm Owners Identification card where Department filed intervention petition as soon as it learned about petitioner's action); *John Hancock Mut. Life*

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Ins. Co., 127 Ill. App. 3d at 144, 468 N.E.2d at 431 (finding motion to intervene that was filed within weeks of the commencement of the action" to be "timely beyond any doubt").

Sufficiency of Interest

8. "Section 2-408 requires only that a party seeking to intervene 'will *or may be* bound,' and it is settled that an enforceable right or tangible detriment fulfills the requirement. *John Hancock Mut. Life Ins. Co.*, 127 Ill. App. 3d at 144, 468 N.E.2d at 431 (citing *Adams v. County of Cook*, 86 Ill. App. 3d 68, 69-72, 407 N.E.2d 1018 (1980); and Ill. Ann. Stat. ch. 110, par. 2-408, Joint Committee Comments at 463 (Smith-Hurd 1983)) (internal citation omitted) (emphasis in original). For instance, in *City of Chicago v. Zik*, 63 Ill. App. 2d 445, 448, 211 N.E.2d 545, 546 (1965), the court reversed the denial of intervention in an action for building code violations and held that applicants' leasehold interests justified intervention as of right.

9. "A party need not have a direct interest in the pending suit"; it need only have "an interest greater than that of the general public, so that the party may stand to gain or lose by the direct legal operation and effect of a judgment in the suit." *Pate*, 2019 IL App (1st) 190449, ¶ 21, __ N.E.3d at ___ (internal quotation marks and citation omitted). "The allegations of an applicant's petition to intervene are to be taken as true in determining whether the applicant's interests are sufficient." *Id.* (citing *Redmond v. Devine*, 152 Ill. App. 3d 68, 74, 504 N.E.2d 138, 142 (1987)).

10. Doe is the person or persons whose identity is being sought by the Petition. Doe's interest in the Petition is his First Amendment right to anonymity. *See* Doe's Motion to Appear Under Fictitious Name, filed herewith. Doe's interest in these proceedings is obvious. *See Hadley v. Doe*, 2015 IL 118000, ¶ 12, 34 N.E.3d 549, 554 (2015) (noting that appellate court found that person whose identity is being sought by Rule 224 Petition "has standing to contest" the circuit

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court order granting a Rule 224 petition "since he or she had an interest in the proceedings, *i.e.*, to remain anonymous"); *Sebastian v. Swan Wealth Advisors Inc.*, No. 2014CH09892, 2014 WL 6724821, *1 (Ill. Cir. Ct. Oct. 24, 2014) ("a party has standing to object to a third party subpoena when 'the party claims some right or privilege with regard to the documents sought'" (quoting with approval *Atl. Inv. Mgmt., LLV v. Millennium Fund I, Ltd.*, 212 F.R.D. 395, 398 (N.D. Ill. 2002)).

<u>Adequacy of Representation</u>

11. In determining whether an intervenor could be adequately represented by the existing parties, courts consider a variety of factors. *John Hancock Mut. Life Ins. Co.*, 127 Ill. App. 3d at 145, 468 N.E.2d at 432 (noting that determination of the adequacy of representation is not subject to "hard and fast rules"). "These factors include: (1) the extent to which the interests of the applicant and of existing parties converge or diverge, (2) the commonality of legal and factual positions, (3) the practical abilities of existing parties in terms of resources and expertise, and (4) the vigor with which existing parties represent the applicant's interests." *Argonaut Ins. Co. v. Safway Steel Prods., Inc.*, 355 Ill. App. 3d 1, 8, 822 N.E.2d 79, 85 (2004). "Of this list, the most important factor is how the interest of the intervenor compares with that of the present parties." *Id.*

12. Although in some cases, this factor may be "a complex matter," *John Hancock Mut. Life Ins. Co.*, 127 Ill. App. 3d at 145, 468 N.E.2d at 432, it is not so here. AT&T has no personal stake in Doe's identity remaining anonymous. Doe obviously does. AT&T therefore cannot adequately represent Doe's interest. This fact is amply demonstrated by the November 26, 2019 Agreed Order For Production whereby AT&T agreed to produce the requested identifying information if either its customer failed to object or its customer objected and a court ordered the

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information to be disclosed. *See* Ex. 1. AT&T itself is clearly indifferent to whether Doe's identifying information is disclosed. It is merely a third-party holder of that information. *See John Hancock Mut. Life Ins. Co.*, 127 Ill. App. 3d at 145, 468 N.E.2d at 432 ("Petitioner's particular interest in the health of her family far exceeds the City's interest in public health, and her property interest varies in significant respects from that of the Condominium Association. Therefore, the trial court's order denying intervention on ground of adequate representation was error.").

WHEREFORE, Jane Doe requests that this petition be granted and he/she/they be allowed to intervene in this matter. If intervention is allowed, Doe proposes to file a motion in this action styled: "Intervenor Jane Doe's Combined Motion To Vacate The November 26 Agreed Order, Quash The AT&T Subpoena, And Deny The Amended Petition." Pursuant to 735 ILCS 5/2-408(e), a copy of said Motion, with brief in support thereof, is submitted herewith as Exhibit A.

Dated: December 16, 2019

Respectfully submitted,

/s/ Sondra A. Hemeryck
Sondra A. Hemeryck
Lynn Moffa
RILEY SAFER HOLMES & CANCILA LLP
Firm ID# 60128
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Attorneys for Intervenor Jane Doe

Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

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EXHIBIT R

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COOK COUNTY, IL
2019L010520

7751624

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC., a Delaware corporation,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	2019-L-10520
AT&T MOBILITY LLC, a Delaware limited Liability company,	)	Hon. Allen Price Walker
	)	
Respondent.	)	
	)	

MOTION PURSUANT TO 735 ILCS 5/2-401(e)
<u>TO APPEAR UNDER FICTITIOUS NAME</u>

Third-party Movant[s], identified more specifically below and represented by the undersigned counsel hereby request[s] that the Court enter an order permitting Movant[s] to file a motion to intervene, and to appear thereafter should the intervention motion be granted, under the fictitious name of Jane Doe. In support of said relief, Movant[s] state[s] as follows:

1. This matter is a Verified Petition For Discovery ("Petition") filed pursuant to Illinois Supreme Court Rule 224.

2. Rule 224 is entitled "**Discovery Before Suit to Identify Responsible Persons and Entities,**" and provides that "[a] person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible in damages may file an independent action for such discovery." Ill. Sup. Ct. Rule 224(a)(1)(i).

3. The Petitioner, project 44, Inc., alleges it has valid claims for defamation *per se* against the individual(s) responsible for certain emails, and seeks to discover the identity of the person[s] responsible for those emails from information it seeks to obtain through this Petition

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from the internet service provider ("ISP") that hosted the IP addresses[1] associated with the emails, namely Respondent, AT&T Mobility LLC ("AT&T").

4. On or about November 25, 2019, AT&T sent a letter to the subscriber(s) associated with the IP addresses for which the Petition seeks identifying information, informing the subscriber(s) that AT&T had received a "civil subpoena" directing AT&T to disclose information about the account, that AT&T intended to disclose information about the account to the Petitioner on 12/5/2019, but that, if before that date AT&T received a copy of a filing contesting the disclosure, AT&T would respond to the subpoena in accordance with the subsequent ruling of the court." Ex. 2 (redacted). (Although the AT&T letter referenced an enclosed "subpoena," the letter in fact enclosed the Petition, not a subpoena.)

5. The undersigned represents the AT&T subscriber[s] who received the above-referenced letter from AT&T, and/or the person or persons who used the AT&T account as shown by the IP addresses for which the Petition seeks identifying information.[2] Said subscriber[s]

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[1] An "internet protocol address" or "IP" address "identif[ies] [the] computer[ ] on the Internet, enabling data packets transmitted from other computers to reach [it]." *Hadley v. Doe*, 34 N.E.3d 549, 552 n.2 (Ill. 2015) (internal quotation marks and citation omitted). According to the Petition, "[w]hen the creator of [an] email account[ ] logs in to create the account, and thereafter logs in to send and receive e-mail, the [IP] address of the device the user utilizes to connect will be recorded. The IP address permits insight into the location where the user is located because it identifies the specific network the user was on when he or she logged into the Gmail account, including what [ISP] provided the internet connection to the user. Once the ISP is known, a subpoena can be sent to it to obtain identifying information." Ex. 1, Petition, ¶ 12.

