IN THE CIRCUIT COURT OF THE 18TH JUDICIAL CIRCUIT
DUPAGE COUNTY, ILLINOIS

CARLA BURKHART AND HERRICANE GRAPHICS, INC.,

Plaintiff,

vs.

EDGAR COUNTY WATCHDOGS, INC., *et al.*,

Defendants.

Case No. 15 L 001244

PLAINTIFFS' RESPONSE TO MOTION TO DISMISS OF EDGAR COUNTY WATCHDOGS AND KIRK ALLEN PURSUANT TO THE ILLINOIS CITIZEN PARTICIPATION ACT

NOW COME the Plaintiffs, CARLA BURKHART ("Burkhart") and HERRICANE GRAPHICS, INC. ("HGI"), by and through their attorneys, GRIFFIN | WILLIAMS LLP, and for their response in opposition to the Motion to Dismiss Pursuant to 735 ILCS 5/2-619(a)(9) under the Illinois Citizen Participation Act (the "Act") filed by the Defendants, EDGAR COUNTY WATCHDOGS, INC. and KIRK ALLEN, state as follows:

Introduction

There is no constitutional right to defame. *Hadley v. Doe*, 2014 IL App(2d) 130489, ¶ 16, 12 N.E.3d 75, 382 Ill.Dec. 75 (2nd Dist. 2015). In the instant case, the Defendants, Kirk Allen ("Allen") and Edgar County Watchdogs, Inc. ("ECWI") have defamed the Plaintiffs in more than 20 blog posts on the *Illinois Leaks* blog.[1] The posts accuse the Plaintiffs of engaging in a pay to play scheme at the College of DuPage ("COD") and fraudulently executing an architectural services contract to avoid bidding requirements. Both accusations allege criminal conduct and are untrue. The accusations have taken over the internet and overwhelm any

[1] The entirety of the blog posts concerning the College of Dupage as well as the Plaintiffs are filed as Plaintiffs' Group Exhibit A under separate cover and incorporated herein by reference. The posts can also be viewed at http://edgarcountywatchdogs.com/.

internet search for the Plaintiffs or their services. As a result of the Defendants' defamatory, malicious and hateful posts, the Plaintiffs have not just suffered damages; their reputation and goodwill have been utterly destroyed. In 2015 alone, the Plaintiffs' lost $200,000 in annual sales that previously averaged at or near $300,000 per year and likely face the complete loss of their business in the near future.

The Defendants combat what they ironically couch as bullying and harassment by characterizing the Plaintiffs' Complaint as a "SLAPP" lawsuit and seek dismissal under the Act so that they may further engage in the political discourse at COD. First, the Plaintiffs' lawsuit is not a SLAPP lawsuit. It is a claim to recover damages for business losses resulting from lies published on a blog for over a year. While the Defendants lament that they are but a humble news blog "not worth $6,000," they ignore the fact that the Plaintiffs were engaged in a small business enterprise themselves making gross sales of only around $300,000 per year and are not a corporate giant that is customarily associated with a SLAPP. See *Ryan v. Fox Television Stations, Inc.*, 2012 IL App (1st) 120005, ¶ 26, 979 N.E.2d 954, 366 Ill.Dec. 153 (1st Dist. 2012)(recognizing a traditional SLAPP is brought by a large and powerful corporation). Defendants also profess that they are but one actor in the political arena. Again, they ignore that Burkhart and HGI have never entered that arena. Burkhart is not a politician; she is a graphic designer who volunteered to raise money for needy students. Finally, as can be viewed by their continued blog posts, Plaintiffs lawsuit has not ended the discourse concerning COD.

Ultimately, if the Defendants sought to raise public awareness about no-bid contracts with COD Foundation members as they suggest, they were and remain free to do so. What they are not free to do is accuse innocent people of criminal behavior to create hysteria that tarnishes and ruins hard working, civic minded citizens like Burkhart.

