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

CHRISTOPHER S. CYNOWA,	)	
	)	
Plaintiff,	)	
	)	No. 08 L 403
v.	)	
	)	
CSSS, INC., et al.	)	
Defendants,	)	

NOTICE OF FILING

TO;

Kevin Duff & Kevin Murray
Rachlis Durham Duff & Adler, LLC
542 South Dearborn, Suite 900
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PLEASE TAKE NOTICE that on the June 7, 2010, the undersigned caused to be filed with the Cook County Clerk of Circuit Court for the Law Division, the attached copies of **PLAINTIFF'S MEMORANDUM IN REPLY TO DEFENDANTS' RESPONSE MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT**, a copy of which is hereby served upon you.

Theresa V. Johnson

PROOF OF SERVICE

I, Theresa V. Johnson, the attorney, certify under penalties as provided by law pursuant to 735 ILCS 5/1-109, that the statements set forth herein are true and correct; that I served this **NOTICE OF FILING** and **PLAINTIFF'S MEMORANDUM IN REPLY TO DEFENDANTS' RESPONSE MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT** by causing a copy to be delivered to the above named parties by____U.S. Mail (first class postage paid) and/or____email and/or____fax and/or____hand-delivery and/or____open court on June 7, 2011

Respectfully Submitted:

Theresa V. Johnson

Theresa V. Johnson, Attorney for Plaintiff

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06/07/11 NOF for Pltfs' Memo Reply to Defs' Memo Opposition to Pltf's Lv to File 2nd Amd Cmplt

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
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CHRISTOPHER S. CYNOWA Plaintiff,	)	
v.	)	No. 08 L 403
CSSS, INC., et al. Defendants.	)	

PLAINTIFF'S MEMORANDUM IN REPLY TO DEFENDANTS' RESPONSE MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

NOW COMES Plaintiff, CHRISTOPHER CYNOWA (Plaintiff), by and through his Attorney, Theresa V. Johnson and tenders his **Plaintiff's Memorandum in Reply to Defendants' Response Memorandum in Opposition to Plaintiff's Motion for Leave to Amend Complaint.**

I. BACKGROUND

Judge Marcia Maras heard Defendants Motion for Summary Judgment ("Defs' MSJ") on March 24, 2011 (**Ex. A** – Record of Proceeding – "Transcript"). The Judge indicated that although Plaintiff could have more artfully drafted the Complaint, nevertheless the totality of the Amended Complaint, the depositions, and other discovery presented evidence that Defendants made defamatory statements to parties, i.e., co-workers, other than Police Officer Adrowski.

In viewing the Plaintiff's Response to Summary Judgment ("RMSJ") in the light most favorable to the non-movant, the Judge, off the record, granted Plaintiff's oral motion to amend his Complaint. However, Defendants vociferously protested the Judge's determination to grant oral leave to amend and demanded a written Motion for Leave to Amend so Defendants could file an opposition brief. The Judge changed her ruling and granted Defendants' demand. (Id. p.)

Plaintiff filed Motion for Leave to Amend on April 7, 2011with a proposed Second Amended Complaint and Defendants filed opposition to that Motion, May 5, 2011. (**Ex. B**)

II. TIMELINE OF KEY OF EVENTS OF PROCEDURAL HISTORY IMPACTING TIMELINE OF CASE ("TIMELINE")

1. **Complaint Filing.** Plaintiff's filed Complaint was filed on January 14, 2008.

2. Defendants' 60 day Delay Filing Appearance and Initial Pleading. Prior to Defendants filing their initial pleading, Defendants' Motion to Dismiss, Defendants asked Plaintiff's counsel for two 30 day extensions to Answer or otherwise plead. Plaintiff's counsel agreed not default Defendant or oppose a later filing of their pleading. Without leave of court, Defendants filed their Motion to Dismiss May 12, 2008 – almost 90 days from filing of Plaintiff's Complaint (**Ex. C** – Appearance and Motion to Dismiss p. 1).

3. Defendants 30 Day Delay in Filing Answer. November 14, 2008, Judge Ronald Davis denied Defendants' Motion to Dismiss, after extensive briefing, and ordered Defendants to Answer the Complaint by December 14, 2008 (see Defs' MSJ Ex. 10 - Court Order). Defendants asked Plaintiff's counsel for a 30 day extension from the December 14, 2009 due date to file Answer Plaintiff's Complaint, and again Plaintiff's counsel agreed not to oppose Defendants delayed filing.. On January 14, 2009 – one year from case filing, without requesting leave of court to answer Out-of-Time, Defendants filed Answer to Complaint. (*Supra,* **Ex. C**)

3. **Carver's Evidence Deposition.** On July 31, 2009, Plaintiff took the evidence deposition of Larry Carver ("Carver"), former VP of Defendants CSSS and co-worker to Plaintiff. Carver testified that Defendants Slater, on the day Defendants fired Chris, entered the room and announced that Chris had a gun or AK47 and that he posed a threat (Pltf's RMSJ, Ex. 1, Carver dep. pp. 39-41 – hereafter "Carver dep").

