No. 129227

IN THE SUPREME COURT OF ILLINOIS

PROJECT44, INC.,	)	
	)	On Appeal from the Appellate Court
Plaintiff-Appellee,	)	of Illinois, First Judicial District
	)	
v.	)	No. 1-21-0575
	)	
FOURKITES, INC.,	)	Circuit Court of Cook County,
	)	Illinois, County Department, Law
Defendant-Appellant.	)	Division
	)	
	)	Circuit Court No. 2020-L-004183
	)	
	)	The Honorable James E. Snyder
	)	Judge Presiding

BRIEF AND ARGUMENT OF PLAINTIFF-APPELLEE PROJECT44, INC.

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TABLE OF CONTENTS

INTRODUCTORY PARAGRAPH

Plaintiff project44, LLC ("project44"), formerly known as project44, Inc., initiated this action for defamation *per se* and conspiracy against Defendant FourKites, Inc. ("FourKites") and unnamed defendants when it learned in pre-suit discovery that FourKites and unknown others used two fictitious email accounts to send defamatory *per se* communications to project44's new Chief Revenue Officer and two outside members (non-employees) of its Board of Directors, accusing project44 of engaging in financial improprieties and criminal activity, and further suggesting to the Revenue Officer that he quit his job. Before project44 could complete discovery into the circumstances of this wrongful conduct, including unveiling the identity of a user who logged into one of the email accounts, the circuit court dismissed the action, concluding that the communications, while otherwise actionable, were not "published" as a matter of law because of who the communications were sent to. The Parties agree that this holding was unprecedented. On project44's appeal, the Appellate Court of Illinois, First Judicial District vacated and remanded the dismissal. FourKites appeals to this Court.

ISSUE PRESENTED FOR REVIEW

Whether uninvited, third-party defamatory *per se* statements about a corporation made to employees and non-employee directors of the corporation, whether of a certain corporate status or not, should be treated differently than intracorporate communications among a corporation's agents under Illinois defamation law, so as to exempt speakers of false statements from defamation claims.

STANDARD OF REVIEW

As project44's complaint was dismissed pursuant to 735 ILCS 5/2-615 for failure to state a claim, this Court's standard of review is *de novo*. *See, e.g., Solaia Tech., LLC v. Specialty Pub. Co.*, 221 Ill.2d 558, 579 (2006). Further, this Court accepts:

> as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. In addition, the allegations in the complaint must be construed in the light most favorable to the plaintiff. A cause of action should not be dismissed under section 2–615 unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to recovery.

Heastie v. Roberts, 226 Ill.2d 515, 531 (2007); *see also Krueger v. Lewis*, 342 Ill.App.3d 467, 470 (1st Dist. 2003).

JURISDICTION

FourKites's Opening Brief ("Op. Br.") correctly sets forth the basis for this Court's jurisdiction.

STATEMENT OF FACTS

As this matter comes to this Court on appeal from the Appellate Court's reversal of the circuit court's grant of FourKites's 735 ILCS 5/2-615 motion to dismiss, the facts set forth below are taken from project44's Complaint.

The Parties.

Project44 (commonly referred to as "p44") is a for-profit Delaware limited liability corporation with its principal place of business in Chicago, Illinois. (A 119[1], at ¶ 12; C 141 V1, at ¶ 12). Prior to February 7, 2022, project44 operated as a Delaware corporation.

[1] Citations herein to "A" are to materials contained in the Appendix to FourKites's Opening Brief. Citations herein to "C" are to materials contained in the Record on Appeal submitted to the Appellate Court, 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.

(*Id.*). 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. (*Id.*).

FourKites is a for-profit Delaware corporation with its principal place of business in Chicago, Illinois. (A 119, at ¶ 13; C 141 V1, at ¶ 13). FourKites also is in the highly competitive shipping logistics industry and is a direct competitor of project44. (*Id.*).

Also named as defendants in the Complaint are Jane Doe, John Doe #1, John Doe #2, and John Does #3-25 as anonymous defendants (hereinafter "the Doe Defendants"). (A 118, at ¶¶ 8-9; C 140 V1, 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 below and, likewise, none of them joined FourKites's motion to dismiss. (A 182; C 268 V1). When project44 caused a subpoena to be issued to AT&T Mobility LLC ("AT&T) to learn the owner(s) of internet protocol addresses belonging to AT&T which were used to log into the fictitious email accounts (explained below), Defendant Jane Doe petitioned to intervene in the circuit court (having received notice from AT&T that it would disclose his or her identity absent court order) in order to attempt to quash said subpoena. (A 456 – A 457; C 546 – C 547 V1). That petition was denied, and the subpoena subsequently rendered moot by the circuit court's dismissal order. (A 54; C 329 V1; SUP C 8).

The May 19th Defamatory Communication.