Argument

A. The Plaintiffs' Complaint Genuinely Seeks Damages For Business Losses And Was Filed More Than A Year After The Harassment Began And On The Last Day Of The Statute Of Limitations. It Is Not A SLAPP.

The Supreme Court's decision *Sandholm v. Kuecker,* 2012 IL 111443, ¶ 1, 962 N.E.2d 418, 356 Ill.Dec. 733 (Ill. 2012) precludes defendant from obtaining relief under the Act.

In *Sandholm,* the Supreme Court determined that the legislature intended the Act "to target only meritless, retaliatory SLAPPs and did not intend to establish a new absolute or qualified privilege for defamation." *Sandholm,* 2012 IL 111443 at ¶ 50. In accordance with this determination, the Supreme Court interpreted the phrase " 'based on, relates to, or is in response to'" in Section 15 of the Act to mean "*solely* based on, relating to, or in response to 'any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government.' " (Emphasis in original.) *Sandholm*, 2012 IL 111443 at ¶ 45. The Court expounded, "[s]tated another way, where a plaintiff files suit genuinely seeking relief for damages for the alleged defamation or intentionally tortious acts of defendants, the lawsuit is not solely based on defendant's rights of petition, speech, association, or participation in government. In that case, the suit would not be subject to dismissal under the Act." *Sandholm*, 2012 IL 111443 at ¶ 45. The Court concluded that the plaintiff's lawsuit was not solely based on, related to, or in response to the acts of the defendants in furtherance of their rights of petition and speech because the "true goal" of the plaintiff's lawsuit was not to chill participation in government or stifle political expression, but to seek damages for the personal harm to his reputation from the defendants' alleged defamatory and tortious acts. *Sandholm,* 2012 IL 111443 at ¶ 57.

Under *Sandholm,* a lawsuit may only be dismissed under the Act if:

> (1) the defendants' acts were in furtherance of their right to petition, speak, associate, or otherwise participate in government to obtain favorable government action; (2) the plaintiffs' claims are solely based on, related to, or in response to the defendants' "acts in furtherance"; and (3) the plaintiffs fail to produce clear and convincing evidence that the defendants' acts were not genuinely aimed at solely procuring favorable government action. *Id.* ¶ 43.

Merely because defendants' activities are the kind that the Act is designed to protect does not necessarily mean that plaintiff's lawsuit is a SLAPP. The next step in the analysis is to determine whether plaintiff's claim is "solely based on" defendants' protected acts. *Sandholm* stated that a lawsuit is not "solely based on" protected acts and therefore is not subject to dismissal under the Act if "a plaintiff files suit genuinely seeking relief for damages for the alleged defamation or intentionally tortious acts of defendants." *Sandholm,* 2012 IL 111443 at ¶ 45.

Under *Sandholm*, there are two required showings to prove that a lawsuit is a SLAPP solely based on, related to or in response to a protected act. The movant must show that the lawsuit is (1) retaliatory and (2) meritless. *Sandholm,* 2012 IL 111443 at ¶ 43-5. To determine retaliatory intent, the two factors most helpful to consider are (1) the proximity in time of the protected activity and the filing of the complaint and (2) whether the damages requested are a good faith estimate of the injury sustained. *Sandholm,* 2012 IL 111443 at ¶ 43-5.

1. Plaintiffs' Claims Are Not Retaliatory.

In the instant case, Plaintiffs waited to file their Complaint for more than one year after the first defamatory blog posts were published in December 2014, nine months after the COD's Board of Trustees election in April of 2015 and nearly eight months after the majority of defamatory posts were published (i.e. prior to May 2015). While it is true that the Defendants continued to post defamatory statements about Plaintiffs until December 4, 2015, by that time Defendants had already secured a new Board of Trustees and Plaintiffs were no longer welcome to work at COD. Had Plaintiffs waited any longer to file the lawsuit, the bulk of the defamation

claims may have been barred by the statute of limitations and they may have lost their ability to be compensated for their losses. There is absolutely no temporal proximity to the filing of the lawsuit and the protected activity. Absent such proximity, no conclusion can be drawn that the lawsuit was designed to inhibit or enjoin the Defendants from engaging in protected activity.