4. **Dismissal on Black Line.** Unbeknownst to Plaintiff, on August 18, 2009, the case was dismissed on the Cook County Black Line. Motion to Re-instate filed February 17, 2010. After full briefing and hearing, case was reinstated June 26, 2010 (see court file Motion to Reinstate)

5. **Late Delivery of Carver Transcript.** Due to a manufacturing defect of the court reporter's equipment, Carver's transcript was not available until February 12, 2010 (*Id.*).
Deposition of Plaintiff Cynowa.

6. **Deposition of Plaintiff.** On July 16, 2010 Defendants deposed Plaintiff.

7. **Deposition of Wolford.** On August 10, 2010, Plaintiff deposed Defendant Wolford.

8. **Affidavit of Noel Flanagan.** On November 9, 2010, Noel Flanagan provides sworn Affidavit denying that he told Slater Chris had a gun or was dangerous. (Pltf's RMSJ, Ex. 6).

9. Interviews of Tushar Engregi, Mike Nikiforis, and Michael Cronin. November 30, 2010 Plaintiff's counsel interviewed Engregi and Nikiforis, and on December 2, 20110 interviewed Cronin. (See Defs' MSJ, Ex. 19, 213 dated 12/16/2011, with incorporated emails reporting interviews).

10. **Depositions of Flanagan and Nikiforis.** On December 6, 2010, Defendants deposed Defendants deposed Mike Nikiforis and on December 7, 2010, deposed Noel Flanagan.

Note: For depositions of Carver, Cynowa, Wolford, Flanagan see Plaintiff's RM SJ Exs. 1, 4 ,5, and 7. For deposition of Nikiforis, see this Reply, Ex. D)

11. **Six months of intense discovery.** The parties were intensely engaged in discovery from June 2010 until December 2011 -interrogatories, requests to produce, motions, emergency motions, depositions, and letter writing to the federal agency, Hines Veteran Administration ("VA"). The parties were seeking to interview, depose and call as witness at trial VA federal employee witnesses *who are not subject to civil subpoenas*. The letter writing exchange between parties and Robert Vega, the attorney for VA, to comply with the federal procedures, took extraordinary effort and time (see **Ex. E** – sample VA letters). **Six 213 Disclosures.** Also, Plaintiff filed answers to 213 interrogatory ("213"s) on six occasions.

12. **Plaintiff's 213 Disclosures.** *"213 (5/28/09)" (Defs' MSJ Ex. 17) references Carver was witness to conversations on the day of Chris' firing (No. 1 a.), and that Carver will help Chris (No. 8 (p.4)). Tushar's phone call regarding gun rumor is at No. 5b. (p. 4). Response to No. 7 a.-c. (p. 4-5) states: a. *"Statement that Christopher Cynowa had an AK47 assault rifle,* b. *...had confrontations with staff, and* c. *...has a temper. Further, statements was made directly to Officer Adrowski and was released all or in part to other employees of the VA and/or its contractors."* Plaintiff's * **"213 09/17/09"** (Defs' Response to Leave Ex. 8), states: *"Plaintiff objects to Defendants' Interrogatories to the extent that they request information that is (1) readily available and/or equally accessible and/or obtainable by Defendants and (3) objects to information already provided by fax or email* (p. 3, para. 4 (1) and (3)). **Depositions were readily available to Defendants (Under ILSC Rule 201a duplication of discovery is to be avoided.** No. 7 (p. 8) re: "precise statements" repeats No.7 a.-c. answers to 5/28/2009 above and No. 8 (p. 8with whom Plaintiff communicated references Defs' to Carver and Cynowa deps.; No. 9 (p.8), extrinsic facts, refers Defendants to Carver, Cynowa and Wolford deps. Also, p. 16, para. 15 states that individuals named in 213 (f) would be called to testify regarding alleged facts and circumstances identified in 213(f) disclosures *"and in any deposition testimony in this lawsuit."* No. 5 and 2 (p.6). rely of deposition testimony of Carver and Cynowa. No.6 refers Defendants to the answers filed 5/28/2009 and *"213(8/31/10)". (Defs' Response to Leave Ex. 8) * **"213 (9/23/09")** (Pltf's Reply **Ex. F – CORRECTED SUPPLEMENT**). states Cynowa will testify to his claims and all discovery (includes depositions) and witnesses do likewise (see answer to p. 4, 13. a.. para. 7 (p.8). Plaintiff's *"213 (10/8/10)" No. 5 (p. 6) states that Plaintiff will rely on deposition transcripts of Cynowa, Wolford, Tucker and *all future deponents*. (also see p. 19 No. 41. g.& h.. and Defs' Ex. 19, p, 15). * **"213 (12/16/ 2010)"** (Defs' MSJ Ex. 19) incorporates all prior 213s by reference and adds interview testimony of Cronin, Engregi, Flanagan and Nikiforis (see No.13 (p.4))and it incorporates Plaintiff attorney's 12/13/10 email to Attorney Duff, and states Flanagan, Nikiforis and Carver will testify to matter their respective discovery depositions No. 13 (p.4) and para. 3 (p.5) the Complaint and all discovery will be relied upon.

