IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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11 – 3572

SATKAR HOSPITALITY INC., et al
Plaintiff-Appellant

v.

FOX TELEVISION STATIONS, et al
Defendant-Appellee

Appeal from the
United States District Court
For the Northern District of Illinois
Eastern Division

10 – 6682

Honorable Matthew F. Kennelly

PLAINTIFF-APPELLANT'S BRIEF IN SUPPORT OF APPEAL

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Plaintiff-Appellants Request Oral Arguments

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I. Statement of the District Court's Jurisdiction.

The United States District Court for the Northern District of Illinois had jurisdiction over the parties in this matter pursuant to 28 U.S.C. § 1331 in that the Complaint stated claims for violations of the U.S. Constitution, and 42 U.S.C. § 1983. The United States District Court further had supplemental jurisdiction over the Appellees in the instant appeal pursuant to 28 U.S.C. § 1367 in that the Complaint stated claims against them under Illinois common law that were factually related to the underlying federal claims.

II. Statement of Appellate Court's Jurisdiction.

This is an appeal from a decision of the United States District Court for the Northern District of Illinois, which granted summary judgment in favor of the Appellees, and therefore dismissed Plaintiff's Complaint with prejudice as to those Defendants only, on September 21, 2011. That Order contained a certification under F.R.C.P § 54(b). The Court extended the time in which to file a Notice of Appeal until November 10, 2011. The Notice of Appeal was filed on November 9, 2011.

III. Issues Presented on Appeal.

I. Whether the District Court erred in dismissing Plaintiff's suit pursuant to the Illinois Citizen's Participation Act, 735 ILCS 110 *et seq,* particularly in light of Sandholm v. Kuecker, ____ Ill.2d _____, 962 N.E.2d 418 (Ill. 2012).

II. Whether the Illinois Citizens Participation Act is unconstitutional:

a. Due to its effect on the right to petition; and

b. Due to vagueness.

IV. Statement of the Case

Plaintiffs, Satkar Hospitality Inc., Sharad Dani, and Harish Dani, filed a Complaint in this matter on October 17, 2010 alleging that the Cook County Board of Review, and its members, improperly singled out Plaintiffs for a tax increase in violation of the First Amendment, and in violation of their Due Process and Equal Protection rights. The Complaint also stated claims for defamation against the Chicago Fox affiliate, Fox Television Stations, Inc., Fox Chicago News, News Corp., Dane Placko, Fox Television Holdings, Carol Fowler, Marsha Bartel, and Patrick Mullen, and against the Illinois Review weblog, including Fran Eaton and Dennis Lacomb. On September 21, 2011, the Court granted both Fox Defendants' and Illinois Review Defendants' Motions for Judgment based on the Illinois Citizens Participation Act, 735 ILCS 110 *et seq*, ("ICPA") dismissing Plaintiff's Complaint. The Court found that the ICPA constituted a substantive defense to the allegations in the Complaint, and therefore awarded attorneys' fees to Defendants based upon the attorney fees provision of the Act. The Court extended the time in which to file a Notice of Appeal until November 10, 2011. The Notice of Appeal was filed on November 9, 2011.

V. Statement of Facts

The Complaint in this matter was filed by Satkar Hospitality Inc., Harish Dani, and Sharad Dani. It stated federal claims against the Cook County Board of Review, Larry Rogers, Joseph Berrios, Scott Guetzow, Brendan Houlihan, John Sullivan, and Thomas Jaconetty (collectively, the "Board Defendants"). It also stated common law claims against Fox Television Stations, Inc., Dane Placko, and others associated with the local Fox affiliate (collectively "Fox Defendants"), and the Illinois Review, Fran Eaton, and Dennis Lacomb (collectively the "IR Defendants). Document 1.

The Complaint was subsequently amended, on Oct. 26, 2010, to add several Defendants affiliated with Fox. Document 6.

a. Allegations in the Complaint.

The relevant allegations of the Amended Complaint are as follows. Satkar Hospitality is an Illinois Corporation that owns, operates and manages a Wingate by Wyndham Hotel at 50 E. Remington Rd., Schaumburg, IL ("the Hotel."). Satkar is owned by Harish and Sharad Dani. Document 6 at ¶ 6 and 7. The Board of Review's rule is to hear appeals of property tax valuations rendered by the Cook County Assessor's office. The Board does not have original jurisdiction over valuations. It only hears appeals. It is the Assessor's office that estimates the value of each property in Cook County – and the Assessor's office is charged with generating assessments of each party. Document 6 at ¶ 20. The Illinois Constitution mandates that taxes upon real property be levied uniformly by valuation, and Illinois statute suggests several methods by which to determine whether taxes on a given property ought to be raised, lowered, or maintained. Document 6 at ¶ 21, 22.