On May 19, 2019, one or more persons or other entities using the email address kenadams8558@gmail.com and the name "Ken Adams" transmitted an email entitled

"Accounting improprieties at P44" ("the May 19th communication") to Jim Baum and Kevin Dietsel, who were both non-employee, outside members of project44's Board of Directors. (A 119-120, at ¶¶ 14-16; A 135; C 142 V1, at ¶¶ 14-16; C 17 V1). This communication is divided into five paragraphs, three of which are numbered. (A 120, at ¶ 16; A 135; C 142 V1, at ¶ 16; C 17 V1). The first numbered paragraph alleges that that "Ex employees [of project44] are silenced with legal threats and defamation suits." (A 120, at ¶ 17; A 135; C 142 V1, at ¶ 17; C 17 V1). 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.*). The word "they" refers to project44. (A 120, at ¶ 17; C 142 V1, at ¶ 17).

The first sentence of the second numbered paragraph states that "[t]here is rampant accounting improprieties" at project44. (A 120, at ¶ 19; A 135; C 142 V1, at ¶ 19; C 17 V1). 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." (A 121 at ¶¶ 20-21; A 135; C 143 V1, at ¶¶ 20-21; C 17 V1). 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." (A 121 – A 122, at ¶ 22; A 135; C 143 V1 – C 144 V1, at ¶ 22; C 17 V1). 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." (A 122, at ¶ 23; A 135; C 144 V1, at ¶ 23; C 17 V1).

The sender(s)' comparison to "Theranos" refers to Theranos Inc., a now-defunct company that, along with its founder Elizabeth Holmes and president Ramesh "Sunny" Balwani, was charged by the U.S. Securities and Exchange Commission with securities fraud and indicted on multiple counts of federal wire fraud charges. (A 122, at ¶ 23; A 137 – A 143; C 144 V1, at ¶ 23; C 25 V1 – C 31 V1). Since the commencement of this litigation, both Ms. Holmes and Mr. Balwani have been convicted of multiple criminal offenses and sentenced to significant prison terms. *See* U.S. V. ELIZABETH HOLMES, ET AL., https://www.justice.gov/usao-ndca/us-v-elizabeth-holmes-et-al (accessed June 1, 2023).

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. (A 123, at ¶ 25; C 145 V1, 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 Tim Bertrand (tbertrand@project44.com), project44's (at the time) newly hired Chief Revenue Officer ("the May 27th communication"). (A 123, at ¶ 27; A 124 at ¶ 30; A 145; C 145 V1, at ¶ 27; C 33). 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." (A 123, at ¶ 29; A 145; C 145 V1, at ¶ 29; C 33 V1). 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. They will tell you the truth." (A 123 – A 124,

at ¶ 29; A 145; C 145 V1– C 146 V1, at ¶ 29; C 33 V1). Like "Ken Adams," the name "Jason Short" is a pseudonym, as project44 has not previously employed anyone named "Jason Short," nor has it ever worked with or become aware of any person having this name. (A 124, at ¶ 31; C 146 V1, 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"). (A 124, at ¶ 33; C 146 V1, 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. (A 124, at ¶ 34; C 146 V1, 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, and once this is known a subpoena can be sent to the ISP to obtain identifying information for the user. (A 124 – A 125, at ¶ 34; C 146 V1 – C 147 V1, at ¶ 34).

On May 30, 2019, before commencing this action, project44 filed an Ill. S. Ct. R. 224 verified petition for discovery in the Circuit Court of Cook County naming Google as respondent (the "Google Petition"). (A 125, at ¶ 35; A 147 – A 153; C 147 V1, at ¶ 35; C 35 V1 – C 41 V1). The Google Petition requested that Google provide project44 with, *inter alia*, the IP address information for the kenadams8558 and jshort5584 email accounts. (A 125, at ¶ 35; A 153; C 147 V1, at ¶ 35; C 41 V1). 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." (A 125, at ¶¶ 36-37; A 155 – A 166; C 147 V1, at ¶¶ 36-37; C 43 V1 – C 54 V1). The information provided in these documents disclosed FourKites's involvement by, among other things, identification of a recovery phone number for the "kenadams8558" Gmail account that belonged to FourKites, as well as IP addresses associated with the "jshort5584" Gmail account belonging to FourKites. (A 126 – A 127, at ¶¶ 38-41; A 163 – A 181; C 148 V1– C 149 V1, at ¶¶ 38-41; C 51 V1– C 69 V1).

The Circuit Court Defamation Lawsuit And FourKites's Motion To Dismiss.

On April 13, 2020, project44 filed its Complaint for defamation and conspiracy to defame in the circuit court. (A 115; C 137 V1). On January 20, 2021, FourKites moved to dismiss pursuant to 735 ILCS 5/2-615 for failure to state a claim. (A 182; C 268 V1). FourKites's arguments were that the emails: (1) did not amount to defamation *per se*; and (2) were not published. (A 182 – A 183; C 268 V1– C 269 V1). The circuit court heard argument on April 21, 2021, and at the conclusion of said hearing granted FourKites's motion because, while it believed that the statements were defamatory *per se*, it did not believe that the email communications were "published," stating:

> 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.

(A 56; A 103 – A 104; R 2 V2; R 49 V2 – R 50 V2).

The record dismissal order 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." (A 54; SUP C 8). The court's order also mooted project44's subpoena seeking information to identify AT&T Mobility user Defendant Jane Doe. (*Id.*).

