explained in ALWD Manual Rule 12.8(a). Note that the explanatory phrases are underlined or italicized and are preceded and followed by a comma.

Blue v. Green, 100 F.3d 25 (7th Cir. 2001), *cert. granted*, 312 U.S. 420 (2002).

This citation means that the Supreme Court of the United States granted review of the case that had been submitted by a petition for a writ of certiorari.

III. CONSTITUTIONAL AND STATUTORY CITATIONS

A. Constitutions

Cite constitutions by country or state and abbreviate "Constitution" as "Const." Do not include a date unless the constitution you are citing has been superseded.

U.S. Const. art. III, § 1, cl. 2.
N.M. Const. art. IV, § 7.

B. Statutes

1. Codes

Statutes are published in codes and are cited to the current official code volumes. The basic citation form includes the abbreviated name and volume of the code in which the statute appears, the section number (or whichever identification is used) of the statute, and the year the code was published. Statutes are also published by private publishing companies in codes that are annotated. Cite to the annotated code only if there is no official code cite; do not use parallel citations. When you cite to an annotated code, include the name of the publisher in the parenthetical. You will find the title of each jurisdiction's codes as well as other compilations and their abbreviations in Appendix 1. The following cite is to the official version of the United States Code, which uses a title number rather than a volume number.

42 U.S.C. § 1985(3) (1994).

The cited statute is found in Title 42 of The United States Code at section 1985(3). The date is the year the code was published, not the year the statute was passed.

If the statute is published entirely in the supplement because it was enacted after the code was published in hardcover, then cite to the supplement:

42 U.S.C. § 2000f(a)-(b) (Supp. 1996).

If you are citing to an amended statute where the original version appears in the code and the amendment is in the supplement, cite to the code and the supplement:

42 U.S.C. § 2000e(k)-(m) (1994 & Supp. 1996).

2. Session laws

If a statute has not yet been published in the code, then cite it as an act in the session laws (laws enacted by a legislature during one of its annual sessions that are published yearly and bound in the order of their enactment). Give its public law number, the section number, the volume and name of the session laws (for state laws, begin with the name of the state) and page. The following is a cite to The Statutes at Large, which is the compilation of session laws of the United States Congress.

Pub. L. No. 86-74, §1, 73 Stat. 156 (1986).

The ALWD Manual Rule 14.6(h) does not require, but permits, inclusion of the name of the act, in italics, preceding the Public Law number.

Also cite to the act in the session laws if you are using material that is not published in the code, such as the statement of legislative purpose.

Although not in the ALWD Manual, some statutes that have been codified are commonly still cited by the name and identification from their original passage as a public act, in addition to their current code citation. For example,

The Omnibus Crime Control and Safe Streets Act of 1968, Title III, 18 U.S.C. §§ 2510-2515 (1988).

3. Electronic Database

Some statutes are available in both print sources and electronic databases but are difficult for a reader to locate in print. In this case, cite the print source as indicated above and add the electronic database reference in parenthesis after the print citation. Begin the parenthetical with the words "available at" or "available in" followed by the unique LEXIS or Westlaw identifier assigned to the statute.

IV. PERIODICALS

Your most common citations to periodicals will be to law reviews. To cite law review material in your text, first give the author's full name as it appears in the publication. Include designations such as "Jr." if used in the periodical.

Follow the author's name with the title of the material, underlined or italicized. Then give the volume number of the periodical, a space, the abbreviated name of the periodical, the page on which the piece begins, and in parentheses the year of publication. See Appendix 5 for the abbreviations for periodicals, and Appendix 3 for other abbreviations.

A. Lead Material

Lead articles, usually written by faculty and practicing attorneys, are cited by the author's full name and the material described above, as in this example.

Phil J. Friday, Jr., *Just the Facts*, 50 J. Crim. L. & Criminology 78 (1980).

B. Student Material

Cite signed student work by the author's full name in the same manner as other signed law review articles; however, in order to indicate that a student wrote the material, insert "Student Author," offset by commas, between the author's name and the title. See Rule 23.1.

Moira Standish, Student Author, *Will Thanksgiving Never Come?*, 50 Nw. U. L. Rev. 5 (1986).

If the student author is not identified, then just use Student Author in place of a name.

Student Author, *Will Thanksgiving Never Come?*, 50 Nw. U. L. Rev. 5 (1986).

C. Abbreviations and Spacing

The general rule is to close up adjacent single capitals. However, for abbreviations of names of periodicals, do not close up single capitals if one or more refers to a geographic or institutional entity. In that case, set off with a space the capitals that refer to the entity from the adjacent single capital. See Rule 2.2.

Moira Standish, Student Author, *Will Thanksgiving Never Come?*, 50 Nw. U. L. Rev. 5 (1986).

This article is in the Northwestern University Law Review. Because the "U." is an abbreviation of part of the name of the institution, it is set off from the "L.," which is the abbreviation for "Law."

V. BOOKS

Cite books with the author's full name as it appears on the publication's title page. Next, cite the title of the book (italicized or underlined) as it appears on the title page (you may also include a subtitle), and the page, section or paragraph from which the material is taken. Finally, in parentheses, include the edition (if more than one edition), the publisher, and the year of publication. See Rule 22.

Benjamin N. Cardozo, *The Growth of the Law* 16 (Greenwood Press 1924).

If the book has an editor, give the editor's name as it appears on the title page, followed by "ed.," in the parenthetical before all other information. This is an example of a citation for a multi-volume set with an editor.

Page on Wills vol. 2, § 152 (Bowe M. Parker ed., W.H. Anderson Co. 1991).

If the book has two authors, include both names, using full names and an ampersand (&) to connect them. If the book has more than two authors, you have two options under ALWD Manual Rule 22.1(a). Either include the first author's name followed by "et al.," or include full names for each author. Use an ampersand between the last two names.

Either of these examples is correct.

W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen, *Prosser and Keeton on the Law of Torts* § 10 (5th ed., West 1984).

or

W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 10 (5th ed., West 1984).

VI. GENERAL CITATION INFORMATION

A. Citation to a Particular Page

If you quote from a source or discuss material on a particular page or pages in the source, you must cite the page or pages on which the quotation or material can be found. If you are citing the source for the first time, put the page citation after you cite the page at which the source begins. This second page citation is often called a jump cite or a pinpoint citation. For example,

Blue v. Gold, 200 N.W.2d 108, 110 (Mich. 1975).

In this example, the quotation from *Blue* is on page 110 of the Northwestern Reporter. The case begins at page 108. If this cite required a parallel cite, it is optional to include a parallel pinpoint cite to the official state reporter, hence:

Blue v. Gold, 50 Mich. 100, 104, 200 N.W.2d 108, 110 (1975).

The parallel cite informs the court that the quotation can also be found on page 104 of the official state reporter.

B. Short Citation Form

Once you have cited an authority with a complete citation, ALWD Manual Rule 11.2 allows you to use a short form citation anytime after you cite with a full citation, if you wish.

1. Id.

Id. is a citation form that refers to the immediately preceding cited authority, and can be used to refer to any kind of authority, except for appellate records and internal cross references. See Rule 11.3 (b). If the second citation is to material on the same page as the preceding cite, use just *id.*

Citation one: *Blue v. Gold*, 233 A.2d 562, 564 (Pa. 1967).
Citation two: *Id.*

If the citation is to a different page, use "*id.* at" the page number. For example:

Citation one: Benjamin N. Cardozo, *The Growth of the Law* 16 (Greenwood Press 1924).
Citation two: *Id.* at 25.

If the citation is to a case that requires a parallel citation, under ALWD Manual Rule 12.21(f), use the short form for both cites, rather than *id.* See B(3) below for short form.

Citation one: *Blue v. Gold*, 426 Pa. 464, 233 A.2d 562 (1967).
Citation two: *Blue*, 426 Pa. at 473, 233 A.2d at 581.

Do not capitalize *id.* if you use it within a sentence as a citation clause. For example,

Because the thirteenth amendment does not require state action, *id.* at 104, the court should hold that a private conspiracy violates that amendment.

2. Supra

Supra is used as a short citation when the authority has been fully cited previously but is not the immediately preceding citation. Do not use *supra* to cite

to cases, statutes, or constitutions. For these, use *id.* where appropriate or use the form discussed below in (3). Use *supra* to cite to books and articles.

Cardozo, *supra*, at 10. [This refers to material on page 10 of Cardozo's previously cited book.]

3. Short Form for Cases Where Id. is Not Appropriate

The short form consists of the name of the case, the volume and name of the case reporter, and the page number (for each reporter if a parallel citation is required). You have a choice as to how much of the case name to include. You may omit the case name and cite to the reporter and page when it is perfectly clear which case you are referring to, as when the case name appears in the preceding sentence; or you may shorten the case name to the name of one party, for example, if the case name is not included in the text of the sentence; or you may provide the full case name. If in doubt, use at least one party's name. For example:

Grey v. Pink, 270 N.W.2d at 390.

or

Grey, 270 N.W.2d at 390.

or

270 N.W.2d at 390.

Typically, if you use the name of one party, use the name of the first named party. However, if that party is a government or a very common name, or is the same name as a party in another case, use the name of the second named party. So, for example, for *State v. Gray*, use *Gray*.

If this citation were to appear in a document submitted to a court that requires parallel cites, for example, a Wisconsin court, the pinpoint cite to the official state reporter would also be included.

Grey v. Pink, 85 Wis. 2d at 768, 270 N.W.2d at 390.

or

Grey, 85 Wis. 2d at 768, 270 N.W.2d at 390.

or

85 Wis. 2d at 768, 270 N.W.2d at 390.

When you discuss a case in text, as opposed to citing the case, you may always refer to the case by the name of a party if you have already cited the case. Again, do not identify a case only by the governmental party, such as "In *United States*. . . ."

> To invalidate an agreement, one court has required actual fraud. *Bubble v. South*, 35 P. 220 (Okla. 1910). However, later courts have limited *Bubble* to its specific facts.
>
> or
>
> Fraud under the FTC requires intentional conduct. *United States v. Mobilier*, 35 F. Supp. 12 (E.D.N.Y. 1960). Later courts have limited *Mobilier* to its facts.

4. Electronic Database

Use the unique database identifier for the case short form. See ALWD Manual Rule 12.21(d).

> *Grey*, 2001 WL 185042, at *1.

5. Short Form for Statutes Where id. *is Not Appropriate*

If you are citing to a statute and *id.* is not appropriate, then ALWD Manual Rule 14.5 requires you to include the same information as the long citation form except omit the parenthetical. If referring to the statute in text, rather than in a citation, do not abbreviate any words when describing the statute. For example,

> Title 42 of the United States Code §12112 is the Americans with Disabilities Act.

6. Constitutions

Do not use a short form citation except *id.* where appropriate.

7. Hereinafter

You may devise your own short form for particularly cumbersome citations instead of using *supra*, when the use of *supra* would be unclear. After

you cite the material in full, follow with "hereinafter" and the form you will use. Enclose this information in brackets. See ALWD Manual Rule 11.4(d) for other restrictions.

> Paul Bator et al., *Hart and Wechsler's The Federal Courts and the Federal System* 300 (3d ed. Foundation Press 1988) [hereinafter Hart & Wechsler].

