Case No. _____
IN THE
SUPREME COURT OF ILLINOIS

CARLA BURKHART and HERRICANE GRAPHICS. INC., *Plaintiff-Respondent,* v. EDGAR COUNTY WATCHDOGS, INC., KIRK ALLEN, ADAM ANDRZEJEWSKI, KATHY HAMILTON, and CLAIRE BALL, *Defendants-Petitioners*.	Appeal From the Second District App. Ct. Case Nos. 2-16-0705; 2-16-0711; 2-16-0712 Date of Appellate Order: January 17, 2017

PETITION FOR LEAVE TO APPEAL PURSUANT TO ILLINOIS SUPREME COURT RULE 315

On Petition for Leave to Appeal from the Appellate Court of Illinois,
Second District Case Nos. 2-16-0705; 2-16-0711; 2-16-0712
There declined to be heard on Rule 306(a)(9) appeal from the Circuit Court of the
Eighteenth Judicial Circuit, DuPage Case No. 15 L 001244
Hon. Robert G. Kleeman, Judge Presiding

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ORAL ARGUMENT REQUESTED IF PETITION GRANTED

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I. PRAYER FOR LEAVE TO APPEAL

Defendants-Petitioners the Watchdogs[1] respectfully petition this Court, pursuant to Illinois Supreme Court Rule 315(a), for leave to appeal from the judgment of the Appellate Court of Illinois, Second Judicial District.

II. JUDGMENT BELOW

On July 29, 2016, the circuit court denied the Watchdogs' Motion to Dismiss Pursuant to the Illinois Citizen Participation Act ("CPA"). Thereafter, the Watchdogs filed a timely Petition for Leave to Appeal pursuant to Illinois Supreme Court Rule 306(a)(9) in the Second District, seeking review of the denial of their CPA motion.

On January 17, 2017, the Second District Appellate Court issued a minute order denying (without briefing or argument) the Watchdogs' Petition for Leave to Appeal. In that same minute order, the Second District also stated, without any analysis, that "Defendants have not established that plaintiff's claims are meritless or filed solely based on defendants' rights of petition, speech association, or to otherwise participate in government such that dismissal pursuant to Section 2-619…would be appropriate." *See* Appendix. No petition for rehearing was filed.

III. POINTS RELIED UPON FOR REVIEW

This Court should grant leave to appeal[2] for the following reasons:

- Pursuant to Rule 315(a), the questions presented involve important First Amendment considerations—namely, whether journalists may report on

[1] Defendants-Appellants Edgar County Watchdogs, Inc. and Kirk Allen are collectively referred to herein as the "Watchdogs".

[2] For the avoidance of doubt, this Court may review this petition even though the appellate court denied the Watchdogs' Rule 306(a) Petition. *Miller v. Consol. Rail Corp.*, 173 Ill. 2d 252, 253 (1996).

politicians engaging in favorable transactions with their friends, and label this behavior as "pay to play", without having to prove that the subject politicians were engaged in criminal behavior. *See, e.g., Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2344 (2014) (conduct concerning political speech "certainly" is "affected with a constitutional interest"). The Watchdogs are investigative journalists engaging in an "essential role in our democracy" with the goal of laying "bare the secrets of government"; "inform[ing] the people"; and "effectively expos[ing] deception."[3] Accordingly, at stake here is nothing less than a newspaper's right to publish stories critical of local governmental officials, without fear of retaliation. Respectfully, the trial court's ruling—and the Second District's merits-based affirmance, despite no apparent analysis—threaten the ability of journalists to perform their important function in democracy.

- Pursuant to Rule 315(a), the circuit court's erroneous holding—that "in Illinois…saying 'pay to play'… [is] implying criminal conduct" (R. C00403 at 110:11-19)—severely misinterpreted Illinois law on "innocent construction". Review is essential because the law on "innocent construction" necessarily implicates important considerations of First Amendment jurisprudence.
- Pursuant to Rule 315(a), a conflict exists between the decisions rendered below regarding "innocent construction" and a long line of cases holding the opposite,

[3] *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971). Illinois law, too, recognizes that a "robust and unintimidated press" is a "necessary ingredient" of democracy. *Krauss v. Champaign News Gazette, Inc.*, 59 Ill. App. 3d 745, 746 (4th Dist. 1978).

as set forth herein. In effect, the courts' rulings below erroneously rendered the phrase "pay to play" off-limits for use by journalists. Moreover, the trial court's invocation of Illinois' long history of political corruption as a rationale to forbid the use of the phrase "pay to play" is illogical, as the fact-based use of that term by journalists and others may expose further corruption.