[2] An IP address subscriber and user can be different individuals. Thus, the AT&T account holder[s] to whom AT&T sent the letter may or may not be the same person[s] as the user[s] of the two Gmail accounts from which the allegedly defamatory emails were sent. This motion will not distinguish between subscriber and user, and instead uses the term "subscriber" to encompass either the owner or the user of the AT&T account, whichever the case may be. *See Stone v. Paddock Publications, Inc.*, 961 N.E.2d 380, 386 n.2 (Ill. App. 2011).

wish[es] to contest the disclosure sought by Petitioner from AT&T while remaining anonymous to protect his/her/their identity from the disclosure to which he/she/they object[s].

6. Under Illinois law, a party may appear under a fictitious name only "[u]pon application and for good cause shown." 735 ILCS 5/2-401(e).

7. "Good cause" is neither defined by the statute, nor discussed by many Illinois cases. *Doe v. Doe*, 282 Ill. App. 3d 1078, 1087-88, 668 N.E.2d 1160, 1167 (1996). "The cases nationwide that discuss the conditions under which anonymity is usually granted, however, look to whether the party seeking to use a pseudonym has shown a privacy interest that outweighs the public's interest in open judicial proceedings." *Id.* at 1088, 668 N.E.2d at 1167.

8. The subscriber's/subscribers' privacy interest in maintaining his/her/their anonymity is rooted in the First Amendment. As the First Circuit Appellate Court explained in *Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 093386, ¶ 15, 961 N.E.2d 380, 388 (Ill. App. 2011), "anonymous speech is a long-protected right of citizenship":

> [T]he Supreme Court has recognized the important role that anonymous speech has played throughout history and that individuals sometimes choose to speak anonymously for the most constructive purposes. In addition, identification and fear of reprisal may deter even peaceful discussions regarding important public matters. "Anonymity is a shield from the tyranny of the majority." Thus, an author is generally free to decide whether he wishes to disclose his true identity and his decision not to do so is an aspect of the freedom of speech provided in the first amendment. . . . That the first amendment applies to speech via the Internet is also clear.

Id. (citing and quoting *Talley v. California,* 362 U.S. 60 (1960); *McIntyre v. Ohio Elections Comm'n,* 514 U.S. 334 (1995); *Reno v. American Civil Liberties Union,* 521 U.S. 844 (1997); and *People v. White,* 116 Ill. 2d 171, 506 N.E.2d 1284 (1987)).

9. There can be no doubt that the subscriber's/subscribers' privacy interest outweighs any interest the public may have in open judicial proceedings because these proceedings involve

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a Rule 224 petition for pre-suit discovery. Parties generally are required to appear by name in a proceeding because the public has a "legitimate interest in knowing all of the facts involved in *a case*, including the identities of the parties." *Doe,* 281 Ill. App. 3d at 1084, 668 N.E.2d at 1164 (emphasis added); *see also Doe v. Nw. Mem'l Hosp.*, 2014 IL App (1st) 140212, ¶ 38, 19 N.E.3d 178, 192 (Ill. App. 2014) (referencing "public policy supporting public access to *lawsuits*") (emphasis added). But this principle has no application where, as here, a lawsuit stating a claim against the person or persons seeking anonymity has not yet been filed. *See Shutes v. Fowler,* 223 Ill. App. 3d 342, 344, 584 N.E.2d 920, 922 (1991) ("[A] complaint naming only respondents in discovery is not a complaint at law, as it does not charge actionable conduct or seek damages.") (internal quotation marks and citation omitted).

10. More importantly, a successful showing by the subscriber[s] that the Petition does not satisfy the requirements of Supreme Court Rule 224 for pre-action discovery of his/her/their identity would be a hollow victory if he/she/they had to reveal his/her/their identity in order to obtain that result.

11. For this reason, courts in Illinois and elsewhere have routinely allowed an anonymous speaker to appear under a fictitious name to contest a discovery order or subpoena seeking the disclosure of his/her/their identity. *See, e.g., Stone,* 2011 IL App (1st) 093386, ¶8, 961 N.E.2d at 386 ("On August 5, 2009, Doe, user of the aforementioned IP address, filed a motion to quash petitioner's subpoena[.]");[3] *see also In re Anonymous Online Speakers,* 661 F.3d 1168, 1171-72 (9th Cir. 2010); *Music Grp. Macao Commercial Offshore Ltd. v. Does*, 82 F. Supp. 3d 979 (N.D. Cal. 2015); *Doe v. Coleman,* 497 S.W.3d 740 (Ky. 2016); *Thomas M. Cooley Law*

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[3] Other examples in Illinois exist but, pursuant to Supreme Court Rule 23, cannot be cited.

School v. Doe 1, 833 N.W.2d 331 (Mich. App. 2012); *In re Does 1-10*, 242 S.W.3d 805 (Tex. Ct. App. 2007).

12. For the above reasons, this Court should allow the same here, and permit the AT&T subscriber(s) to use a fictitious name to protect his/her/their identity in filing a motion to intervene, and in further proceedings if allowed to intervene, to protect his/her/their right to anonymity until such time when and if the Court were to rule that disclosure of identifying information is required under Supreme Court Rule 224.

WHEREFORE, Movant[s] respectfully requests that he/she/they be allowed to proceed under the fictitious name of "Jane Doe."

Dated: December 16, 2019

Respectfully submitted,

/s/ *Sondra A. Hemeryck*

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**IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION**

PROJECT44, INC., a Delaware corporation, Petitioner, v. AT&T MOBILITY LLC, a Delaware limited liability company; and MIMECAST NORTH AMERICA, INC., a Delaware corporation, Respondents.	)	Case No. 2019 L - 010520 Hon. Allen Price Walker

PETITIONER PROJECT44, INC.'S MEMORANDUM IN SUPPORT OF ITS RULE 2-615(e) MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION FOR HEARING PURSUANT TO RULE 224

INTRODUCTION

On multiple occasions in May 2019, one or more individuals levied false and harmful accusations against Petitioner project44, Inc. ("project44") through the cloak of anonymous emails. Specifically, the emails alleged that:

- project44 has "rampant accounting improprieties;"
- an employee of project44's relative "used to be the book keeper for a Chicago Mafia and they [project44] are using that to silence folks [ex-employees];"
- project44 is "another Theranos happen [*sic*] in Chicago;" and
- project44 is "the next Ponzi scheme or next theranos [*sic*]."

The sender's statements went beyond mere opinion, as they cited to specific documents, specific business relationships, and specific former employees in an attempt to add legitimacy to their false

claims. Indeed, it is clear that the purpose of these communications was not to exercise the sender's constitutional right to free speech, but rather to defame project44 and disrupt its business activities, including, *inter alia*, calling on project44's newly-retained Chief Revenue Officer to resign, and distracting project44's board members with false claims of impropriety.

project44 could not let these attacks go unanswered. Pursuant to Ill. S. Ct. R. 224, project44 filed a petition for discovery to identify the sender of these defamatory communications, with the intention of filing a lawsuit for defamation. Rather than own up to their statements, the sender of these communications instead opted to appear anonymously as Intervenor Jane Doe and contest the basis for project44's Rule 224 petition. While Jane Doe has yet to formally move to dismiss project44's petition, in filings before this Court the Intervenor has suggested that the complained-of statements were not published, that the statements did not rise to the level of defamatory communications, and that the petition was not pled with requisite particularity.