Instead of following any of the methods suggested, the Board of Review has no consistently applied method for the adjudication of tax appeal claims. Document 6 at ¶ 23. Rather, the Board has established a system of pay for play wherein real estate tax appeal lawyers that contribute to the campaign funds and campaign committees of the Commissioners achieve better results for their clients than non-contributing lawyers and non-contributing taxpayers. Document 6 at ¶ 24. When Plaintiffs appealed the Hotel's 2007 property taxes, the Board of Review's Commissioners lowered the Hotel's valuation such that it would save over $40,000.00 per year in property taxes. Document 6 at ¶ 26.

In May through July of 2009, and for several months thereafter, continuing through December 2009, Dane Placko, Marsha Bartel, Carol Fowler and Patrick Mullen of Fox Holdings,

Inc., ran a story alleging that Illinois State Representative was engineering successful Board of Review appeals for his constituents in return for large campaign contributions. Document 6 at ¶ 27. The story also ran on the Illinois Review blog, a conservative blog, which adopted a guilty-by-association attitude for any individuals associated with Froehlich. Document 6 at ¶ 31. The only basis for the story was the word of a disgruntled former Froehlich employee. Document 6 at ¶ 28. As part of that story, and with no actual evidence or reasonable belief whatsoever, the Fox Defendants ran a story accusing Plaintiffs of bribing Rep. Froehlich. According to the story, Rep. Froehlich agreed to arrange a successful appeal of the Plaintiffs' property taxes in exchange for large campaign contributions. Document 6 at ¶ 29. The Illinois Review followed up with several sensationalized stories that maligned Plaintiffs, and claiming that they committed bribery. Document 6 at ¶ 32. At the time of the filing of the Complaint, both the Fox News story, and the Illinois Review articles were accessible on the Internet. Document 6 at ¶ 33. As a result of the story, Plaintiffs lost standing and business. Document 6 at ¶ 34. Plaintiffs never engaged in any illegal or improper behavior with Rep. Froehlich. Rep. Froehlich never promised Plaintiffs a reduction in their property taxes in exchange for campaign contributions. Document 6 at ¶ 35. Rep. Froehlich is not a Commissioner on the Board of Review, and therefore does not have the authority to grant a property tax reduction. The only people who had the authority to hear appeals from the Assessor's assessment are the three Commissioners of the Board of Review. Document 6 at ¶ 36.

In response to the negative press, the Board of Review required Plaintiffs to appear, ostensibly to discuss the previous assessment appeal. Document 6 at ¶ 39. In reality, no questions about the assessment were asked; instead, Plaintiffs were made to answer questions regarding the relationship between Rep. Froehlich and Plaintiffs. Document 6 at ¶ 37. The impromptu, and inappropriate did not manage to unearth any evidence of Plaintiffs exercising illegal influence over

the Board through Rep. Froehlich or otherwise. Document 6 at ¶ 43. Nonetheless, the Board invited Fox into the closed-door hearing, and proceeded to pander to them to the discomfort of Plaintiffs. Document 6 at ¶ 44. Despite totally ignoring evidence presented by Plaintiffs regarding the value of their property, and based entirely on the desire to avoid the appearance of unclean hands (without doing anything to actually address legitimate concerns), the Board arbitrarily rescinded the reduction in property taxes that it itself granted close to one year prior, affecting the 2008 and 2009 appraisals of the Hotel, simply stating "we can do anything we want." Document 6 at ¶ 46.

b. Defamatory statements of Defendants

To the extent that the actual statements made by Defendants (rather than merely the pleadings) are relevant, the first of the IR blog-posts regarding its "investigation" into Rep. Froehlich is labeled "FROEHLICH DENIES CAMPAIGN DONATION SWAP FOR LOWER RE-ASSESSMENT." Document 69-2, attached as Exhibit A). IR begins by claiming, "Illinois Review has obtained documents that raise questions about a northwest suburban hotel owner's 2008 in-kind contributions to Democrat State Rep. Paul Froehlich." In that post, IR implies that a hotel owner gave large contributions to Froehlich in exchange for a lowered property tax valuation, stating "Noting how Dositi would save $284,013 over three years after the '07 property taxes on his Comfort Suites were appealed and lowered, the hand-written memo states: "I asked Bimal -- and he agreed -- to cover my sign bill ($12 K) and provide xxrooms for workers both in '08 and in '10." Further corroborating the allegations, in the eyes of IR, Froehlich denied that the lowered property tax assessments were in exchange for campaign contributions.

