**IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIR**
**DUPAGE COUNTY, ILLINOIS**

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| 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. | ) | |

**REPLY IN SUPPORT OF 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 (collectively, "Watchdogs"), and for their Reply in Support of Motion to Dismiss Pursuant to the Citizen Participation Act (the "Act") and 735 ILCS 5/2-619(a)(9), state as follows:

## INTRODUCTION

The Watchdogs' motion under the Act was supported by evidence in the form of a detailed, sworn affidavit of Defendant Kirk Allen, which also authenticated every document which the Watchdogs used to support their motion. Even though this burdened Plaintiffs to respond themselves ***with evidence***—including "clear and convincing" evidence that the Watchdogs' actions were not genuinely aimed at solely procuring favorable government action—Plaintiffs have provided ***literally no evidence at all***. They offer no affidavits, for example; they had the right to take discovery, but elected not to. Instead, they dumped on the Court some 1,500 ***unauthenticated*** pages of (what they claim to be) selected portions of the Watchdogs' website (see Exhibit A to Plaintiffs' Response), including, nonsensically, many pages of citizens' responses to the Watchdogs' blogging, and many pages more which are *dated after the date Plaintiffs filed their lawsuit*. Whether Plaintiffs did this expecting the Court to wade through all

these pages for something that might be helpful to their case, or as an indirect way to seek to expand the scope of their complaint, it is improper. And, most to the point, it is not evidence. For this reason, alone, the Watchdogs' motion under the Act should be granted.

Moreover, and as recited throughout this brief, for each of the *Sandholm* elements, Plaintiffs' arguments are not only unsupported by evidence, but are also unsupported by law. For example:

- **The Watchdogs were exercising their First Amendment rights.** Plaintiffs' argument that the Watchdogs' true motivation in all of this was to aid Kathy Hamilton's political career is false and completely devoid of any evidence. However, even if it were 100% accurate, it would prove only that the Watchdogs were exercising their First Amendment right to support candidates of their choosing. Indeed, that a centerpiece of Plaintiffs' complaint is their attack on all Defendants' alleged support of a political candidate—which is perhaps the most Constitutionally protected activity of all—is compelling evidence of the bad faith with which the complaint was filed in the first place. *See* pages 3-4, and 9, below.

- **Plaintiffs' complaint was retaliatory.** Plaintiffs devote many pages to a calculation of claimed compensatory damages, which, they hope, will take some of the sting out of their obviously retaliatory demand for up to $6 million in punitive damages. But the problem with this calculation is not so much that it is merely a lawyer's argument—which it is—and therefore not evidence at all, but rather that the very suggestion that the Watchdogs said anything that caused Plaintiffs damage is demonstrably false. And Plaintiffs know it. As described in this brief, ***months before*** the Watchdogs said anything about Plaintiffs, Plaintiff Burkhart had already informed COD that she was weary of performing under her no-bid contracts, and therefore had "decided…to not accept any more work at COD." Plainly, Plaintiffs' filing of a suit claiming millions in damages ***that could not possibly have been caused by the Watchdogs*** is further compelling evidence of their retaliatory intent. *See* pages 4-5, below.

- **Plaintiffs' defamation claims are meritless**. While Plaintiffs argue that, "under no scenario" was Plaintiff Burkhart's membership on the COD Foundation board linked to her company's receipt of lucrative no-bid contracts from COD—and thus was not "pay to play"—this claim insults common sense and the facts. Including the facts that Burkhart was appointed to the Foundation board, and received her first no-bid contract from COD, ***on the same day, at literally the same board COD meeting,*** thereby joining an exclusive club of other Foundation board members who themselves had been awarded nearly $200 million in no-bid COD contracts. Moreover, in labeling these contracts as appearing to be "pay to play", the Watchdogs were not defaming anyone, but rather saying exactly what COD Trustee Diane McGuire had said herself about these deals, when she labeled as

"having the appearance of pay to play" any no-bid contract handed to a Foundation board member.

When the unchallenged facts offered by the Watchdogs are examined, it is clear that Plaintiffs had no reason to file this case other than as an improper attempt to punish the Watchdogs simply because they highlighted Plaintiffs' involvement in some of the worst of government behavior, *ie,* non-competitive awarding of taxpayer-funded contracts to political insiders. Thankfully, no less of an authority than the US Constitution says that the Watchdogs have a right to say what they said about Plaintiffs and their friends in high places. Indeed, and perhaps most importantly of all, the Constitution protects the Watchdogs' right to say this, ***as a means to protect the right of the people to hear it***.

The Watchdogs' motion under the Act should be granted, as an affirmation of the need for Constitutional protection of those brave enough to bring to our attention things that anger or embarrass those in power.

## ARGUMENT

### I. Plaintiffs Concede that the Watchdogs Have Satisfied the First *Sandholm* Prong.

Plaintiffs do not attempt to make a serious argument that the Watchdogs were not exercising their First Amendment rights by engaging in investigative journalism and blogging about the results. *Ryan v. Fox Television Stations, Inc.*, 2012 IL App (1st) 120005 is dispositive on this point. The *Ryan* Court found that investigative journalism 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, and accordingly, it was "undisputable that the first prong of the Act's test was satisfied". *Id.* at ¶ 19.