None of Jane Doe's assertions are correct. Each of the above statements accused project44 of either being dishonest in its trade, incompetent in its business activities, or guilty of a crime. As such, each of these statements is *per se* defamatory, and when taken in the context of the email communications as a whole, these statements are incapable of a reasonable innocent construction or classification as an opinion. Further, project44's petition is pled with particularity as it, *inter alia,* attaches the defamatory communications and establishes who received the statements, the pseudonyms of the individual(s) who sent the statements, when the statements were made, and how the statements were communicated. Finally, Jane Doe is wrong to claim that the statements have not been published, as the caselaw Intervenor relies on to support their claim is not only from outside of Illinois, but is in fact inapposite to Illinois law on publication.

Before its Rule 224 petition can be granted, project44 must show - in a hearing before this Court - that its petition can survive a section 2-615 motion to dismiss. As the following memorandum of law shows, project44 has set forth claims that meet this standard. Wherefore, pursuant to section 2-615(e), judgment on the pleadings is appropriate, and pursuant to Rule 224 project44 respectfully requests a hearing so that its petition for discovery may be granted.

BACKGROUND

The circumstances that led to project44 filing its Rule 224 petition are discussed in detail in project44's January 3, 2020 Second Amended Verified Petition for Discovery ("Second Amended Petition"). (*See* Second Amended Petition at ¶¶ 2-5; 12-17.) In summary, on May 19, 2019, an anonymous Gmail user utilizing the pseudonym "Ken Adams" sent to project44 outside board members Jim Baum and Kevin Dietsel an email that purported to bring to "your [the board members'] attention certain things." (Exhibit A to Second Amended Petition.) The email then proceeded to levy the following accusations against project44:

(1) that project44 has "rampant accounting improprieties;"

(2) that "Ex employees [*sic*] are silenced with legal threats and defamation suits," and that a project44 employee's relative "used to be the book keeper for a Chicago Mafia and they [project44] are using that to silence folks;" and

(3) that project44 is "another Theranos happen [*sic*] in Chicago."

(*Id.*) To add an air of legitimacy to these claims, the sender provided the name of the employee whose relative was accused of being affiliated with the "Chicago Mafia." (*Id.*) The sender also cited to specific documents ("pilots, out clauses, rev rec etc.") they claimed were the result of financial improprieties, as well as cancelled contracts ("Estes cancelled the contract"). (*Id.*)

Separately, on May 27, 2019, an anonymous Gmail user utilizing the pseudonym "Jason Short" sent to newly-hired project44 Chief Revenue Officer Tim Bertrand an email encouraging Mr. Bertrand to resign from his position at project44. (*See* Exhibit B to Second Amended Petition.) The email accused project44 of being "the next Ponzi scheme or next theranos [*sic*]," and asserted specific former affiliates of project44 have evidence to support the sender's claims. (*Id.*) (stating "[t]alk to ex CFO Bruns. Talk to ex Sales [*sic*] people, talk to customers.") The email also compared project44's products to excrement. (*See id.*)

Through a prior Rule 224 petition, project44 obtained IP address data from Google for the Gmail accounts associated with the "Ken Adams" and "Jason Short" pseudonyms. (*See* Second Amended Petition at ¶¶ 12-16.) The petition currently before this Court was subsequently filed on September 24, 2019 and sought subscriber data from *inter alia*, AT&T Mobility LLC, whose IP addresses were linked to the Gmail accounts. (*See id.* at ¶¶ 16-17.) Pursuant to their internal procedures, AT&T notified their customer of the pending petition, and on December 16, 2019, the customer, proceeding under the pseudonym Jane Doe, filed their Petition for Intervention to oppose project44's petition, as well as their Petition to Proceed Under a Fictitious Name, both of which were subsequently granted. (*See* December 16, 2019 Petition for Intervention ("Petition for Intervention") and Motion Pursuant to 735 ILC5/2-401(e) to Appear Under Fictitious Name; December 20, 2019 Order Granting said Petition and Motion.) It is thus clear that there is an actual person behind these defamatory communications, so let us find out who that is.

While Jane Doe has not formally moved to dismiss project44's petition, the Intervenor has suggested in filings before the Court that the complained-of statements were not published, that the statements did not rise to the level of defamatory communications, and that the petition was

not pled with particularity. (*See* Exhibit A to Petition for Intervention at 7-15.) None of these assertions are correct.

RELEVANT LAW

A. Rule 224

Under Ill. S. Ct. R. 224, a petitioner may discover "the identity of an unidentified individual who may be liable to him." *Hadley v. Doe*, 2015 IL 11800, ¶ 25 (citations omitted). Before a Rule 224 petition is granted, the petition must first be "subjected to a hearing at which the court determines that the petition sufficiently states a cause of action." *Stone v. Paddock Publications, Inc.*, 2011 IL App (1st) 093386, ¶ 17 (citing *Maxon v. Ottawa Publishing Co.,* 402 Ill.App.3d 704, 711 (3rd Dist. 2010)). The burden is on the petitioner to show that discovery of the individual's identity is necessary. *Hadley v. Doe*, 2015 IL 11800, ¶ 25 (citations omitted). Where a Rule 224 petition is filed for defamation, "[t]o demonstrate necessity, a petitioner must present sufficient allegations . . . to overcome a section 2-615 motion to dismiss." *Id.* at ¶ 26.

B. Section 2-615(e)

Pursuant to Section 2–615(e), "[a]ny party may seasonably move for judgment on the pleadings." 735 ILCS 5/2–615(e). Moreover:

> A motion for judgment on the pleadings requires the trial court to examine the pleadings so as to determine whether there is an issue of fact or, conversely, whether the controversy can be resolved as a matter of law. In ruling on such a motion, the trial court may consider only facts apparent from the face of the pleadings, matters subject to judicial notice, and judicial admissions.

John T. Doyle Tr. v. Country Mut. Ins. Co., 2014 IL App (2d) 121238, ¶ 13 (citations omitted); *see also Employers Ins. of Wausau v. Ehlco Liquidating Tr.*, 186 Ill. 2d 127, 138 (1999) (stating "a motion for judgment on the pleadings is like a motion for summary judgment limited to the pleadings"). The Illinois Supreme Court in *Hadley* noted that "[a] circuit court should not dismiss

a complaint under section 2-615 unless it is clearly apparent no set of facts can be proved that would entitle the plaintiff to recovery." *Hadley*, 2015 IL 11800, ¶ 28.

C. Defamation

To set forth a claim for defamation, the plaintiff must show that "the defendant made a false statement about the plaintiff, the defendant made an unprivileged publication of that statement to a third party, and the publication caused damages." *Hadley*, 2015 IL 11800, ¶ 30 (citations omitted). Damages are presumed where the statements are defamatory *per se*. *Tuite v. Corbitt*, 224 Ill.2d 490, 501 (2006). Illinois recognizes five categories of *per se* defamatory statements, namely:

> (1) statements imputing the commission of a crime; (2) statements imputing infection with a loathsome communicable disease; (3) statements imputing an inability to perform or want of integrity in performing employment duties; (4) statements imputing a lack of ability or that otherwise prejudice a person in his or her profession or business; and (5) statements imputing adultery or fornication.

Id. at 501; *see also Solaia Technology, LLC v. Specialty Pub. Co,* 221 Ill.2d 558, 580 (2006).

Even if a statement qualifies as defamation *per se*, the plaintiff must also show that the statement is not reasonably capable of an innocent construction and is not an expression of opinion. *Hadley*, 2015 IL 118000, ¶¶ 31-33. The Illinois Supreme Court in *Hadley* noted the following as to the innocent construction standard:

> courts must give the allegedly defamatory words their natural and obvious meaning. Courts must therefore interpret the allegedly defamatory words as they appeared to have been used and according to the idea they were intended to convey to the reasonable reader. When a defamatory meaning was clearly intended and conveyed, this court will not strain to interpret allegedly defamatory words in their mildest and most inoffensive sense in order to hold them nonlibellous under the innocent construction rule.

Id. at ¶ 31 (citations omitted). The Court in *Hadley* further stated that:

> The innocent construction rule "does not require courts 'to espouse a naïveté unwarranted under the circumstances.'" "[I]f the likely intended meaning of a statement is defamatory, a court should not dismiss the plaintiff's claim under the

> innocent construction rule. In those circumstances, an innocent construction of the statement would necessarily be strained and unreasonable because the likely intended meaning is defamatory.