- Pursuant to Rule 315(a), a conflict exists between the decision rendered below and *McDonnell v. United States*, 136 S. Ct. 2355 (2016) which confirms that, irrespective of its unsavory nature, "pay to play" in American politics is not always illegal, and therefore, the term cannot serve as the basis for a defamation action;
- Pursuant to Rule 315(a), there is a need for the Supreme Court to exercise its supervisory authority, because the Second District issued a merits-based affirmance of the trial court's denial of the Watchdogs' CPA motion, without briefing, argument or apparent analysis.
- Pursuant to Rule 315(a), there is a need for the Supreme Court to exercise its supervisory authority, because, respectfully, the decisions of the trial and appellate courts have failed to give due consideration to the Illinois legislature's determination that "the constitutional rights of citizens and organizations to be involved and participate freely in the process of government must be encouraged and safeguarded with great diligence." 735 ILCS 110/5. Due to the "disturbing increase in lawsuits termed…SLAPPs," which "significantly chill[] and diminish[] citizen participation in government [and] voluntary public service," the Illinois legislature enacted the CPA to protect participation in

democracy, award attorneys' fees and costs to prevailing defendants, and provide a mechanism to quash "intimidating" and "harassing" SLAPP suits. *Id.*

- Pursuant to Rule 315(a), the judgment sought to be reviewed is expressly contemplated as an enumerated basis for an interlocutory appeal. *See, e.g.*, Illinois Supreme Court Rule 306(a)(9) (allowing for filing of petition for leave to appeal "from an order of the circuit court denying a motion to dispose under the [the CPA, 735 ILCS 110/1]"); 735 ILCS 110/20 ("[a]n appellate court shall expedite any appeal or other writ, whether interlocutory or not, from a trial court order denying [a CPA] motion...").
- Pursuant to Rule 315(a), there is conflict of law between *Stein v. Krislov*, 2013 IL App (1st) 113806, ¶ 19 (a lawsuit filed just before the expiration of the statute of limitations is evidence of a plaintiff's retaliatory intent) and *Goral v. Kulys*, 2014 IL App (1st) 133236, ¶ 55 ("[t]he relatively close proximity between the posting of defendant's articles and plaintiff's suit suggests that it was retaliatory").[4]

IV. STATEMENT OF FACTS

The Watchdogs have an extensive history of investigative journalism, reporting on local Illinois politics and quasi-governmental entities. Their investigations have focused on politicians from the Republican, Democratic, and independent parties, as well as on

[4] Alternatively, this Court has on numerous recent occasions directed an appellate court to review the merits of the denial of a Motion to Dismiss pursuant to the CPA. *See, e.g., Drury v. Neerhof*, 45 N.E.3d 674, 675 (Ill. 2015) (directing appellate court to vacate judgment denying leave to appeal and directing it to grant leave to appeal and review merits of denial of CPA Motion); *Samoylovich v. Montesdeoca*, 2014 IL App (1st) 121545, ¶ 13 (noting that Illinois Supreme Court denied leave to appeal but directed the appellate court to vacate a denial of a petition for leave and consider merits of denial of CPA motion).

entities of all political affiliations, in more than a dozen counties in Illinois. (R. C00035-36 at ¶¶ 6-14). The Watchdogs began investigating the College of DuPage (the "COD") in late 2013, after their news blog received tips of possible misuse of taxpayer money. (R. C00036-37 at ¶ 15). When the COD denied their FOIA request seeking records of its president's spending, the Watchdogs filed a lawsuit against the COD, seeking the denied records. *Id*.

Their investigation included not only Plaintiffs, but also other COD vendors; COD's contracts with entities related to the members of the COD Foundation, which is the COD's fundraising arm; and the COD president's spending. (R. C00037 at ¶ 18). After an extensive investigation involving their more than 125 FOIA requests (*id*. at ¶ 19), the Watchdogs uncovered at least three examples of COD Foundation board members receiving no-bid contracts from the COD, and reported on all of them. *Id*. at ¶ 20.