Relative to temporal proximity, this Court should also consider that Allen and ECWI are not the lone defendants. Plaintiffs have also sued Adam Andrzejewski, Claire Ball and Kathy Hamilton, although Mrs. Hamilton has been voluntarily dismissed by agreement. Relative to Hamilton, Plaintiffs' suit occurred only after she resigned from the COD Board Of Trustees on or about December 13, 2015. See Group Exhibit A, December 13, 2015 post. Relative to Claire Ball, her involvement in the COD controversy ended after she lost the Board of Trustee election in April of 2015 and removed her offensive website content. As for Adam Andrzejewski, outside of his involvement in the conspiracy with Allen and ECWI, he last wrote offensive comments about Plaintiffs in October of 2014 and he is not even being sued for his comments, only as a co-conspirator to the acts of Allen and ECWI. As can be seen, Plaintiffs allowed sufficient time for the Defendants to engage in "protected activity" relative to COD and the election and did not rush to sue any party in an attempt to halt any investigation, alter the April 2015 election or even salvage Plaintiffs reputation with COD and others.

In addition, the alleged damages are a good faith estimate of the injury sustained. Plaintiffs have pled six, ***alternative*** Counts against Allen and ECWI. The six Counts seek relief for defamation, tortious interference, misappropriation and conspiracy for an eventual award in an amount in excess of $50,000 and punitive damages of more than $1,000,000. Regardless of Defendants exaggerations, the alternative Counts do not seek a total judgment of more than $6,000,000 on their face.

The damages alleged in the Complaint include actual economic damages of $200,000 alone in 2015 relative to lost sales, the expectation that similar losses will result in 2016 and beyond, damages for loss of reputation and goodwill and punitive damages. In fact, it is entirely likely that Plaintiffs' business will fail as a result of the unrelenting cloud of corruption the Defendants' defamation has created via the internet and various search engines. In quantifying the Plaintiffs' losses, they are entitled to credit for lost sales as well as credit for lost goodwill, or value, in their business. Assuming *arguendo* that Plaintiffs would only be entitled to losses for 2015 and not beyond, their lost sales would be approximately $200,000 and the lost business value, or goodwill, would likely be in excess of $200,000 (assuming a 1 x multiplier of gross sales in relation to business value is a conservative estimate). Thus, one year of the Plaintiffs' losses would include actual, economic damages of not less than $400,000. Assuming Plaintiffs losses continue and cannot be mitigated, these damages will increase significantly.

In addition, the $400,000 figure does not account for loss of reputation. In a defamation *per se* lawsuit, damages to reputation are presumed and where such a presumption has been coupled with proof of actual damages, Illinois courts have affirmed awards of in excess of $1,000,000 for loss of reputation alone. See *Leyshon v. Diehl Controls North America, Inc.*, 407 Ill.App.3d 1, 12-3, 946 N.E.2d 864, 349 Ill.Dec. 368 (1st Dist. 2010)(approving an award of $2,000,000 for loss of reputation). In addition, as discussed in *Leyshon*, courts have recognized the propriety of a multiple of three times actual damages when awarding punitive damages. *Leyshon v. Diehl Controls North America, Inc.*, 407 Ill.App.3d at 13-24 (approving an award of $6,000,000 in punitive damages).

Thus, based upon 2015 economic losses alone, Plaintiffs have conservatively alleged compensatory damages of more than $400,000 and punitive damages in excess of $1,000,000

and provided a good faith, factual basis to sustain a damages award of nearly $1,500,000 in compensatory damages and $4,500,000 in punitive damages.