C. String Citation

A list of citations to several authorities for a particular point is called a string citation. You will see string cites used in judicial opinions and in memoranda and briefs, but you should use long ones sparingly. Unless your purpose is to actually list every case or other authority on point, or to literally show overwhelming authority, a string cite is usually not necessary and is difficult to read. The reader will tend to avoid it.

A citation of just a few authorities, however, is fairly common. The authority or authorities that are considerably more helpful or important than the others should be cited first. The others should follow in the order listed in Rule 46.4—enacted law first (constitutions, statutes, and other enacted law), international agreements, case law, and others as listed in the rule. If no authorities stand out, this ordering scheme governs the entire string cite. There is also a correct order within each type of authority. For case law, the order is federal cases, state cases, listed alphabetically by state, and foreign cases. Within each jurisdiction (each federal appellate and district court is a separate jurisdiction), cite cases from highest court to lowest court, and within each court level, most recent to least recent. Use the same order of jurisdictions to cite constitutions and statutes. Separate each citation with a semicolon.

> *Sosa v. Alou*, 350 F. Supp. 80 (N.D. Ill. 1987); *Smoltz v. Jones*, 400 S.E.2d 10 (Ga. 1986); *Martinez v. Vina*, 430 S.W.2d 85 (Mo. 1986); *Jeter v. O'Neill*, 500 N.E.2d 3 (N.Y. 1985); *Bagwell v. Biggio*, 150 S.W.2d 82 (Tex. 1979); *Olerud v. Boone*, 200 P.2d 20 (Wash. 2000).

Remember that not all authorities are equal in weight. A string cite obscures the differences in the importance of the authorities listed. A case or statute from the jurisdiction of your assignment, for example, should be more important than those from other jurisdictions, and these citations should precede the others. Although you may cite controlling authority

first in a string cite, you should also consider citing controlling authority alone, after the proposition it supports. Then, use an introductory signal (see below) to cite supporting cases from other jurisdictions, as is done in this example from an Illinois problem:

> A parent is not immune from suit brought by an emancipated minor. *Oscar v. Green*, 350 N.E.2d 10 (Ill. 1971). *See also Roosevelt v. Franklin*, 390 A.2d 50 (N.J. 1965); *Kit v. Carson*, 41 N.W.2d 200 (N.D. 1962); *Black v. Hills*, 460 N.W.2d 80 (S.D. 1964).

D. Introductory Signals

Introductory signals are the italicized or underlined words that often precede citations to authority. Signals are used to show what type of support the citation supplies for the author's statement. The meanings of the most used signals are described below. See Rule 45.

1. Direct citation without a signal: Use no signal before a citation if the authority

   a. is the source of a quotation or paraphrase, or
   b. identifies an authority referred to in the text, or
   c. is direct support for the proposition.

2. Introductory signals

a. *See* is the signal most often used. It means that the cited authority is a basic source material for the proposition in the text. *See* is used if the proposition is not directly stated in the cited authority (use no signal if it is) but supports the proposition in the text, or the cited authority contains dicta that supports the cited proposition.

> Because Jones did not act intentionally or recklessly, she is not guilty of criminal contempt. *See Yellow v. Orange*, 100 F. Supp. 58 (S.D.N.Y. 1951).[2]

b. E.g. means "for example." Use it to give one or more examples of support for the proposition in the text. *E.g.* may be combined with other signals, such as in *See e.g.*

[2] *See* is used instead of no signal because *Yellow v. Orange* does not say anything about Jones.

Most state statutes require that the defendant act intentionally or recklessly. *See e.g.* N.Y. Penal Law § 50 (McKinney 1980); Or. Rev. Stat. § 32 (1985); Utah Code Ann. § 12 (1981). A defendant, therefore, should not be guilty if he acted negligently. *See e.g. Blue v. Green*, 400 F.2d 12 (7th Cir. 1972) (defendant "just careless"); *Gold v. Brass*, 394 F.2d 42 (9th Cir. 1971) (defendant "merely inadvertent"); *Yellow v. Orange*, 100 F. Supp. 58 (S.D.N.Y. 1951) (defendant's "mere oversight").

c. *Cf.* means that the proposition in the cited authority is different from, but analogous to, the proposition in the text. *Cf.* can show comparisons, as can the signal "*Compare.*"

d. *Contra* is used to show authority in direct contradiction to your proposition. You may also show authority in contradiction with a signal introduced by "*but,*" such as "*but see,*" and "*but cf.*"

Either intentional or reckless disregard of a court order constitutes criminal contempt. *Gold v. Brass*, 394 F.2d 42 (D.C. Cir. 1971). *But see Lead v. Pipe*, 512 F.2d 65 (10th Cir. 1980) (requiring intentional conduct for criminal contempt).

A signal may be used with an explanatory parenthetical as in the examples above. The ALWD Manual and most readers encourage parenthetical information to be added to the basic citation in order to explain the relevance of the authority cited with an introductory signal. The parenthetical information should relate to the material discussed in your text. Generally, a parenthetical should be a phrase, not a sentence, and should usually begin with a present participle (example 2(d)). However, if you do not need a complete participial phrase, use a shorter parenthetical (example 2(b)). See Rule 47.

Do not use parentheticals for an important point, however. The facts of important cases should be discussed in your text, not relegated to parentheticals.

Another use of parentheticals is to supply other information, such as information that explains the weight of the cited authority, as in these examples.

Lawless v. Justice, 394 F.2d 42 (D.C. Cir. 1971) (Bork, J., dissenting).
Lead v. Pipe, 512 U.S. 65 (1980) (per curiam).

ALWD Manual Citation Exercises

Rewrite these citations correctly. If the correct citation form requires information that you do not have, such as a page number, a date or a court, indicate that information with an underline. For example, if the exercise does not identify the date of a decision, indicate that as follows: (Ill. 19__). For information concerning typeface for citations, *see* ALWD Rule 1.0.

1. Assume that this citation appears in an internal office memo:

   Johnson et. al. v. Smith 312 N.E.2d 600 (Il. 1964).

2. Assume that this citation appears in an internal office memo:

   Michaels v. Jordan, 100 F.Sup. 5 (R.I. 1941).

3. Assume that this citation appears in an internal office memo:

   Jordans v. Marsh Corp. Inc., 206 So.2d 3 (Miss. 1959).

4. Assume that this citation appears in an internal office memo:

   Marsh v. Metropolitan Housing Institute, 6 F.3d 9 (CA 2 1992)

5. Assume that this citation appears in an internal office memo:

   Simon v. Pauls, 210 U.S. 15, 200 S. Ct. 7, 190 L.Ed. 16 (Sct. 1965).

6. Assume that these citations appear in a document that you are filing in an Alabama state court.

   In this appeal, the defendant has raised an error he did not raise at trial. *See U.S. v. Carter,* 230 F.2d 62 (1971) quoted on page 64. See *State v. Brown,* 400 P.2d 10 (Calif. 1990), *State v. Wallace,* 100 So.2d 7 (Ala. 1951), *State v. LaFollette,* 100 Wisc.2d 48 (1985), 312 N.W.2d 30 (1985).

7. Assume that these citations appear in an internal office memo:

   In *Ryan v. Quinn Brothers Corporation,* 318 N.E.2d 6 (Mass. 1964), the court held that the defendant had violated Section 12 Mass. Annotated Laws Chapter 5. However, the plaintiff received only nominal damages. *Ryan,* supra on page 10.

8. Assume that this citation appears in an internal office memo:

   Title 15 Section 552 Part a4 of The United States Code published in 1989 permits a court to award attorney fees "reasonably *incurred*" to a successful litigant [my emphasis].

9. Assume that this paragraph appears in a document that you are filing in a Maryland state court:

   The appellee has distinguished Maryland law from the cases that the appellant has relied on. For example, the appellee distinguishes *Pioneer Lands Inc. v. Agnew,* 400 A.2d 36, 390 Md. Repts. 165 (Md. 1981). The Environmental Preservation Act, Md. Code Annot. [Environ.] § 36 (1992), the statute at issue in *Pioneer Lands,* is different from the one at issue here. Pioneer Lands at 38.

10. Assume that these citations appear in a document that you are filing in a Mississippi state court:

    The statute requires that three witnesses sign the will. § 15 Miss. code Ann. Only two witnesses signed the decedent's will, and the will is invalid. See, *Macabre v. Macabre,* 150 So.2d 35 (Miss. 1972), *Rigor v. Mortis,* 182 So.2d 10 (Miss. 1979). This court has said, "It is more important that the statue [error in original] be enforced than the will be valid," *Macabre,* at 37.

11. Assume that you are citing to the book *Learned Hand, The Man and the Judge,* by Gerald Gunther, published by Alfred Knopf in 1994, for information in footnote 148 on page 37. Assume that this citation appears in an internal office memo.

12. You have just read a law review article, "Videotaping Wills: a new frontier in estate planning." The author, who is not a student, is Alfred W. Buckley. It appeared in volume 11 Ohio Northern University's law review in 1984 on pages 271–287. Cite this law review article as you would in an internal office memo.

Appendix C

Sample Office Memorandum

TO: Assistant State's Attorney

FROM: J.B.

RE: *People v. Keith*

DATE: November 1, 1989

Facts: Roger Keith was indicted for murder in a hit-and-run killing in Silver Stone, Colorado. At a preliminary hearing on September 30, 1989, Keith's defense attorney moved for dismissal of the murder charge on the ground that the state had lost the alleged murder weapon, and that the loss constituted suppression of exculpatory evidence and denied Keith the right to a fair trial. The court has asked for a memo in opposition to the motion.

The murder indictment stems from a hit–and–run accident on September 2, 1989, at 6:30 P.M. Two witnesses observed a young white man they could not identify start a car, take off at high speed, and swerve onto the sidewalk, striking the victim. The witnesses said the car was a red hatchback that had a rear license plate that said "GUMSHOE."

Keith is a newspaper reporter and was investigating allegations of corruption in the Silver Stone Police Department at the time. The stories already published had named the arresting officer in his case as involved in some minor illegal activities. Keith owned a red hatch-back with "GUMSHOE" license plates. Keith was arrested the night of the killing and insisted that he was home alone all evening and that his car was not in operating condition. He also claimed that his car was missing its front license plate. The police found Keith's car in his garage and towed it to the police impoundment yard. It was stolen that night from the police yard and has never been recovered.

Police Officer Miller, the arresting officer, testified at Keith's pre-trial hearing that the police impounded Keith's car according to usual police practice. Miller last saw Keith's car at the police impoundment area on the

night of the killing. His partner, Police Officer Jaeger, was to have secured the impoundment area that night, but Miller was unable to testify that Jaeger in fact did so. Unfortunately, Jaeger died the next day, which, obviously, precluded him from testifying. Miller returned to the impoundment area the following day and found the gate open and the defendant's car gone. There was no damage to the locks on the gate, and Keith's car was the only one missing. Miller also testified that he did not start or examine the car the night of the arrest because the forensic team was going to examine it the following morning. However, Miller said that he did not observe any evidence that the car was involved in a hit-and-run killing, and did not notice if the car was missing its front plate.