Id. at ¶ 32 (citations omitted). As to whether a statement comprises an opinion, *Hadley* stated the following:

> there is no artificial distinction between opinion and fact: a false assertion of fact can be defamatory even when couched within apparent opinion or rhetorical hyperbole. Indeed, '[i]t 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.' Similarly, '[a] defendant cannot escape liability for defamatory factual assertions simply by claiming that the statements were a form of ridicule, humor or sarcasm.' The test is restrictive: a defamatory statement is constitutionally protected only if it cannot be reasonably interpreted as stating actual fact. Several considerations aid our analysis: whether the statement has a precise and readily understood meaning; whether the statement is verifiable; and whether the statement's literary or social context signals that it has factual content. If a statement is factual, and it is false, it is actionable.

Id. at ¶ 32 (citations omitted).

ARGUMENT

A. The Sender's Defamatory Statements Were Published

There is no doubt that the emails that are the basis of project44's Rule 224 Petition were published. Exhibits A and B of the Second Amended Petition show that the emails were transmitted to Jim Baum and Kevin Dietsel (outside board members of project44), as well as Tim Bertrand (project44's CRO ("Chief Revenue Officer")). (*See* Exhibits A and B to January 3, 2020 Second Amended Petition.) While Jane Doe suggests that the transmission of these statements to project44's employees and board members do not count as publications, the Intervenor's only support for their claim are two non-Illinois cases. (*See* Exhibit A to December 16, 2019 Petition for Intervention at 8-9.) Intervenor's failure to cite any Illinois caselaw is telling, since Illinois rejects the so-called "non-publication" rule advocated by Jane Doe, and instead follows the "'better view' espoused . . . by the Restatement (Second) of Torts." *See* § 1:21 Intracorporate and

comparable publications, Defamation: A Lawyer's Guide § 1:21; *see also Popko v. Continental Casualty Company*, 355 Ill.App.3d 257, 263, 265-266 (1st Dist. 2005) (rejecting the non-publication rule, adopting the Restatement rule, and stating that Illinois courts "recognize that communication within a corporate environment may constitute publication for defamation purposes"). In *Missner v. Clifford,* 393 Ill.App.3d 751 (1st Dist. 2009), the First District expressly adopted comment *e* to the Restatement (Second) of Torts § 577, which states that defamatory statements provided to an agent or employee of the defamed party constitute a publication, so long as said statements are not subject to a conditional privilege:

> *e. Publication to agent.* The fact that the defamatory matter is communicated to an agent of the defamer does not prevent it from being a publication sufficient to constitute actionable defamation. The publication may be privileged, however, under the rule stated in § 593. *So too, the communication to a servant or agent of the person defamed is a publication* although if the communication is in answer to a letter or a request from the other or his agent, the publication may not be actionable in defamation.

Restatement (Second) of Torts § 577, cmt. e (emphasis added); *Missner*, 393 Ill.App.3d at 763. Further, courts in Illinois recognize that assertion of a conditional privilege is an affirmative defense that is typically not relevant when evaluating a Rule 224 petition (as said petitions are reviewed under a section 2-615 standard). *See, e.g., Maxon*, 402 Ill.App.3d at 711, fn. 3 (stating "[a]n affirmative defense of privilege would require a responsive pleading from the defendant and thus would not be appropriately addressed under section 2–615 of the Code.) This - coupled with the fact that Jane Doe to date has asserted no conditional privilege - confirms that the defamatory statements were published.[1]

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[1] Even if Jane Doe asserted a privilege, it is unclear how the Court could determine whether the privilege would apply, since the Intervenor has chosen to remain anonymous.

B. The Statements-At-Issue Are *Per Se* Defamatory

For the reasons set forth below, each of the statements in the May 19th and May 27th emails are *per se* defamatory, and cannot otherwise be innocently construed or considered an opinion.

1. The May 19, 2019 Email

The claim of "rampant accounting improprieties" in the May 19, 2019 email is defamatory *per se*, as it imputes both a want of integrity in project44's performance of its employment duties, as well as a lack of ability in project44's business (such as the ability to comply with generally accepted accounting procedures). (Exhibit A to Second Amended Petition). "Impropriety" is commonly understood to mean "dishonest behavior, or a dishonest act." (https://dictionary.cambridge.org/us/dictionary/english/impropriety.) As such, by using the phrase "accounting improprieties," the sender of the email accuses project44 of dishonest financial practices. *See, e.g., Antell v. Arthur Anderson LLP,* No. 97 C 3456, 1998 WL 245878, *1 (N.D. Ill. May 4, 1998) (equating "accounting improprieties" to "accounting manipulations" and "misrepresentations").[2] The sender further uses the term "rampant" to convey that the alleged dishonest financial practices occur frequently. (*See, e.g.,* https://dictionary.cambridge.org/us/dictionary/english/rampant) (project44 requests that the Court take judicial notice of the definitions of the terms "improprieties" and "rampant.")

Additionally, the May 19th email's allegations of "Chicago Mafia" connections, "legal threats," and "silence folks," are both accusations of criminal activity, as well as allegations of a want of integrity in project44's performance of its employment duties. Thus, these statements, too, are defamatory *per se*. (Exhibit A to Second Amended Petition.) Taken together, these statements represent that: (a) project44 threatens their former employees; (b) that project44 is in

[2] Non-Illinois State Court cases cited in this memorandum are attached as group Exhibit 1.

league with the "Chicago Mafia" (via a connection through a project44 employee's family member); and (c) that not only does project44 threaten "Ex employees [*sic*] . . . with legal threats and defamation suits," but also that project44 uses its connection with the "Chicago Mafia . . . to silence folks [i.e. the former employees]." (*Id.*) The use of the phrases "Chicago Mafia" with "silence folks," convey the idea that project44 threatens their ex-employees with violence or other intimidation. (*Id.*; *see also, e.g.*, https://dictionary.cambridge.org/us/dictionary/english/silencing (providing, as an example of a sentence using the word "silenced," that "Al Capone *silenced* his opponents by killing them").) These allegations suggest that project44 is guilty of, *inter alia*, the crime of intimidation (720 ILCS 5/12-6), as well as fraternizing with a criminal organization.

Similarly, the reference in the May 19th email to "Theranos" likewise conveys the idea that project44 has committed a crime and is thus defamatory *per se*. There can be no doubt that the sender's comparison to "Theranos" refers to Theranos Inc., a now-defunct company that (along with its founder Elizabeth Holmes) was charged by the U.S. Securities and Exchange Commission with securities fraud. (*See, e.g.* https://www.sec.gov/litigation/complaints/2018/comp-pr2018-41-theranos-holmes.pdf.) Ms. Holmes and Theranos's former president, Ramesh Balwani, have also been indicted on multiple counts of wire fraud and conspiracy to commit wire fraud (their cases are currently pending). (*See, e.g.,* https://www.justice.gov/usao-ndca/pr/theranos-founder-and-former-chief-operating-officer-charged-alleged-wire-fraud-schemes) (project44 requests that the Court take judicial notice of Theranos, Inc. and the charges levied against it, Ms. Holmes, and Mr. Balwani.) Thus, it is clear that the May 19th email's reference to Theranos is to convey the idea that, like Theranos, project44 is allegedly involved in fraudulent activity.

These statements cannot be innocently construed. The sender of the May 19th email does not make the accusations of "rampant accounting improprieties," threats and involvement in the

"Chicago Mafia," and being akin to "Theranos" in a vacuum. Rather, these statements are intertwined and the intended effect is to distract board members of project44 with baseless claims of impropriety. Moreover, the sender attempts to offer "proof" for their accusations by encouraging the recipients of the May 19th email to "take a look at the contracts (pilots, out clauses rev rec etc)," which the sender claims are the result of accounting improprieties. (*Id.*) The sender's reference to a cancelled contract (with "Estes") is also meant to suggest that the former customer ("Estes") ceased doing business with project44 due to project44's alleged improprieties. (*Id.*). Thus, there is no doubt that these statements are intended to convey the idea that project44 is both dishonest and has engaged in criminal activities. Moreover, since these accusations have a readily understood meaning, can be verified if true, and give the appearance of asserting factual content (via, *inter alia*, references to specific documents and former clients), none of these statements can be considered an opinion. *See Hadley*, 2015 IL 118000, ¶ 32.