The next installment in the Froehlich "investigation" featured Plaintiffs. Document 69-3. The blog posting is entitled "FRIENDS OF FROELICH: PART 2," and it is a continuation of the

previous post's theme. It begins by invoking the first, and aforementioned, hit piece, stating "On Monday, Illinois Review revealed some 'interesting' in-kind contributions made by a Schaumburg-based hotel owner to Democrat State Rep. Paul Froehlich's 2008 campaign." It continues, "Well, IR has obtained a second document showing another Schaumburg area hotel owner whose property was also favorably re-assessed and who also subsequently made in-kind contributions to Froehlich's '08 re-election campaign." The "report", for lack of a better word, continues to explain that "like the last document we provided," this one indicates, in a handwritten note, the amount of tax savings that the Satkar Corporation's Wingate by Wyndham Hotel could enjoy over the course of three years. The report continues to explain that the Satkar Corporation had also chosen to give over $10,000.00 of in-kind contributions to the Froehlich campaign, as if to say that the one was in exchange for the other. Further underscoring the allegation of *quid pro quo*, IR once again produced Froehlich's denial that the lowered property tax assessments were in exchange for campaign contributions.

The blog comments (comments offered by people, mostly anonymous, who read the blog post) indicate that the article's underhanded implications were understood exactly as IR intended them to be understood. User "Matt Gauntt" (potentially a pseudonym) comments:

> Excellent work, Fran.
>
> I'm sure that the Democrat controlled Illinois Assembly will launch and investigation into these matters just as quickly as they looked into Paul's bff[1] Rod Blagojevich.
>
> Considering that the Dems work so quickly to root out corruption, Paul's Benedict Arnold[2] switch to the Donkey's is not surprising.

User "NW Suburbanite" comments:

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[1] The Court is invited to take judicial notice of the fact that bff is Internet slang for "best friend forever."
[2] The Court is also invited to take judicial notice of the fact that Paul Froehlich had recently switched parties from the Republican Party to the Democrat Party when the "investigation" took place, hence the reference to Benedict Arnold.

> Paul, no sense taking baby steps once you've decided to go over the other side.
>
> The water's warmer and with the worthless--depending on your standards for integrity--Madigan as Attorney General in charge, the risk of getting burned is pretty much nil.

To be sure, other comments claimed that the article's implication was untrue, that Froehlich was actually an honest politician, and that he was not involved in illegal any *quid pro quo*. However, each of those presented itself as a sharp contrast to the article's allegations of wrongdoing.

The "investigation" into Froehlich continued throughout the summer.

Less than 3 weeks later, IR removed all pretenses, posting an article entitled "FRIEND OF FROELICH 4: A KNOCK AT THE DOOR." Document 69-4. That article claimed that

> *Questions arose about Board of Review assessments and Froehlich's aggressive campaign to assist constituents with their property values when a document made public last month implied that a local hotel owner had agreed to donate to the Friends for Froehlich campaign. A handwritten note next to handwritten calculations on a Board of Reviews' amended property value assessment report indicated the property owner would save over $200,000 in taxes over three years, and that he would pay for Froehlich's campaign workers lodging and yard signs. According to the Illinois State Board of Elections, such an in-kind contribution was made on behalf of Froehlich.*

The article offered the following analysis:

> *Republicans in Chicago say this kind of* ***implied favor*** *exchanging can only go on when the members of the county's tax review board are also members of the same political party, or have some sort of undue influence with those who determine property values.*
>
> *Property values are based on market trends and judgment calls by appraisers. Such a relative system of evaluation is fraught with opportunities to "influence".*
>
> *"This is a Democrat tactic we've heard of for years in the City of Chicago," Chicago Republican Chairman Eloise Gerson told Illinois Review. "Only Democrats can tell property owners they have a great chance of getting their taxes lowered at the Board of Review, since the Democratic Party's Cook County Chairman, Joe Berrios, sits on the Board and decides the appeals," she said. Gerson questioned whether the Democrats are turning Republican suburbs blue by going house to house and promising hundreds of dollars of saving a year by* ***using influence to lower property tax bills****.* (emphasis added).

From May through July of 2009, and for several months thereafter, Fox Defendants ran a story on Fox Chicago News (also still accessible by internet) regarding these allegations. AC at 27. The Fox stories were prompted by the IR postings. Document 69-5.