The defendant's mother, Estelle Keith, supported Keith's assertion that his car was inoperable, testifying that the car needed to be jump-started in order to run. She also testified that Keith's front license plate had been missing for "a week or so before Roger was arrested."

Question Presented: Whether a hit-and-run murder charge against a criminal defendant should be dismissed on the ground that his car, stolen from police custody before the police could examine it, was material exculpatory evidence, and that under the federal and Colorado constitutions, he cannot receive a fair trial without it.

Short Answer: No. Although the police suppressed Roger Keith's car when it was stolen from police custody, and Keith is unable to obtain comparable evidence, he has no concrete evidence that police acted in bad faith, or that the police were aware of the exculpatory nature of the evidence.

Discussion: Under the federal and Colorado constitutions, a criminal defendant's due process right to a fair trial may be violated as a result of the state's failure to preserve potentially exculpatory evidence. *See People v. Enriquez,* 763 P.2d 1033, 1036 (Colo. 1988). However, the evidence must possess exculpatory value that is apparent to the state before its loss, and it must be of such a nature that the defendant cannot obtain comparable evidence by other means. *Id.* Furthermore, for a due process violation under the federal constitution, the state must have acted in bad faith when it failed to preserve the evidence. *Arizona v. Youngblood,* 488 U.S. 51, 58 (1988). The record here reflects that the state suppressed the evidence, and that Keith cannot obtain comparable evidence by other means. However, the record is not clear whether the police were aware of the exculpatory nature of the automobile before its loss, or that the evidence was lost as a result of bad faith on the part of the police, although the inference is

strong that it was. Moreover, even if the state does not require police bad faith, Keith's due process right to a fair trial will not be violated under Colorado law unless the police were aware of the exculpatory nature of the automobile.

When evidence can be collected and preserved in the performance of routine procedures by the state, failure to do so is tantamount to suppression of evidence. *People v. Humes,* 762 P.2d 665, 667 (Colo. 1988). In *Humes,* the court held that because there are routine procedures for collecting and preserving blood samples, the police's failure to preserve the samples constituted suppression of evidence by the prosecution. *Id.* Similarly, in *People v. Sheppard,* 701 P.2d 49 (Colo. 1985), the state was responsible for the loss of a car that was evidence in a vehicular homicide case. Without authorization from the state police, the body shop that was holding the car crushed it for scrap metal. The court held the state responsible for the loss. Under the circumstances, the failure to collect and preserve the automobile was "properly attributable to the prosecution." *Id.* at 52. However, when the state fails to preserve evidence in its possession, through no fault of its own, the state does not suppress evidence. *People v. Greathouse,* 742 P.2d 339 (Colo. 1987). In *Greathouse,* the blood samples in question were not lost as a result of police action or inattention, but apparently by a natural process of decay. Thus the state had not destroyed the evidence. *Id.*

In the present case, as in *Humes* and *Sheppard,* the loss of evidence is attributable to the state. Miller testified that it is standard procedure for police to impound automobiles involved in hit-and-run cases. Moreover, the circumstances surrounding the car's disappearance indicate that Jaeger failed to lock the impoundment area gate. His dereliction of duty contributed to the car's disappearance, and therefore it can be concluded that the state suppressed the evidence.

However, the suppressed evidence must have possessed exculpatory value apparent to the police before its loss. *California v. Trombetta,* 467 U.S. 479, 489 (1984); *People v. Sheppard,* 701 P.2d at 54. In *Sheppard,* the court dismissed the case on due process grounds when the exculpatory nature of the evidence was clear to the police as a result of its own preliminary evaluation of the evidence. Sheppard's car had gone off the side of the road and down an embankment, killing a passenger. A policeman had inspected the car after the accident and reported it to have mechanical defects that could have accounted for the accident. *Id.* Conversely, the state does not have the duty to preserve apparently inculpatory evidence. *People v. Gann,* 724 P.2d 1322 (Colo. 1986). In *Gann,* the defendant's due process

rights were not violated by the failure of the police to preserve the apparently inculpatory telephone number of an anonymous informant. *Id.*

There is some evidence that Keith's automobile may have had apparent exculpatory value. Miller said that the car bore no evidence of a hit-and-run killing. Nonetheless, Miller's superficial examination is probably not sufficient to establish that the police were aware of the exculpatory nature of the automobile before it was stolen. Had the police noticed whether the front license plate was missing or had they confirmed that the car was not in working order, then the evidence would have had apparent exculpatory value. Since they noticed neither, the evidence was not apparently exculpatory.

Furthermore, if the defendant can obtain comparable evidence by other reasonable means, the loss of exculpatory evidence does not violate the defendant's right to a fair trial. *Trombetta,* 467 U.S. at 489. In *Sheppard,* 701 P.2d at 54, the defendant, charged with vehicular manslaughter, claimed that an examination of his car would have revealed that mechanical defect and not driver negligence caused the accident. The destruction of the physical evidence deprived Sheppard of the opportunity to examine the car. Concluding that, despite the police preliminary report tending to support the defendant's claim of malfunction, the defendant had no adequate evidentiary substitute for his destroyed vehicle, the court held that Sheppard's due process right was violated. *Id.*

Like the defendant in *Sheppard,* Keith has no evidence "comparable" to the stolen vehicle itself. Instead of objective evidence like the policeman's report, he has only his own and his mother's testimonies that his car was inoperable, and that his front license plate was missing. He also has Miller's statement that he did not notice damage consistent with the crime. This statement is even less authoritative than the preliminary report in *Sheppard,* and certainly does not carry the same weight as, for example, a forensic finding to the same effect. *See People v. Palos,* 930 P.2d 52 (Colo. 1985) (forensic ballistics report provided exculpatory evidence comparable to defendant's lost gun). Thus, because Keith is unable to obtain evidence comparable to his car, he should be able to satisfy this element.

Finally, a due process violation under the federal constitution requires that the police have acted in bad faith when they failed to preserve the evidence. *Youngblood,* 488 U.S. at 58. It is insufficient to show that the loss was a result of mere negligence on the part of the police. Rather, the defense is limited to those cases in which "the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant," and, acting in bad faith, failed to preserve it. *Id.*

The Colorado courts have not yet had occasion to consider *Youngblood's* addition of a bad faith requirement. However, the court must do so to determine Keith's federal due process claim. A failure to follow routine practice may indicate bad faith. In *Youngblood,* 488 U.S. at 56, and *Trombetta,* 467 U.S. at 488, the defendants' cases were weakened because the police had followed their normal practices. In contrast, normal procedures were not followed here. Since there is no evidence of a break-in, Keith's car must have been lost because Jaeger failed to lock the gates, and by failing to do so, he did not follow standard police procedure. Only Keith's car was stolen. The police had reason to frame Keith because one of Keith's newspaper stories had named Miller in connection with minor illegalities. The police did not know if future stories would name not only Miller again, but others in the department. Jaeger may have left the gate open in solidarity with another officer. The inferences from these facts are strongly in Keith's favor.

However, at this point, Keith has only inferences. There is no concrete evidence about the missing front license plate, the unlocked gate, the vehicle's disappearance, and even Jaeger's death. He has nothing to link these events to prove police bad faith. Moreover, bad faith will turn on whether the police knew that Keith's car was exculpatory evidence. "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was destroyed." *Youngblood,* 488 U.S. at 56 n.2. Officer Miller's credibility will be crucial because he is the only officer who looked at Keith's car before he impounded it.

Nevertheless, it is not clear whether *Youngblood* requires concrete evidence of bad faith, or whether the court will be allowed to infer bad faith from these rather suspicious circumstances. In *Youngblood,* the defendant had neither concrete evidence nor inferences because the police laboratory personnel acted negligently by not preserving evidence before the police had any information linking the defendant with the crime. Miller and Jaeger, however, identified and charged Keith before they impounded his car. Because the lost car is so crucial to Keith's defense, the inference of bad faith may be enough to make this criminal trial "fundamentally unfair," *id.* at 61 (Stevens, J., concurring), unless Miller offers credible testimony that he was not aware of the exculpatory nature of the car.

Moreover, even if the police did not act in bad faith, it is possible that the indictment may be dismissed under the due process clause of the Colorado Constitution. The Colorado Supreme Court's last decision on this issue was *Enriquez,* decided just before the Supreme Court of the United

States decided *Youngblood.* The Colorado court may decide that bad faith is not required, and that the Colorado Constitution affords greater due process protection than does the United States Constitution. Then, under *Enriquez,* the crucial issue will be whether the police were aware of the car's exculpatory value before the car was stolen. 763 P.2d at 1036. Keith's story would be corroborated if Miller cannot credibly testify he did not notice if the car was missing its front plate. If he did notice, then the police would have known that the car was exculpatory evidence. That fact and the loss of the car would require the court to dismiss this case. Without that information, however, it is likely that Keith's motion will fail.

Appendix D

Sample Office Memorandum

TO: Senior Attorney
FROM: Law Clerk
DATE: November 21, 1994
RE: Emily West Contract Litigation

FACTS: Emily West is president of the newly formed Aunt Em's Natural Heartland Bake Company, a producer of goods baked without additives or preservatives. While searching for a source of very high quality wheat, West was referred to Abel Prentice, an experienced wheat farmer with an excellent reputation as a knowledgeable grower and dealer. Prentice grows wheat on a 3,000 acre farm he owns and operates in this state. For over thirteen years he has been selling his own wheat and wheat grown by other farmers to manufacturers.

West visited Prentice in May 1994 and described the kind of bread she wished to produce. Prentice assured West that he knew a great deal about the bread business. In fact, Prentice told her that he probably knew more about her business than she did. After thinking it over, West signed a contract to buy wheat from Prentice. The written contract contained the terms of quantity, price, delivery, and payment schedules. No description or warranty as to the quality of the wheat, however, was included. After signing the contract, Prentice said: "You won't be sorry. I grow the finest wheat money can buy."

When the wheat was delivered in July, West found that 15–20% of it was blighted and unusable. West rejected the wheat and refused to pay Prentice. On August 5, 1994, Prentice filed suit against West's company for breach of contract.

QUESTION PRESENTED: Can West, a buyer of wheat, successfully defend a breach of contract suit on the grounds that the seller, Prentice, breached both express and implied warranties under the Kansas Commercial Code,

Kan. Stat. Ann. §§ 2-313, 2-314, 2-315 (1983), when 15–20% of the wheat Prentice delivered was blighted and unusable?

CONCLUSION: West has a strong defense based on breach of implied warranty of merchantability, Kan. Stat. Ann. § 2–314 (1983), since the goods sold to her were neither of fair average quality nor fit for the ordinary purpose of baking bread. She can also prove a breach of the implied warranty of fitness for a particular purpose, Kan. Stat. Ann. § 2–315 (1983), since she informed Prentice of her particular use for his goods, that of baking breads without additives or preservatives, and he knew she was relying on his judgment to select suitable goods. However, she probably cannot successfully use breach of express warranty, Kan. Stat. Ann. § 2–313 (1983), because Prentice's statement to her was an opinion and not an affirmation of fact.