14. **Defendant's Motion for Summary Judgment.** January 19, 2011, Defendants filed MSJ, March 2, 2011 Plaintiff filed Response. Hearing on MSJ was March 24, 2011 (See the Defs' and Pltf's Exhibit Indices for MSJ and RMSJ which show selected key filings in the case).

III. ILLINOIS LAW ON AMENDMENTS TO PLEADINGS

(1) Leave to amend a pleading: ILCS 5/2-616(a) and 5/22 1005(g) and ILCS 5/2-616(c).

(2) The state of the law in Illinois is that Amendments, before or after Summary Judgment, shall be liberally granted. See Defendants' cited case, ***Martin v. Yellow Cab Co.*, 567 N.E. 2d 461, 464; 208 Ill. App .3d 572-576.** (3) Illinois allows amendments to conform with the proofs. See Defendants cited case, ***Grove v. Foundation Hospital*, 846 N.E.2d 153 (2006); 364 Ill.App.3d 412, 417 (4th Dist. 2006)**, at 158-159. (4) Courts are to construe pleadings liberally, with the view to do substantial justice between parties. (citation omitted). (*Martin*, N.E.2d at 158-159) (5) *Grove* at 158 supports Plaintiff's position for leave to amend as follows:

> Amendments to conform the pleadings to proofs are allowed pursuant to 2-616(c), if the evidence that supports the amendments is 'inextricably intertwined' with evidence related to other alleged acts and omissions already alleged in the original complaint. (citations omitted). Thus the focus is on whether the amendment alters the nature and quality for the defendant to defend itself. (citations omitted).

(6) Leave to amend is subject to the discretion of the court (*Id., N.E.2d at. 465*).

IV. PLAINTIFF'S ARGUMENT

Defendants attempt to obfuscate the sole important question before this court - should this court, as a matter of doing substantial justice, grant Plaintiff Motion for Leave to file his proposed Second Amended Complaint to conform with the proofs identified through the discovery process? Defendants raise seven (7) objections (paraphrased below) to Plaintiff's Motion for Leave, with Plaintiff's Reply to each objection immediately following.

Objection 1: Alleged Violation of Court's Order. (Defs' brief, section I, at 4). Plaintiff has not filed an Amended Complaint, but is seeking *permission* from the court to do so within the solid confines of statutory and case law on amendments (See II., legal stds. above). The Judge's oral ruling and the court order placed no restrictions on the number paragraphs Plaintiff could revise. (Defs brief, Ex. 1 excerpt from MSJ Hearing transcript 96). Defendants present no case or statute that defines the number of paragraphs allowed in an amendment. It was within Plaintiff's prerogative to relate the facts and make his claims related to his co-workers in whatever way Plaintiff deemed appropriate. Defendants' attorney wrote the court order – which does not comport what was actually said by the Judge. (Note: Defs' Exhibit 1 - incomplete dialog excerpt between Judge and attorneys - see this Reply, for full transcript, pp. 95-96). The Judge said "Attempt whatever you need to attempt. It's a motion for leave to amend." (*Id.*, at 96:1-3). The events of the case are inextricably interwoven – the evidence supports that at least 3 groups of persons heard

Chris had a gun and posed some type of danger. The law supports amendment to conform pleadings to the proofs (*Supra*, II, p. 3).

Objection 2: Just and Reasonable Terms: (*Id.*, II, at 6). Defendants do not suffer injustice by the proposed amendment which contains no new factual information not fully disclosed to Defendants prior to Defendants filing MSJ. If the court allows Plaintiff's proposed amendment, Defendants as a matter of right will be able to answer the new complaint or alternatively file another dispositive motion. Justice is built into the system. The trial court should exercise its discretion liberally in favor of allowing amendment, if allowing the amendment will further the ends of justice. See Defendants cited case, ***Arroyo v. Chicago Transit Authority*, 268 Ill. App.3d 317, 323 (1st Dist. 1994); 643 N.E. 2d 1322, 1327.** Allowing Plaintiff's proposed amendment will serve justice because the testimony of Carver, Nikiforis, Egregi, and Cronin (see "213" 9/16/2010) supports they all heard the defamatory information about Chris having a gun, weapon or AK-47 and being a threat or "Going Postal" and Defendants knew these facts before they filed MSJ. The court could grant Defendants additional discovery as a term of reasonableness.

Four Factors for Amendments. Defendants Brief, II, p. 6 cites four factors courts should consider in determining if to allow leave to amend: (1) defect cure, (2) surprise and prejudice to other party, (3) timeliness of amendment, and (4) other opportunities to amend (Martin at N.E. 2d 465). Application of these factors to Plaintiff case tip the scales in his favor as discussed below.

