IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
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 Popejoy
Defendants.	)	

EDGAR COUNTY WATCHDOGS, INC.'S AND KIRK ALLEN'S MOTION TO DISMISS PURSUANT TO THE ILLINOIS CITIZEN PARTICIPATION ACT AND 735 ILCS 5/2-619(a)(9)

NOW COME Defendants, EDGAR COUNTY WATCHDOGS, INC. and KIRK ALLEN, by and through their attorneys, The Collins Law Firm, P.C., and for their Motion to Dismiss Pursuant to the Citizen Participation Act and 735 ILCS 5/2-619(a)(9), state as follows:

INTRODUCTION

Plaintiffs filed this action seeking ***more than $6,000,000*** from a small independent news blog, arising out of a series of stories on corruption at the College of DuPage ("COD"). Defendants Kirk Allen and the Edgar County Watchdogs, Inc. (collectively, "Defendants") extensively researched their stories, some of which reported on insider contracts between COD and its Foundation's Board members, one of which is Plaintiff Clara Burkhart. At stake in this case is a newspaper's right to publish stories critical of local government officials without fear of retaliation. Of course, this type of speech has been protected by our Constitution dating back to its birth. The United States Supreme Court has noted that the Founding Fathers recognized that the press must have protection to "fulfill its essential role in our democracy" in order to "bare the secrets of government", "inform the people", and "effectively expose deception". *New York Times*

Co. v. United States, 403 U.S. 713, 717 (1971). Illinois law similarly commands that a "robust and unintimidated press" is a "necessary ingredient" of democracy.[1] Plaintiffs' lawsuit is nothing but a Strategic Lawsuit Against Public Participation (a "SLAPP")—designed to intimidate and harass Defendant into silence. The Illinois Citizen Participation Act (the "Act") provides a mechanism for dismissal of SLAPPs like Plaintiff's lawsuit, and this Court should dismiss it and award Defendant her attorneys' fees and costs incurred in defending this meritless lawsuit.

BACKGROUND FACTS

Defendants have an extensive history of investigative journalism, reporting on local Illinois politics and quasi-governmental entities, and their investigations have included politicians from the Republican, Democratic, and independent parties, as well as entities of all political affiliations, in more than a dozen counties in Illinois. *See* Exhibit A at ¶¶ 6-14.[2] Defendants began investigating COD in early 2013, after the News Blog received tips of possible misuse of taxpayer money. *Id*. at ¶ 15. When COD denied a FOIA request seeking records of Dr. Breuder's spending, Defendants filed a lawsuit against COD seeking the denied records. *Id*.

Defendants' investigation included not only the Plaintiffs in the above-captioned lawsuit but also other COD vendors and COD's contracts with entities related to COD foundation members, and Dr. Breuder's severance. *Id*. at ¶ 18. After an extensive investigation involving more than 125 FOIA requests (*id*. at ¶ 19), Defendants uncovered at least four examples of COD Foundation board members receiving contracts, and reported on all of them. *Id*. at ¶ 20.

Defendants' investigation uncovered that Plaintiffs signed a "Standard Form of Agreement Between Owner and Architect" dated April 19, 2012, for which they received hundreds of thousands of dollars from COD for work performed. *Id*. at ¶ 21, Exhibit 1 thereto. *The Washington*

[1] *Krauss v. Champaign News Gazette, Inc.*, 59 Ill. App. 3d 745, 746 (4th Dist. 1978).
[2] Attached hereto as Exhibit A and incorporated herein by reference is a true and correct copy of the Affidavit of Kirk E. Allen.

Times, The Chicago Tribune, The Daily Herald, and *The Illinois Herald* all provided coverage of the exact same contract, but Defendants are not aware that any of these newspapers have been sued for nearly-identical comments. *Id*. at ¶¶ 25-29.

LEGAL STANDARD

"A defendant must bring a motion to dismiss under the Act through section 2–619(a)(9)" *Samoylovich v. Montesdeoca,* 2014 IL App (1st) 121545, ¶ 44, *citing Garrido v. Arena,* 2013 IL App (1st) 120466, ¶ 2. Pursuant to Act, due to the "fundamental philosophy of the American constitutional form of government", Illinois has determined 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. Information, reports, and claims are "vital" to the operation of government and "the making of public policy and decisions, and the continuation of representative democracy." *Id*.

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 Act 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*. "To combat SLAPPs, the Act provides for expedited discovery and hearings on motions to dismiss a case under the Act and awards of attorney fees and costs for successful movants." *Garrido*, 2013 IL App (1st) 120466, at ¶ 15.