APPLICABLE STATUTES:

Kan. Stat. Ann. § 84–2–104. Definitions: "Merchant"; "Between Merchants"; "Financing Agency"

> (1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.
>
> . . . .

Kan. Stat. Ann. § 84–2–313. Express Warranties by Affirmation, Promise, Description, Sample

(1) Express warranties by the seller are created as follows:

(a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

(b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

. . . .

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

Kan. Stat. Ann. § 84–2–314 Implied Warranty: Merchantability; Usage of Trade

(1) Unless excluded or modified (Section 2–316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

. . . .

(2) Goods to be merchantable must be at least such as
(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used;
. . . .

. . . .

Kan. Stat. Ann. § 84–2–315. Implied Warranty: Fitness for Particular Purpose

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose.

DISCUSSION: Abel Prentice's breach of contract claim is based on Emily West's wrongful rejection of the goods. However, if Prentice breached any of the three warranties under the Kansas Commercial Code, then West

rightfully rejected the goods and has a successful defense. The Kansas Commercial Code provides three possible defenses based on breach of warranty: breach of implied warranty of merchantability, § 2–314; breach of implied warranty of fitness for a particular purpose, § 2–315; and breach of express warranty, § 2–313. West has a strong defense based on breach of implied warranty of merchantability. Moreover, she has a good defense based on implied warranty of fitness for a particular purpose. However, she cannot successfully defend the suit by claiming breach of express warranty.

The best defense against Prentice's suit is under § 2–314, the implied warranty of merchantability. This section provides that if the seller is a merchant, a warranty of merchantability is implied in a contract. Id. (1). Section 2–314(2) sets out minimum standards which goods must meet to be merchantable. Under these standards, goods must, *inter alia*, "pass without objection in the trade under the contract description," § 2–314(2)(a); and, in the case of fungible goods, be "of fair average quality within the description," § 2–314(2)(b); and be "fit for the ordinary purposes for which such goods are used," § 2–314(2)(c). Prentice is a merchant and the goods did not meet any of these standards. Therefore, Prentice breached the implied warranty of merchantability.

The statute itself defines merchant, in pertinent part, as "a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction." Kan. Stat. Ann. § 2–104(1) (1983). One court in Kansas has addressed the question of whether a farmer is a merchant in a case involving the sale of hogs between hog farmers. *Musil v. Hendrich*, 627 P.2d 367 (Kan. App. 1981). The court concluded that the defendant farmer in the hog transaction was a merchant under either definition in the statute. First, as someone who had been in the hog business for thirty years and was selling 50–100 hogs per month, he was a dealer in hogs. Second, he held himself out as having knowledge or skill relating to the goods, since he had equipment and buildings related to hog farming and sold hogs to private individuals, as well as to a slaughterhouse. Id. at 373. Prentice, like the hog farmer in *Musil*, is a merchant under either definition. Prentice is a dealer because he is a wheat farmer who sold manufacturers not only his own wheat, but also the wheat of other farmers. He also held himself out as having knowledge relating to the goods, since he has been a wheat farmer for thirteen years, runs a 3,000 acre farm, and stated to West that he knew more about her business than she did. Prentice is therefore a merchant, and it is appropriate to apply § 2–314.

Under the standards of merchantability provided in § 2–314, the warranty was breached first because the 15–20% blighted wheat was of lesser quality than would "pass without objection in the trade" and was not of "fair average quality." § 2–314(2)(a)(b). Fair average is described as "the middle belt of quality ... not the least or the worst ... but such as can pass without objection." § 2–314 Comment 7. According to regulations from the Kansas Department of Agriculture, to be of fair average quality, a wheat shipment can contain no more than 10% of a blighted or inferior product. Kan. Admin. Regs. 397.41 (1981). Since the wheat Prentice shipped was 15–20% blighted, it did not meet this standard.

The implied warranty of merchantability was also breached because the wheat was not fit for its ordinary purposes. Under Kansas law, the buyer must show the ordinary purpose of the goods involved and show that the goods are not fit for that purpose. *Black v. Don Schmidt Motor, Inc.*, 657 P.2d 517, 525 (Kan. 1983). The ordinary purpose for wheat is to make flour for bread. Since wheat that is 15–20% blighted would not make acceptable flour, the wheat is not fit for its ordinary purpose. Accordingly, Prentice breached the implied warranty of merchantability.

Prentice has also breached the implied warranty of fitness for a particular purpose. A warranty of fitness for a particular purpose is implied "when the seller, at the time of contracting, [knows] any particular purpose for which the goods are required, and [knows] that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods." § 2–315. At the time the contract was made, Prentice knew that West required a high quality wheat for her all-natural bread, and that she was relying on his judgment to select and provide suitable wheat. Since the making of all-natural bread is a particular purpose, and since wheat that is 15–20% blighted is not fit for this purpose, Prentice has breached an implied warranty of fitness.

The first requirement is that the goods are to be used for a particular, as opposed to an ordinary purpose. In *International Petroleum Services, Inc. v. S & N Well Service, Inc.*, 639 P.2d 29, 37 (Kan. 1982), the court described a particular purpose as more specific, narrow, and precise than an ordinary purpose. *Id.* The court also stated that a particular purpose meant a use peculiar to the nature of the buyer's business. *Id.* West intended to use the wheat to make all-natural bread and cakes using no preservatives. She would, therefore, need especially high quality wheat, not a product that could be used in making ordinary baked goods which could rely on preservatives for freshness.

In addition, Prentice had reason to know of the particular purpose she intended for the wheat. Prior to signing the contract, West described her business to Prentice and told him the kind of bread she wanted to produce.

Finally, West relied on Prentice's skill and judgment to select the appropriate goods. *See Addis v. Bernadin, Inc.*, 597 P.2d 250 (Kan. 1979). In *Addis*, the plaintiff buyer, a manufacturer of salad dressings, informed the defendant seller that he needed jar lids for dressings containing vinegar and salt. Although the seller knew that the lids the buyer had ordered were incompatible with their intended use, he did not tell the buyer. *Id.* at 254. The court held the seller, who had superior knowledge, had breached the implied warranty of fitness for a particular purpose. The buyer had relied on the seller's knowledge of his product and on his judgment to select appropriate goods in conformity with the use the buyer described. *Id.* West, too, relied on Prentice's judgment to provide appropriate goods. She was just starting her business, but Prentice had been selling his own wheat for over thirteen years. Moreover, Prentice not only said he knew all about the wheat business, he boasted that he knew more about her business than she did. Therefore, a court would probably hold that Prentice breached an implied warranty of fitness for a particular purpose.

It is not likely, however, that an express warranty had been created. An express warranty is created by a seller's "affirmation of fact" about the goods, or a description, sample, or model of the goods given to the buyer, any of which is "made part of the basis of the bargain." § 2–313(1)(a)(b)(c). The seller need not use formal words of guarantee, or intend to create a warranty. § 2–313(2). However, a statement that is merely the seller's opinion of the goods does not create a warranty. *Id.* The written Prentice–West contract made no mention of any express warranty. That could only have been created in Prentice's statement to West that he grows "the finest wheat money can buy." However, as this statement is more opinion than an affirmation of fact, Prentice did not create an express warranty.

Kansas courts have held that express warranties can be created by oral statements if these statements are affirmations of fact and not opinions. Formal words of guarantee are not necessary, but an affirmation merely of the value of the goods is not sufficient to create an express warranty. *Young & Cooper, Inc. v. Vestring*, 521 P.2d 281 (Kan. 1974); *Brunner v. Jensen*, 524 P.2d 1175 (Kan. 1974). In *Young*, the defendant buyer purchased cattle from the plaintiff seller who told him that the cattle were "a good reputable herd ... clean cows." 521 P.2d at 285. The court said that such statements are taken by cattlemen to mean that cattle are free of brucellosis. The seller thereby created an express warranty, which was breached when the cattle

were found to have the disease. *Id.* at 293. The court classified these statements as affirmations of fact and not opinion, since they were representations of fact "capable of determination" or "susceptible of exact knowledge." *Id.* at 290. Similarly, in *Brunner,* another case concerning cattle, the seller's oral statement to the buyer that cows would calve by a certain date was not, the court said, an opinion. The court held that the seller's statements created an express warranty which was breached when the cows did not calve on time. 524 P.2d at 1186.

The facts in West, however, are distinguishable from those in *Young* and *Brunner.* A court would probably classify Prentice's statements about his wheat as opinion, rather than fact because his statement is neither "capable of determination" nor "susceptible of exact knowledge." The statement more resembles sales talk, and therefore, did not create an express warranty.

Appendix E

Sample Memorandum in Support of a Motion

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

PARK, INC., et al.,	)	
Plaintiffs,	)	No. 86 L 22939
v.	)	N.W.
DAVID RYAN, et al.,	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT AS TO WRIGLEY HOUSING, INC., JOE SAYERS, ANN CHRISTIE, AND MARGARET JAMES

INTRODUCTION

Plaintiffs PARK, INC. ("Park"), a real estate management company, and its President, Earl Marple ("Marple"), have sued more than thirty individuals and organizations active in the tenants' rights movement in the West Park section of Chicago. Plaintiffs' four-count complaint purports to state claims for libel and slander. On December 22, 1986, defendants Wrigley Housing, Inc. ("Wrigley"), Joe Sayers ("Sayers"), Ann Christie ("Christie") and Margaret James ("James"), filed a motion to dismiss the complaint as to those defendants pursuant to Rule 2–615 of the Illinois Rules of Civil Procedure. This memorandum is submitted in support of those defendants' motion to dismiss.

STATEMENT OF FACTS

Plaintiff Park is a corporation engaged in the business of managing and developing real estate. (Complaint ¶ 1.) Park has developed and manages more than 500 rental units in the West Park area of Chicago. (Complaint ¶ 12.) Plaintiff Marple is President of Park, and has been in the real estate business since 1969. (Complaint ¶¶ 1, 9.) This case arises out of a dispute between Park and Marple, on the one hand, and the West Park Tenants' Committee ("WPTC"), the Professionals for Better Housing ("PBH"), and Alderman David Ryan, on the other hand, concerning Park's real estate management practices. (Complaint ¶¶ 16–22.)

In April 1986, WPTC convened a meeting of tenants and former tenants of Park and of representatives of other tenants' rights organizations and block clubs, in response to complaints about Park's rental policies and practices. (Complaint ¶ 22; Exhibit A.) Park's tenants continued to meet, to distribute literature to Park tenants, and to picket at Park's rental office and at Marple's home. (Complaint ¶ 22.)

Plaintiffs allege that the communications thus published by WPTC and PBH were defamatory. (Counts I and II.) Specifically, in Count I, they allege that a newsletter attached as Exhibit A to the complaint contains the following defamatory statements:

> That in August 1985 (or on or about said time) there were complaints regarding Park as to "giant rent increases"; "failure to refund security deposits and pay interest"; "chronic heat and hot water problems"; "intimidation of tenants"; and "outrageous set of move-out policies."

(Complaint ¶ 30.)