Objection 3: Expansive revision prejudices Defendants because alleged new legal theories would require defendants to defend against alleged ever evolving claims and for Defendants to incur ever greater costs. (*Id.* at 7). Defendants cite three distinguishable cases in support of Objection 3: ***Mendelson v. Ben Borenstein & Co.*, 240 Ill. App3d. 605, 620(1st Dist. 1992); 608 N.E.2d 187 (1992),** *Grove* and *Arroyo*, and Plaintiff Replies:

1) ***Mendelson* – No Supporting Evidence.** Unlike *Mendelson*, where the court found *there was no evidence* to support Mendelson's new theory (Defs' Response Brief p. 7, para. 2) that defendants' failed to perform in a workmanlike manner and where the Appellate court noted that Plaintiff had never previously undertaken a misperformance theory (*Mendelson* at 196;), in the case at bar, the alleged defamatory statements made to Carver, Wolford, Ewell, Theobald and Slatton is richly supported by Carver's evidence deposition (Carver dep. pp. 39-41) – defamation is the legal theory for the prior Complaints and the proposed Second Amended Complaint. The Complaint p. 10, para. 40, ***which is incorporated by reference in all the counts***, and Plaintiff's 5/28/2009 213

disclosures (incorp'd by reference into subsequent disclosures) allege that the statements to Officer Adrowski were disseminated to co-workers (Defs' MSJ, Ex. 6 – Pltf's Amd Complt p.10 para. 40 and Ex. 17, Pltf's 213 (5/28/09) No. 7 a.-c (p.4); Niforis dep. 23:7-8, 14). And lastly, Depositions of Nikiforis, and interviews with Cronin and Engregi support that they all heard the rumor of Chris "gun", "go Postal" rumor. IPI instructions allow circumstantial evidence at trial. A reasonable jury could conclude that since the information that Chris allegedly had a gun was exclusively in the hands of the Defendants, that one or more Defendants told Chris' co-workers that Chris had a gun. Accordingly, adding a count for the co-workers based on the factual allegations from the Complaint, depositions and 213 interrogatory answers constitutes full disclosure, thus there is no prejudice to Defendants.

2. *Grove* - Theory Change & Facts Not Inextricably Intertwined. Unlike *Grove*, where Plaintiff's case theory changed and the amendment would have required defendants to produce different testimony on the scope of the doctor's *medical specialty* and the *intended purpose of a medical device* (*Grove* at 159), in this case, the proposed amendment presents no new legal theories. Plaintiff's Complaint alleged defamation regarding statement to Police Officer Androwski ***and to co-workers*** (Complaint p. 10, para. 40). Plaintiff's proposed second amendment only adds causes of action for the co-employees/co-workers and Defendants knew these facts prior to filing MSJ. In *Grove*, the court found that the facts for the new claims were not inextricably intertwined (Grove at 160) with the evidence supporting the alleged negligent acts or omissions already in the original complaint. (*Id.*, at 159). In this Plaintiff's case; however, the facts are inextricably intertwined in that they relate to the multiple occasions of the same essential defamatory statements made that Chris had a gun, was dangerous and or would shoot people being communicated to VA and CSSS co-workers on the same day Defendants fired Chris (See Pltf's MSJ). Defendants' and Plaintiff's counsel sat at the same deposition table and heard: 1) Carver testify Slater entered the room the day they terminated Chris' and announced Chris having a gun and posed a danger, and Defendants cross-examined Carver, 2) Nikiforis testify the rumor about Chris having a gun was spreading through the office like wildfire and that Chris might "Go Postal" (Nikiforis dep. 23:7,14), and 3) Flanagan testify he never told Slater Chris had a gun or that Chris was dangerous (See Pltf's RMSJ, Ex. 6 p. and Ex 7 p.). Each deponents' testimony disputes some aspect of Defendants version of the material facts: 1) that Slater's discussed the gun story privately with Police Officer Adrowski (implying only the Slater told only the Police) (Defs' MSJ Ex. 2, Slater decl. para. 11-14), 2) that

Wolford never heard Chris had a gun until she was served with Plaintiff's lawsuit, 3) 2) that Flanagan did not tell anyone besides Slater that Plaintiff had a gun, was "hot headed" and dangerous (see Defs' MSJ, Ex. 7, Answer to Amd Complt, p. 2, paras. 4-6). Defendants Answer admits that they were in *exclusive control* of the defamatory information of the Chris gun story. Defendants'current cry that they did not depose certain defendants because the Plaintiff had allegedly premised his entire case only on statements made to Police Officer Adrowski is absurd because the fact of statements made to co-workers was in the Original complaint (Id.) and the statements were in the depositions. In Defendants' *Grove* case at 168-16, dissenting Justice Cook explains how the trial court should Plaintiff's Complaint – litigants should not be allowed to close their eyes to readily apparent facts.

> Today the function of informing an opponent of one's position is largely accomplished through discovery, a function that was largely fulfilled by the pleadings at an earlier time. (Citations omitted)
> ***
> ...Illinois is a fact pleading state and the complaint need only allege facts to establish right for recovery. (Citations omitted)
> ***
> I disagree with the statements that the original complaint must provide the Defendants with all the information necessary for preparation of the defense for the claim asserted later... (Citations omitted)
> ***
> There is no support in the statute or the decisions of the Supreme Court for that additional requirement. A litigant investigating a case does not limit his investigation to his opponent's allegations but attempts to learn everything he can about the incident. ***We should not encourage litigants to close their eyes to facts that are readily apparent.*** [emphasis ours]. I disagree with the argument that if the amendment sets up a new theory or a new focus, it cannot be allowed. Illinois is a fact-pleading state. It is not necessary to plead any specific theory of recovery. 'A complaint need only allege facts which establish the right to recovery; not only are allegations of law or conclusions not required, they are improper.'