ARGUMENT

Illinois courts employ a three-step analysis for determining whether a claim is in fact a SLAPP and should be dismissed under the Act:

> "(1) the movant's acts were in furtherance of his right to petition, speak, associate, or otherwise participate in government to obtain favorable government action; (2) the nonmovant's claims are solely based on, related to, or in response to the movant's acts in furtherance of his constitutional rights; and (3) the nonmovant fails to produce clear and

convincing evidence that the movant's acts were not genuinely aimed at solely procuring favorable government action."

Garrido, 2013 IL App (1st) 120466, ¶ 16.

I. Defendants Were Unquestionably Engaged in Conduct Protected by the Act.

Investigative journalism, communicated to the public and urging investigation of questionable activities, is "well within the scope of the Act" and an "an excellent example of the kind of activity that the legislature sought to protect" through the Act. *Ryan v. Fox Television Stations, Inc.*, 2012 IL App (1st) 120005, ¶ 19 (finding that it was "undisputable that the first prong of the Act's test was satisfied").

The Act draws no distinction between "professional" and "amateur" journalists,[3] and the First Amendment draws no distinction between "biased" and "unbiased" reporters.[4] However, even if such a distinction were relevant, Defendants conducted a substantial, professional investigation which does not constitute anything less than professional journalism. Exhibit A at ¶¶ 15-24. Moreover, the financial issues plaguing COD broadly, and Plaintiffs, generally, are unquestionably of public interest. *The Washington Times*, *The Chicago Tribune*, and *The Daily Herald*, and countless other news sources all provided coverage of the exact same issue for which Defendants have been sued—both before *and* after Defendants published the articles which are the subject of this suit. *See* Exhibit A at ¶ 29.

II. Plaintiffs' Lawsuit is Based Solely on Defendants' Acts in Furtherance of Their Constitutional Rights.

In order to carry their burden under the second prong, Defendants must demonstrate that Plaintiffs' lawsuit is a "SLAPP within the meaning of the Act, that is, that the claim is meritless

[3] *Goral v. Kulys*, 2014 IL App (1st) 133236, ¶¶ 3, 36 (blogger's article, questioning an alderman's political eligibility, and posted on blog, was conduct "in furtherance of his right to speak and participate in government" and therefore protected by CPA).

[4] *Howell v. Blecharczyck*, 119 Ill. App. 3d 987, 992-93 (1st Dist. 1983) (holding that "'biased' journalism is afforded the same constitutional protection as writing thought of as 'balanced'").

and was filed in retaliation against the defendants' protected activities in order to deter the defendants from further engaging in those activities." *Garrido*, 2013 IL App (1st) 120466, ¶ 18.

A. Plaintiffs' lawsuit is retaliatory, as evidenced both by the extensive damages sought and the timing of the suit.

In determining whether a lawsuit is retaliatory, courts should consider "(1) the proximity in time between the protected activity and the filing of the complaint, and (2) whether the damages requested are reasonably related to the facts alleged in the complaint and are a good-faith estimate of the extent of the injury sustained." *Ryan*, 2012 IL App (1st) 120005, ¶¶ 23, 26.

The Damages Sought by Plaintiffs are Indicative of Retaliatory Intent

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 seek $1,000,000 in punitive damages from Defendants 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.[5] Moreover, the retaliatory intent becomes even clearer when the excessive punitive damages are viewed in light of the $50,000 in claimed compensatory damages. *See Stein*, 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

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

"reputational harm" from the articles at issue. Rather, they are indicative of a "classic SLAPP scenario." *Ryan*, 2012 IL App (1st) 120005 at ¶ 24.

The Timing of the Lawsuit is Indicative of Retaliatory Intent

A lawsuit filed just before the expiration of the statute of limitations is evidence of a Plaintiffs' retaliatory intent. *Stein v. Krislov*, 2013 IL App (1st) 113806, ¶ 19. In the instant case, Plaintiffs filed their lawsuit ***on the last day*** of the statute of limitations for defamation claims, with regard to the January 1, 2015 article—featured most heavily in the Complaint (*see* Complaint at ¶¶ 29-30)—and just days before the statute of limitations ran on three more articles featured prominently in the Complaint. *See* Complaint at ¶¶ 31-36; 735 ILCS 5/13–201.

Furthermore, the timing of Plaintiffs' lawsuit is further indicative of a retaliatory intent because it was filed less than one month after the last complained-of article, which was published December 4, 2015, and was one in a series of monthly articles. *See* Complaint at ¶ 44. Therefore, Plaintiffs sought to silence Defendants from publishing more articles. *Goral*, 2014 IL App (1st) 133236, ¶ 55 (retaliatory intent satisfied when suit filed six weeks after publication of article).

B. Plaintiffs' claims[6] are meritless—there is a purely political dispute between the Parties, and Defendants' reporting has been meticulously accurate.