Plaintiffs allege that a leaflet attached as Exhibit B to the complaint contains the allegedly defamatory statement that "the WPTC wanted to meet with Park 'to discuss the state investigation of Park.'" (Complaint ¶ 28.) They also allege that leaflets attached to the complaint as Exhibits C and D libel Park and Marple by stating, *inter alia,* that Park's tenants want to meet with Marple to discuss "problems relating to his mismanagement of ten buildings in West Park with nearly 500 apartments" and, specifically, "lack of water," "lack of heat," "poor building security," "unfair security deposit deductions," "lack of smoke detectors," "unresponsiveness to requests for repairs," "failure to pay security deposit interest," "electrical problems," "roaches," "intimidation and harassment of tenants," "infrequent garbage pickup," and "outrageous move-out policies." (Exhibits C–D; Complaint ¶ 31.) Plaintiffs allege that Exhibits A, B, C and D were authored

by WPTC and PBH and that the authors "were one or more of the following Defendants," with Christie included on a list of thirteen names. (Complaint ¶ 25.)

In Count II, plaintiffs allege that various defendants, including Christie, picketed the offices of Park's rental agent. (Complaint ¶¶ 47–48.) Plaintiffs claim that various picket signs and oral communications included defamatory statements that Park and Marple were "in housing court," did not supply heat in their buildings, had a policy "not to return security deposits," "made bogus deductions" from security deposits, and that the buildings managed by Park had roaches. (Complaint ¶ 49.)

Counts III and IV concern a letter sent to the limited partners of Park on or about October 1, 1986. (Complaint ¶ 64.) The letter indicates that it was endorsed by Alderman Ryan and a number of tenants' and housing rights groups, including Wrigley Housing. (Exhibit E.) Plaintiffs allege in Count III that the letter contains the following allegedly defamatory statements:

> A. Evidence exists documenting continuous complaints by tenants about maintenance problems and the indifferent handling of these complaints by Park, Inc.
>
> B. City inspection reports detail numerous instances of housing code violations in Park, Inc. properties.
>
> C. Park is not repairing housing code violations and is not making repairs in a workmanlike manner.
>
> D. Numerous outgoing tenants have complained about not receiving proper disbursement of their security deposits.
>
> E. Most tenants have not received the requisite interest on their security deposit interests.
>
> F. The buildings show serious signs of mismanagement and distress.
>
> G. Many tenants are not renewing their leases with Park, Inc. because they cannot deal with habitually poor management.
>
> H. The buildings are developing high vacancy rates and falling into disrepair.

ARGUMENT

The plaintiffs' complaint must be dismissed because the communications complained of in Counts I, II, III, and IV are not defamatory *per se* under Illinois law. Even assuming that the statements are defamatory, Illinois law grants them a qualified privilege. Furthermore, plaintiffs' prayer

for punitive damages is unsupported and must be stricken from the complaint. Finally, the complaint contains no allegations concerning defendants Sayers and James and should be dismissed as to those defendants.

I. ALL COUNTS MUST BE DISMISSED BECAUSE THE COMMUNICATIONS COMPLAINED OF ARE NOT DEFAMATORY PER SE.

Under Illinois law, the defendants' statements are not defamatory *per se*. To be considered defamatory *per se*, the language must be so obviously and naturally harmful to the person to whom it refers that damage is a necessary consequence and need not be specially shown. *Owen v. Carr*, 113 Ill. 2d 273, 274, 497 N.E.2d 1145, 1147 (1986); *Sloan v. Hatton*, 66 Ill. App. 3d 41, 42, 383 N.E.2d 259, 260 (4th Dist. 1978). Four classes of words, if falsely communicated, give rise to an action for defamation without a showing of special damages:

> 1. Those imputing the commission of a criminal offense
> 2. Those imputing infection with a communicable disease
> 3. Those imputing inability to perform or want of integrity in the discharge of duties of office or employment, and
> 4. Those prejudicing a particular party in his profession or trade.

Fried v. Jacobson, 99 Ill. 2d 24, 26, 457 N.E.2d 392, 394 (1983). With respect to corporate plaintiffs, moreover, the alleged libel must assail the corporation's financial or business methods or accuse it of fraud or mismanagement. *American International Hospital v. Chicago Tribune Co.*, 136 Ill. App. 3d 1019, 1022, 483 N.E.2d 965, 969 (1st Dist. 1985); *Audition Division, Ltd. v. Better Business Bureau*, 120 Ill. App. 3d 254, 256, 458 N.E.2d 115, 118 (1st Dist. 1983).

In determining whether particular language constitutes libel *per se*, Illinois courts apply the rule of innocent construction:

> a written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning; if, as so construed, the statement may reasonably be innocently interpreted as referring to someone other than the plaintiff it cannot be actionable *per se*. This preliminary determination is properly a question of law to be resolved by the court in the first instance.

Chapski v. Copley Press, 92 Ill. 2d 344, 347, 442 N.E.2d 195, 199 (1982). Thus, the court must examine the statements here within the context of the sur-

rounding circumstances and events, and judge the words accordingly. Id.; *Sloan v. Hatton,* 66 Ill. App. 3d at 43, 383 N.E.2d at 261. Moreover, the trial court is required to make this determination in the context of the entire publication. *Chapski,* 92 Ill. 2d at 345, 442 N.E.2d at 199.

The following emerges clearly from an examination, in context, of Exhibits A through E to the complaint: As Exhibit A shows, tenants of buildings owned and managed by Park were meeting and organizing in early 1986. It is clear from Exhibits B through E that the tenants' goal was to meet with Park and Marple to discuss various problems the tenants perceived.

> "To plan other direct action to get Park to meet with us" (Exhibit B)
>
> "We want to meet with Earl Marple to discuss and get action on these problems" (Exhibit C)
>
> "Quite simply we want Park to meet with us and begin to address our legitimate concerns" (Exhibit D);
>
> "Therefore, we are asking that (1) you attend a special meeting of the West Park Housing Forum... and (2) that you encourage Mr. Marple to attend this meeting also" (Exhibit E, at 3).

Thus, the context of the communications here was clearly a dispute between tenants and a landlord about the manner in which he was managing his buildings.

Chapski requires that, in ruling on a motion to dismiss, the trial court must review the allegedly libelous documents to determine, as a matter of law, whether they are subject to a reasonable *non-defamatory* construction; if so, the documents are not actionable even if they may also be subject to a reasonable *defamatory* construction and even if the party receiving the communications understood them in a defamatory sense. *Chapski,* 92 Ill. 2d at 345, 442 N.E.2d at 199. Following this mandate, Illinois courts have repeatedly dismissed libel cases after finding that the statements complained of were susceptible of a reasonable innocent construction. *See, e.g., Meyer v. Allen,* 127 Ill. App. 3d 163, 165, 468 N.E.2d 198, 200 (4th Dist. 1984); *Audition Division, Ltd. v. Better Business Bureau,* 120 Ill. App. 3d at 257, 458 N.E.2d at 119; *Cartwright v. Garrison,* 113 Ill. App. 3d 536, 537–40, 447 N.E.2d 446, 447–50 (2d Dist. 1983).

Rasky v. CBS, Inc., 103 Ill. App. 3d 577, 431 N.E.2d 1055 (1st Dist.), *cert. denied,* 459 U.S. 864 (1982), is particularly relevant to this case. The *Rasky*

plaintiff was a landlord whose building maintenance and business practices were criticized by a number of tenants' groups and a state representative, among others; CBS News then broadcast a news program describing the controversy and interviewing tenants. The appellate court, affirming dismissal of the case, found that the derogatory remarks by the news media and community groups could be interpreted innocently.

> The overall thrust of the CBS news telecast was that citizens in the community were bitterly opposed to the way in which they perceived that plaintiff managed his buildings and that, through their representatives, they intended to explore available legal remedies for redress. In that context, the report noted that Edgewater citizens: have accused plaintiff of being a "slumlord"; have previously taken legal action against him; claim he does not make repairs. In our opinion, the CBS news telecast, taken as a whole, is capable of an innocent construction and cannot be considered defamatory as a matter of law.

103 Ill. App. 3d at 577, 431 N.E.2d at 1059.

The communications complained of in this case, read as a whole and in context, amount to no more than the statements found to be non-defamatory in *Rasky.* The thrust of Exhibits A through E is that numbers of citizens were "bitterly opposed to the way in which they perceived that plaintiff[s] managed [their] buildings and ... intended to explore available legal remedies for redress." *Id.* In that context, Exhibits A through E may reasonably be construed innocently and thus may not sustain an action for defamation.

Furthermore, it is not libel *per se* to state that complaints have been filed about a business. *See, e.g., Audition Division, Ltd. v. Better Business Bureau,* 120 Ill. App. 3d at 254, 458 N.E.2d at 119; *American Pet Motels, Inc. v. Chicago Veterinary Medical Ass'n,* 106 Ill. App. 3d 626, 628, 435 N.E.2d 1297, 1300 (1st Dist. 1982). Illinois courts have reasoned that a statement that customers have complained about a business is not equivalent to a statement that the business is incompetent, fraudulent, or dishonest. Thus, the statements complained of in Exhibit A—that in August 1985 there were a variety of complaints regarding Park (Complaint ¶ 30)—are not defamatory, as a matter of law.

Under Illinois law, it is also not libel *per se* to state that a plaintiff's business activities are under investigation. *Cartwright v. Garrison,* 113 Ill. App. 3d 536, 539, 447 N.E.2d 446, 450 (2d Dist. 1983); *see also Spelson v. CBS, Inc.,* 581 F. Supp. 1195, 1205 (N.D. Ill. 1984), *aff'd mem.,* 757 F.2d 1291 (7th

Cir. 1985). Thus, the statement complained of in paragraph 28 of the complaint (that the WPTC wanted to meet with Park "to discuss the state investigation of Park") is not defamatory *per se,* as a matter of law.

In short, when considered as a whole and in context, the statements in Exhibits A through E are susceptible of a reasonable innocent construction, and do not constitute libel *per se.*

II. THE COMMUNICATIONS COMPLAINED OF ARE ENTITLED TO A QUALIFIED PRIVILEGE UNDER ILLINOIS LAW.

Even assuming, *arguendo,* that this Court finds the statements complained of defamatory, they are nonetheless not actionable, because they are privileged under Illinois law. Certain communications, even if false and defamatory, are afforded special protection—a qualified privilege—because the law recognizes their social importance. The elements of this qualified privilege are (1) good faith by the defendant, (2) a legitimate interest or duty to be upheld, (3) publication limited in scope to that purpose, and (4) publication in a proper manner to proper parties. *See, e.g., Edwards by Phillips v. University of Chicago Hospitals,* 137 Ill. App. 3d 485, 488, 484 N.E.2d 1100, 1104 (1st Dist. 1985); *American Pet Motels, Inc. v. Chicago Veterinary Medical Ass'n,* 106 Ill. App. 3d at 630, 435 N.E.2d at 1301.

The face of plaintiffs' complaint demonstrates that the privilege applies here. First, the defendants had a good faith, legitimate purpose for the communications challenged: to address a matter of shared concern—the availability of decent, affordable, safe housing in the West Park community—and to assist one another in dealing with problems they perceived in the management practices of one large landlord. The documents themselves, a newsletter and leaflets, show that defendants' purpose was entirely legitimate, i.e., to meet with Park to discuss those problems.