The Watchdogs' investigation uncovered, *inter alia,* that Plaintiffs had signed a "Standard Form of Agreement Between Owner and Architect" dated April 19, 2012. *Id*. at ¶ 21, Exhibit 1 thereto. The Agreement identifies "Herricane Graphics, Inc." as the "Architect," a defined term under the Agreement (*id*. at ¶ 22, Exhibit 1 thereto), and the term "architect" is used hundreds of times throughout the "architect" contract. (R. C00039-C00081). However, neither Plaintiffs nor anyone on their staff is a licensed architect. R. C00037 at ¶ 23. Importantly, an "Architect Contract" is one of the unique categories of services for which COD was not required to follow a competitive bidding procedure, and the work could never have been awarded to Plaintiffs on a no-bid basis unless it was an "architect's contract". *Id*. at ¶¶ 24-25. Plaintiffs received hundreds of thousands of dollars from COD for work performed under this no-bid Architecture Contract. (R. C00039).

Moreover, the Watchdogs discovered that Plaintiff Burkhart was appointed to the COD Foundation board—thus obligating her to provide services to the Foundation and a $5,000 financial contribution—***on the very same day***, and in the ***very same meeting*** that the awarding of the initial no-bid "architecture" contract occurred. (R. C00095; C00268; C00273). Thereafter, Plaintiffs received hundreds of thousands of dollars of no-bid contracts from COD. (R. C00098). Moreover, Plaintiffs' fellow Foundation board members received millions of dollars in no-bid contracts with COD. (R. C00093). While not criminal, the Watchdogs used the term "pay to play" in connection with the no-bid contracts between Plaintiffs and COD. Importantly, *The Washington Times*, *Chicago Tribune*, *Daily Herald*, and *The Illinois Herald* all provided coverage of the exact same contract and corruption, but the Watchdogs are not aware that any of these newspapers were sued for making nearly-identical comments. (R. C00037-38 at ¶¶ 25-29).

Procedural History

On December 31, 2015, Plaintiffs filed an eight count Complaint against five defendants,[5] seeking compensatory damages and punitive damages in excess of $16,000,000. (R. C00001-21). The Complaint asserted four counts of defamation and one count each of tortious interference with contract, tortious interference with prospective advantage, misappropriation, and conspiracy against all five defendants. *Id*.

Each and every one of these causes of action indisputably arise out of written statements made by the defendants in online news articles. (R. C00005-10). On February

[5] The Watchdogs have filed the instant petition. A third defendant, Claire Ball, is also represented by the undersigned counsel and concurrently seeks leave to appeal pursuant to Rule 315. The Watchdogs believe that a fourth defendant, Adam Andrzejewski, will also seek leave to appeal pursuant to Rule 315. The fifth defendant, Kathy Hamilton, was dismissed by Plaintiffs after she filed a motion to dismiss.

11, 2016, the Watchdogs filed their Motion to Dismiss Pursuant to the CPA, as well as a Motion to Dismiss Pursuant to 735 ILCS 5/2-619.1, supported by affidavit. (R. C00025; R. C000109). In their Response, Plaintiffs did not file any affidavits or provide any evidentiary support. However, after their Response was due, Plaintiffs filed more than 1,500 pages of unauthenticated documents (purporting to be articles from the Watchdogs' online newspaper) to attempt to rehabilitate their Complaint. Although the Watchdogs objected to the circuit court's consideration of these additional documents, the circuit court read and considered these pages. (R. C00314 at 21:10-18; R. C00316 at 23:16-19).

On July 29, 2016, the circuit court held oral argument on the motions and ruled, denying the CPA Motion in its entirety. (R. C00444). The Watchdogs timely sought leave to appeal in the Second District, and the Second District issued a minute order on January 17, 2017, denying leave to appeal. *See* Appendix.

