IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRC
DUPAGE COUNTY, ILLINOIS

CARLA BURKHART and HERRICANE GRAPHICS. INC., Plaintiff,	)	
v.	)	Case No. 15 L 001244
EDGAR COUNTY WATCHDOGS, INC., KIRK ALLEN, ADAM ANDRZEJEWSKI, KATHY HAMILTON, and CLAIRE BALL,	)	Hon. Judge Sutter
Defendants.	)	

CLAIRE BALL'S REPLY IN SUPPORT OF MOTION TO DISMISS PURSUANT TO THE ILLINOIS CITIZEN PARTICIPATION ACT AND 735 ILCS 5/2-619(a)(9)

NOW COMES the Defendant, CLAIRE BALL ("Ball"), and for her Reply in Support of Motion to Dismiss Pursuant to the Citizen Participation Act (the "Act"), states as follows:

INTRODUCTION

Plaintiffs' response proves why their lawsuit was filed to retaliate against Claire Ball for making a Constitutionally-protected statement, and therefore why Ball's motion under the Act should be granted, *eg:*

- Plaintiffs offer, literally, no evidence to prove that their unverified complaint was not aimed at punishing Ball for protected speech about their no-bid government contracts. Under the Act, when Ball filed her motion supported by evidence—specifically, her affidavit and its attachments—this burdened Plaintiffs to respond with evidence of their own, including clear and convincing evidence that Ball's allegedly defamatory statements about the contracts were not aimed solely at procuring favorable government action. But Plaintiffs did not bother to offer any evidence. Also, while the Act gives Plaintiffs the right to seek discovery to find evidence that might support their claims, Plaintiffs did not bother to do that either. That Plaintiffs filed a case like this without evidence, and indeed without bothering to search for evidence or to supply the Court with any, is compelling proof of their retaliatory intent.

- Plaintiffs argue that the Act does not protect Ball, in part, because she was an "opportunist", running for government office (COD Trustee). *See* Response at p. 8. That Plaintiffs would waste anyone's time with the argument that Ball's running for office was not an exercise of her most cherished of First Amendment rights is further compelling proof of their retaliatory intent.

- Plaintiffs purport to calculate their "damages" allegedly accruing from Ball's allegedly defamatory statement (Response at pp. 5-6), but this is lawyer argument, not evidence. Worse, Plaintiffs fail to tell the Court that, well before Ball ever said anything about Plaintiffs' no-bid contracts, Plaintiffs had already told COD that they were weary of performing under the no-bid contracts, and ***did not want any more of them***. That Plaintiffs are seeking more than $2 million in "damages", despite having admitted that there couldn't possibly be any damages attributable to Ball's (and other Defendants') statements, also exposes their retaliatory intent.

- Plaintiffs are attempting to use their Response brief to improperly expand the scope of their complaint against Ball. As noted in Ball's Motion, in its single paragraph of allegations against Ball, Plaintiffs' complaint alleges only that Ball referred to Plaintiffs' contracts as "pay to play" in a single January 14, 2015 article which Ball published on her website. Plaintiffs' response, however, attaches an unverified excerpt from Ball's website which is not referenced in their complaint, and argues that statements made in it—*ie,* that Foundation board members receiving no-bid contracts were in a "conflict of interest", and that such practices were a "breeding ground for fraud"—are defamatory. However, even apart from the improper attempt to belatedly amend their deficient complaint, such statements could never be found to be defamatory, as they reflect more than reasonable conclusions for anyone to have reached under these circumstances.

- Plaintiffs criticize Ball for calling their contracts "pay to play", even though Ball's use of the term was no different than that used by none other than a COD Trustee herself (Dianne McGuire), who publicly noted that any no-bid contract awarded to a Foundation board member (like Burkhart) gave the "appearance of 'pay to play'". That Plaintiffs have sued neither McGuire, nor the *Daily Herald*, *Chicago Tribune* or *Washington Times*—all of which publications criticized Plaintiffs' no-bid contracts more harshly than did Ball—reveals their intent to punish the one (Ball) whom Plaintiffs assess to have the fewest resources to defend herself.

Claire Ball had a Constitutionally-protected right to run for the COD Trustee position, and while doing so to discuss and criticize those COD practices that were pertinent to that office, such as the awarding of lucrative, taxpayer-funded contracts to political insiders like Plaintiffs, without any competitive bidding whatsoever. That she gave this practice the same label as many others did—"pay to play"—and that this label accurately describes the circumstances of the no-bid contracts, shows that her statements were more than reasonable, and thus obviously not defamatory.