Moreover, the statements in Exhibits A through E were limited in scope to furthering these common concerns. The newsletter describes community efforts to improve housing conditions. (Exhibit A.) The leaflets and letter to Park's limited partners are directed at the goal of meeting with plaintiffs to discuss certain perceived problems in Park's rental units. (Exhibits B, C, D, E, at 3.)

Finally, the statements here were communicated in a proper manner and to proper parties. The newsletter and leaflets were distributed to Park's tenants and to other residents of the West Park community interested in improving their housing conditions. (Complaint ¶¶ 31, 54B.) Exhibit E was addressed only to the limited partners of Park. (Complaint ¶ 64.)

Similarly, the statements complained of in Count II, which concern the picketing of Park's rental agent, are privileged under Illinois law. The persons making these statements spoke in good faith and in the interest of promoting good rental housing; they limited their statements to Park tenants and prospective tenants; and they made the statements in furtherance of their purpose to persuade plaintiff to meet with them to discuss their perceived problems and complaints. (*See* Exhibit D: "Why we're picketing Park/Rental Express" ... "Quite simply, we want Park to meet with us and begin to address our legitimate concerns ....")

Under these circumstances, the qualified privilege clearly applies to all the communications complained of in plaintiffs' complaint, requiring dismissal as a matter of law, absent factual allegations that defendants abused the privilege. *See, e.g., American Pet Motels,* 106 Ill. App. 3d at 626, 435 N.E.2d at 1302.

III. PLAINTIFFS FAIL TO STATE A CLAIM FOR PUNITIVE DAMAGES.

Punitive damages may not be recovered without a showing of actual malice. *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 349–50 (1974). Plaintiffs here seek an award of punitive damages based solely upon the bald assertion that defendants acted "maliciously, willfully, and with a conscious disregard for the rights of Plaintiffs." (Complaint ¶¶ 32, 52, 55, 60, 67, 71.) Bare allegations of actual malice in a complaint, however, do not suffice; "rather, conclusions of malice and intent must be clothed with factual allegations from which the actual malice might reasonably be said to exist." *L.R. Davis v. Keystone Printing Service, Inc.,* 111 Ill. App. 3d 427, 433, 444 N.E.2d 253, 262 (2d Dist. 1982). Because plaintiffs do not adequately plead actual malice, their prayers for punitive damages should be stricken from the complaint.

IV. THE COMPLAINT DOES NOT CONTAIN THE NECESSARY FACTUAL ALLEGATIONS CONCERNING CERTAIN INDIVIDUAL DEFENDANTS AND SHOULD THEREFORE BE DISMISSED AS TO THOSE DEFENDANTS.

Finally, the complaint should be dismissed as to certain of the individual defendants, because it contains no allegations of wrongdoing on their part. The complaint contains no factual allegations whatsoever concerning the conduct of defendants Sayers and James, and should therefore be dismissed in its entirety as to them. Counts III and IV, which concern the letter to Park's limited partners, contain absolutely no allegations that defendants

James, Sayers, or Christie participated in the composition or publication of that letter, and should therefore be dismissed as to those defendants. Additionally, Count II, alleging defamation based on picketing the office of Park's rental agent, is devoid of any allegations concerning the conduct of defendants James or Sayers, and should therefore be stricken as to those defendants.

Finally, plaintiffs fail throughout to allege defamation with sufficient particularity. In actions for libel and slander, a plaintiff is held to a high standard of specificity in pleading. *Altman v. Amoco Oil Co.*, 85 Ill. App. 3d 104, 106, 406 N.E.2d 142, 145 (1st Dist. 1980). By contrast, plaintiffs here allege, for example, that the authors of Exhibits B, C and D "were one or more of the following Defendants," including defendant Christie in a list of thirteen names. (Complaint ¶ 25.) Unless plaintiffs can amend to specify the personal involvement of each named individual, the complaint should be dismissed as to those individual defendants.

CONCLUSION

For the foregoing reasons, defendants Wrigley Housing, Inc., Joe Sayers, Ann Christie and Margaret James respectfully request that this Court enter an order dismissing the complaint with costs, or, in the alternative, dismissing them as defendants in this case.

WRIGLEY HOUSING, INC.,
JOE SAYERS, ANN CHRISTIE
AND MARGARET JAMES

By: _____
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Appendix F

Sample Appellate Brief

IN THE
UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT
March Term, 1987
No. 87–551

ARNIE FRANK,
APPELLANT
v.
CENTRAL INTELLIGENCE AGENCY,
and
FEDERAL BUREAU OF INVESTIGATION,
APPELLEES

On appeal from the
United States District Court for the
Northwestern District of Illinois

BRIEF FOR THE APPELLANT

QUESTIONS PRESENTED FOR REVIEW

1. Does the 1974 amendment to the Freedom of Information Act, 5 U.S.C. § 552 (a) (4) (E), permitting a court to award attorney fees to substantially prevailing complainants, permit fee awards to pro se litigants who are attorneys?

2. If so, does a court abuse its discretion by denying an award of attorney fees to a plaintiff who substantially prevails in a Freedom of Information Act suit when the defendant government agencies had no reasonable basis in law for withholding a majority of the documents eventually released, and the information revealed by the suit exposes illegal government activities that the plaintiff intends to disseminate to the public?

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OPINION BELOW

The opinion of the United States District Court for the Northwestern District of Illinois denying Mr. Arnie Frank's motion for attorney fees appears at 1000 F. Supp. 1 (N.D. Ill. 1987).

JURISDICTION

The United States Court of Appeals for the Seventh Circuit has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1291 (1983).

STATUTE INVOLVED

Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E)(1983)

> The court may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed.

PRELIMINARY STATEMENT

The appellant, Mr. Arnie Frank, brought this action against the appellees, the Central Intelligence Agency (CIA) and the Federal Bureau of Investigation (FBI) to recover attorney fees under the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(E). The United States District Court for the Northwestern District of Illinois declared Mr. Frank ineligible under the statute for an award, and denied him the fees he requested. *Frank v. CIA*, 1000 F. Supp. 1 (N.D. Ill. 1987). Mr. Frank now appeals this decision.

STATEMENT OF THE CASE

Mr. Frank is an attorney in private practice, and donates a considerable amount of his professional time to the service of the political leader Lyndon LaRouche and his supporters. (R.2) In 1972, Mr. Frank requested certain documents from the Department of Justice under the Freedom of Information Act, 5 U.S.C. § 552 et seq. (1983), concerning FBI and CIA monitoring of Mr. LaRouche's supporters. (R.3) Through those documents, Mr. Frank learned that he had been under government surveillance while he was a student at the Windy City School of Law in Chicago in 1968. (R.3)

As a student, Mr. Frank was the president of a student group called Law Students Against Tyranny (LSAT) that supported Mr. LaRouche. (R.3) When LSAT staged a demonstration outside the Democratic National

Convention, the CIA and FBI assigned covert agents to spy on Mr. Frank and other members of LSAT (R.3) The FBI was also keeping several other political groups under surveillance, including the NAACP, the American Civil Liberties Union, and the Students Against the Vietnam War. (R.6) At the same time, the CIA was illegally wiretapping phone conversations and intercepting the mail of members of those groups. (R.7)

The discovery of the government's illegal activities prompted Mr. Frank to investigate the true extent of the government's surreptitious investigation of himself and other supporters of Mr. LaRouche. Mr. Frank then filed another request under the FOIA in 1974 for documents concerning the matter. (R.3) After protracted correspondence, the government responded by refusing to divulge the requested documents without offering any legal justification. (R.2) In order to obtain the documents, Mr. Frank was forced to sue the government under the provisions of the FOIA. (R.1)

Not until 1979, under an order from this court, *Frank v. Department of Justice,* 540 F.2d 2 (7th Cir. 1979), did the government produce approximately one-half of the documents Mr. Frank originally requested. (R.1) The further revelations of the government's shocking activities led Mr. Frank to sue the CIA and the FBI for invasion of privacy. (R.3) In order to prevent embarrassment from the wide-spread dissemination of information about the government's illegal activities, the government settled the claim before trial. (R.4) At the same time, however, the government continued its refusal to produce the rest of the documents. (R.2) Mr. Frank proceeded with his FOIA suit in spite of the government's recalcitrance, and finally in 1985 recovered thirty-five of the forty documents he originally requested. (R.2) That recovery marked the end of almost fifteen years of litigation. (R.2) Mr. Frank now plans to publish a book discussing the released documents and the government's illegal activities.

Mr. Frank requested the court below to award him attorney fees. During the entire pendency of his FOIA suit, Mr. Frank acted as his own attorney. (R.4) Mr. Frank estimates that he spent no less than 2 1/2 hours per week on his case for a period of fifteen years. He has requested an award computed at the hourly rate of $125. Because the FOIA provides that a court may award attorney fees to complainants who "substantially prevailed," Mr. Frank instituted this action in the court below to recover fees. (R.2) That court denied the award of attorney fees, holding that an attorney acting pro se is not eligible for an award of fees. In addition, although the parties stipulated that Mr. Frank "substantially prevailed," and that the government had no "reasonable basis in law for withholding a majority of the records eventually released," the court held that it would not have

exercised its discretion to award fees even if Mr. Frank were eligible. (R.2) In response to the decisions of the court below, Mr. Frank now files this brief for review by this court to be argued orally on April 9, 1987.

SUMMARY OF THE ARGUMENT

The broad language of the 1974 amendment to the Freedom of Information Act (FOIA), 5 U.S.C. § 552(a)(4)(E)(1983), allows the court to award "reasonable attorney fees and other litigation costs reasonably incurred" to complainants who "substantially prevailed" in suits brought under the statute. The conventional rules of statutory construction require that this language be interpreted to read that only litigation costs must have actually been incurred and attorney fees need not actually be incurred for a court to award them. Thus, because there are no exceptions to the statute, attorney pro se litigants are eligible for awards of fees pursuant to the Act although they incur no literal out-of-pocket expenses for counsel.

Congress originally passed § 552(a)(4)(E) to facilitate private enforcement of the FOIA by removing the economic obstacles that previously prevented citizens from vindicating their rights. Attorneys, like other citizens, may face economic barriers when they choose to represent themselves in FOIA suits. The time they spend pursuing their claims diverts their professional skills from other income-producing activities. Because the cost of vindicating their rights is economically equivalent to incurring legal expenses, attorneys should not be excluded from eligibility to receive compensation under the statute. Moreover, an attorney who acts pro se has been represented by an attorney, thus distinguishing the attorney from a lay person acting pro se, whom this court has held is not eligible for fees.

Furthermore, Congress enacted the amendment to discourage government recalcitrance in complying with the FOIA by penalizing its bad faith with charges for fee awards. When the government harasses self-represented complainants, or withholds information in bad faith, the fee award serves as a penalty for its unreasonable behavior. Excluding attorneys from eligibility merely encourages the government not to comply with the Act whenever releasing information to attorney pro se litigants would cause government officials or agencies embarrassment.