The First District Appellate Proceeding.

On May 20, 2021, project44 filed its notice of appeal to the Appellate Court. (A 613). Briefing was completed on December 3, 2021, oral argument was heard on November 1, 2022, and on November 22, 2022, the court issued a fifty-seven-paragraph opinion reversing the circuit court's dismissal order. (A 1 – A 18; A 391). Central to the Appellate Court's holding was its prior jurisprudence regarding "intracorporate communication," most notably as set forth in *Popko v. Continental Casualty Co.*, 355 Ill.App.3d 257 (1st Dist. 2005), which held that communication between employees in the same corporation *were* "published" for purposes of a defamation claim. (A 7 – A 11). Titles and corporate hierarchy have no part in this analysis. Noting that "Illinois is part of a growing majority of jurisdictions that has adopted the 'intracorporate publication' rule," the court held that this rule is part of a broader proposition, namely that:

> 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 with the company can be just as damaging as defamation published beyond the corporate wall. It would be odd, indeed, for the law to redress one of those reputational harms but not the other.

(A 8 – A 9). Commenting that FourKites's actions amount to "corporate sabotage," the court found that the communications at-issue were indeed published. (A 10 – A 17). The court likewise rejected FourKites's claims that its holding would "'eviscerat[e]' the

publication requirement in the context of commercial defamation," and instead held that "the filter of 'privilege'" was sufficient to protect the interests of "sincere, good-faith communicators." (A 13 – A 16).

ARGUMENT

This case presents the question of whether uninvited, third party defamatory statements, made about a company to one or more of that company's employees and directors, should be: (a) considered "unpublished" – perhaps depending solely upon the stature of the recipient at the company – and therefore not actionable as a matter of law; or (b) assessed pursuant to existing qualified privilege law whereby the communication is recognized for what it was – published – but may nevertheless be unactionable because of an applicable privilege. Project44 submits that the latter approach, which the Appellate Court adopted, is more congruous with existing defamation (and corporate) law, presents the more just framework for assessing individual cases, adds fewer artifices into the analysis, and more fairly calls FourKites to account for the strategic communications it made here against project44's reputation to actual people, not "the company."

Existing caselaw from Illinois and other jurisdictions and from learned and long-accepted treatises supports this argument. In contrast, the rule FourKites proposes is entirely at odds with existing law and would lead to inconsistent results in future defamation cases, due solely to the arbitrary outcome of *who* received the defamatory communication.

I. This Court Should Hold That The Email Communications Were Published.

A. Project44, Like Any Corporation, Has Its Own Reputation To Protect, Including With Its Employees.

Both FourKites and project44 agree that the tort of defamation "is intended to protect against reputational harm caused by false statements." (Op. Br. at 5, citing RESTATEMENT (SECOND) OF TORTS § 577, cmt. b (1977)). FourKites also concedes that the Appellate Court's observation that a "corporation cares abouts its reputation among its own employees . . . is no doubt true." (*Id.* at 15). FourKites further admits "[t]here is no doubt that not all corporate representatives are the legal equivalent of the corporation for the purposes of defamation." (*Id*. at 20). Given this series of admissions, then, it is difficult to discern a logical basis for concluding that falsehoods made to certain employees are nonetheless beyond the reach of defamation law when the defamed party is a corporate entity.

B. The Restatement (Second) Of Torts And Illinois Precedent Confirm That Defamatory Communications Made To Any Agent Of A Defamed Corporation Can Give Rise To A Claim For Defamation.

FourKites's contention that the communications at-issue are not published is squarely at odds with the Restatement (Second) of Torts, which quite plainly states that a communication to an agent of the defamed person is a publication:

> *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). Moreover, a plain reading confirms that this Comment makes no distinction as to the type or title of the

servant or agent to whom defamatory communications may be published. Thus, in those jurisdictions that follow this portion of the Restatement – which include Illinois – FourKites's argument is without support. *See, e.g., Missner v. Clifford*, 393 Ill.App.3d 751, 763 (1st Dist. 2009), (citing RESTATEMENT (SECOND) OF TORTS § 577, cmt. e (1977) for the proposition that "the communication of defamatory material from a principal to his agent, as in an attorney-client relationship, also may be a publication").

While there does not appear to be an Illinois case predating the Appellate Court's decision in this matter applying § 577, Comment *e* to third-party communications made to agents of a defamed corporation, prior Illinois decisions have looked to the Restatement when in concluding that communications made *within* the corporate context are published, including communications involving executives. Specifically, in *Popko v. Continental Casualty Co.* the First District deemed to have been published statements made about an employee that were communicated to both an in-house employee working as a "managing trial attorney" (*i.e.*, a manager) and a corporate vice president. 355 Ill.App.3d 257, 258-66 (1st Dist. 2005). While recognizing that "courts remain badly split" on whether these intracorporate communications are published, the *Popko* court acknowledged that Illinois is one of the states that "recognize that communication within a corporate environment may constitute publication for defamation purposes." *Id.* at 261-62.