Plaintiffs' complaint against Ball is an argument for a world in which a candidate running for government office would not be allowed to criticize even those highly-questionable government practices which the candidate vows to correct if elected. It would be a world that punishes not only the candidate, but, most especially, the citizens who need to cast well-informed votes, and to understand what their government is doing with their money. The blatant unconstitutionality of such a world shows why Ball's motion under the Act should therefore be granted.

ARGUMENT

I. Plaintiffs Concede that Ball Has Satisfied the First *Sandholm* Prong.

Plaintiffs do not attempt to make a serious argument that Ball was not exercising her First Amendment rights by running for political office, being interviewed by an Illinois newspaper related to her campaign, and posting her campaign platform on the internet. Without any evidentiary support, Plaintiffs accuse Ball as being "seemingly an opportunist that craves the spotlight." Response at p. 8. However, just two sentences later, Plaintiffs reluctantly concede that "Ball's statements we [sic] made for the purpose of being elected." Response at p. 8.

The Act "safeguard[s] with great diligence" the constitutional rights of individuals "to be involved and participate freely in the process of government." 735 ILCS 110/5. The Act instructs courts to "provide the utmost protection for the free exercise of these rights of petition, speech, association, and government participation." *Id.*

It defies all logic that a local politician running for office and being interviewed by a news reporter in the process is doing anything other than engaging in conduct protected by the Act. Neither the Act, nor defamation law, draws distinctions between politicians who are "opportunists"

and "legitimate" politicians, nor should this Court engage in such an inquiry.[1] Moreover, the only evidence in this case is undisputed, and its shows that Ball was a legitimate candidate for public office, with the intention of bettering the COD community and participating in local government. *See* Ball Affidavit at ¶ 5. The interview in which Ball made the allegedly defamatory statements was with an established newspaper, covering the local election. *Id.* at ¶ 6. Ball has established the first *Sandholm* prong.

II. Ball's Unchallenged Evidence and Undisputed Legal Authority Proves that Plaintiffs' Lawsuit is Retaliatory.

In their Response, Plaintiffs offer no evidence at all as to why their claims are not retaliatory and wholly fail to address Balls' case law which proves the lawsuit was retaliatory.

Plaintiffs' Damages Analysis is Unsupported by Evidence, And It is Demonstrably False

Attempting to show that their Complaint is not retaliatory, Plaintiffs engage in a detailed damages calculus. *See* Response at pp. 5-6. But this is not evidence, and thus it carries no weight. Plaintiffs also claim in their unverified complaint that "Burkhart has been denied opportunities to perform work through Herricane at the COD…" Complaint at ¶ 75. Plaintiffs end their damages calculus by asserting that they have provided a good faith basis for $6 million in damages. Response at p. 6.[2]

Importantly, the unchallenged evidence is that anything that Ball said about Plaintiffs could not have caused them damage. This is because Plaintiff Burkhart has already admitted to COD that the critical press surrounding her receipt of no-bid contracts ***had nothing to do with her own***

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[1] *Howell v. Blecharczyck*, 119 Ill. App. 3d 987, 992-93 (1st Dist. 1983) (a "biased" perspective is "afforded the same constitutional protection" as a "balanced" perspective).

[2] Just one page earlier, Plaintiffs claim that "the alternative Counts [against Ball] do not seek a total judgment of more than $2,000,000 on their face as Balls suggests", but instead only $1,050,000. *See* Response at p. 5. This argument misses the mark: whether Plaintiffs seek $1 million, $2 million, or $6 million from a 33 year-old accountant from Addison is irrelevant. Plaintiffs' extreme measure of invented damages is a heavy-handed, prohibited-by-the-Act tactic designed to silence Ball and strike fear into the political arena against any who might dare challenge Plaintiffs.

decision to stop accepting business from COD in September 2014. In an email to now-terminated COD treasurer Tom Glaser, Burkart wrote that: "[o]n a business note, I decided the Monday before I left to Germany to not accept any more work at COD…I want you to know that I made this decision long before having received the most recent scathing Forbes Blog post from my sons [published by Defendant Andrzejewski]…" *See* Exhibit 1 hereto, a true and accurate copy of Burkart's email with Glaser.[3] Burkhart then went on to describe the real reason she wanted to sever ties with COD, *ie*, the parties had several payment and scope-of-work disputes, and Burkhart wanted no more of it. *Id.*

The truth is that, months before Ball ever mentioned Plaintiffs at all, in January 2015—and with state and federal investigations into "pay to play" at COD swirling all around her—Burkhart had already announced to COD that she would not be accepting any further contracts. Thus, the fact that Plaintiffs are getting no more COD contracts is a result of their own choice, not anything the Ball (or anyone else) said or did.