The Watchdogs' alleged motivation to "propel Kathy Hamilton to power of [sic] COD" and "advance[e] the political career of Kathy Hamilton" (Response at pp. 8-9) is irrelevant and false. But even if it had weight, the right to support a political candidate is precisely the type of conduct contemplated by the Act which states that the "opinions, claims, arguments, and other expressions provided by citizens are vital to effective....operation of government...and the continuation of representative democracy." 735 ILCS 110/5. Because the only evidence before this Court is that the Watchdogs are investigative journalists reporting on a matter of public interest (Allen Affidavit at ¶¶ 6-14), the first *Sandholm* prong is satisfied. *See, e.g., Goral v. Kulys*, 2014 IL App (1st) 133236 ¶ 36 (blog posts critical of public figure were written "in furtherance of [blogger's] right to speak and participate in government").

## II. The Watchdogs' Unchallenged Evidence and Undisputed Legal Authority Proves that Plaintiffs' Lawsuit is Retaliatory.

Plaintiffs offer no evidence at all as to why their lawsuit is not retaliatory; wholly fail to address the Watchdogs' case law on this point; and provide only one Illinois case which does nothing more than describe the general law of damages in defamation cases.

### *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 p. 6. But this is unsupported by any 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 ¶ 61. Plaintiffs end their damages calculus by asserting that they have provided a good faith basis for $6 million in damages. Response at p. 7.[1]

[1] Ironically, Plaintiffs just two pages earlier claimed that they were not seeking such high damages from the Watchdogs, accusing the Watchdogs of "exaggerate[ng]" the damages demanded by Plaintiffs because Plaintiffs "pled

Importantly, the unchallenged evidence is that anything the Watchdogs 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 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 September 2014 email.[2] 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 the Watchdogs ever mentioned Plaintiffs at all, in December 2014—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 Watchdogs said or did.

Plaintiffs' claimed damages could never have been caused by the Watchdogs and, in any event, are demonstrably nonexistent. Accordingly, Plaintiffs' demand for $6 million in damages is indisputable evidence of Plaintiffs' retaliatory evidence. *See Ryan,* 2012 IL App (1st) 120005 at ¶ 24; *Goral*, 2014 IL App (1st) 133236 at ¶ 56 ("Plaintiff's damage requests, exceeding $1

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six, ***alternative*** Counts against Allen and ECWI." Response at p. 5 (emphasis in original). There is nothing to indicate that these counts are pled in the alternative, nor could they be, as they are pled by different plaintiffs. These counts are simply not pled in the alternative. Indeed, whether Plaintiffs seek $1 million, $2 million, or $6 million from a not-for-profit news blog is irrelevant: the extreme measure of invented damages is a heavy-handed, prohibited-by-the-Act tactic designed to silence the Watchdogs.

[2] *See* Plaintiff's Group Exhibit A2 at pg. 218. For convenience's sake, the Watchdogs re-attach the article.

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").[3]

***The Watchdogs' Unchallenged Case Law Proves Plaintiffs' Retaliatory Intent***

Plaintiffs simply ignore the Watchdogs' 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 any longer to file the lawsuit, the bulk of the defamation claims may have been barred by the statute of limitations…" Response at p. 5. Indeed, the Plaintiffs literally filed their lawsuit ***on the very last day*** before the statute of limitations ran on the Watchdogs' January 1, 2015 article – featured most heavily in the Complaint. Plaintiffs do not even attempt to distinguish *Stein*, and it remains the law in Illinois. Furthermore, the only evidence is that the timing of the lawsuit is further indicative of retaliation because Plaintiffs sought to bully the Watchdogs into silence by filing a multimillion dollar lawsuit less than one month after the Watchdogs' latest article about Plaintiffs. *Goral*, 2014 IL App (1st) 133236 at ¶ 55 (retaliatory intent satisfied when suit filed six weeks after publication of article).[4]

Finally, perhaps the best evidence that Plaintiffs retaliated against the Watchdogs is that Plaintiffs have not sued *any other publication or writer for defamation* including the *Daily Herald*,

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[3] Plaintiffs' sole case does not help them. In *Leyshon v. Diehl Controls N. Am., Inc.*, 407 Ill. App. 3d 1 (1st Dist. 2010), the appellate court affirmed a large jury verdict entered in favor of a plaintiff claiming breach of contract for wrongful termination, along with defamation. The court based its holding on the fact that the plaintiff presented "largely uncontradicted" evidence on damages. *Id.* at 13. The opposite is true here: only the Watchdogs have presented evidence to this Court.