In finding the communications to have been published, the First District looked to § 577, Comment *i* of the Restatement which, much like Comment *e*, addresses communications within the principal/agent context, and holds that a defamatory communication from one agent to another agent of the same principal is a publication by both the first agent and the principal:

> *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); *see also Popko*, 355 Ill.App.3d at 265-66. The *Popko* court expressly rejected defense claims that the intracorporate speech at-issue merely constituted "a corporation 'talking to itself,'" and instead relied upon its sister federal court's decision in *Jones v. Britt Airways, Inc.*, 622 F.Supp. 389, 391 (N.D. Ill. 1985) for the proposition that publication is accomplished when the statement is communicated to any third party, including agents of the defaming party:

> 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."

Popko, 355 Ill.App.3d at 261-62 (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 likewise concludes that a statement is published if it reaches a third person, regardless of whether that person is an agent of the party making the defamatory statement:

> [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, at 798 (5th ed. 1984); *see also Jones*, 622 F.Supp. at 391. The *Jones* court went on to observe 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 intracorporate speech is not published – confuses "the issues of publication and privilege." 355 Ill.App.3d at 262. Instead, *Popko* held that the speech at-issue was unquestionably published, yet may still be subject to a conditional privilege and thus not actionable. *Id.* at 264-65. While the plaintiff argued that such a holding would "inordinately" expose corporations to liability, the *Popko* court disagreed, reasoning that the qualified-privileged analysis strikes an appropriate balance, as compared to an absolute privilege in favor of a corporation to defame others with impunity:

> [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.

Id. at 265.

Here, the Appellate Court repeatedly cited to *Popko* in its decision reversing the circuit court, and we respectfully contend that said reasoning should be followed by this Court. (A 7 – A 9; A 15). The holding in *Popko* (along with *Missner*), sets forth principles to guide Illinois courts in matters involving publication where the defamed party is a corporation and the audience is one or more of the company's employees and directors, namely:

1. Consulting the Restatement (Second) of Torts on matters involving defamation;
2. Deferring to finding communications published, and instead evaluating whether said speech is subject to a conditional privilege; and

3. Refusing to resolve issues of publication in a manner such that they would "amount to an absolute privilege . . . against all defamation actions."

(*Popko*, 355 Ill.App.3d at 264-65; *Missner*, 393 Ill.App.3d at 763). While, admittedly, prior Illinois caselaw addressed these circumstances only in instances where a company was a *defendant* in a defamation action, FourKites has advanced no colorable argument regarding why the Appellate Court erred in extending this reasoning to where a company is the *plaintiff*.

Instead, FourKites contends without support that "the question it [*Popko*] resolved was materially different than that presented here." (Op. Br. at 14). Yet – as project44 explained when FourKites made this argument before the Appellate Court – this is a red herring, as there is no dispute that the issue at bar is one of first impression in Illinois. (*See* A 395 – A 396). Seeing that, to the best of anyone's knowledge (including the Appellate Court's), *Popko* is the only Illinois case that has addressed in detail publication within the confines of a corporation, the decision is uniquely pertinent to this matter, and thus the First District's reasoning in that case can be an aid to this Court. *See, e.g.*, *People v. Stanley*, 397 Ill.App.3d 598, 607 (1st Dist. 2009) (stating that, when addressing a matter of first impression, the court may draw analogies to "other Illinois cases, as well as decisions from other jurisdictions"); *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).

Given this, FourKites's contention that communications defaming a company are never considered published when made solely to executive agents of said company is nothing more than the "absolute privilege . . . against all defamation actions" the *Popko*

court warned against. 355 Ill.App.3d at 265. To support its rejection of the reasoning in *Popko*, FourKites relies upon argument drawn from general corporate principles regarding the unremarkable proposition that a corporation can act only through its agents, directors, and officers. (Op. Br. at 8-9; A 367; A 134 – A 135; C 271 V1 – C 272 V1). Importantly, none of these cases address publication in the context of a defamation claim, and – contrary to FourKites's assertions – none 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* 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. 306 Ill.App.3d 639, 647 (1st. Dist. 1999); (Op. Br. at 8). And while the *Small* court found the conspiracy claim there 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-conspirator when the agent acts outside of 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"). Given that corporate law recognizes these distinctions, FourKites's proposal properly is cast as too rigid given other Illinois law.

Similarly, FourKites's reliance on *TABFG, LLC v. Pfeil* for the proposition that "only managers, directors and officers of a corporation are authorized to act on the

corporation's behalf" is misplaced. 746 F.3d 820, 825 (7th Cir. 2014); (Op. Br. at 9). That case dealt with the agent privilege derived from the business judgment rule which "protects [agents] [] from personal liability for their decisions made on behalf of the corporation," but *TABFG* and subsequent cases have established that this privilege is conditional, not absolute. 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).

FourKites's attacks on the authorities relied on by *Popko* are similarly without merit. For example, FourKites's contention that Prosser allegedly "reflects a recognition that an officer of the company *is* the company for purposes of publication" relies on a tortured construction of that treatise. (Op. Br. at 16). While it is undisputed that Prosser, when describing to whom a defamatory statement may be published, included "officer[s], even when the *defendant* is a corporation," and did not include a similar statement for a corporate plaintiff, a plain reading makes clear that Prosser was simply commenting on reported cases. W. PROSSER & W. KEETON, TORTS § 113, at 798 (5th ed. 1984). That Prosser was unaware of any opinion that addressed communications made to an officer of the defamed is unsurprising, given the paucity of caselaw discussing the issue. Indeed, the Appellate Court disposed of this argument succinctly when it commented that "[i]f 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." (A 13).