V. ARGUMENT

The Watchdogs petition this Court to reverse the circuit court's denial of their motion under Illinois' CPA, and the appellate court's denial of the Watchdogs' Petition for Leave to Appeal pursuant to Rule 306(a)(9). Those rulings were based on the following errors of law more fully discussed in this petition:

(1) **Holding that the use of the phrase "pay to play" in a news article necessarily implies criminal behavior and subjects the author to liability for defamation, despite the trial court's explicit recognition that the phrase means "a number of different things", thus necessarily making the phrase subject to the "innocent construction" rule:** Under Illinois law, statements which may in context be reasonably "innocently interpreted" are not actionable. *Chapski v. Copley Press*, 92

Ill. 2d 344, 352 (1982). This well-settled law, known as the "innocent construction rule", "prevents a case from getting to the jury if there is ***any possible reasonable innocent interpretation*** of the language." *Chicago City Day Sch. v. Wade*, 297 Ill. App. 3d 465, 471 (1st Dist. 1998) (emphasis added). In this case, the circuit court agreed with the Watchdogs that the phrase "pay to play" has multiple reasonable meanings. R. C00403 at 110:11-14 (emphasis added) (stating, "I've taken a look at the pay to play, and ***I understand that pay to play can mean a number of different things***…"). Therefore, under Illinois' innocent construction rule, the circuit court was obligated to find the phrase to be non-actionable. However, the circuit court applied the wrong standard because it then held that "in Illinois…saying 'pay to play'… [is] implying criminal conduct." (R. C00403 at 110:11-19). Statements which merely "imply" criminal conduct—but which have additional non-criminal meanings—are not actionable as a matter of law. In so ruling, the court effectively: determined that, in this state at least, "pay to play" could never be subject to an "innocent construction"; equated "innocent" with "unobjectionable", even though "innocent" in this free speech context simply means "not actionable"; and failed to apply Illinois law which has found "pay to play"-type words/phrases such as "fraud", "corrupt", "cheating the city", "theft", "ripping off" and "pulling a fast one" to be subject to an "innocent construction".

(2) Holding that a defamation defendant must prove his/her statement to be "absolutely" or "undeniably" true. Illinois law requires that most public contracts be subjected to a competitive bidding process. One exception to the bidding process is for architectural contracts. In the instant case, Plaintiffs side-

stepped the required public bidding process by using a form "Architect" contract which was signed by Plaintiff as the "architect", and which referenced some 300 times the services to be provided thereunder by an "architect". (R. C00039). But neither Plaintiff, nor any of their employees, is an architect, and there is a law in Illinois criminalizing the "use of the title 'architect'" by one who is not an architect. The Watchdogs thus reported Plaintiffs to have violated this statute. However, in denying the Watchdogs' CPA motion, the circuit court cited a half-sentence in an addendum to the contract—"[e]xclusions to the scope include: architecture"—to conclude that, notwithstanding Plaintiffs' identification of themselves as the "architect" and the contract's hundreds of references to "architect", Plaintiffs were not really "doing architectural work", (R. C00325 at 32:17) and therefore that the Watchdogs had not satisfied the standard of showing that their reporting was "***absolutely***" or "***undeniably***" true. (R. C00397 at 104:9) (emphasis added). The Watchdogs respectfully claim this to have been error because:

- A violation of the statute does not require that Plaintiffs were "doing architect's work", merely that they were holding themselves out as an architect, which they clearly were;
- Plaintiffs undeniably escaped the public, competitive bidding process because they used the form "Architect" contract, and thus should not be allowed to repudiate the architectural services character of the contract by use of a few words in an addendum; and

- There is no authority in Illinois which defines in a free speech context what "absolute" or "undeniable" truth means, let alone imposes on a defamation case defendant the obligation to prove that his/her statement satisfies it.

Accordingly, as set forth herein, the Watchdogs respectfully request that this Court grant its Petition and allow an appeal in this matter to review the ruling below.

A. This case involves matters of constitutional concern and threatens to muzzle journalists and those critical of the government.

Conduct concerning political speech "certainly" is "affected with a constitutional interest". *See, e.g., Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2344 (2014). The circuit court's rulings muzzle the press, threatening to place off-limits commonly used critical phrases, such as "corruption", "fraud", and "pay to play". Illinois law dictates that a "robust and unintimidated press" is a "necessary ingredient" of democracy. *Krauss v. Champaign News Gazette, Inc.*, 59 Ill. App. 3d 745, 746 (4th Dist. 1978). Because the Watchdogs operate an independent online news "blog", they are even more in need of protection than the state's largest newspapers and most well-regarded journalists. Due to the Watchdogs' limited resources, they are more susceptible to SLAPPs and a greater target to plaintiffs seeking to silence them from their important work. Indeed, in this case, *The Washington Times, Chicago Tribune, Daily Herald*, and *The Illinois Herald* all provided coverage of the exact same contract and corruption, but only the Watchdogs have been sued for making nearly-identical comments vis-à-vis these more established newspapers. (R. C00037-38 at ¶¶ 25-29).