A claim is "meritless" if a defendant disproves some essential element of the plaintiff's claim. *Garrido*, 2013 IL App (1st) 120466, ¶ 19; *see also Wright Development Group, LLC v. Walsh,* 238 Ill.2d 620, 638 (2010) (plaintiff's defamation claim was meritless because defendant showed that allegedly defamatory statement was actually true). That Plaintiff wishes to advance a different analysis or understanding of these facts is a political issue—not appropriate fodder for a defamation lawsuit. Plaintiffs' lawsuit is in fact a SLAPP condemned by the Act.

[6] For purposes of the Act, the claim's legal theory is irrelevant. *See Sandholm v. Kueker*, 2012 IL 111443, ¶ 35 ("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"); *Schivarelli v. CBS, Inc.*, 333 Ill. App. 3d 755, 764-65 (1st Dist. 2002) (affirming dismissal of misappropriation claim because it is nonactionable to use likeness in news report).

Initially, it is significant that Plaintiffs fail to directly quote the allegedly defamatory statements in their entirety, or even attach the allegedly defamatory articles.[7] Instead, Plaintiffs set forth only excerpts and snippets of articles, and in some cases, only paraphrase the allegedly defamatory statements. *See, e.g.*, Complaint at ¶ 30. This is significant because, when viewed in their entire context—as this Court must do[8]—the complained-of statements are all substantially true[9], reasonably capable of innocent construction,[10] or opinion and therefore are not actionable. Plaintiffs incorrectly claim the following statements are defamatory:

- *Plaintiffs participated in a "pay-to-play" scheme, or corruption, or otherwise engaged in "deception" (Complaint at ¶¶ 30(e), (f), 32, 33, 36, 37, 41, 42, 45)*

Illinois law is clear: Accusations that a plaintiff engaged in deception, cronyism, improper bidding, "pay-offs" and corruption are not actionable. *See, e.g., Horowitz v. Baker*, 168 Ill. App. 3d 603, 606-608 (3d Dist. 1988) (articles alleging that plaintiff "pull[ed] a fast one" by being a part of a "secret" deal with the mayor in which he received a "benefit not available to others", constituting a "cozy little deal" where the city was "rip[ped] off" due to improper bidding); *Harte v. Chi. Council of Lawyers*, 220 Ill. App. 3d 255, 261 (1st Dist. 1991) ("[t]o be the beneficiary of 'favoritism,' does not…necessarily suggest wrongdoing" because one can receive special treatment "for any number of reasons that do not implicate any wrongdoing"); *Quinn v. Jewel Food Stores, Inc.*, 276 Ill. App. 3d 861, 866–67 (1995) (labeling someone a "con artist", defined

[7] Setting forth the complained-of statements with "[p]recision and particularity" is "necessary", so that the Court can conduct a review and formulate a "preliminary construction of an allegedly defamatory statement is a question of law…" *Green v. Rogers*, 234 Ill. 2d 478, 492 (2009).

[8] Even statements which are defamatory are "not actionable if [] reasonably capable of an innocent construction", which requires "a court to consider the statement in context and to give the words of the statement, and any implications arising from them, their natural and obvious meaning." *Solaia Tech., LLC v. Specialty Pub. Co.*, 221 Ill. 2d 558, 580 (2006). If a statement can reasonably be innocently construed, "it cannot be actionable", and "[t]here is no balancing of reasonable constructions." *Id*.

[9] *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).

[10] *Goral*, 2014 IL App (1st) 133236 at ¶ 46 ("Plaintiff's suit was also meritless because defendant's statements were reasonably capable of an innocent construction").

as a swindler or defrauder, is not defamatory); *Riddell, Inc. v. BSN Corp.*, Case No. 90 C 990, 1990 WL 133517, at *1 (N.D. Ill. Sept. 12, 1990) (allegation that "payoff" occurred is not defamatory).

Allegations of deception and corruption, too, may be innocently construed. *See, e.g.*, *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"). They are also assertions which are not capable of verification, and therefore not defamatory. *Rose v. Hollinger Int'l, Inc.*, 383 Ill. App. 3d 8, 18 (2008) (statement not defamatory when the court "d[id] not see how a reasonable person would go about proving or disproving the assertion").

- *COD entered into an "architect contract" with the Plaintiffs, and that one or both of the Plaintiffs held themselves out as an architect (Complaint at ¶¶ 30(a), (b), 31, 32, 33, 36, 37, 42, and 44)*

These statements demonstrate that the lawsuit is meritless, because the complained-of statements are substantially true—Burkart, on behalf of Herricane, executed a contract which is entitled the "Standard Form of Agreement Between Owner ***and Architect***" (the "Agreement") (emphasis added). *See* Exhibit 1 to Exhibit A. The Agreement's header identifies it as an "AIA Document", *i.e.*, a document associated with the American Institute of ***Architects***, and it identifies "Herricane Graphics, Inc." as the "***Architect***", a defined term under the Agreement. *Id*. (emphasis added). Contained within the Agreement are *hundreds* of references to "***Architect***", as well as sections entitled "***Architect's*** Responsibilities (*id*. at p. 3) and "Scope of ***Architect's*** Basic Services." *Id*. at p. 5 (emphasis added). Plaintiffs held themselves as architects, so the complained-of statements are true.