3. ***Arroyo*** **-Extreme Time Delays & No Good Reason**. Unlike *Arroyo,* where Plaintiff attempted to amend one (1) day before trial, eleven years and seven months (11yrs. 7 mos.) after filing Complaint, five and one (5 ½) half years after re-filing of Complaint, and where the trial court refused Arroyo leave to amend at the end of his case in chief because his proposed amendment was known to him at the time he filed his original pleading, and Plaintiff provided no good reason for the amendment not having been filed at that time (*Id.*, at 1327), this Plaintiff

requested amendment three (3) weeks before trial, eight (8) months after reinstatement of the case in June 2010, and six (6) mos. after the September 17, 2010 Amended Complaint. Furthermore, stated, previously, the discovery schedule was intense and key depositions occurred up until the very end of the discovery period (II. Timeline, *surpa*, p. 2, paras. 6-13). Also, Plaintiff asserts that the rule for MSJ do not advise litigants that amendment of pleading is required (see, *infra,* p. 9, Obj. 4, incorp'd herein by reference). Additionally, the discovery took large amounts of time and effort, leaving little to no margin during discovery to Amend or between discovery close December 10, 2011, before the 2010 Christmas holiday and Defendant's filing MSJ on January 19, 2011 to allow Plaintiff opportunity to Amend his Complaint.

Greater Costs Argument. Defendants cry Plaintiff's alleged infractions increase their defense costs, yet, on information and belief, Defendants Wolford's government contracts exceed $8 million/year (Wolford dep. at 7-8, 11-12) versus Plaintiff who supports a family of five on a modest salary. If greater costs to Defendants is part of the decision process in this Court's ruling, then Plaintiff asks this court to consider the greater costs to Plaintiff as a result of Defendants many infractions of procedure and civility - a few examples: (1) Defendants HR Manager, Scott Theobald's, physically shoved and threw Summons at the Special Process Server upon service of Summons (**Ex. G** – Tim Marchese, Process Server statement 2/24/08, file 6/3/09 – he called the Police), (2) filed 60 days late Motion to Dismiss without requesting leave of court (II, *supra*, p. 2, para. 2), (3) filed Answer to Complaint and Counterclaim 28 days late without leave of court (*Id.*, para 3) . The Counterclaim was tactical gamesmanship (Defendants' watched their claim go abandoned on the Black Line August 18, 2009 at hearing on the dismissal, and after case reinstatement, they voluntarily dismissed it on September 7, 2010), 4) Wolford's witness tampering – she threatened to ruin Carver's career if he testified on behalf of this Plaintiff (See Carver dep., p. 58). 5) changing possible dates for Wolford deposition to ensure she was deposed long after Plaintiff (extensive emails not included here), 5) Defendants filed a bad faith 21 page Emergency Motion to Bar Plaintiff's alleged undisclosed witnesses at trial (premised on discovery being closed when it was not closed). (**Ex. H** - Motion to Strike Motion to Bar and **Ex. I** - Court Order 9/23/10 setting witness cut-off date), Defendants' bullying tactics cost Plaintiff and his attorney time and money. Defendants demand justice. Where is the justice of a litigation system that is ruled by money? Money provides access to the transcripts of depositions and hearings, and other tools that are needed to put on the case which an average working person, like this Plaintiff, cannot afford.

Justice? If greater costs to Defendants' client is unjust, then is it not more unjust that Defendants' counsel caused a solo attorney to lose days of work responding to and going to court on a bogus emergency motions (see **Ex. J** - email 9/1/10), and always holding Plaintiff's feet to the fire for *alleged* missed deadlines when Plaintiffs gave Defendants *over 85 days of grace* at the beginning of the case? If costs are going to rule the day, then Plaintiff hereby reserves the right to dredge up and prove up these and other additional infractions of Defendants for 137 sanctions.

Objection 4: Alleged Violation in SCR 213 disclosure rule/tactical gamesmanship. (*Id.*, Section II.A, 2 at 9). Defendants present no evidence that Plaintiff or his attorney have engaged in tactical gamesmanship. At Hearing on March 24, 2011, when Judge Marras asked Plaintiff's counsel why Plaintiff had not amended the complaint prior to MSJ, Plaintiff counsel responded by stating the essence of the following standard summary judgment rule ("SJR") that appears in hundreds of cases:

> Summary Judgment shall be entered when the pleadings, depositions, and admissions on file together with affidavits, if any, show that there is no genuine issue of material fact, and that the moving party is entitled to a judgment as a matter of law. (citations omitted) While the use of the summary judgment procedure is to be encouraged as an aid in the expeditious disposition of that law suit, it is a drastic means of disposing of litigation and there should be allowed only when the right of the moving party is clear and free from doubt (citation omitted) (*Mendelson* at 194, para. 1).

In determining the existence of a genuine issue of material fact, the court must consider the pleadings, depositions, admissions, exhibits, and affidavits on file in the case, and must construe them strictly against the movant and liberally in favor of the opponent. (citation omitted). (Id.)