Plaintiffs' claimed damages could never have been caused by Ball and, in any event, are demonstrably nonexistent. Accordingly, Plaintiffs' demand for $2 million—or even "merely" $1,00,000—in damages is indisputable evidence of Plaintiffs' retaliatory evidence, designed only to "strike fear" into Ball for even mentioning Plaintiffs in the press. *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"); *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).[4]

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[3] *See* Plaintiff's Group Exhibit A2 at pg. 218. For convenience's sake, Ball re-attaches the article.

[4] Plaintiffs' case law does not help. In *Leyshon v. Diehl Controls N. Am., Inc.*, 407 Ill. App. 3d 1 (1st Dist. 2010), the appellate court affirmed a large jury verdict in favor of a plaintiff on its claim for breach of contract for wrongful termination, along with defamation. The court based its holding on the fact that the plaintiff presented "largely

Ball's Unchallenged Case Law Proves Plaintiffs' Retaliatory Intent

Plaintiffs simply ignore Ball's authority, which holds that a lawsuit filed just before the expiration of the statute of limitations is evidence of a plaintiff's retaliatory intent. *Stein v. Krislov*, 2013 IL App (1st) 113806, ¶ 19. In their Response, Plaintiffs admit that, had they "waited to file their Complaint for nearly a year after Ball gave the Illinois Herald interview and published her website content." Response at p. 4. Plaintiffs do not even attempt to distinguish *Stein*, and it remains the law in Illinois.

Finally, perhaps the best evidence that Plaintiffs retaliated by suing Ball for defamation is that Plaintiffs have not sued *any other politician or newspaper for defamation* including Dianne McGuire, the *Daily Herald*, *Chicago Tribune* and *Washington Times*—notwithstanding the fact that these publications used far harsher language and reported in far greater detail on Plaintiffs vis-à-vis Ball. *See, e.g.,* Ball Affidavit at Exhibit 2; Exhibits 3-6 to the Allen Affidavit.[5]

III. Plaintiffs' Claims are Meritless Because the Only Evidence Before this Court is that Ball Was Reasonable in Commenting that the Plaintiffs Had Engaged in a "Pay to Play" Scheme with COD.

Confusingly, Plaintiffs argue that Ball "does nothing more than rest on her argument that her Illinois Herald interview is not actionable." Response at p. 6. This is inaccurate: in her Motion, Ball actually argued that "the complained-of statements are all ***substantially true***, reasonably capable of innocent construction, or opinion..." Motion at p. 8. At this time, the *only evidence* before this Court comes from Ball's Affidavit, which provides unrebutted evidence that Plaintiffs did in fact receive more than $400,000 in payments for work performed at COD, and the

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uncontradicted" evidence on damages. *Id.* at 13. The opposite is true here: only Ball has presented evidence to this Court.

[5] In fact, two *Chicago Tribune* writers were selected as winners of the National Headliner Award for their investigative reports on COD—including the significant no-bid contracts awarded to Foundation Board members. *See, e.g.,* http://www.chicagotribune.com/news/watchdog/cod/ct-tribune-headliner-award-met-20160408-story.html.

first of Plaintiffs' lucrative contracts was awarded on the very day that Burkart was appointed to the Foundation Board. *See* Exhibit B at ¶ 11; Exhibit 2 thereto; *see also* April 19, 2012 Board meeting minutes, attached hereto as Exhibit 2 and incorporated herein by reference, at pp. 9 and 14.[6] The only evidence in the record supports that Ball spoke, at the least, reasonably, when she labeled the relationship between COD and its Foundation Board members as "pay to play".

Moreover, Ball is entitled to protection under the Act not only if she can prove that the statements in her interview were true, but also if the statements can be reasonably innocently interpreted. Recently, in *Goral v. Kulys*, 2014 IL App (1st) 133236, the First District affirmed dismissal, pursuant to the Act, of a plaintiff's defamation complaint. The defendant-blogger posted an article questioning the plaintiff's fitness to run for office, stating that the politician may have committed criminal acts, and the plaintiff sued for defamation. *Id.* at ¶ 3, 5. After finding that the blogger acted in furtherance of his Constitutional rights, the Court examined whether the lawsuit was also meritless and retaliatory. *Id.* at ¶ 39. The *Goral* Court found that the plaintiff's suit was in fact meritless because the complained-of statements were true. *Id.* at ¶ 44. However—critically—the First District Appellate Court further held that "[p]laintiff's suit was also meritless because defendant's statements were reasonably capable of an innocent construction." *Id.* at ¶ 46.