2. Plaintiffs' Claims Are Not Meritless.

With respect to their burden to prove Plaintiffs' claims are meritless, Defendants do nothing more than rest on their prior arguments that the blog posts were not actionable defamation. As fully discussed in Plaintiffs' Response To Section 2-619.1 Motion To Dismiss Of Edgar County Watchdogs And Kirk Allen, Plaintiffs' claims appropriately alleged tortious conduct against the Defendants for their defamatory and untrue blog posts. Regardless, as recognized by *Sandholm*, merely arguing that a claim is not sufficiently pled as a matter of law is not adequate to carry the defendant's burden. *Sandholm,* 2012 IL 111443 at ¶ 55-8; See also *Ryan v. Fox Televsision Stations, Inc.*, 2012 IL App (1st) 120005 at ¶ 26. Rather, Defendants must bring forth affirmative evidence to establish undisputed facts that disprove Plaintiffs' claim which is presumed legally sufficient under a Section 2-619 review. Defendants have not even attempted to do so. The Affidavit of Allen does little more than recite a self-serving and unconvincing resume while failing to address the veracity of his prior claims that Plaintiffs engaged in a pay to play scheme or fraudulently represented themselves as architects in the 2012 Signage Design Contract.

In the end, however, the ultimate holding in *Sandholm* cannot be overcome by the Defendants. When the defendant's acts cause actual injury to the plaintiffs and a lawsuit properly seeks redress for those acts, the lawsuit cannot, as a matter of law, be considered "solely based on" protected acts. As detailed in *August v. Hanlon*, 2012 IL App (2d) 111252, ¶ 30, 975 N.E.2d 1234, 363 Ill.Dec. 925 (2nd Dist. 2012), when a pleading alleges economic damages for the harm to plaintiff's reputation and the relief sought by plaintiff is, in part, compensatory in

nature, the defendant cannot prove that a complaint is "***solely*** based on" protected acts. Further, as recognized in *Ryan v. Fox Television*, even where a lawsuit appears retaliatory and lacks actual damages, it will not be considered a SLAPP unless the claims are also meritless and the defendants bring forth undisputed evidence that disproves the plaintiff's claims. *Ryan v. Fox Television Stations, Inc.*, 2012 IL App (1st) 120005 at ¶ 23-6.

Defendants do not even attempt to adduce evidence to prove the veracity of their blog posts. In their companion Motion, Defendants' leading argument relative to the pay to play accusations was that they are political rhetoric and hyperbole or, in other words, exaggerations that were untrue. As discussed in Plaintiffs' responsive brief thereto, accusing the Plaintiffs of bribing government officials to obtain government contracts is far from rhetorical hyperbole which typically consists of terms such as "scab," "traitor," "amoral," "scam," "fake," "phony," "rat," and "crank," among others, that are "too vague to be falsifiable or sure to be understood as merely a label for the labeler's underlying assertions." See *Dilworth v. Dudley*, 75 F.3d 307, 309 (7th Cir. 1996). Regardless of Defendants' arguments, the fact remains that Plaintiffs do not seek to enjoin or prevent the Defendants from engaging in protected acts, but to be compensated for the damages wrought by Defendants' tortious acts.

3. Defendants' Acts Were Not Genuinely Aimed At *Solely* Procuring Favorable Government Action.

To the extent the burden of proof in this analysis shifts to Plaintiffs, which it should not under the *Sandholm* standard, the undisputed allegations of the Complaint as well as the admissions in Defendants' Motion provide ample evidence to conclude that the Defendants' actions were not ***solely*** aimed at procuring favorable government action. First, as alleged in the Complaint, the Defendants' acts were motivated by a conspiracy to propel Kathy Hamilton to power of COD. Allen's affidavit does not deny such a conspiracy. Assuming the Plaintiff's

allegations to be true, the Defendants actions were aimed at advancing the political career of Kathy Hamilton and not just at procuring favorable government action at COD.