The Fox publications (attached as Exhibits A1-A3 to Document 104-2; Transcripts of the same can be found at Document 104-3, attached as Exhibit A4), in a fashion similar to the Illinois Review stories, allege that Froehlich was involved in influence pedaling to benefit some of his campaign donors, who gladly paid Froehlich large campaign donations (i.e., bribes) in exchange for favorable reviews of their property taxes. The reports, like the Illinois Review post, names the Dani family by name, identifies the hotel property affected, and the name of the Satkar Corporation.

The transcript of the first report (Document 104-3, Exhibit A4) reads, in pertinent part, as follows:

> *When asked about [a note referring to campaign contributions] Froehlich replied, "I've never had the authority to lower anybody's assessment never. Now if I would have I'd understand your point." But when we looked at his campaign contributions we found a payment for campaign signs. Another handwritten note[3] shows Froehlich calculating his own cut from the Wingate tax appeal, more than $14,000. Three weeks later, the Wingate owners began sending checks to pay for his campaign office. They also picked up the tab for more than $8000 in hotel rooms for campaign workers in last year's election.*
>
> *It was Froehlich's first election after jumping to the Democratic Party and he had the Democratic power brokers behind him, including Joseph Berrios, head of the Cook County Democratic Party and head of the tax board of review. Froehlich and Berrios ran an outreach program to teach residents how to appeal their taxes.*
>
> *Brendan Houlihan also sits on the tax board. He says he was excluded from the event and all of the appeals generated by Froehlich went to Berrios' staff even though Houlihan's district covers that area. Now the board has launched an investigation of hundreds of appeals filed by Froehlich and whether he was getting inside help.*

The second report features Dane Placko, a Fox reporter, asking

[3] In reference to Plaintiffs.

> *Undue influence? Inappropriate access? So why does this matter to you? Well nobody likes to pay property taxes, but it's something we all have to do. If your neighbor is paying less because they have somebody on the inside putting their thumb on the scale... It means you have to pay more." Document 104-3.*

The report then refers to an internal investigation of the Board of Review, and claims that the States Attorney was involved with the investigation. It goes on to repeat the previous report regarding "two hotels" that Froehlich allegedly helped win tax reductions of more than $400,000 in exchange for campaign contributions. Document 104-3.

c. Proceedings before the District Court

On November 22, 2010, the Fox Defendants filed a Motion to Dismiss the Amended Complaint. Document 21. On December 27, 2010, the IR Defendants did the same. Document 39. The Court denied the Fox Motion to Dismiss on April 4, 2011. Document 98. On May 20, 2011, the Court denied the Illinois Review's Motion as well. Fox filed a new Motion to Dismiss on April 18, 2011. This time, Fox claimed that the Complaint ought to be dismissed based upon the Illinois Citizens Participation Act. Document 102. The Court denied that Motion, too, on June 2, 2011, stating that Fox had already filed, and lost, a Motion to Dismiss, and that federal procedures did not allow two Motions to Dismiss to be filed based upon the same Complaint. Document 118. Specifically, the Court noted that the ICPA constituted a substantive defense to the Complaint which "falls squarely within the scope of Rule 12," thus making a successive motion to dismiss inappropriate.

On June 17, 2011, the Fox Defendants, once again, filed a Motion for Judgment based upon the Illinois Citizen Participation Act. Document 127. The Illinois Review followed suit, and filed what it called a Motion to Dismiss – though the Court interpreted the Illinois Review's Motion as a

Motion under FRCP 12(c) – on June 24, 2011, despite Fox just having lost its second Motion to Dismiss due to the federal rules not permitting two Motions to Dismiss based upon the same Complaint. Document 131. On September 21, 2011, the Court granted both Fox and Illinois Review's Motions, dismissing Plaintiff's Complaint. Document 143.

d. The decision of the District Court

The Court's Opinion and Order found the following:

The Court held that the Illinois Citizens Participation Act (ICPA) is not unconstitutional because; 1.) it does not infringe Plaintiffs' First Amendment right to petition; 2.) it is not unconstitutionally void for vagueness; and 3.) it does not violate Satkar's right to privacy.

I. Constitutionality of the ICPA

The Court held that the right to petition was not implicated by the ICPA because the "the concept of constitutionally protected access to courts revolves around whether an individual is able to make use of the courts' processes to vindicate such rights as he may have, as opposed to the extent to which rights are actually extended to protect or compensate him." Document 143, page ID 919; quoting Bowman v. Niagra Mach. & Tool Works, 832 F.2d 1052, 1054 (7 Cir. 1987). Since Plaintiffs were allowed to *file* their action, the substantive defense to that action was deemed not to offend the constitution.