Not surprisingly, other courts have refused to dismiss similar claims for defamation, and affirmed findings that similar statements are defamatory. For instance, in *DSC Logistics, Inc. v. Innovative Movements, Inc.*, No. 03 C 4050, 2004 WL 421977 (N.D. Ill. Feb. 17, 2004), the Northern District of Illinois, applying Illinois law, refused to dismiss a defamation claim where defendants (whose attorneys included Intervenor Jane Doe's counsel) accused plaintiff via email of poor business practices and acting in "utter bad faith," finding that "[t]hese statements are undoubtably [*sic*] criticisms of . . . [plaintiff's] business methods and, as such, fall into a category of statements that are defamatory *per se.*" *DSC Logistics*, 2004 WL 421977 at *1. Additionally, in *Arts4All, Ltd. v. Hancock,* 773 N.Y.S.2d 348 (2004), the New York Supreme Court, Appellate Division, reversed dismissal of a defamation claim where defendant made statements to plaintiff's board of directors accusing plaintiff of "deceptive accounting practices, used . . . time and

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resources for personal business without authorization, and provided false information to government agencies and insurance companies." *Arts4All*, 773 N.Y.S.2d at 352. In *Thompson v. Bank One Louisiana NA* 134 So.3d 653 (La. Ct. App. 2014), the Louisiana Court of Appeals upheld a verdict finding defamation *per se* where the defendant Church accused plaintiff of misappropriating Church funds. *Thompson*, 134 So.3d at 662. Finally, in *Vasquez v. Whole Foods Market Inc.*, 302 F.Supp.3d 36 (D.D.C. 2018) the U.S. District Court for the District of Columbia found plaintiffs sufficiently stated claims for defamation where defendants accused plaintiffs of, *inter alia*, "manipulating a bonus program to their benefit." *Vasquez*, 302 F.Supp.3d at 63.

Separately, the Illinois Supreme Court found accusations that plaintiff would "commit bribery or other criminal conduct" contained in a nonfiction book about organized crime to be defamatory *per se*. *Tuite v. Corbitt*, 224 Ill.2d 490, 497 (2006). Looking to the context of the statement (as part of a nonfiction book concerning "story after story of corruption"), the Illinois Supreme Court found that there was no reasonable innocent construction for the statement, and although defendants did not explicitly accuse the plaintiff of criminal activity, their statement was nonetheless defamatory. *Id.* at 514-515. Other courts have also found similar accusations of intimidation or affiliation with organized crime to be *per se* defamatory. *See, e.g., Clemente v. Espinosa*, 749 F.Supp. 672, 677-680 (E.D. Pa. 1990) (finding allegations that plaintiff was "connected with the Mafia" and had "connections with the Mafia" were defamatory *per se*); *Spangler v. Glover*, 50 Wash.2d 473, 479 (Wash. 1957) (stating "we held libelous *per se* a letter published by an employer, stating that the plaintiff employee had intimidated other employees"); *Lega Siciliana Social Club, Inc. v. St. Germane* 77 Conn.App. 846, 855 (Conn. App. 2003) (concluding "that the statement linking the plaintiff to the Mafia was libelous *per se*"). Finally, courts have allowed defamation *per se* claims to proceed for comparisons to Madoff Investment

Securities LLC (who, like Theranos, was the perpetrator of another notorious fraud). *See, e.g., Cohen v. Hansen*, No. 2:12-CV-1401 JCM (PAL), 2015 WL 3609689, *9 (D. Nev. June 9, 2015).

2. The May 27, 2019 Email

Not only does the May 27, 2019 email convey the idea that project44 is liable for criminal conduct by way of its reference to "theranos [*sic*]," the email flat-out accuses project44 of being a criminal enterprise by calling it a "Ponzi scheme." (Exhibit B to Second Amended Petition.) This, combined with the fact that (1) the May 27th email is both directed to and calls on the newly-hired CRO of project44 (Tim Bertrand) to resign; (2) invites Mr. Bertrand to reach out to specific former employees of project44 to confirm the sender's baseless claims; and (3) compares project44's products to excrement, confirms that the statements in the May 27th email cannot be innocently construed or are otherwise on opinion. (*See* Exhibit B to Second Amended Petition.) Moreover, multiple courts have found the use of the term "Ponzi scheme" to be defamatory. For instance, in *Mann v. Swigett*, No. 5:10-CV-172-D, 2012 WL 1579323 (E.D.N.C. May 4, 2012), the court found statements accusing plaintiff of "running a 'Ponzi scheme' and engaging in 'fraudulent transactions' to be defamatory *per se*. *Mann*, 2012 WL 1579323, *4. Similarly, in *Finance Ventures, LLC v. King*, Civil Action No. 4:15-cv-00028-JHM, 2016 WL 9460307 (W.D. Ky. Aug. 8, 2016) the court found statements that plaintiffs were "'crooks,' 'thieves,' operators of a '*Ponzi scheme*,'" etc. to be defamatory *per se*. *Finance Ventures,* 2016 WL 9460307 at *2. Further, in *Cohen v. Hansen*, the court refused to dismiss a claim for defamation *per se* where defendant accused plaintiff of running a Ponzi scheme as well as compared defendant to Bernard Madoff. *Cohen,* 2015 WL 3609689, *9.

For these reasons, project44 has made the requisite showing that the above statements are defamatory, and thus the petition meets the initial judicial review standard required by Rule 224.

C. project44's Petition Is Pled With Particularity

In Exhibit A to their Petition to Intervene, Jane Doe cites to *Green v. Rogers*, 234 Ill.2d 478 (2009) for the principle that, like common-law fraud, actions for defamation *per se* "must be pled with a heightened level of precision and particularity." *Green*, 234 Ill.2d at 495; (*see also* Exhibit A to Petition for Intervention at 7-8.) Intervenor claims that the instant petition, like the complaint in *Green*, should be dismissed for failure to particularly plead a defamation claim. (*See* Exhibit A to Petition for Intervention at 7-8.) While project44 does not dispute the standard set forth in *Green*, the facts in that case differ from the instant petition.

In *Green*, the Illinois Supreme Court focused on a complaint for defamation (as opposed to a petition for discovery), where the alleged defamatory statements were pled on information and belief. As such, the *Green* court looked to whether the complaint sufficiently set forth claims such that they could be subject to an initial judicial review, as well as enabled the defendant to understand the claims and "properly formulate an answer and identify any potential affirmative defenses." *Green*, 234 Ill.2d at 492. The *Green* Court found that the complaint-at-issue satisfied neither standard. In contrast, in the context of a Rule 224 *petition* for discovery (such as the case here), courts have focused solely on whether the petition adequately sets forth a claim for initial judicial review, as the defendant is not yet known. *See, e.g., Doe ex rel. Doe v. Catholic Diocese of Rockford,* 2015 IL App (2d) 140618, ¶¶ 30-32 (2015); *see also Dobias v. Oak Park and River Forest High School District 200*, 2016 IL App (1st) 152205, ¶ 87 (citing *Doe* with approval). In *Doe*, the court allowed a Rule 224 petition seeking discovery on a defamation claim to proceed, even though the claims were pled on information and belief. *Doe*, 2015 IL App (2d) 140618, ¶ 27. Central to the Second District's holding was the fact that the petition identified how the petitioner became aware of the defamatory statements, as well as described in detail the nature of

the defamatory statements, factors the *Doe* court noted were absent from the complaint in the *Green* case. *Id.* at ¶¶ 30-32.