Plaintiff's attorney's literal interpretation of the words of the summary judgment rule as stated above, which does not contemplate, hint, suggest, or order that amendment of the Complaint is required to defeat summary judgment, does *not* constitutes tactical gamesmanship a game requires conscious effort and strategy. Plaintiff gladly received the Judge's instruction that Plaintiff should have amended prior to MSJ. One has to ask, why did the SJ rule not advise Plaintiff and his counsel of the same? If the rule does not mean what it says, then why is that not taught in law school? Why does the statute on SJ state that Plaintiff has duty to amend his/her Complaint to conform to the proofs? Why do the rules on amendment not inform litigant to amend his Complaint to conform to

proofs prior to a party filing MSJ? Apparently, there is a legislative gaping hole that causes endless wasting of Appellate court time on needless summary judgment and amendment cases.

Defendants pretend surprise by Plaintiff's amendment for statements made to Carver , Wolford, Ewell, Theobald and Slatton ("Carver et. al"), yet they were advised in Plaintff's 213 disclosure that Plaintiff would base the case on all depositions in the case and all 213 disclosures, etc. (See II. Timeline, p. 2, para. 11-12 details). "Duplication of discovery methods to obtain the same information should be avoided." (ISCR 201(a)). The fact is, Plaintiff had no duty to answer any of Defedants' duplicative discovery. Thus, there was no need to reiterate defamatory statements contained in the depositions in defendants' possession. As Justice Collins said, Defendants should not be allowed to close their eyes to facts readily apparent. (See, *supra,* p. 7).,

Assuming, *arguendo*, that Defendants had deposed some other party who would deny that Carver heard Slater say Chris had a gun, the deponent party's denial that Slater made the statement, would not entitle Defendant to summary judgment as the matter of law because there is exists disputed of material facts, and the jury has to decide who is telling the truth – Slater and Wolford or Carver?

Plaintiff answered Defendants' 213 interrogatory No. 7 (a/k/a No. 6) requesting "specific statements" by referencing the case's depositions and all future depositions - thus - Carver's, Plaintiff's, Flanagan's and Nikiforis' depositions are included in the disclosure. "Ditto" for interrogatory 9, requesting extrinsic facts which would enhance damages. (see II. Timeline, p. 3 para.12 incorporated herein by reference).

Defendants misapply the *Sullivan* case, where the court refused to allow a doctor expert witness to testify about nursing standards of case when that testimony had not been disclosed already in 213 disclosures. That case has nothing to do with this Plaintiff's Motion before this court or leave to file proposed Second Amended Complaint. All the factual evidence Plaintiff relies on for his proposed amendment was set forth in Plaintiff's RMSJ Exhibits, in Defendants deposition of Nikiforis, in 213s incorporating the deposition by reference, and Defendants' tender production.

Defendants' also misapply the *American Service* case to this case because in this case, it is impossible for defendants to be surprised at the defamatory allegations to two groups of co-workers, Defendants deposed Nikiforis and on cross, he identified Thiam Kow, a co-worker (Nikiforis dep., p. 32:12-24).who was present when he arrived at work and people were talking about the Chris gun story. Nikiforis testified the day Chris was fired news of an alleged gun spread through the office

like wildfire. (*Id,*. at 23). On information and belief, one or more person who worked on Nikiforis' shift or immediately before it, heard "Chris had a gun story" from Slater.

This Plaintiff has disclosed the witnesses he intends to call at trial, and Defendants had opportunity to depose them, and now shift blame to Plaintiff for their failure not to depose disclosed witnesses. (See Ex. I) email to Attorney Duff about deposing witnesses. There is no violation of rule 213 disclosure. Defendant knew at all times the testimony of Carver, Cynowa, Flanagan, and Nikiforis from their depositions. (See II. Timeline., *supra*, p. 2-3).

Objection 5: Alleged "Exacerbated" Prejudice – Plaintiff's alleged missed deadlines and inadequate disclosures. (Defendants' Brief, at 14, para. 3). Plaintiff incorporates Objection 4 Reply above as if fully set forth in Reply for Objection 5. Defendants' Objection 5 is ridiculous. It is a desperate attempt to thread together prior adjudicated matter (and reporting on it in a misleading manner) clearly intended to distract the court from the matter that is currently before it and to prejudice the court against the Plaintiff. Plaintiff hereby incorporates by reference the conduct of defendants discussed previously (see Objection 3, supra. p. at 8-9). Defendants apparently want the court to review and undo all of the decisions made in the case prior to the instant motion before the court. Plaintiff's replies below to Defendants parade of pettiness.

1. The Defendants attacked Plaintiff (Id., I.A. 3, at 11-12, para. a), d), and h), incorporates the ridiculous, namely: a) Plaintiff disclosed an "*unidentified witness*" *before* the cut-off to disclose the witness, d) Plaintiff was "*threatened*" with default, and h) Plaintiff identified eight new witnesses "*just nine days before close of discovery*" – the statements show Plaintiff's compliance with court procedures, not his non-compliance! Defendants' manner of criticizing Plaintiff is akin to criticizing basketball player dunking the ball through the hoop just before the buzzer sounds!