B. The CPA contemplates immediate, expedited appeal, and the Watchdogs will undoubtedly face years of costly litigation if this Petition is not granted.

This Court should allow this appeal because it comports with the underlying policies and purposes of the CPA, which specifically contemplates a speedy and complete resolution of litigation implicating the rights that the CPA seeks to protect. *See* 735 ILCS 110/20(a) (requiring expedited interlocutory appeals); Illinois Supreme Court Rule 306(a).

The circuit court found that the Watchdogs acted in furtherance of their Constitutionally-protected rights to speak and participate in government, i.e., that they had satisfied the first *Sandholm* factor under the CPA. (R. C00374 at 81:5-7). If, as the Watchdogs contend, the circuit court erred in applying the law protecting their right to speak in the second *Sandholm* prong, then this Court has the ability to efficiently reverse those errors and prevent years of unnecessary, costly litigation. Being forced to litigate when a CPA motion was filed and improperly denied directly undermines the purpose of the CPA "as expressly dictated by the Illinois legislature—to curtail the "significant[] chill[ing]" of SLAPPs and eliminate a "means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs." *See* 735 ILCS 110/5.

C. Plaintiffs' lawsuit is meritless and retaliatory, and the circuit court erred in applying the law of defamation to the facts of this case.

For purposes of the CPA, a lawsuit is meritless not only if the complained-of statements are true, but also if they can be reasonably innocently interpreted. *Goral v. Kulys*, 2014 IL App (1st) 133236, ¶ 46. At issue were two categories of the Watchdogs' statements: one, that Plaintiffs engaged in "pay to play" and the other, that Plaintiffs had violated Illinois law by holding themselves out as architects.

***Plaintiffs' lawsuit is meritless because the use of the term "pay to play" in a news article is non-actionable under the law of defamation, especially in light of* McDonnell v. United States**

The circuit court erred by misunderstanding and misapplying the legal test to determine whether "pay to play" is protected by the innocent construction rule. First, while the circuit court recognized that the phrase "pay to play" may be interpreted as describing non-criminal behavior, it nonetheless allowed the case to continue because it found that "in Illinois…saying 'pay to play'… [is] implying criminal conduct." (R. C00403 at 110:11-19); *see also* R. C00403 at 110:11-14 (emphasis added) (circuit court stating, "I've taken a look at the pay to play, and ***I understand that pay to play can mean a number of different things***…").

The circuit court erred when it stated that "pay to play" necessarily imputes upon its participants the commission of a crime. Importantly, under a new United States Supreme Court decision, this nation's highest court *reversed* the "pay to play" conviction of Governor McDonnell, who was criminally convicted for accepting payments, loans, and gifts in exchange for favorable governmental action. *McDonnell v. United States*, 136 S. Ct. 2355, 2364-65 (2016). This new authority confirms that, simply put, and irrespective of its unsavory nature, "pay to play" is not always illegal.[6] Consistent with *McDonnell*, Illinois law likewise recognizes that even very harsh labels placed on unsavory behavior do not imply criminality. *See, e.g., Doctor's Data, Inc. v. Barrett*, 170 F. Supp. 3d 1087,

[6] In the same way that it is not *per se* illegal to accept benefits from constituents as a governmental official, it is not *per se* illegal for constituents to receive benefits from their relationships with the officials. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 359 (2010) ("[t]he fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt").