Here, the Rule 224 petition before the Court far exceeds these standards, since the statements referenced in the petition are attached as exhibits, and as such the facts surrounding the defamatory statements are not pled on information and belief. (*See* Second Amended Verified Petition at Exhibits A-B.) Moreover, both the exhibits and the petition establish who sent the defamatory statements (Gmail users with the email addresses kenadams8558@gmail.com and jshort5584@gmail.com), who received the statements (Jim Baum, Kevin Dietsel, and Tim Bertrand), when the statements were made (May 19, 2019 and May 27, 2019), and how the statements were communicated (via email). (*See id.*) Like the petition in *Doe*, project44's defamation claims are capable of initial review by the Court, and as such project44's petition has been pled with sufficient particularity.

CONCLUSION

As the above shows, the statements contained in the May 19, 2019 and May 27, 2019 emails are undoubtedly *per se* defamatory communications. WHEREFORE, for the foregoing reasons, judgment on the pleadings for project44's petition for discovery is proper, and project44 respectfully requests a hearing pursuant to Ill. S. Ct. R. 224 granting its petition.

Dated: February 21, 2020

Respectfully Submitted,

PROJECT44, INC.

By: /s/ Peter G. Hawkins
One of Its Attorneys

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused a copy of the foregoing **PETITIONER PROJECT44, INC.'S MEMORANDUM IN SUPPORT OF ITS RULE 2-615(e) MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION FOR HEARING PURSUANT TO RULE 224** to be served by email on February 21, 2020 upon:

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IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

PROJECT44, INC., a Delaware corporation, Petitioner, v. AT&T MOBILITY LLC, a Delaware limited liability company; and MIMECAST NORTH AMERICA, INC., a Delaware corporation, Respondents.	)))))))))))	Case No. 2019 L - 010520 Hon. Allen Price Walker

PETITIONER PROJECT44, INC.'S RULE 2-615(e) MOTION FOR JUDGMENT ON <u>THE PLEADINGS AND MOTION FOR HEARING PURSUANT TO RULE 224</u>

NOW COMES Petitioner, project44, Inc., by and through its attorneys, and, for the reasons set forth in the corresponding memorandum filed concurrently herewith, as well as pursuant to 735 ILCS 5/2-615(e) and Ill. S. Ct. R. 224, Petitioner respectfully requests that this Court both conduct a hearing on and grant Petitioner's Rule 224 Second Amended Verified Petition for Discovery.

Dated: February 21, 2020

Respectfully Submitted,

PROJECT44, INC.

By: <u>/s/ Peter G. Hawkins</u>
One of Its Attorneys

Douglas A. Albritton
Peter G. Hawkins
Actuate Law LLC
FIRM ID No. 62266
641 West Lake, 5th Floor
Chicago, IL 60661
312-579-3108
doug.albritton@actuatelaw.com
peter.hawkins@actuatelaw.com
Counsel for project44, Inc.

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he caused a copy of the foregoing **PETITIONER PROJECT44, INC.'S RULE 2-615(e) MOTION FOR JUDGMENT ON THE PLEADINGS AND MOTION FOR HEARING PURSUANT TO RULE 224** to be served by email on February 21, 2020 upon:

AT&T Mobility LLC
c/o Daniel A. Kazlauski, Esq.
225 W. Randolph Street, Suite 25B
Chicago, IL 60606
(312) 727-3995
dk7632@att.com

Counsel for Respondent AT&T Mobility LLC

Sondra A. Hemeryck, Esq.
Lynn Moffa, Esq.
Riley Safer Holmes & Cancila LLP
Three First National Plaza
70 W. Madison Street, Suite 2900
Chicago, IL 60602
shemeryck@rshc-law.com
lmoffa@rshc-law.com

Counsel for Intervenor Jane Doe

/s/ *Peter G. Hawkins*

Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

FILED
4/13/2020 10:19 PM
DOROTHY BROWN
CIRCUIT CLERK
COOK COUNTY, IL
2020L004183

9069711

FILED DATE: 4/13/2020 10:19 PM 2020L004183

EXHIBIT U

FILED DATE: 4/13/2020 10:19 PM 2020L004183

HEARING DATE ORDER-MOTION CALL "Z"

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

Project44, Inc
Plaintiff(s)

-v-

AT&T Mobility, LLC
Defendant(s)

No: 2019L-010580

Judge Presiding

ORDER

Intervenor Jane Doe

This cause coming before the Court for entry of a hearing date on the Motion of Attorney Project 44 for X 2-615 Dismissal, ____ 2-619 Dismissal, ____ Rule 103(b) Dismissal, ____ In Camera Inspection, ____ 2-1005 Summary Judgment, or and ____ Other Motion (Post hearing final relief), the Movant representing that all courtesy copies, briefs, ~~pleadings, full~~ transcripts of depositions, and exhibits, in compliance with the applicable Motion Judges' Rules, have been submitted to this Court.

IT IS HEREBY ORDERED:

The above-captioned matter is set for hearing and case management on April 20, 2020 11:15 pm/am in Courtroom 2204.

The previously scheduled status hearing for March 17 at 9:30 a.m. is stricken

MOTIONS WITH INCOMPLETE COURTESY COPIES WILL BE DENIED

Atty. No: 62366
Atty. Name: Peter Hawkins
Atty. for: Petitioner
Address: 641 West Lake, 5th Floor
City: Chicago
Telephone: 312-571-3148

ENTER: Associate Judge Daniel T. Gillespie
MAR 13 2020
Circuit Court - 1507

CIRCUIT JUDGE NO.

Return Date: No return date scheduled
Hearing Date: No hearing scheduled
Courtroom Number: No hearing scheduled
Location: No hearing scheduled

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COOK COUNTY, IL
2020L004183

9069711

FILED DATE: 4/13/2020 10:19 PM 2020L004183

EXHIBIT V

FILED DATE: 4/13/2020 10:19 PM 2020L004183

Peter Hawkins

Subject: FW: PostCard ID=LD2019L010520___20200324000086

From: enotice@cookcountycourt.com <enotice@cookcountycourt.com>
Sent: Tuesday, March 24, 2020 11:40 AM
To: Dara Tarkowski <dara.tarkowski@actuatelaw.com>
Subject: PostCard ID=LD2019L010520____20200324000086

i - No employee in your company has ever replied to this person.

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** EXTERNAL SENDER **

Sent by Clerk of the Circuit Court, Cook County

1 CIRCUIT COURT OF COOK COUNTY
LAW DIV., RM. 801, DALEY CTR.
CHICAGO, IL. 60602

ID: LD2019L010520 20200324000086
AT: ACTUATE LAW LLC
TO: DARA.TARKOWSKI@ACTUATELAW.COM

* * * * * N O T I C E * * * * *

CASE 19-L-010520

PROJECT44, INC., A DELAWAV. AT&T MOBILITY LLC, A DEL

BY GENERAL ADMINISTRATIVE ORDER OF THE COOK COUNTY CIRCUIT COURT
ADDRESSING COVID-19 PRECAUTIONS, YOUR CASE IN THE CIRCUIT COURT
OF COOK COUNTY HAS BEEN RESCHEDULED TO TUESDAY, THE
12TH DAY OF MAY 2020, AT 9:30 A.M., IN ROOM 2204.

FILED
5/20/2021 12:48 PM
IRIS Y. MARTINEZ
CIRCUIT CLERK
COOK COUNTY, IL
2020L004183
13402691

FILED DATE: 5/20/2021 12:48 PM 2020L004183

☐ **THIS APPEAL INVOLVES A MATTER SUBJECT TO EXPEDITED DISPOSITION UNDER RULE 311(a).**

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY **DEPARTMENT,** LAW **DIVISION/DISTRICT**

PROJECT44, INC.

Plaintiff/ ◉ Appellant ○ Appellee

v.

FOURKITES, INC., and JANE DOE, and JOHN DOE #1, and JOHN DOE #2, and JOHN DOES #3-25

Defendant/ ○ Appellant ◉ Appellee

Reviewing Court No.: ____________

Circuit Court No.: 2020-L-004183

PLAINTIFF/APPELLANT PROJECT44, INC.'S **NOTICE OF APPEAL**

(Check if applicable. See IL Sup. Ct. Rule 303(a))(3).