Second, the professed purpose of the Defendants as stated in their Motion was to end no-bid contracts between COD and COD Foundation members. The Defendants blog posts accusing Plaintiffs of criminal acts served no purpose in this endeavor. The Defendants ran limited blog posts concerning the no-bid arrangements between other COD Foundation members that were also a COD bank (US Bank) and COD attorney (Kenneth Florey of Robbins Schwartz), among others. Those parties, with deep pockets and the ready ability to attack the Defendants, were never subjected to the pay to play accusations or other defamatory comments. The coverage devoted to such individuals is scant compared to the time and pages devoted to attacking the Plaintiffs. Ultimately, the Defendants could have effected favorable government action simply by taking the high road, calling for an end to no-bid contracts with COD Foundation members and steering clear of defamatory accusations of criminal conduct.

Third, even after Defendants secured a favorable outcome, they continued their smear campaign. Defamatory posts continued to be published after the April 2015 election for their candidates, after Hamilton and her Clean Slate candidates obtained control of the COD Board of Trustees, after the new COD Board ended the no-bid contracts between COD and COD Foundation members and after Plaintiffs were shunned from doing business with COD. In fact, Defendants continue their assault against the Plaintiffs to this day in posts published in March of 2016. See Group Exhibit A, March 2016 posts.

Fourth, the Defendants' blog posts that elude to an improper relationship between Burkhart and the former COD President by using their separate pictures together as well as the posts that outright challenge Plaintiffs to attack the Defendants serve no purpose in procuring

government action. See e.g. Group Exhibit A, August 5, 2015 post. These posts improperly included Burkhart's photograph. The posts were meant to embarrass Burkhart and otherwise bolster the authenticity of Allen's investigation and prior posts among his readers. The posts were unprofessional, immature, reckless and display a bias that cannot be ignored by this Court.

Finally, and perhaps most importantly, much, if not all, of the actions of the Defendants since the April 2015 and perhaps before, were aimed at forcing Burkhart from her board seat at the COD Foundation. The COD Foundation is not a government entity; it is a private, not-for-profit corporation. Thus, the removal of Burkhart from the COD Foundation serves no governmental purpose.

Conclusion

The most intractable problem with the Act is that a normal lawsuit is nearly impossible to distinguish from a SLAPP. See *Sandholm,* 2012 IL 111443 at ¶ 35. Dismissal of the lawsuit under the Act is a drastic and extraordinary remedy and absent clear and convincing evidence the plaintiffs' claims are ***solely*** based on, related to, or in response to the defendants' "acts in furtherance," dismissal is not warranted. As Plaintiffs' lawsuit is solely premised on seeking compensation for tortious acts, Defendants cannot carry their burden and the Act does not apply.

WHEREFORE, the Plaintiffs, CARLA BURKHART and HERRICANE GRAPHICS, INC. request that the Motion to Dismiss be denied and for such other and further relief as is deemed equitable and just.

CARLA BURKHART & HERRICANE GRAPHICS, INC.,

By: _____
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Defendants.

Case No. 2015 L 001244

NOTICE OF FILING

TO: See Attached Service List

PLEASE TAKE NOTICE that on the 30th day of March, 2016, the undersigned, on behalf of the Plaintiff, Carla Burkhart, caused to be electronically filed via the i2file Internet Case Filing System in the above-entitled cause with the DuPage County Circuit Court Clerk, **Plaintiffs' Response to Motion to Dismiss of Edgar County Watchdogs and Kirk Allen Pursuant to The Illinois Citizen Participation Act** before 5:00 p.m. A copy of which is attached and served upon you.

GRIFFIN|WILLIAMS LLP

By: /s/ Joshua M. Feagans

CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that I caused the foregoing **Notice of Filing** and **Plaintiffs' Response to Motion to Dismiss of Edgar County Watchdogs and Kirk Allen Pursuant to The Illinois Citizen Participation Act** to be served on the above parties by depositing a copy of same in the U.S. Mail, in Geneva, Illinois postage prepaid before 5:00p.m. on March 30, 2015.

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