1123–24 (N.D. Ill. 2016) (applying Illinois law) (statement that doctor's test was a "fraud" not defamatory because "to speak of something as a 'fraud' may mean it is criminally deceptive, but it may also mean simply that it is not what it purports to be"); *Kapotas v. Better Gov't Ass'n*, 2015 IL App (1st) 140534, ¶ 51, *appeal denied*, 39 N.E.3d 1003 (2015) ("the use of a term which has a broader, noncriminal meaning does not impute the commission of a crime"); *Owen v. Carr*, 134 Ill. App. 3d 855, 859 (4th Dist. 1985), *aff'd*, 113 Ill. 2d 273 (1986) (allegation that party was trying to "intimidate" not defamatory because it could refer to the "crime of intimidation" or other non-criminal meaning); *Ponzio v. Biscaglio*, 2016 IL App (1st) 143069-U, ¶ 22, *appeal denied*, 60 N.E.3d 882 (Ill. 2016) (use of term "Ponzio Scheme" not defamatory, although it implies plaintiff was involved in a criminal Ponzi scheme, even when "it is easy for an ordinary reader to make the mental leap from 'Ponzio Scheme' to the familiar 'Ponzi Scheme'"); *Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755, 761-62 (1st Dist. 2002) (finding non-actionable the statement that company was "cheating the city", because although cheating may "imply criminal acts," it "means different things to different people at different times and in different situations"); *Tamburo v. Dworkin*, 974 F. Supp. 2d 1199, 1213-14 (N.D. Ill. 2013) (deciding, as a matter of law, that statement which accused plaintiff of "theft" was not actionable because, "[t]o a lay person…'theft' can also mean the wrongful act of taking the property of another person without permission").

On literally the same day that Plaintiff Burkhart was appointed to the board of the COD Foundation, ie, the fundraising arm of the COD, which committed Burkhart to many hours of service and thousands of dollars in donations, she and her company, Plaintiff Herricane Graphics, were awarded by COD a lucrative, publicly-funded contract without

having to engage in any competitive bidding process whatsoever. (R. C00268; R. C00273). The Watchdogs' use of the term "pay to play" was reasonable and is not actionable as a matter of law.

Second, the circuit court mistakenly believed that that an "innocent construction" can only be found if the statement itself is non-objectionable. (R. C00401-402 at 108:24-109:4) (in using the term "pay to play" the circuit court believed that the Watchdogs "call[ed] [plaintiffs' behavior] corrupt…misuse of public funds, which may all be true, but I don't know that it[]…necessarily gives rise to an innocent construction"). This is incorrect: the innocent construction rule is a rule to determine only whether a statement is non-actionable, not whether it is distasteful or subject to objection. *Chapski*, 92 Ill. 2d at 352. This inquiry—whether the statements are Constitutionally-protected under the "innocent construction rule"—is a question of law to be resolved by the circuit court (*id*.) in order to "advance[] the constitutional interests of free speech and free press and encourage[] the robust discussion of daily affairs." *Tuite v. Corbitt*, 224 Ill. 2d 490, 511 (2006). Importantly, the circuit court failed to recognize that *if* a statement can reasonably be innocently construed, "it cannot be actionable," and "***[t]here is no balancing of reasonable constructions***." *Solaia Tech., LLC v. Specialty Pub. Co.*, 221 Ill. 2d 558, 580 (2006) (emphasis added).

Plaintiff's lawsuit was meritless because the Watchdogs' statements about the architecture contract were true, and there is no authority requiring journalists to publish only "absolute" truth

The second-complained of statement—that non-architect Plaintiffs held themselves out as architects in violation of state law—is substantially true. In not finding this to be the case, the circuit court erred in two respects. First, the circuit court applied the wrong

standard when it required the Watchdogs to prove that their statement—that Plaintiff "held herself out as an architect"—was "absolutely true" (R. C00334 at 41:1-20) or "undeniably" true (R. C00397 at 104:9); *contra Maag v. Illinois Coal. for Jobs, Growth & Prosperity*, 368 Ill. App. 3d 844, 852 (5th Dist. 2006) (affirming dismissal of defamation complaint because the statements—while inaccurate, incomplete, "misleading," "shallow," "truncated," and "designed to generate fear and anger"—were also substantially true); *Tamburo*, 974 F. Supp. 2d at 1213-14 (deciding, as a matter of law, that statement which accused plaintiff of "theft" was substantially true when plaintiff took data from party, and party believed that it "constituted theft," even when plaintiff had not or could not be prosecuted for actions, because, "[t]o a lay person…'theft' can also mean the wrongful act of taking the property of another person without permission").

In the instant case, it was substantially true that, by entering into a contract identifying one of the Plaintiffs as an architect, the Plaintiffs violated 225 ILCS 305/36 (noting that it can be a felony for anyone to "use the title 'architect' or any of its derivations unless the person or other entity holds an active license as an architect or registration as a professional design firm in the State").