☐ Joining Prior Appeal ☐ Separate Appeal ☐ Cross Appeal

Appellant's Name: project44, Inc.

◉ Atty. No.: 62266
○ Pro Se 99500

Name: Actuate Law LLC/Douglas A. Albritton

Address: 641 West Lake St., 5th Floor

City: Chicago

State: IL Zip: 60661

Telephone: 312-579-3108

Primary Email: doug.albritton@actuatelaw.com

Appellee's Name: FourKites, Inc.

◉ Atty. No.: 47375
○ Pro Se 99500

Name: Polsinelli PC/Scott M. Gilbert

Address: 150 North Riverside Plaza, Suite 3000

City: Chicago

State: IL Zip: 60606

Telephone: 312-819-1900

Primary Email: sgilbert@polsinelli.com

FILED DATE: 5/20/2021 12:48 PM 2020L004183

An appeal is taken from the order or judgment described below:

Date of the judgment/order being appealed: 4/26/21

Name of judge who entered the judgment/order being appealed: Hon. James E. Snyder

Relief sought from Reviewing Court:

P a nt ff/Appe ant pro ect44, Inc. w ask the Appe ate Court to reverse the C rcu t Court's Apr 26, 2021 order grant ng

Defendant/Appe ee FourK tes Inc.'s Mot on to D sm ss P a nt ff's Comp a nt and d sm ss ng a counts of pro ect44 Inc.'s

comp a nt w th pre ud ce, vacate the udgment, and for such other and further re ef as the Appe ate Court deems proper.

I understand that a *"Request for Preparation of Record on Appeal"* form (CCA 0025) must be completed and the initial payment of $70 made prior to the preparation of the Record on Appeal. The Clerk's Office will <u>not</u> begin preparation of the ROA until the Request form and payment are received. Failure to request preparation of the ROA in a timely manner, i.e., at least 30 days before the ROA is due to the Appellate Court, may require the Appellant to file a request for extension of time with the Appellate Court. A *"Request for Preparation of Supplemental Record on Appeal"* form (CCA 0023) must be completed prior to the preparation of the Supplemental ROA.

/s/ Douglas A. Albritton

To be signed by Appellant or
Appellant's Attorney

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

PROJECT44, INC

Plaintiff/Petitioner

Reviewing Court No: 1-21-0575
Circuit Court/Agency No: 2020L004183
Trial Judge/Hearing Officer: JAMES E. SNYDER

v.

FOURKITES, INC. ET AL.

Defendant/Respondent

E-FILED
Transaction ID: 1-21-0575
File Date: 7/22/2021 4:50 PM
Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

CERTIFICATION OF RECORD

The record has been prepared and certified in the form required for transmission to the reviewing court. It consists of:

1 Volume(s) of the Common Law Record, containing 628 pages
1 Volume(s) of the Report of Proceedings, containing 60 pages
0 Volume(s) of the Exhibits, containing 0 pages

I hereby certify this record pursuant to Supreme Court Rule 324, this 22 DAY OF JULY, 2021

E-FILED
3/31/2023 2:24 PM
CYNTHIA A. GRANT
SUPREME COURT CLERK

Iris Martinez

(Clerk of the Circuit Court or Administrative Agency)

IRIS MARTINEZ, CLERK OF THE COOK JUDICIAL CIRCUIT COURT ©
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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

PROJECT44, INC
Plaintiff/Petitioner

Reviewing Court No: 1-21-0575
Circuit Court/Agency No: 2020L004183
Trial Judge/Hearing Officer: JAMES E. SNYDER

v.

FOURKITES, INC. ET AL.
Defendant/Respondent

COMMON LAW RECORD - TABLE OF CONTENTS

Date Filed	Title/Description	Page No.
04/13/2020	DOCKETLIST	C 6-C 13
04/13/2020	AFFIDAVIT PURSUANT TO ILLINOIS SUPREME COURT RULE 222 B	C 14-C 15
04/13/2020	EXHIBIT A	C 16-C 17
04/13/2020	EXHIBIT B	C 18-C 20
04/13/2020	EXHIBIT C	C 21-C 23
04/13/2020	EXHIBIT D	C 24-C 27
04/13/2020	EXHIBIT E	C 28-C 31
04/13/2020	EXHIBIT F	C 32-C 33
04/13/2020	EXHIBIT G	C 34-C 41
04/13/2020	EXHIBIT H	C 42-C 45
04/13/2020	EXHIBIT I	C 46-C 49
04/13/2020	EXHIBIT J	C 50-C 54
04/13/2020	EXHIBIT K	C 55-C 60
04/13/2020	EXHIBIT L	C 61-C 63
04/13/2020	EXHIBIT M	C 64-C 65
04/13/2020	EXHIBIT N	C 66-C 69
04/13/2020	EXHIBIT O	C 70-C 78
04/13/2020	EXHIBIT P	C 79-C 80
04/13/2020	EXHIBIT Q	C 81-C 87
04/13/2020	EXHIBIT R	C 88-C 93
04/13/2020	EXHIBIT S	C 94-C 113

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COMMON LAW RECORD - TABLE OF CONTENTS

Page 2 of 4

Date Filed	Title/Description	Page No.
04/13/2020	EXHIBITS	C 114
04/13/2020	EXHIBIT T	C 115-C 132
04/13/2020	EXHIBIT U	C 133-C 134
04/13/2020	EXHIBIT V	C 135-C 136
04/13/2020	COMPLAINT	C 137-C 155
04/13/2020	SUMMONS	C 156-C 158
04/15/2020	E NOTICE	C 159
04/15/2020	SUMMONS	C 160-C 162
04/22/2020	AFFIDAVIT OF SERVICE	C 163
04/22/2020	NOTICE OF FILING	C 164-C 165
05/15/2020	APPEARANCE	C 166-C 167
05/15/2020	AGREED MOTION FOR EXTENSION	C 168-C 172
05/18/2020	ORDER	C 173
05/27/2020	E NOTICE	C 174
06/05/2020	ORDER	C 175
06/05/2020	UNOPPOSED MOTION FOR EXTENSION	C 176-C 180
06/12/2020	SUMMONS	C 181-C 182
06/18/2020	MOTION TO TRANSFER AN ACTION	C 183-C 185
06/18/2020	NOTICE OF MOTION	C 186-C 188
06/22/2020	ORDER	C 189
06/22/2020	UNOPPOSED MOTION FOR EXTENSION	C 190-C 194
06/23/2020	E NOTICE	C 195
07/06/2020	ORDER	C 196
07/06/2020	UNOPPOSED MOTION FOR EXTENSION	C 197-C 201
08/05/2020	ORDER	C 202
08/05/2020	UNNOPOSED MOTION FOR EXTENSION	C 203-C 207
09/21/2020	ORDER	C 208
09/21/2020	UNOPPOSED MOTION FOR EXTENSION	C 209-C 213
10/13/2020	MOTIONTODISMISSFILED__56	C 214-C 226
10/15/2020	ORDER	C 227
10/16/2020	ORDER	C 228
11/05/2020	EXHIBIT A	C 229-C 230
11/05/2020	UNOPPOSED MOTION FOR EXTENSION	C 231-C 233
11/09/2020	ORDER	C 234-C 235
11/19/2020	EXHIBIT A	C 236-C 237

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COMMON LAW RECORD - TABLE OF CONTENTS