In addition, because Mr. Frank is eligible for fees, the court below abused its discretion when it denied him an award. When he substantially prevailed in his FOIA action against the government, Mr. Frank exposed important information to the electorate about the misconduct of the two government agencies. The dissemination of that information through his

suit and the book he will publish provides a substantial public benefit by making citizens aware of the government's illegal activities. Although Mr. Frank may profit from his publication, the public benefits he has provided are substantially more important than any commercial benefit he might receive.

Moreover, the CIA and FBI withheld documents from Mr. Frank with no reasonable basis in law in order to avoid disseminating records revealing their illegal activities toward Mr. Frank and members of other political organizations. Mr. Frank was forced to litigate for almost fifteen years when the government should have honored his FOIA request immediately. The court should have exercised its discretion to award attorney fees to Mr. Frank to further Congress' goal of penalizing government agencies for their obdurate behavior.

Finally, Mr. Frank's request for fees was sufficiently documented and was reasonable considering the time and effort he was forced to expend over the fifteen years of litigation. This court should remand to the district court to exercise its discretion and award Mr. Frank the sum he requested for attorney fees.

ARGUMENT

I. AN ATTORNEY PRO SE LITIGANT IS ELIGIBLE TO RECEIVE AN AWARD OF ATTORNEY FEES AND LITIGATION COSTS UNDER THE FREEDOM OF INFORMATION ACT (FOIA) IF HE SUBSTANTIALLY PREVAILS IN A FOIA SUIT.

By enacting appropriate legislation, Congress has the power to alter the "American Rule" in which no attorney fees may be awarded to the prevailing party. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y,* 421 U.S. 240 (1975). In the 1974 amendment to the Freedom of Information Act, Congress did so by allowing citizens who "substantially prevailed" against the government in suits brought under the Act's provisions to receive awards in the court's discretion "of reasonable attorney fees and other litigation costs reasonably incurred." 5 U.S.C. § 552(a)(4)(E)(1983). In enacting the amendment, one of Congress' primary goals was to remove the economic barriers that would preclude a complainant with a meritorious FOIA claim from pursuing it. S. Rep. No. 93–854, 1, 17 (1974) (hereafter S. Rep. 854).

The plain meaning of the amendment is that only litigation costs must have been incurred. However, even if the litigant must also have incurred attorney fees, Mr. Frank in effect incurred fees because an attorney who acts pro se in a FOIA suit faces economic barriers to pursuing the suit if he cannot be compensated for his time. The attorney has foregone other income-producing activities of his law practice. Thus the litigant in effect has incurred the fees of being represented by an attorney.

Thus, although this court has held that a lay pro se litigant is not entitled to attorney fees, *DeBold v. Stimson,* 735 F.2d 1037, 1043 n.4 (7th Cir. 1984), the reasoning of that decision does not apply to an attorney litigant because an attorney acting pro se is represented by a member of the Bar. Because the situation of attorneys who represent themselves in FOIA litigation differs from that of laymen acting pro se, they should be eligible for fees.

A. The language of the 1974 FOIA amendment is plain that attorney pro se litigants need not literally incur attorney fees in order to be eligible for an award of fees.

The 1974 FOIA amendment authorizes courts to "assess against the United States reasonable attorney fees and other litigation costs reasonably incurred." § 552(a)(4)(E). The plain meaning of the words "reasonably incurred" is that they modify only the words "litigation costs" and not "attorney fees." A complainant thus need not actually incur attorney fees for

a court to award fees under the amendment. In *Holly v. Chasen,* 569 F.2d 160 (D.C. Cir. 1977) and *Cuneo v. Rumsfeld,* 553 F.2d 1360 (3d Cir. 1981), the courts interpreted the words "reasonably incurred" to modify only "litigation costs." This interpretation is appropriate in light of the statute's plain meaning and the Doctrine of the Last Antecedent. The plain meaning of "reasonable attorney fees and other litigation costs reasonably incurred" is that "reasonably incurred" modifies "other litigation costs" alone. Were "reasonably incurred" interpreted to modify "reasonable attorney fees" the second "reasonable" would be redundant. This reading contradicts the presumption that every word in a statute is intended to have meaning.

Furthermore, the Doctrine of the Last Antecedent states that "qualifying words, phrases, and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including those more remote." *See Quinden v. Prudential Ins. Co.,* 482 F.2d 876, 878 (5th Cir. 1973). Under this rule, the phrase "reasonably incurred" modifies only "litigation costs" because it is the phrase immediately preceding it. *Id.* This resolution of the semantic issue makes it clear that a complainant need not actually incur attorney fees to be eligible for an award under § 552(a)(4)(E). *See Cuneo,* 553 F.2d at 1366.

B. An award of fees to attorney pro se litigants promotes Congress' goal of facilitating private enforcement of the FOIA by removing economic barriers to litigation confronting potential litigants.

Congress passed the 1974 attorney fees and costs amendment to the FOIA to close "loopholes which allow agencies to deny legitimate information to the public." H.R. Rep. No. 93–876, *reprinted in* 1974 U.S. C.C.A.N. 6272, 6287. Before the amendment, many citizens with legitimate claims were unable to pursue them because of the obstacle of attorney fees, and Congress enacted § 552(a)(4)(E) to remove that economic barrier from litigants. *Id.* Congress designed the FOIA so that individual citizens would ensure government compliance with the Act through private litigation without major economic barriers. *See Cazalas v. Department of Justice,* 709 F.2d 1051, 1057 (5th Cir. 1983), *cert. denied,* 469 U.S. 1207 (1985).

Thus, even if the statutory antecedent "reasonably incurred" is ambiguous, the statute should be interpreted to promote the statutory policy. In representing themselves, attorneys face economic barriers when they seek to enforce the FOIA through litigation. Such barriers include the prospect of paying an attorney or foregoing the opportunity to earn a regular income for a day or more in order to pursue a pro se suit. *Crooker v. De-*

partment of the Treasury, 634 F.2d 48, 49 (2d Cir. 1980) [hereafter *Crooker I*]. *Accord Holly,* 72 F.R.D. at 116 (pro se litigants face economic barriers). The opportunity cost of an attorney's spending time on his own case is no less real than the costs incurred by a litigant who must hire an attorney. *Id.* If they have to divert time from income-producing activities, attorneys may find themselves unable to vindicate their rights under the FOIA. *Id.* In economic terms, there is simply no difference between money paid out and income foregone, and both of them may represent the same economic burden. Richard A. Posner, *The Economics of Justice* 10 (1981).

Furthermore, by not permitting an attorney pro se litigant eligibility for fees, this court would encourage attorneys who wished to vindicate their FOIA rights to hire other attorneys to represent them. Such a response would result in an increase in total litigation costs. Attorneys capable of pursuing their own FOIA claim should not be penalized simply because they choose to do so. Moreover, unlike the lay pro se litigant in *Debold,* the attorney acting pro se has secured professional representation in order to enforce FOIA claims. *See DeBold,* 735 F.2d at 1043.

Not only is an award of fees to an attorney pro se litigant consistent with this court's decision in *DeBold,* it is also consistent with the court's policy of awarding fees to legal-aid and public interest organizations even where the litigant paid nothing for the services he received. *Id.* In both situations, attorneys must perform services without remuneration in order to pursue legitimate FOIA claims. It would be anomalous to allow citizens facing economic barriers to recover attorney fees when none were charged, but deny this benefit to attorneys facing the same barriers. *See, e.g., Falcone v. IRS,* 714 F.2d 646, 647 (6th Cir. 1983) (attorney fees permitted to legal service organizations, but not to attorney pro se litigants in FOIA suits). If the Congressional purpose of citizen enforcement of the FOIA through private litigation is to be achieved, the courts should not create economic disincentives to attorneys by denying them fees when they represent themselves. *See Cazalas,* 709 F.2d at 1056.

Finally, the circuits that have denied attorneys eligibility for an award of fees have reasoned that an allowance of these fee awards creates a "windfall," and that an award of litigation costs is a sufficient incentive to induce attorney pro se litigants to pursue their claims. *See, e.g., Crooker v. Department of Justice,* 632 F.2d 916, 921–22 (1st Cir. 1980) [hereafter *Crooker II*]. However, this analysis overlooks the fact that the time spent pursuing FOIA litigation precludes attorneys from receiving remuneration by representing clients in other actions. In such situations, attorneys might reasonably choose to represent another's FOIA claim rather than their own

simply because in the former they would receive compensation for professional services. Such economic realities could keep an attorney from seeking what would otherwise be a meritorious FOIA claim. This frustrates the Congressional purpose of encouraging all persons to vindicate their statutory rights under the Act. S. Rep. No. 854 at 17.

C. Congress intended wide application of the 1974 amendment in order to discourage government recalcitrance in complying with the Act and to penalize the government for pursuing litigation without a reasonable basis in law.

By allowing eligibility for attorney fees to claimants who "substantially prevail," Congress sought to discourage government agencies from employing dilatory tactics to frustrate legitimate FOIA requests. *Id.* Fee awards are to be taken out of the agency's budget rather than from the general fund to ensure that agencies would litigate only cases where their position was supported by some "reasonable basis in law." *Id.* In fact, one of the four major criteria to determine whether a particular complainant is entitled to discretionary fees is whether the government's withholding of the records had a reasonable basis in law. S. Conf. Rep. No. 93–1200, *reprinted in* 1974 U.S. C.C.A.N. 6285, 6288; *See Stein v. Department of Justice,* 662 F.2d 1245, 1262 (7th Cir. 1981). Congress intended to penalize government agencies that are "recalcitrant in their opposition to a valid claim or [are] otherwise engaged in obdurate behavior." S. Rep. No. 854 at 19.

In order to achieve these important Congressional purposes, this court should not limit the application of § 552(a)(4)(E). If attorney pro se litigants were not allowed to recover fees, government agencies could block one type of valid claim and stall the dissemination of legitimately requested documents with impunity. This would especially be the case where dissemination of the documents would lead to embarrassment of, or claims against, government officials and agencies. *See Cazalas,* 709 F.2d at 1055. The goal of penalizing the government's harassing and dilatory behavior in FOIA cases is as compelling when the claimant is an attorney acting pro se as when the claimant is an ordinary citizen. Indeed, if individuals are to be accorded full protection against abuses of the power of the government, then there is a strong incentive for this court to hold government agencies acting in bad faith financially accountable to all litigants who "substantially prevail" in FOIA suits.

Furthermore, the government has repeatedly withheld information illegally and litigated weak cases when litigants represented themselves. *See, e.g., Cazalas,* 709 F.2d at 1055 (government sought to harass and embarrass

attorney pro se litigant); *Barrett*, 651 F.2d at 1089 (government withholding of documents was both "arbitrary and unreasonable"); *Crooker II*, 632 F.2d at 920 (government denied existence of requested documents). If the court imposes fee awards upon the government following bad faith behavior, those awards will discourage such tactics and force the government "to oppose only [in] those areas that it ha[s] a strong chance of winning." S. Rep. No. 854 at 17. Disallowing eligibility for fees under § 552(a)(4)(E) would encourage the government to engage in that behavior Congress expressly sought to discourage. That this behavior is limited to pro se litigants is no consolation. By allowing pro se attorneys to recover, this court would help effectuate Congressional policy by discouraging government harassment of individuals with meritorious FOIA claims. *Id. Accord Cazalas*, 709 F.2d at 1055.