The circuit court further erred here, because it found that Plaintiffs necessarily did not use the title "architect" or otherwise hold themselves out as architects because—despite the contract's signature block, defined terms, and hundreds of other references to the Plaintiff as an architect—the Architecture Contract contained an unsigned exhibit which stated that "[e]xclusions to the scope include: architecture" (R. C00077). The never-executed addendum did not and cannot repudiate the contract's hundreds of references to Plaintiff being an "architect." The entire rationale for the use of the Architecture Contract

was to escape bidding requirements—which was accomplished despite the supposed exculpatory language in the Architecture Contract's exhibit. Therefore, the trial court erred by interpreting the Architecture Contract's exhibit as meaning "we're not doing architectural work pursuant to this contract" (R. C00327 at 34:1-2). This is the wrong inquiry—Plaintiffs' violation of state law turns not on whether Plaintiffs were actually doing architectural work, but rather on whether the held themselves out as architects and used that term to define themselves in the Architecture Contract.

Plaintiffs' case is meritless whether the Watchdogs' statements are true, or whether they may "merely" be reasonably innocently construed. As more fully set forth in the Watchdogs' briefs (R. C00109; R. C00169; R. C00238; R. C00250), the law of defamation is clear that the Watchdogs' news articles are not actionable. Plaintiff's case is meritless.

This Court should grant the Watchdogs' Petition because Plaintiffs' lawsuit is clearly retaliatory

Furthermore, the circuit court erred in determining that Plaintiffs' case was not retaliatory. It plainly was. It is well-settled in Illinois that "[d]emanding damages in the millions for alleged defamation is a classic SLAPP scenario." *Ryan,* 2012 IL App (1st) 120005 at ¶ 24; *Goral v. Kulys*, 2014 IL App (1st) 133236 at ¶ 56 ("Plaintiff's damage requests, exceeding $1 million and requesting an unspecified amount of punitive damages" is retaliatory); *Hytel Grp., Inc. v. Butler*, 405 Ill. App. 3d 113, 126 (2d Dist. 2010) (claim for $8 million in damages was "intended to strike fear into the defendant").

Here, Plaintiffs sought $1,000,000 in punitive damages from the Watchdogs on Counts I, II, V, VI, VII, and VIII, for a total of $6 million in punitive damages—an amount clearly indicative of a retaliatory intent. (R. C00013; R. C00014; R. C00018; R. C00019;

R. C00020; R. C00021).[7] Plaintiffs' retaliatory intent becomes even clearer when the excessive punitive damages are viewed in light of the $50,000 in claimed compensatory damages. *See Stein v. Krislow*, 2013 IL App (1st) 113806, ¶ 19 (finding that $50,000 was not a good-faith estimate damages arising out of alleged defamation because it was a speculative amount and plaintiff alleged only reputational harm). The damages sought are not a good faith estimate of the plaintiffs' alleged "reputational harm" from the articles at issue. Rather, they are indicative of a "classic SLAPP scenario." *Ryan,* 2012 IL App (1st) 120005 at ¶ 24. Moreover, the Watchdogs presented evidence—which was wholly unrebutted by evidence from the Plaintiffs—in which Plaintiffs admitted they were not damaged by the Watchdogs' articles. (R. C00241-243).

D. Illinois authority is inconsistent regarding when a lawsuit is "retaliatory" for purposes of analysis under the CPA.

In the circuit court, the Watchdogs argued that Plaintiffs' lawsuit was retaliatory in part because it was filed on the last day before the statute of limitations ran for one of the articles published by the Watchdogs about Plaintiffs. The Watchdogs premised this argument on *Stein v. Krislov*, 2013 IL App (1st) 113806, ¶ 19, which holds that a lawsuit filed just before the expiration of the statute of limitations is evidence of a plaintiff's retaliatory intent. The circuit court disregarded this controlling precedent (*see* R. C00398-400 at 105:12-107:8), perhaps due to other seemingly inconsistent case law which holds

[7] Further evidence that Plaintiffs' damages are not a good faith measure of damages – and therefore retaliatory – can be found in the fact that Plaintiff Herricane sought the exact same measure of damages ($50,000 in compensatory, and $1,000,000 in punitive) for Count II, which alleges that Herricane's business has been decimated, as Burkhart sought in Count VII, which alleged that the Watchdogs misappropriated ***a single photograph*** of Burkhart. Clearly, the damages sought are arbitrary values designed to "strike fear" into the Watchdogs for challenging Plaintiffs in the press. *Hytel Grp., Inc.*, 405 Ill. App. 3d at 126.

that "[t]he relatively close proximity between the posting of defendant's articles and plaintiff's suit suggests that it was retaliatory." *Goral*, 2014 IL App (1st) 133236 at ¶ 55. This Court now has an opportunity to clarify this apparent contradiction, in order to provide guidance to lower courts on the important issue of determining whether a lawsuit is a SLAPP and therefore subject to dismissal under the CPA.