C. Sister State Precedent Provides Persuasive Authority That The Communications At-Issue Should Be Considered Published.

While this case is a matter of first impression in Illinois for this Court, other states have confronted these issues (as project44 previously argued to the Appellate Court and as the court reasoned in its opinion). For instance, in *Sleepy's LLC v. Select Comfort Wholesale Corp.*, 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. 909 F.3d 519, 528 (2d Cir. 2018). Importantly, it was clear from the *Sleepy's* district court decision (which the Second Circuit cited at length) that all of the recipients of the defamatory communications were upper-echelon employees of the plaintiff, with titles such as "Regional Manager," "District Manager," "Regional Sales Manager," or "District Sales Manager." *Sleepy's LLC v. Select Comfort Wholesale Corp.*, 133 F.Supp.3d 483, 491-94 (E.D.N.Y. 2015), *aff'd in part, vacated in part, remanded*, 909 F.3d 519 (2d Cir. 2018); *see also Sleepy's*, 909 F.3d at 523-29 (referencing the *Sleepy's* district court opinion more than ten times). Nevertheless, these employees' positions held no sway over the Second Circuit's decision that the communications at-issue were published.

Instead, the Second Circuit looked to *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 led the *Sleepy's* court to conclude that a principal and agent are different people, and publication to the agent is, in fact, publication to a third party:

> [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, 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 the cases that follow it leave no doubt that Restatement § 577 Comment *e* applies to both communications made to agents of the defamed as well as agents of the defamer, and *Sleepy's* confirms that this reasoning applies regardless of the agents' positions within a defamed company.

FourKites's only criticism of *Sleepy's* is to claim that "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." (Op. Br. at 13). Yet, this presupposes that such an analysis is necessary. Under the New York law followed by *Sleepy's* (which was based on the Restatement) no distinction with respect to publication is made based on the position of an employee within a company. *Sleepy's*, 909 F.3d at 528. Thus, the Second District had no reason to undertake the analysis that FourKites claimed that it should have.

Perhaps aware of this, FourKites goes on to attempt a reconciliation between its proposed sweeping prohibition on publication and the *Sleepy's* holding, stating:

> 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.

(Op. Br. at 13) (emphasis added). This path FourKites's asks this Court to take based upon this inexplicit argument is untenable. First, the standard is wholly unprecedented. As discussed *infra*, the caselaw FourKites cites in support of its position does not limit nonpublication so narrowly. (*See* Op. Br. at 12-13) (discussing *Fausett v. American Resolution Mgmt. Corp.*, 542 F. Supp. 1234 (D. Utah 1982)); *see also* § II, *infra*. Further, FourKites's claim that no inquiry into the responsibilities of the recipients of the emails at-issue is necessary "given the role played by those who received the Emails," is, for the reasons discussed herein, blind to reality. Other than their titles, no facts have been adduced that set forth Baum's, Dietsel's, and Bertrand's duties within project44, and no other factual record has been developed that could support FourKites's claims. More importantly, FourKites is either unwilling or unable to articulate the metes and bounds of where its proposed "line" is drawn on the "corporate ladder." (Op. Br. at 13). Its failure to do so reflects the unworkability of its argument. And, in any event, there is no uniform definition in the corporate world as to who qualifies as an executive or officer. Making the issue of publication in defamation law turn upon these vagaries invites too much confusion into an issue that is more readily addressed as the Appellate Court held.

In contrast to FourKites's proposed amorphous and boundless nonpublication rule, decisions such as *30 River Court East Urban Renewal Co. v. Capograsso* demonstrate that the approach set forth by the Restatement and followed by the Appellate Court is practical and workable in experience. 892 A.2d 711 (N.J. Super. 2006). In *Capograsso*, which is notably absent from FourKites's Supreme Court Brief (despite the fact that FourKites cited and discussed it in its filings before the circuit and appellate courts), a defendant tenant of a corporate apartment complex made statements to the complex's concierge, which the

plaintiff property owner contended were defamatory. 892 A.2d at 713-14; (*see also* A 187; A 373 – A 374). While the trial court concluded that the statements had been published, the Appellate Division reversed this finding. *Capograsso*, 892 A.2d at 717-18. Central to this holding was the fact that "the apartment's management *invited and encouraged* tenants to communicate their concerns about any tenancy issue to the . . . concierge . . . ." *Id.* at 714 (emphasis added). Relying on the portion of § 577, Comment *e* of the Restatement that states "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," the court stated that "[w]e conclude that a landlord, having designated an agent to accept tenant complaints, cannot sue a tenant in defamation for complaining to the agent." *Id.* at 717 (citing RESTATEMENT (SECOND) OF TORTS § 577, cmt. e).