D. Pro se attorney eligibility under § 552 (a) (4) (E) will encourage vigorous advocacy in FOIA cases, but will not result in abusive fee generation.

Because the award of fees is within the discretion of the court, there is little merit to the concern that full awards for pro se litigants will encourage attorneys with inactive practices to create suits in order to generate fees. *See, e.g., Falcone*, 714 F.2d at 648 ("the United States could become an unwilling 'client' for inactive attorneys"). However, the mere fact that attorneys are eligible for awards does not mean that these awards are automatic. *See* H. R. Rep. No. 876 at 6–7. This court has already recognized this limitation when it said that "[f]ulfillment of the condition precedent [i.e., substantially prevailing] alone does not entitle a litigant to an award of attorney fees." Stein, 662 F.2d at 1262. *See also Cox v. Department of Justice*, 601 F.2d 6 (D.C. Cir. 1979) (eligibility does not mean entitlement); *Chamberlain v. Kurtz*, 589 F.2d 827, 842 (5th Cir. 1978), *cert. denied*, 444 U.S. 842 (1979) (awards left to discretion of district judge); *Blue v. Bureau of Prisons*, 570 F.2d 529, 533 (5th Cir. 1979) (eligibility does not create presumptive award under FOIA).

Unmeritorious awards are additionally unlikely because this court has adopted the four criteria suggested in the Senate version of the 1974 amendment that ensure discretionary awards of attorney fees only when there are valid claims. *Stein*, 662 F.2d at 1262. When using its discretion to determine awards, this court considers

(1) the benefit to the public, if any, derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's

> interest in the records sought; and (4) whether the government's withholding of the records had a reasonable basis in law.

Id. at 1256, *citing* S. Rep. No. 854 at 17.

Because only meritorious claims would receive awards, the fear of fee generation is unfounded. The stringent considerations listed above would allow a court to use its discretion to "weed out" those fees that an attorney purposely generated. *Id.* Also, a court is not bound to award the total amount of fees requested, but may adjust the size of the award in its discretion. *See Jordan v. Department of Justice,* 691 F.2d 514, 518 (D.C. Cir. 1982). The equitable powers of the court are broad enough that concerns over fee generation cannot serve as a rational basis for denying eligibility to all attorneys. *Id.*

Furthermore, the statutory requirement that a complainant "substantially prevail," § 552(a)(4)(E), renders fee generation virtually impossible. An attorney bringing a frivolous lawsuit would be unable to generate fees since eligibility for an award is contingent on the suit's merit and necessity. *See Cox,* 601 F.2d at 6. (adverse court action must be necessary to substantially prevail). Thus, any complainant who has substantially prevailed has, by definition, brought a worthwhile suit. In addition, the government may avoid the prospect of having to pay attorney fees by releasing the documents it does not reasonably believe it has a right to withhold. *Cazalas,* 709 F.2d at 1056 (no fees necessary if government responds to justified requests). Hence, it is unrealistic to characterize a "substantially prevailing" attorney pro se litigant as trying to generate fees when illegal and unreasonable actions on the part of the government are necessary to receive an award.

Finally, attorneys who represent themselves in FOIA litigation provide the kind of vigorous advocacy Congress desired. S. Rep. No. 854 at 17–19. The determination and skill of attorneys dedicated to vindicating their rights would promote Congress' purpose of encouraging citizens to enforce the act. *See, e.g., Cazalas,* 709 F.2d at 1056.

II. THE COURT BELOW ABUSED ITS DISCRETION BY DENYING ATTORNEY FEES TO MR. FRANK WHEN HE SUBSTANTIALLY PREVAILED IN HIS FOIA SUIT.

The parties have stipulated that Mr. Frank "substantially prevailed" in his FOIA suit, and that the government had no reasonable basis in law for withholding a majority of the records Mr. Frank sought. (R.2)

This court has adopted the four criteria of the Senate version of the 1974 amendment to be used in determining whether an award of attorney fees is appropriate. These criteria are:

> (1) the benefit to the public, if any, derived from the case; (2) the commercial benefit to the complainant; (3) the nature of the complainant's interest in the records sought; and (4) whether the government's withholding of the records had a reasonable basis in law.

Stein, 662 F.2d at 1262.

A careful consideration of all four criteria and the reasonableness of Mr. Frank's claim in light of the time he spent working on the FOIA suit show that the court below abused its discretion when it denied a fee award to Mr. Frank.

A. Because the public substantially benefitted from Mr. Frank's FOIA suit and the government unreasonably withheld its records, the court below abused its discretion by denying Mr. Frank's request for attorney fees.

The documents released as a direct result of Mr. Frank's FOIA suit provided substantial benefit to the public by exposing important information to the electorate. One of the principal goals of the FOIA is to promote "an informed and intelligent electorate" by ensuring public access to information concerning the activities of government officials and agencies. H.R. Rep. No. 1497, 89th Cong., 2d Sess. 12, *reprinted in* 1966 U.S.C.C.A.N. 2418, 2429. Mr. Frank's suit has furthered that goal by revealing information about the improper conduct of the CIA and FBI. (R.7) The information that the government unreasonably withheld exposed their embarrassing and illegal wiretapping and mail-censoring activities, not only of Mr. Frank, but of members of several other political groups, including the NAACP, the ACLU, and the Students Against the Viet Nam War. (R.7) Although these revelations are highly disconcerting, they provide an essential public service by informing the electorate of wrongdoing in the government. Disseminating the information that an agency of the government is "less than just" in its dealings surely benefits the public. *See Cazalas,* 709 F.2d at 1053 (pro se attorney revealed discriminatory employment practices of the Department of Justice). Mr. Frank's FOIA request has made available the kind of important information that the public needs to make responsible political decisions. *See Aviation Data Serv. v. Federal Aviation Admin.,* 687 F.2d 1319, 1323 (10th Cir. 1982).

Moreover, Mr. Frank's commercial and personal interests in bringing his FOIA suit were slight in comparison to the public benefit derived from his FOIA request. Mr. Frank now plans to further disseminate his findings to the public by publishing a book discussing the released documents. (R.6) When the nature of a publication is "scholarly, journalistic, or public interest oriented," then it clearly accrues to the public benefit, *see Des Moines Register and Tribune Co. v. Department of Justice,* 563 F. Supp. 82, 84 (D.D.C. 1983). Only if the purpose of the FOIA request is to acquire information that profits only the recipient's business will the recipient's commercial and personal interest make an award of attorney fees inappropriate. For example, in *Aviation Data Services,* the plaintiff requested information from the Federal Aviation Administration that was used only for its business of collecting and selling information about the aviation industry to its clients. 687 F.2d at 1320. Mr. Frank, however, has no business clients to whom he will sell the information. Instead, he will use the information he requested only for scholarly publication.

Mr. Frank's use of the disclosed records is more like that of the journalist who published a newspaper article that the court held was not a commercial use of the materials he received from his FOIA request. *Des Moines Register,* 563 F. Supp. at 84. Mr. Frank's book is also an enterprise that he undertook to educate the public. Any remuneration that he receives from book sales no more detracts from his primary goal of promoting public awareness than a newspaper reporter's salary or a newspaper's sales detracts from the public benefits of news articles. *Id.*

Moreover, Mr. Frank's personal interest in the records is based on his active political involvement, not on commercial activity. Mr. Frank has always been involved in activities that educate the public. (R. 3–4) He donates his services to the political candidate he supports and has financed the present fifteen-year litigation out of his own funds. (R.4) Although Mr. Frank may have had a considerable personal interest in the litigation at its inception, that interest disappeared when the government settled his personal suit for invasion of privacy after it was forced to release the first set of documents. (R.4) After that settlement, Mr. Frank pursued the records in order to expose them to public scrutiny. This publication comes only at the end of fifteen years of opposition to government recalcitrance. (R. 4)

When the court below said that Mr. Frank's "commercial and personal interests in the matter outweigh any public aspect of the case," (R. 7), the court incorrectly balanced these criteria. A party's commercial benefit should not deprive him of attorney fees if the public benefits from the disclosure of the requested material, or if the agency acted in bad faith

without reasonable basis in law. *Aviation Data Services,* 687 F.2d. at 1322; *Cazalas,* 709 F.2d at 1054. Not only are the disclosed materials of substantial public interest, but the court below accepted the stipulation that the government agencies acted without any "reasonable basis in law." (R. 2) The court below abused its discretion in denying fees on those grounds.

Moreover, a claimant's request for personal records does not disqualify him from a fee award. For example, in *Cazalas v. Department of Justice,* 709 F.2d 1051, the claimant requested documents related to her dismissal from the United States Attorney's office. The court decided that, although she had a strong personal interest in the documents, she was not disqualified from a fee award because her request benefitted the public by exposing sex discrimination in government. *Id.* at 1053. The public benefit from Mr. Frank's request for records is even greater than the plaintiff's in *Cazalas.* His request produced documents that went beyond information about himself and included information about government spying on other individuals and organizations.

Finally, when "government officials have been recalcitrant in their opposition to a valid claim or have been otherwise engaged in obdurate behavior," then fee awards are appropriate. S. Rep. No. 854 at 19. The government's spying on Mr. Frank is a prime example of the kind of behavior Congress had in mind when suggesting the fourth criterion. Indeed, the agencies conceded that they had acted without any "reasonable basis in law." The CIA and FBI engaged in reprehensible illegal activities against Mr. Frank and other members of political organizations. (R.3) They later sought to further harass Mr. Frank by refusing to comply with his legitimate FOIA request. (R.1) The agencies sought to prevent "wide-spread dissemination of the information in [Mr. Frank's] documents" by settling his privacy claim, and continued to unreasonably refuse to disclose documents for years. (R.4) Under the circumstances of this case, in light of the government's unreasonable withholding of documents, the court abused its discretion in not penalizing the government by awarding fees to Mr. Frank.

B. Mr. Frank requested a reasonable fee award from the court to compensate him for the time he spent working on his FOIA suit.

In his claim for attorney fees, Mr. Frank estimated that he spent no less than 2 1/2 hours per week on the case for a period of fifteen years. (R.4) He also provided the court below with documentation attesting to the reasonableness of the hourly rate of $125 that he was requesting. (R.4) Yet, the court below denied any fees to Mr. Frank, leaving him with no compensa-

tion for over fifteen years of professional work. (R.4) "To decline any fee award whatsoever simply because of doubts of parts of the claim is, in any but the most severe of cases, a failure to use the discretion" of the court. *Jordan,* 691 F.2d at 521 ($125/hour fee not excessive with proper documentation). The court below abused its discretion when it refused to award anything to Mr. Frank. His fee estimate was conservative, and represented a large sum only because the government forced him to litigate for almost fifteen years. Mr. Frank deserves compensation for the time and effort he spent "fighting the government," and the fees he requested are a reasonable estimate of attorney fees for his work.

CONCLUSION

For the foregoing reasons, the decision of the United States District Court for the Northwestern District of Illinois denying plaintiff's motion for attorney fees pursuant to 5 U.S.C. § 552(a)(4)(E)(1983) should be reversed and the case remanded for the district court to determine fees.

Respectfully submitted,
Counsel for the Appellant

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