VI. CONCLUSION

WHEREFORE, Defendants-Petitioners, EDGAR COUNTY WATCHDOGS, INC. and KIRK ALLEN, respectfully request that this Court grant their Petition, allow them to file a brief in support of their petition, reverse the Circuit Court, require that the Circuit Court grant Defendants' CPA Motion, and provide such further relief as is just.

February 21, 2017

Respectfully submitted,
EDGAR COUNTY WATCHDOGS, INC. and KIRK ALLEN

By: /s/ Shawn M. Collins
One of their Attorneys

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CERTIFICATE OF COMPLIANCE

I certify that the Petition for Leave to Appeal Pursuant to Supreme Court Rule 315 conforms to the requirements of Rule 341 (a) and (b). The length of this brief, excluding the cover page and supporting record, is 18 pages.

Dated: February 21, 2017

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Case No. _____
IN THE
SUPREME COURT OF ILLINOIS

CARLA BURKHART and HERRICANE GRAPHICS. INC., *Plaintiff-Respondent,* v. EDGAR COUNTY WATCHDOGS, INC., KIRK ALLEN, ADAM ANDRZEJEWSKI, KATHY HAMILTON, and CLAIRE BALL, *Defendants-Petitioners*.	Appeal From the Second District App. Ct. Case Nos. 2-16-0705; 2-16-0711; 2-16-0712 Date of Appellate Order: January 17, 2017

NOTICE OF FILING

TO: ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on this 21st day of February, 2017, the undersigned Petitioner, by and through their attorneys, The Collins Law Firm, P.C., filed the attached ***Petition for Leave to Appeal Pursuant to Illinois Supreme Court Rule 315***, with the Clerk of the Supreme Court of Illinois, 200 East Capital Avenue, Springfield, IL 62701, via electronic filing.

Respectfully submitted,
EDGAR COUNTY WATCHDOGS, INC. and KIRK ALLEN

By: _/s/ Shawn M. Collins_____
One of their Attorneys

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CERTIFICATE OF SERVICE

The Undersigned, an attorney, certifies that he caused to be served the foregoing ***Petition for Leave to Appeal Pursuant to Illinois Supreme Court Rule 315*** by email delivery on February 21, 2017.

By: _/s/ Shawn M. Collins_____

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APPENDIX

STATE OF ILLINOIS APPELLATE COURT SECOND DISTRICT

OFFICE OF THE CLERK
847/695-3750

APPELLATE COURT BUILDING
55 SYMPHONY WAY
ELGIN, ILLINOIS 60120-5558

Appeal from the Circuit Court of County of DuPage

Trial Court No.: 15L1244

THE COURT HAS THIS DAY, 01/17/17, ENTERED THE FOLLOWING ORDER IN THE CASE OF:

Gen. No.: 2-16-0705
Cons. Cases: 2-16-0711, 2-16-0712

Burkhart, Carla et al. v. Edgar County Watchdogs, et al.

Defendants, Edgar County Watchdogs, Inc., Kirk Allen, Adam Andrzejewski, and Claire Ball, appeal the trial court's denial of their motion to dismiss in accordance with the provision of the Citizen Participation Act (Act) (735 ILCS 110/1 et seq. (West 2016)). Leave to appeal is denied as to all defendants. Defendants have not established that plaintiffs' claims are meritless or filed solely based on defendants' rights of petition, speech, association, or to otherwise participate in government such that dismissal pursuant to Section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-619 (West 2016)) would be appropriate. We express no opinion on the actual merits of plaintiffs' causes of action. Any outstanding motions are stricken as moot.
THIS ORDER IS FINAL AND SHALL STAND AS THE MANDATE OF THIS COURT.
(Hudson, Zenoff, Burke, JJ).

Robert J. Mangan
Clerk

cc: The Collins Law Firm, P.C.
Shawn M. Collins
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Robert L. Dawidiuk
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Joshua M. Feagans
Jordan D. Dorrestein