Importantly, the *Capograsso* court was only able to reach the above conclusion after a factual record had been developed in that matter, whereas again here no such record has been established. The *Capograsso* opinion also confirms that, in contrast to the sweeping prohibition on publication proposed by FourKites, the measured approach set forth by the Restatement better promotes justice. It is for this reason that, for example, statements made to an employee operating a company's "customer complaint" line generally would not be found to be published. And this is also why FourKites's hypothetical of the single-member LLC necessarily fails, as the sole proprietor is the only individual who could receive such communications on behalf of the LLC.

D. FourKites's Proposed Publication Rule Is Incongruent With Existing Defamation Law That It Does Not Challenge.

FourKites goes much too far with its claim that the Appellate Court's opinion "upends the tort of defamation in Illinois by eliminating the critical gatekeeping function

served by the publication requirement in cases brought by corporate plaintiffs." (Op. Br. at 3). As noted, Illinois already recognizes that communications among employees of a corporation are "published" within the context of intracorporate communication defamation cases, which are considered within a qualified privilege framework that has not by any measure overburdened the courts or inconvenienced litigants any more than any other kind of case (and FourKites certainly cites no contrary study or other data). That framework recognizes that the nature and circumstances of the communications at-issue matter in defamation cases. Importantly, FourKites never offers a legal or other basis for creating distinct lines of publication law dependent upon to whom within a corporation the communications are made.

Given this, what *would* upend Illinois defamation law, or at the very least create inexplicable inconsistencies and varying outcomes in defamation cases, would be to adopt FourKites's blanket, unassailable "no publication" rule – a proposal convenient only to FourKites in this particular case.

For starters, its proposal treats actors who make similar defamatory statements differently, even if the outcome and basis for the communication were identical. For example, if a company's human relations staff directed an employee to concoct a false embezzlement claim as a basis for terminating a third employee, the company's actions, through the conduct of its agents, would be subject to the current qualified privilege analysis (that the company certainly would fail and a claim for defamation by the third employee would succeed). Under FourKites's rule, no problem if the speaker happens to be an uninvited third party making false embezzlement claims about a competitor to that

competitor's employees, so long as the targeted employees stood at some unspecified height on the proverbial corporate ladder.

If one of those contacted employees were to terminate his or her employment based upon these false claims, FourKites's position would be that it has no idea why that happened (or perhaps that such is not its fault). This is incongruous not only with the other side of the corporate defamation coin – the intracorporate communication doctrine – but also with defamation damage law, where cases already recognize that the loss of employees is a recoverable element of the reputational harm that a corporation may suffer when false statements are made about it. *See, e.g., Network Cap. Fund. Corp. v. Ramirez*, No. 13-1294, 2013 WL 12204306, at * 3 (C.D. Cal. Nov. 4, 2013). FourKites is thus contending that it can hold a press conference and defame its corporate competitors, and that those companies are without redress if only highly statured employees resign.

This example highlights a second problem with FourKites's proposal, namely that it treats all "higher" employees and directors the same and as one with the subject company, without examination. But FourKites's own defamatory communications betray that this is a just way to consider these kinds of cases. In both sets of emails detailed above, FourKites communicated with the outside directors and revenue officer as though each were *separate* from project44. In the May 19th email to the outside directors, the speaker acts as though he or she is sharing information with the recipients that they do not know, and never refers to project44 as "them" or "their company." The plain gist of the email is to have the directors think unfavorably of project44 based upon things the speaker believes they do not yet know.

Similarly, the May 27th email to the new Chief Revenue Officer treats him as though he is "on the outside" regarding the defamatory information shared, and advises that he should quit his job. Again, if FourKites believed Mr. Bertrand was project44, it would not have written in this manner. To put it another way, FourKites specifically targeted these two sets of people because it believed that its message to them would negatively impact project44. To put it yet another way, FourKites did not think of these audience members as one in the same with project44 in the manner that its attorneys now argue to this Court.

The Appellate Court was blunter in its assessment of FourKites's conduct, referring to it as "corporate sabotage" and observing that:

> 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.

(A 10). Based on this reasoning the Appellate Court held that:

> It would be unrealistic, unfair, and contrary to any principle of defamation law we recognize to embrace the artifice that [Messrs. Baum, Dietsel, and Bertrand] . . . 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.

(*Id.*). To be clear, project44 does not contend that FourKites's "intent" in sending the communications should be an element that is considered in the publication analysis, but it nevertheless confirms that project44 had 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 . . . ." (Op. Br. at 10).

It also is not accurate to suggest that Illinois courts are ill equipped or overburdened by having to consider whether actions are privileged or not. Aside from the intracorporate communication cases that FourKites does not argue should be exempted from existing

qualified privilege law, this Court has held that certain privileges protect conduct that might otherwise be said to amount to other torts including, for example, tortious interference with contract. *See, e.g.*, *HPI Health Care Servs., Inc. v. Mt. Vernon Hosp., Inc.*, 131 Ill.2d 145, 157-60 (1989).