2. Allegations b) and c) regarding the Cook County Black Line dismissal omits that Defendants' Counterclaim was also dismissed on the black line even though they were present at the dismissal and that after case reinstatement, they dismissed their counterclaim – demonstrating that Defendants counterclaim was created for tactical gamesmanship – which is Defendants *modus operandi* (See Flanagan dep p. 44, lines 10-11) and to cause Plaintiff's counsel additional work. See court file for Motion to Reinstate filed February 17, 2010 for resons for dismissal.

3. Defendants' paragraph f) falsely accuses Plaintiff of improper acquisition and use of Defendants' document which was not addressed to an attorney. Carver sent the document to Plaintiff voluntarily and Plaintiff had no duty to treat the document as privileged until this court deemed it to be privileged and ordered Plaintiff not to use the document.

4. Defendants' paragraph g) alleges Plaintiff filed his response to the MSJ after the due date, but Defendants that Plaintiff did so with leave of court from Judge Maddux (see seupra, p.). Plaintiff admits filing a supplement for errata, without substance change, or harm to Defendants.

Objection 6: Alleged Un-timeliness (Defs' brief, section I. B. at 13). Plaintiff's Motion for Leave to Amend is not untimely. No Illinois case quantifies a time limit on when a Complaint may be amended. Furthermore, every case Defendants cite to support their un-timeliness argument is distinguishable from this Plaintiff's case. Carver did not come forward to help this Plaintiff until March 2009 (deposed 7/31/2009, transcript tendered 2/12/2010 – two full years after case filing) (see II. Timeline, *supra,* p. 2, para. 3). Defendants more than 85 days delay in filing Appearance initial pleading, Answer and Counterclaim, and the Black Line dismissal for 5 months 29 days motion before Plaintiff discovered dismissal, greatly impacted the schedule. Plaintiff did not know the testimony of Flanagan, Engregi, Nikiforis and Cronin until late fall 2010 and Defendants did not depose Flanagan and Nikiforis until six weeks before MSJ filing. Plaintiff distinguishes each of Defendants cases that establish "bogies" 3 ½ year to 11-1/2 years after Complaint filing results in denial of request to amend Complaint.

(1) **No Cure of Defect**. In ***Martin,*** the rationale for the court's denial of amendment based on un-timeliness was Plaintiff's inability to prevail on claims of entrustment and negligent hiring because they were legally untenable (*Id.*, at 464), and thus amendment would not have cure the defect in Martin's pleading. This Plaintiff's proposed Second Amended Complaint adding causes of action for defamatory statements made to Carver et. al, Engregi, Nikiforis, Cronin and co-workers will cure the defect.

(2) **2-615 Defect of Pleading**. In ***Maggio,*** trial court denied Plaintiff's motion to amend three and one half (3 ½) years after filing; however, the dismissal was on a 2-615 Motion to Dismiss for defect in pleading, not MSJ as in this case at bar, where extensive discovery provides evidence of Defendants' defamatory statements made to Plaintiff's co-workers and that the information was known by Defendants. Maggio's time frames applicable are inapplicable here.

(3) **No Cure of Defect.** In ***Wingate v. Camelot Swim Club*, 193 Ill. App. 3d 963, 967 para. 5 (3d. Dist. 1990); 550 N.E.2d 685**, the trial court denied Plaintiff leave to file a fourth amended complaint after four years because the amendment would not have cured the defective pleading (Wingate at 967). Wingate is distinguishable from this Plaintiff's case for the same reasons stated in Reply to Obj. 6, para 1 above.

(4) **No cure of Defect.** The ***Mendelson*** court determined amendment would not cure the defect of the Complaint, found that *Mendelson* had amended his complaint on two other occasions,

and that he was introducing an entire new theory of recovery - i.e., workmanlike manner and misperformance (*Mendelson* at 196). Here, Plaintiff's amendment will cure the defect, the theories of recovery have not changed (defamation before, defamation now) and Plaintiff has amended his Complaint only once.

(5) **Amend Request Long After SJ.** In ***Harrington v. Chicago Sun Times*, 150 Ill. App. 3d 797 (1st Dist. 1986);502 N.E.2d 332,** the Court denied Plaintiff's filing of amended complaint that was requested seven (7) months *after* Summary Judgment had been entered, four (4) years after the shooting, and three years (3) after filing his original action. Further, the request was filed six (6) days prior to a scheduled hearing to reconsider the Motion for SJ and was not included in the motion for reconsideration filed six months earlier (*Id.* at 805). Here, Plaintiff did request leave seven (7) months ***after*** Summary Judgment, but ***before*** MSJ ruling has issued, three weeks before trial, and there is no motion for reconsideration.

(6) In, the case of ***Sullivan v. Edward Hospital*, 209 Ill. 2d 100, 111; 806 N.E.2d 65 (2004),** the courts striking a doctor experts testimony due to improper 213 disclosures has no bearing on Plaintiff's present Motion before this court – there is no undisclosed expert witness issue here. Sullivan is inapplicable to this case.

Because each of Defendants foregoing cases are distinguishable from this case, this court should grant Plaintiff leave to file his proposed Second Amended Complaint.