Ball's statements were capable of a reasonable innocent construction—because she used the exact same label as that used by COD Trustee Dianne McGuire, to describe Plaintiffs' conduct. Moreover, "pay to play" can be construed not only as describing illegal behavior, but behavior which the public views as corrupt but within a legal gray area. *See also* Watchdogs' Reply in support of Section 2-619.1 motion to dismiss, incorporated herein by reference.

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[6] The Court may take judicial notice of this publically-available document.

Finally, in an effort to rehabilitate their Complaint, Plaintiffs for the first time attach an alleged excerpt from Ball's website which contains a statement that Foundation Board members whose companies received no bid contracts had a "clear conflict of interest" and that COD created an environment which was a "breeding ground for fraud." Like all of Ball's statements, the single challenged sentence on her website is true and reasonably capable of innocent construction.[7] Because the challenged statements are true and reasonably capable of innocent construction. *See Goral*, 2014 IL App (1st) 133236 at ¶ 46. Ball has satisfied the second *Sandholm* prong.

Ball's Candidacy and Interview Were Aimed Solely at Procuring Favorable Action

Plaintiffs argue that, "[r]egardless of Ball's arguments, the fact remains that Plaintiffs do not seek to enjoin or prevent her from engaging in protected acts, but to be compensated for the damages wrought by her tortious acts." *See* Response at p. 7. This statement is entirely unsupported by evidence, but, moreover, it underscores the importance of the Court's reliance on the retaliatory and meritless *Sandholm* prongs. This is because "SLAPPs masquerade as ordinary lawsuits and may include myriad causes of action, including defamation, interference with contractual rights or prospective economic advantage, and malicious prosecution." *See Sandholm v. Kueker*, 2012 IL 111443, ¶ 35.

As set forth above, Ball has prevailed under the second prong by demonstrating that the plaintiff's lawsuit is retaliatory and meritless. *Garrido*, 2013 IL App (1st) 120466, ¶ 18. Therefore, the burden shifts to Plaintiffs to show by ***clear and convincing evidence*** that Ball's actions were not genuinely aimed at solely procuring favorable governmental action.

[7] Moreover, whether COD was, or was not, a "breeding ground for fraud" simply cannot be [proven true or false]. It is non-actionable as a matter of law. *Rose v. Hollinger Int'l, Inc.*, 383 Ill. App. 3d 8, 18 (2008) (statement not defamatory when it is an assertion not capable of verification, such as when it is unclear "how a reasonable person would go about proving or disproving the assertion").

IV. Plaintiffs Have Not Met their Burden to Produce Clear and Convincing Evidence that Ball's Acts Were Not Genuinely Aimed at Solely Procuring Favorable Government Action.

Once Ball, as the moving defendant, has met her burden of proof of the first two prongs—as she has—the burden shifts to the non-movant plaintiff to show by ***clear and convincing evidence*** that the defendant's acts were not genuinely aimed solely at procuring favorable government action. *Garrido*, 2013 IL App (1st) 120466, ¶ 16.

Plaintiffs have not even attempted to do this; they have come forward with no evidence whatsoever, let alone evidence sufficient to meet the high standard of clear and convincing evidence imposed on them by the Act. Plaintiffs argue—without evidence—that Ball is an "opportunist that craves the spotlight". Response at p. 8. But again, this is not the test to obtain protection under the Act. Plaintiffs have again confused the role of political maneuvering—assuming it even existed at all—with the law of defamation, in which political concerns cannot be considered by this Court. *Goral*, 2014 IL App (1st) 133236 at ¶ 63 (a "defendant's acts would be immune from suit even if they were solely aimed at procuring a favorable [political] outcome…[or] even if defendant hoped that plaintiff would lose [a political] election…"). Plaintiffs have wholly failed to meet their high burden to show that Ball's acts were not genuinely aimed solely at procuring favorable government action.

CONCLUSION

WHEREFORE, Defendant, CLAIRE BALL, prays that this Honorable Court grant her Motion, or, in the alternative, dismiss this action pursuant to Section 2-619, and award such other relief as this Court deems equitable and just.