[4] Plaintiffs confusingly argue that "[r]elative to temporal proximity, this Court should also consider that…Plaintiffs have also sued [three other defendants]." Response at p. 5. There is no legal support for how Plaintiffs' inclusion of other defendants (including one which was nearly immediately dismissed by agreement) is even relevant under the Act. Moreover, these other defendants have also moved for dismissal under the Act, making similar arguments that Plaintiffs retaliated against them by filing the instant lawsuit.

*Chicago Tribune* and *Washington Times*—notwithstanding the fact that these publications reported on Plaintiff in nearly the exact same manner as the Watchdogs. *See, e.g.,* Exhibits 3-6 to the Allen Affidavit; ¶ 29 thereto.[5]

## III. Plaintiffs' Claims are Meritless Because the Only Evidence Before this Court is that the Watchdogs Were Reasonable in Reporting that Plaintiffs had Engaged in a "Pay to Play" Scheme with COD.

Confusingly, Plaintiffs argue that the Watchdogs "have not even attempted to" present "affirmative evidence" that Plaintiffs' claims in their unverified complaint are meritless. Response at p. 7. However, at this time, the *only evidence* before this Court shows that:

- With her appointment to the Foundation board, Burkhart joined an exclusive—and truly lucky—club of Foundation board members, whose companies since 2010 had been awarded by COD ***nearly $200 million in no-bid contracts***;
- Burkhart's company, Herricane, was itself awarded at least $630,000 in no-bid contracts;
- The largest of these was awarded by COD despite the fact that Burkhart had falsely identified herself as an architect in order to get the contract;
- As a Foundation board member, Burkhart "donated" at least $5,000 per year to the COD Foundation, as well as "contributed" her time to help the Foundation raise money; and
- On the very day Burkhart was appointed to the Foundation board, her company was awarded the first of the lucrative no-bid contracts.

*See* Watchdogs' Reply in support of its Section 2-619.1 motion to dismiss, incorporated herein by reference, and Allen Affidavit, attached to the Watchdogs' Motion. Plaintiffs' argument that the Watchdogs "do not even attempt to adduce evidence to prove the veracity of their blog posts" (Response at p. 8) is nonsensical: only the Watchdogs have presented evidence, and it all supports the contention that Plaintiffs' relationship with COD can be reasonably interpreted as "pay to play".

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[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.

Moreover, the Watchdogs are entitled to protection under the Act not only if they can prove that the statements in their blog posts are true, but also if the statements can be reasonably innocently interpreted. Recently, in *Goral v. Kulys*, the First District affirmed dismissal, pursuant to the Act, of a plaintiff's defamation complaint. 2014 IL App (1st) 133236. 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 further held that "[p]laintiff's suit was also meritless because defendant's statements were reasonably capable of an innocent construction." *Id.* at ¶ 46.

As more fully set forth in the Watchdogs' Reply in support of their Section 2-619.1 motion to dismiss, the Watchdogs' statements were capable of a reasonable innocent construction—because the Watchdogs 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 also behavior which the public views as corrupt but falls within a legal gray area. *See* Watchdogs' Reply in support of Section 2-619.1 motion to dismiss.

***The Watchdogs' Article Was Aimed Solely at Procuring Favorable Action***

Under *Garrido*, a defendant prevails under the second prong—that the plaintiff's "claims are solely based on, related to, or in response to the movant's acts in furtherance of his constitutional rights"—by demonstrating that the plaintiff's lawsuit is retaliatory and meritless. *Garrido*, 2013 IL App (1st) 120466, ¶ 18. As set forth above, the Watchdogs have made this showing; therefore, the burden shifts to Plaintiffs to show by ***clear and convincing evidence*** that

the Watchdogs' blog posts were not genuinely aimed at solely procuring favorable governmental action.

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

Once the Watchdogs, as the moving defendants, meet their burden of proof of the first two prongs—as they have—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 that, if this Court accepts their mere conclusory allegations that a conspiracy existed amongst the defendants, then the "Watchdogs' actions were aimed at advancing the political career of Kathy Hamilton and not just at procuring favorable government action at COD." Response at p. 9; *see also id.* at p. 10 (arguing that the Watchdogs' "posts were unprofessional, immature, reckless and display a bias that cannot be ignored by this Court"). But this argument is not evidence, and it misses the mark: even if the Watchdogs were driven by "[b]ias, ill will, or even hatred", such a motivation is "irrelevant" in defamation actions. *Krueger v. Lewis*, 342 Ill. App. 3d 467, 477 (1st Dist. 2003). 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 the Watchdogs' acts were not genuinely 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, and award such other relief as this Court deems equitable and just.

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

By: _____
One of Their Attorneys

[redacted]

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| **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

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 &#65533;our( her & I)&#65533; 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 &#65533;now&#65533; the college wants to include. IE. The &#65533;Hill&#65533; 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&#65533;m a reasonable person. I&#65533;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 &#65533;ring&#65533; 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&#65533;m a thing of the past, unless you want to terminate me sooner, than let me know.

Last&#65533;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&#65533;s none of anyone&#65533;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&#65533;lots of good &#65533;candy&#65533;&#65533;.and a remaining relaxing vacation.

Best always.
Carla