These arguments also dispense with FourKites's "puppet-puppeteer" and "single-member LLC" arguments. (Op. Br. at 9, 11). First, that is not what happened here. Project44 is a large organization and FourKites strategically targeted three specific people and messaged them as though each could be told something they did not know about the company – and certainly not as though each of them were "the company" – in an effort to at least separate one of them from his employment. Second, Illinois already recognizes that intracorporate communications are published, even though FourKites would describe the same as the company talking to itself. Third, FourKites offers no basis to conclude that the qualified privilege approach would provide any less protection against the hypothetical cases it imagines (and which are not its case).

Given the incongruent outcomes that arise from FourKites's suggested rule, the Appellate Court's ruling reflects a measured approach, couched within the Restatement (Second) of Torts and existing Illinois and sister state precedent. FourKites simply ignores the Appellate Court's reasoning that good-faith communicators in the corporate context are adequately protected by the qualified privilege doctrine, failing to even use the term "qualified privilege" in its opening brief. That qualified privilege analysis, and not the artifices of who made and who received a defamatory communication, properly balances the concerns of free speech with the needs of a corporation to protect its reputation.

II. FourKites's Reliance on *Fausett* Contradicts Established Illinois Jurisprudence.

Given the dearth of Illinois caselaw on this topic generally, FourKites relies upon a single out-of-state case, *Fausett v. American Resolution Management Corp.*, that adopts the nonpublication rule it seeks.[2] 542 F.Supp. 1234 (D. Utah 1982); (Op. Br. at 12). There is no denying that *Fausett* holds that defamatory communications made to a company's upper-echelon personnel are not published. But, contrary to FourKites's proposal, the *Fausett* court more broadly extends its nonpublication rule to a company's "management." *Id.* at 1241. Project44 respectfully submits that the *Fausett* rule is inconsistent with the other side of the Illinois defamation coin regarding intracorporate communications and, thus, if adopted, would lead to the inconsistent results alluded to above. Further, as *Popko* confirmed, courts in Illinois are willing to take positions on issues involving publication that contradict the holdings of other jurisdictions. 355 Ill.App.3d at 261-62.

Take, for example, FourKites's reliance on the *Fausett* court's pronouncement that:

> 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.

(Op. Br. at 12) (*citing Fausett*, 542 F.Supp. at 1241). This statement is unprecedented, because the *Fausett* court cites no case in support of this blanket conclusion. It instead

[2] In its briefing before the circuit court and Appellate Court, FourKites also cited to a pair of Florida cases, namely *Hoch v. Loren,* 273 So.3d 56 (Fla. 4th App. Dist. 2019), and *Advantage Personnel Agency, Inc. v. Hicks & Grayson, Inc.*, 447 So.2d 330 (Fla. Dist. Ct. App. 1984). (*See, e.g.*, A 370 – 372; A 416; A 461 – A 462). However, the Appellate Court refused to find these opinions persuasive "because Florida is a jurisdiction that, unlike Illinois, does not recognize the 'intracorporate publication' doctrine," and "Florida courts do not believe that individual employees have reputational interests distinct from their corporation, but Illinois does." (A 12).

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").

On top of this, *Fausett* declined to find persuasive § 577, Comment *e* of the Restatement, by inexplicably concluding that it 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 already established herein, Comment *e* is not limited solely to intracorporate 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.

Additionally, while the *Fausett* court claims that both *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), support its interpretation of § 577 Comment *e* (542 F.Supp. at 1242), a plain reading of both cases confirms that neither opinion references this section of the Restatement. On the contrary, both cases contradict the reasoning of the Restatement, as they hold that intracorporate communications *are not* published. *See 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 it is possible that the *Fausett* court 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.*, 113 Nev. 188, 192 (1997) (overruling *Golden Spike* and finding communications published, consistent with § 577 of the Restatement). And, as the Appellate Court observed, both the decisions in *Simpson* and *Popko* are "part of a growing majority of jurisdictions that . . . [have] adopted the 'intracorporate publication' rule," and which, project44 contends, would find publication here as well. (A 8) (citations omitted).

In contrast to *Fausett*, the First District's decision in *Popko* cited to no less than fifteen authorities in support of its holding that intracorporate communications are published, and both analyzed and rejected prior caselaw holding to the contrary. 355 Ill.App.3d at 261-62 (analyzing and rejecting *Prins v. Holland–North America Mortgage Co.,* 107 Wash. 206 (1919)). The principles espoused in *Popko* are both directly applicable to the instant matter and warrant a finding that the communications were published, and the Second Circuit's holding in *Sleepy's* offers a similarly well-reasoned counterpoint to the *Fausett* opinion.

III. The Appellate Court's Approach Will Not Shackle Free Speech.

FourKites claims that if its proposed nonpublication rule were rejected, it would result in a "shackl[ing of] free speech," as such a ruling would subject purveyors of good faith criticism to drawn-out and expensive litigation. (Op. Br. at 17-18). First of all,

FourKites has never admitted that it sent the communications at-issue, let alone had tested by discovery any claim that its surreptitious emails were good faith in any matter. In any event, FourKites focuses solely on the *absolute* privilege of truth, citing to caselaw stating that this defense "is no protection against the incredibly high cost of litigation and the distraction from business that accompanies that cost." (Op. Br. at 18 (citations omitted)); *see also Hnilica v. Rizza Chevrolet, Inc.*, 384 Ill.App.3d 94, 97 (1st Dist. 2008) (stating "[t]ruth is an absolute defense to defamation").