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Respectfully Submitted,
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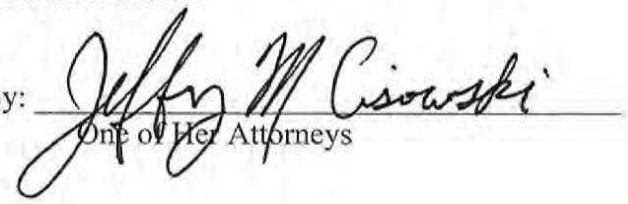
By: 
One of Her Attorneys

[redacted]

From:	Carla Burkhart
To:	Glaser, Thomas
Subject:	FW: October Board Change Order
Date:	Tuesday, September 23, 2014 4:08:15 PM
Attachments:	HG CO #7 and #8 - Julie Comments.xlsx
Importance:	High

[redacted]

Hi Tom,

[redacted]

I stopped by to see you yesterday, but your staff indicated you were on vacation. I hope it is(was) relaxing especially in spite of everything happening at the college.

[redacted]

On a business note, I decided the Monday before I left to Germany to not accept any more work at COD (I have not had this conversation with Dr. Breuder yet, but I☐m sure he☐s expecting this). In the latest request for bid for the SRC Donor Wall, I elected to ☐no☐ bid, although I really wanted to. I will miss everyone at COD. Everyone has made me feel like family. ☹ I want you to know that I made this decision long before having received the most recent scathing Forbes Blog post from my sons, whom proceeded to ask me if I was going to ☐jail☐☐ which I forwarded to you and Cathy Brod. I have since sent this to our attorney for review in the event of libel.

[redacted]

Not surprising , I received the following email and attached spread sheet (today). (No shocker considering the source).

[redacted]

I cannot keep repeating this history of invoices of work over and over. We have been talking about this change order work now since the three of us met, and even before we met. Julie requested we invoice the work(as if approved), we do, and then I get this excel sheet. Yesterday when I met her to punch the PE project, she wanted to review this sheet indicating that she wanted COD to absorb costs that we were not getting paid in other projects☐.today when I actually received the paperwork, she☐s indicating that we are not getting paid at all. I told her that in order for me to review this paperwork, she can☐t spring it on me at 3:30 in the afternoon and expect that I can give her an answer without reviewing the content, thus this email.

[redacted]

This issue and the issues relative to our design fees are out of hand. I know that COD needs timely responses from Herricane. Herricane and every other company to include COD staff sometimes have to take a vacation or take a leave of absence. To say that she demanded a response in two days, and I was unable to provide one because I was overseas or unavailable to my email, does not preclude her from calling into my office or reaching out to someone on my staff to say ☐hey we need Carla to address something ☐☐. Moreover to assume that this precludes Herricane from getting paid from doing the work we already performed is really unprofessional. Herricane has not defaulted on any contract work or failed to provide work timely. I haven☐t inquired with our attorney, but the ☐timeliness☐ of discussing contract fees and invoicing is not necessarily contractual.

[redacted]

EX. 1

[redacted]

The issue that I believe is with Julie and our design proposals is that she indicated to Dr. Breuder that there would be a credit offset from our design fees to the construction management contract. However, she did not review the design proposals. The design proposals that were up for the CMS services did not include any construction drawings, specs, or bid document work, and contained only design intent. So I believe based on [redacted]our(her & I)[redacted] conversation she now would have to indicate to Dr. Breuder that there would be no substantial credit. That in itself is not a problem, but maybe does not appear so favorable to her. In addition, most of the design projects that are(or were)coming up were put together more than a year ago, and that pricing may have changed or the scope did not include all that [redacted]now[redacted] the college wants to include. IE. The [redacted]Hill[redacted] project which we had already started requires electrical which was being handled by operations. Julie now wants us to include the electrical and she is unhappy that we did not include it initially. This is not the problem of Herricane, but what was decided by the previous project manager before her.

I[redacted]m a reasonable person. I[redacted]m not interested in burning a bridge with COD, or more importantly with yourself and Dr. Breuder. I would like to get these misc items off my plate, bring them to resolution, have people live by the resolution and move on to better things.

I know that you are walking through a [redacted]ring[redacted] of fire right now, and I know it will only get worse until April. The LAST THING YOU NEED is ME knocking at your door. Can you may be set aside about an hour (maybe after 5 or whenever is most convenient for you) to walk through what is really going on here and get this behind us. We have only two-three projects left and then I[redacted]m a thing of the past, unless you want to terminate me sooner, than let me know.

Last[redacted]my office has received anonymous calls from Media groups about Dr. Breuder and about COD. Right now I have instructed my staff to say nothing to no one. It[redacted]s none of anyone[redacted]s business what we do for COD. I plan to attend the board meeting Thursday night unless you think I should not.

I wish you safe travels[redacted]lots of good [redacted]candy[redacted][redacted].and a remaining relaxing vacation.

Best always.

Carla

[redacted]