- *Plaintiffs violated state law (Complaint at ¶¶ 30(c), 37, 38)*

This statement is substantially true, can be innocently construed, and was repeatedly qualified by Defendants. Plaintiffs accuse Defendants of "implying that Herricane and Burkhart had engaged in a felony." *Id*. at ¶ 38. No action for defamation lies when a defendant "implies"

someone committed a criminal act. *See, e.g., Schivarelli,* 333 Ill. App. 3d at 761-62 (finding non-actionable statement that company was "cheating the city", even though such a phrase may "imply criminal acts").[11] Moreover, it is in fact a violation of state law for non-architects to use the title "architect". 225 ILCS 305/36. Finally, Defendants inclusion of the statute and repeated qualification that it "appears" state law was violated is sufficient to absolve them of any liability, to the extent Plaintiffs did not in fact violate state law. *Goral,* 2014 IL App (1st) 133236 at ¶¶ 47-48 (statement that crime may have occurred is not actionable as a matter of law).

- *COD held a contract with "its own COD Foundation Board member" (Complaint at ¶¶ 33, 34, 36, 42)*

This claim is substantially true, capable of innocent construction, and not defamatory. According to public records, Carla Burkhart is the President, Secretary, and Registered Agent of Herricane. To say that Herricane is "her" company, and that COD has a contract with its Foundation Board member is substantially true. It is common parlance to refer to a company though its owner or sole officer. Moreover, the mere fact that COD held a contract directly with Burkhart—even if not substantially true—is not defamatory because there is nothing *per se* improper with COD contracting directly with a Foundation member, or through an entity owned and controlled by a Foundation member.

- *Plaintiffs received the Agreement without submitting a proposal (Complaint at ¶¶ 36)*

This claim, too, is true or substantially true. Defendants' article explains that they submitted a FOIA for the proposal, and that COD did not turn over such a proposal. Exhibit A at ¶ 21. But again, even if this statement is false, it simply is not defamatory.

[11] *See also, Garber–Pierre Food Products, Inc. v. Crooks,* 78 Ill. App. 3d 356, 360 (1st Dist. 1979) ("blackmail" and "extortion" reasonably capable of innocent construction rather than commission of crime); *Knafel v. Chicago Sun-Times, Inc.*, 413 F.3d 637, 640 (7th Cir. 2005) (finding that statement by newspaper that woman worked in "profession that's a lot older than singing"—prostitution—could reasonably and "easily" by subject to an innocent construction).

The bottom line is that Plaintiffs misunderstand Illinois law: *even if* Defendants' sole motivation was to limit or even eliminate someone from the political sphere, and even if Defendants intended that result through their articles (*see* Complaint at ¶ 46), Defendants' conduct is protected by the Act. *Goral*, 2014 IL App (1st) 133236, ¶ 63 (2015); *see, e.g., Maag v. Illinois Coal. for Jobs*, 368 Ill. App. 3d 844, 850 (5th Dist. 2006)) (holding that exaggerated rhetoric is "commonplace" in politics, and affirming dismissal of defamation complaint).

III. The Burden Now Rests upon Plaintiffs to Produce *Clear and Convincing Evidence* that Defendants' Acts Were Not Genuinely Aimed at Solely Procuring Favorable Government Action.

Once a moving defendant meets its burden of proof of the first two prongs, the burden shifts to the nonmovant to show—by clear and convincing evidence—that the movant's acts were not genuinely aimed at solely procuring favorable government action. *Garrido*, 2013 IL App (1st) 120466, ¶ 16. Defendants have produced sufficient evidence as to the first two prongs to shift the burden to Plaintiffs, to show that their article series was not aimed solely at procuring favorable government action.

CONCLUSION

WHEREFORE, Defendants, EDGAR COUNTY WATCHDOGS, INC. and KIRK ALLEN, pray that this Honorable Court grant their Motion, award attorneys' fees and costs pursuant to 735 ILCS 110/25, and award such other relief as this Court deems equitable and just.

Shawn M. Collins
Robert L. Dawidiuk
Jeffrey M. Cisowski
THE COLLINS LAW FIRM, P.C.
1770 Park Street, Suite 200
Naperville, Illinois 60563
630-527-1595
DuPage County Firm No. 24048

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

By: _____
One of Their Attorneys