While FourKites may have defeated this straw man that there is expense in demonstrating truth – a concept hardly foreign in our society – it glosses over the multiple other defenses and privileges available to a defamation defendant. In fact, not once in its Opening Brief does FourKites recite the phrase "qualified privilege," and thus it ignores precedent demonstrating that such conditional privileges do in fact prevent flawed defamation lawsuits from "slingshot[ting] past the fundamental issue of reputational harm straight to damages." (Op. Br. at 10, 19); *see also Kuwik v. Starmark Star Mktg. & Admin., Inc.*, 156 Ill.2d 16, 25 (1993) (discussing elements of the qualified privilege defense). In fact, just last year this Court in *Dent v. Constellation NewEnergy, Inc.* (issued after briefing before the Appellate Court in this matter was completed) confirmed that defamation defendants "can raise qualified privilege in . . . section 2-615 motion[s]" to dismiss on the pleadings. 2022 IL 126795, ¶ 28. FourKites does not acknowledge this decision. FourKites similarly has not offered a reasoned basis to reject the Appellate Court's conclusion that it is not fair to say that all complaints sent to a corporation will lead to expensive litigation, because, as the court held, qualified privilege and the limitations set

forth in the Restatement properly cabin bad faith actions and ensure that the law of defamation remains focused on protecting reputational harm.

In short, none of FourKites purported policy arguments provide a persuasive explanation for why this Court should disturb both the *Popko* court's reasoning and the Appellate Court's opinion, and enact a transformative and arbitrary black-line rule regarding publication.

CONCLUSION

There is no denying that the commercial marketplace and the marketplace of ideas, both areas where it is undeniably incredibly important to protect free speech, can be incredibly rough and tumble requiring a certain steadiness to succeed. It is, of course, a common refrain and accepted social more to state that this competition raises us all through better policy and better goods and services. But our system does not permit that anything goes, and therein lies the problem with FourKites's suggested absolute publication defense. It shields all knowingly and purposefully made false speech about a company, no matter the consequence, from all defamation claims based solely upon the audience member's position on the ever-evolving concept of the corporate ladder.

Even if it is accepted as true that qualified privilege defenses "cost more" to advance in some undefined measure than FourKites's absolute defense, project44 submits that, in this very important area of the law, said expense is well worth it to deter malicious conduct such as this and, failing that, to prosecute claims against actors who would knowingly make defamatory claims about a company to that company's employees. The approach already followed for intracorporate communications, *i.e.*, finding defamatory communications to be 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*, 156 Ill.2d at 26. It thus is not surprising that multiple treatises consider this approach to publication "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).

WHEREFORE, for the foregoing reasons, Plaintiff-Appellee project44, LLC respectfully requests that the judgment of the First District Appellate Court, which reversed the Circuit Court of Cook County's granting of Defendant-Appellant FourKites, Inc.'s Motion to Dismiss that resulted in the dismissal of project44's complaint with prejudice, be AFFIRMED, and that this case be REMANDED to the circuit court for further proceedings consistent herewith.

Dated: June 7, 2023

Respectfully Submitted,

By: /s/ Douglas A. Albritton

One of the Attorneys for project44, LLC (formerly project44, Inc.)

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No. 129227

IN THE SUPREME COURT OF ILLINOIS

PROJECT44, INC.,	)	
	)	On Appeal from the Appellate Court
Plaintiff-Appellee,	)	of Illinois, First Judicial District
	)	
v.	)	No. 1-21-0575
	)	
FOURKITES, INC.,	)	Circuit Court of Cook County,
	)	Illinois, County Department, Law
Defendant-Appellant.	)	Division
	)	
	)	Circuit Court No. 2020-L-004183
	)	
	)	The Honorable James E. Snyder
	)	Judge Presiding

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 thirty (30) pages.

/s/ Douglas A. Albritton
One of the Attorneys for project44, LLC (formerly project44, Inc.)

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 Circuit Court No. 2020-L-004183 The Honorable James E. Snyder Judge Presiding

NOTICE OF FILING

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PLEASE TAKE NOTICE that on June 7, 2023, the undersigned electronically filed the foregoing **BRIEF AND ARGUMENT OF PLAINTIFF-APPELLEE PROJECT44, INC.** with the Clerk of the Court for the Supreme Court of Illinois by using the Odyssey eFileIL System.

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: June 7, 2023

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Defendant-Appellant.	)	Division
	)	
	)	Circuit Court No. 2020-L-004183
	)	
	)	The Honorable James E. Snyder
	)	Judge Presiding

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the **BRIEF AND ARGUMENT OF PLAINTIFF-APPELLEE PROJECT44, INC**. was electronically filed with the Clerk of the Court for the Supreme Court of Illinois using the Odyssey eFileIL system on June 7, 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 ARGUMENT OF PLAINTIFF-APPELLEE PROJECT44, INC** on June 7, 2023, to the following via email:

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