Objection 7: Alleged Prior opportunities to Amend. (Id., I. C. at 14). Plaintiff's opportunity to amend for Larry Carver did not exist three years ago (See II. Timeline and Objection 6 Reply above). Further, Plaintiff could not have made the same allegations regarding Engregi, Nikiforis, Cronin in Second Amended Complaint on September 17, 2011 because Plaintiff did not interview Engregi and Nikiforis until November 30, 2010 (2 mos. after 9/17) and Cronin until December 2, 201 (eight days before discovery cut-off 12/10/2011). Furthermore, Plaintiff did not know the full details of Nikiforis' experience with the "Chris has a gun rumor" until Defendants' December 6, 2010 deposition of Nikiforis. Assuming, *arguendo*, Plaintiff could have amended his Complaint on September 17, 2010, but did not, *Defendants do not cite a single case* that states that failure to amend four months before filing of MSJ when discovery depositions with key information was not available until six weeks before MSJ filing, would dictate that this court should deny leave to amend. Further, if Plaintiff had amended his Complaint each time he learned new facts, Plaintiff would have had to amended his Complaint eight (8) times, to wit: after deposition of Carver,

Cynowa, Wolford, interview with Engregi, interview with Cronin, interview if Nikiforis, deposition of Flanagan and deposition of Nikiforis. (See, II. Timeline, p. 2). On information and belief, Illinois case law allows no more than six amendments. Defendants' allege that Plaintiff's could have amended their 213s - Plaintiff did amend his 213s on 12/16/2010, which incorporated by reference all depositions (See II. Timeline, p. 3, para. 12).

This court should grant Plaintiff's leave to amend because Plaintiff's proposed Amendment cures the defects in the Complaint raised at Hearing on MSJ regarding statements made to Plaintiff's co-employees/co-workers and it conforms the Complaint to proofs found in discovery. Also, the case procedural delays and back to back discovery schedule, left little margin of time and opportunity for Plaintiff to amend his Complaint. (See II. Timeline 1-14).

V. CONCLUSION

The additional facts and causes of action in the Plaintiff's proposed Second Amended Complaint are based on factual evidence gathered during the discovery process, and therefore, under Illinois law it is proper for this court to allow amendment to conform the Complaint to those proofs (see II, *supra*, p. 3). Defendants' brief is a parade of form over substance propositions and arguments. Why? Because the substantive evidence of the case is not in Defendants' favor. Plaintiff's RMSJ Exhibits, which at all times has been in possession of defendants, provides evidence that the defamatory statements about Chris having a gun or AK47 and posing a danger were communicated at least three times (Carver et. al., Adrowski, and Nikiforis, Engregi & other co-workers). Further, Flanagan testimony that he never told Slater Chris had a gun directly disputes the material fact of Slater's declaration that he heard the gun story from Flanagan. Here, there is nothing new under the sun. With the truth and facts on Plaintiff's side, Defendants only defense is to manufacture red herring arguments and distract the court with procedural hair splitting and quoting endless cases. Since Defendants have known the facts of the proposed Complaint, they cannot experience alleged "*exacerbated prejudice*" from Plaintiff conforming his Complaint with the proofs. So what are Defendants really saying? They are saying that Defendants do not want to Answer the Complaint.

Defendants' counsel laments greater costs of defense, but they come to the table with dirty hands, having increased Plaintiff's and his attorney's costs. Defendants demanded written briefing

on the Plaintiff's leave to amend, even though the Judge wanted to save time by granting Plaintiff's oral Motion. No doubt that Defendants' 15 page motion was costly to his clients..

What do we have here? All Plaintiff is asking is to conform his Complaint with the proofs. The default law is that a Plaintiff can conform his Complaint with proofs – even in situations after summary judgment has been already been entered. Here, summary judgment has not been entered, Plaintiff has filed only one amendment to his Complaint thus far, and Defendants proffered only distinguishable cases to support their seven objections.

All Plaintiff wants Defendants to do is allow Plaintiff to file his Second Amended Complaint, and Defendants answer it, admitting or denying the allegations. That is not hard. Either the facts from discovery support Plaintiff's position or they do not. If they do not, then Defendant wins. If they do, then Plaintiff is entitled to have his case heard by a jury.

Wherefore, Plaintiff prays that this Honorable Court will grant Plaintiff relief as follows:

1) Grant Plaintiff's Motion Leave to file Plaintiff's proposed Second Amended Complaint.

2) If the Court grants Plaintiff's Motion for Leave to Amend, also grant Defendants and Plaintiff leave to obtain additional discovery on just and reasonable terms.

3) If the court finds Plaintiff's Complaint is acceptable in part and not acceptable in other parts, allow Plaintiff to remove by additional amendment unacceptable content and keep the acceptable content.

4) If the court rules that allowing Plaintiff's amendment would be unjust to Defendants, that this Court offset any determined injustice to Defendants by the injustice Defendants imposed upon Plaintiff and allow Plaintiff to file motion for relief under Il. Sup. Crt. Rule 137.

5) Provide equitable relief as the Court deems appropriate.

Dated: May 5, 2011

Respectfully Submitted:
Chrisopher Cynowa

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