Date Filed	Title/Description	Page No.
11/19/2020	UNOPPOSED MOTION FOR EXTENSION	C 238-C 240
11/24/2020	ORDER	C 241-C 242
12/21/2020	EXHIBIT A	C 243-C 244
12/21/2020	UNOPPOSED MOTION FOR EXTENSION	C 245-C 247
12/28/2020	ORDER	C 248
01/20/2021	EXHIBITS	C 249-C 267
01/20/2021	MOTION TO DISMISS COMPLAINT	C 268-C 280
02/03/2021	ORDER	C 281-C 282
02/04/2021	NOTICE OF FILNG	C 283-C 284
02/17/2021	MOTION	C 285-C 328
02/17/2021	PETITION FOR INTERVENTION	C 329-C 427
02/17/2021	NOTICE OF MOTION	C 428-C 431
02/22/2021	EXHIBIT 1	C 432-C 531
02/22/2021	NOTICE OF FILING	C 532-C 533
02/22/2021	RESPONSE IN OPPOSITION TO MOTION TO DISMISS	C 534-C 549
03/02/2021	NOTICE OF MOTION	C 550-C 552
03/03/2021	ORDER	C 553-C 554
03/05/2021	REPLY IN SUPPORT OF MOTION TO DISMISS	C 555-C 564
03/08/2021	NOTICEOFFILINGFILED__84	C 565-C 566
03/08/2021	RESPONSE IN OPPOSITION TO PETITION FOR INTERVENTION	C 567-C 580
03/09/2021	AGREED ORDER	C 581-C 582
03/11/2021	MOTION FOR LEAVE TO FILE A SUR- REPLY	C 583-C 587
03/12/2021	UNOPPOSED MOTION FOR LEAVE TO FILE OVERSIZED BRIEF	C 588-C 590
03/26/2021	REPLY TO OPPOSITION TO	C 591-C 600
03/26/2021	NOTICE OF FILING	C 601-C 603
03/29/2021	AGREED ORDER	C 604-C 605
03/31/2021	REPLY TO MOTION TO DISMISS	C 606-C 608
03/31/2021	NOTICE OF FILING	C 609-C 610
03/31/2021	ORDERS OF THE COURT	C 611
05/18/2021	NOTICE OF FILING	C 612-C 613
05/20/2021	NOTICE OF APPEAL	C 614-C 615
05/20/2021	NOTICE OF FILING	C 616-C 617

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COMMON LAW RECORD - TABLE OF CONTENTS

Page 4 of 4

Date Filed	Title/Description	Page No.
05/20/2021	REQUEST TO PREPARE RECORD	C 618-C 619
05/26/2021	NOTICEOFFILINGFILED__100	C 620-C 621
05/26/2021	REQUEST FOR REPORTS OF PROCEEDINGS	C 622-C 628

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TABLE OF CONTENTS OF THE APPELLATE COURT RECORD

Internal Facts Sheet 1/4-4/4

Opinion (November 22, 2022) 2-18

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

PROJECT44, INC

Plaintiff/Petitioner

Reviewing Court No: 1-21-0575
Circuit Court/Agency No: 2020L004183
Trial Judge/Hearing Officer: JAMES E. SNYDER

v.

FOURKITES, INC. ET AL.

Defendant/Respondent

CERTIFICATION OF SUPPLEMENT TO THE RECORD

The supplement to the record has been prepared and certified in the form required for transmission to the reviewing court. It consists of:

1 Volume(s) of the Supplement to the Common Law Record Section, containing 7 pages
1 Volume(s) of the Supplement to the Report of Proceedings Section, containing 0 pages
1 Volume(s) of the Supplement to the Exhibits Section, containing 0 pages

I hereby certify this record pursuant to Supreme Court Rule 324, this 13 DAY OF AUGUST, 2021

E-FILED
Transaction ID: 1-21-0575
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Thomas D. Palella
Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

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(Clerk of the Circuit Court or Administrative Agency)

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Table of Contents

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

PROJECT44, INC
Plaintiff/Petitioner

Reviewing Court No: 1-21-0575
Circuit Court/Agency No: 2020L004183
Trial Judge/Hearing Officer: JAMES E. SNYDER

v.

FOURKITES, INC. ET AL.
Defendant/Respondent

SUPPLEMENT TO THE RECORD - TABLE OF CONTENTS

Page 1 of 1

Section	**Page**
SUPPLEMENT TO THE COMMON LAW RECORD SECTION	SUP C 3-SUP C 9
SUPPLEMENT TO THE REPORT OF PROCEEDINGS SECTION	SUP R 0
SUPPLEMENT TO THE EXHIBITS SECTION	SUP E 0

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Table of Contents

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

PROJECT44, INC
Plaintiff/Petitioner

Reviewing Court No: 1-21-0575
Circuit Court/Agency No: 2020L004183
Trial Judge/Hearing Officer: JAMES E. SNYDER

v.

FOURKITES, INC. ET AL.
Defendant/Respondent

COMMON LAW RECORD - TABLE OF CONTENTS

Page 1 of 1

Date Filed	Title/Description	Page No.
08/11/2021	REQUEST FOR PREPARATION OF SUPPLEMENTAL RECORD ON APPEAL	SUP C 4-SUP C 5
08/11/2021	STIPULATION TO SUPPLEMENT RECORD ON APPEAL	SUP C 6-SUP C 7
04/26/2021	ORDER GRANTING DEFENDANT FOURKITES, INC.'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT	SUP C 8-SUP C 9

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Table of Contents

APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

PROJECT44, INC
Plaintiff/Petitioner

Reviewing Court No: 1-21-0575
Circuit Court/Agency No: 2020L004183
Trial Judge/Hearing Officer: JAMES E. SNYDER

v.

FOURKITES, INC. ET AL.
Defendant/Respondent

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Clerk of the Appellate Court
APPELLATE COURT 1ST DISTRICT

REPORT OF PROCEEDINGS - TABLE OF CONTENTS

Page 1 of 1

Date of Proceeding	Title/Description	Page No.
04/21/2021	HEARING	R 2-R 60

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No. 129227

IN THE SUPREME COURT OF ILLINOIS

Project44, Inc., Plaintiff-Appellee, v. FourKites, Inc., Defendant-Appellant.	)))))))))))))	On Appeal from the Appellate Court of Illinois, First Judicial District No. 1-21-0575 Circuit Court of Cook County, Illinois, County Department, Law Division Case No. 2020-L-4183 The Honorable James E. Snyder, Judge Presiding

---

NOTICE OF FILING AND CERTIFICATE OF SERVICE

The undersigned hereby certified that ***Defendant-Appellant's Brief and Supplemental Appendix*** was electronically filed with the Clerk of the Court using the Odyssey File & Serve System on May 3, 2023, which will send notification of such filings to all attorneys of record, and further certifies that the undersigned will serve copies of ***Defendant-Appellant's Brief and Supplemental Appendix*** on May 3, 2023, to the following via email:

Douglas A. Albritton
Peter G. Hawkins
Actuate Law LLC
641 West Lake, 5th Floor
Chicago, IL 60661
Doug.albritton@actuatelaw.com
Peter.hawkins@actuatelaw.com

Under penalties as provided by law, pursuant to Section 1-109 of the Code of Civil Procedures, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Scott M. Gilbert

Scott M. Gilbert, #6282951
Adam S. Weiss, #6256842
POLSINELLI PC
150 North Riverside Plaza, Suite 3000
Chicago, IL 60606
T: 312.819.1900
F: 312.819.1910
sgilbert@polsinelli.com
aweiss@Polsinelli.com
Firm No. 47375

CERTIFICATE OF SERVICE

The undersigned hereby certifies that ***Defendant-Appellant's Brief and Supplemental Appendix*** was electronically filed with the Clerk of the Court using the Odyssey File & Serve System on May 3, 2023 which will send notification of such filings to all attorneys of record, and further certifies that the undersigned will serve a copy of ***Defendant-Appellant's Brief and Supplemental Appendix*** on May 3, 2023, to the following via email:

Douglas A. Albritton
Peter G. Hawkins
Actuate Law LLC
641 West Lake, 5th Floor
Chicago, IL 60661
doug.albritton@actuatelaw.com
peter.hawkins@actuatelaw.com

Under penalties as provided by law, pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

/s/ Scott M. Gilbert

Counsel for Defendant-Appellant FourKites, Inc.
Scott Gilbert, #6282951
Adam Weiss, #6256842
Polsinelli PC
150 N. Riverside Plaza, Suite 3000
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Tel: (312) 463-6375
sgilbert@polsinelli.com
aweiss@polsinelli.com