The Court further held that the statute was not void for vagueness because the while "the doctrine [of vagueness] has been applied to attacks upon both criminal as well as civil or regulatory actions" it nonetheless "is inapplicable to non-penal statutes." Document 143, page ID 921. In order to qualify as penal, a statute must; 1.) impose automatic liability for a violation of its terms; 2.) set forth a determined amount of damages; and 3.) impose damages without regard to the actual

damages suffered by the plaintiff. Since the ICPA did none of these things, it was deemed to be non-penal in nature.

Finally, the Court held that the disclosure of private information on the part of private parties could not deny due process, and that the fact that the ICPA prevented Plaintiffs from successfully prosecuting a claim against Defendants therefore did not render the ICPA constitutionally infirm.

II. The applicability of the ICPA to Plaintiffs' suit.

The Court ultimately held that the ICPA constituted a substantive defense to the Amended Complaint. The ICPA applies to "any motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, or relates to, or is 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." Document 143, page ID 923; citing 735 ILCS 110/15. It creates immunity for "acts in furtherance of these rights regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome." Document 143, page ID 923; citing 735 ILCS 110/15. The Court was therefore required to dismiss the Complaint unless Plaintiffs could produce "clear and convincing evidence that the acts of [Defendants] are not immunized from, or are not in furtherance of acts immunized from, liability by this Act. 143, page ID 923; citing 735 ILCS 110/20(c).

The Court found that the ICPA protected Defendants rights to "libel with impunity." 143, page ID 925; citing Sandholm v. Kuecker, 405 Ill.App.3d 835, 855 (Ill. App. 2 Dist. 2010). The Court rejected Plaintiffs contention that the ICPA was not intended to protect wealthy news

organizations' right to libel in their "reporting" of the news, despite the news organizations' profit motive (as opposed to a motive to petition the government for redress of grievances).

In determining whether, under the ICPA's burden shifting component, Plaintiffs had demonstrated that the Defendants' actions were not genuinely aimed at procuring favorable government action," the Court applied the Noerr-Pennington doctrine. Under that doctrine, the Court must first ask, "whether objective persons could have reasonably expected to procure a favorable government outcome" by engaging in the speech at-issue. If the answer to what question is no, then the Court must consider whether the Defendants' subjective intent was not to achieve a government outcome that may interfere with Plaintiff, but rather to interfere with Plaintiff using the government *process* itself. 143, page ID 926. The Court determined that the Defendants' purpose appeared to be sufficiently connected with preventing corruption in government to fall under the ambit of the ICPA.

The Court next considered whether the fact that the no government process was at issue (that is, the fact that no Defendant petitioned the government for redress, but rather reported matters of apparent public concern on the internet, and on the television) prevented the statute from being applicable. 143, page ID 927. United States District Court Judge Joan Lefkow previously ruled that in a matter in which "there was no use of the governmental process involved in authoring and publishing" a news article, a defendant's statements in the article "were not genuinely aimed at procuring favorable government action." 143, page ID 927; citing Trudeau v. ConsumerAffairs.com, Inc., 10 C 7193, 2011 WL 3898041, at 6 (N.D. Ill., Sept. 6, 2011). However, based upon the Illinois Supreme Court's decision in Wright Dev. Group LLC. v. Walsh, 238 Ill.2d 620, 636 (Ill. 2010), the Court found that immunity is not limited to cases in which a moving party reached out directly to a

government entity. 143, page ID 927. The Court therefore granted the Fox Defendants' and Illinois Review Defendants' Motions for Judgment under the ICPA.

e. After the Court's decision, dismissing Plaintiff's suit.

Plaintiffs filed a Motion to Extend the Time Within Which to File a Notice of Appeal Document 151, which was granted, giving Plaintiffs until November 10, 2011 to File a Notice of Appeal. Document 157. Plaintiffs then filed a timely Notice of Appeal. Document 156.

Subsequently, and based upon the ICPA's fee-shifting provisions, the Court awarded attorneys fees to the Fox Defendants in the amount of $11,787.50, and to the Illinois Review Defendants in the amount of $24,850. In coming to its decision, the Court noted that "in light of an intervening decision by the Illinois Supreme Court that significantly narrowed the ICPA, Sandholm v. Kuecker, ____ Ill.2d _____, 962 N.E.2d 418 (Ill. 2012), the Court's dismissal ruling is very likely wrong."

VI. Summary of the Argument

I. The decision of the District Court predated the decision in Sandholm v. Kuecker, ____ Ill.2d _____, 962 N.E.2d 418 (Ill. 2012). The Illinois Supreme Court, in Sandholm, overturned the appellate decision upon which the District Court's decision was based. The District Court's decision rejected Plaintiffs' arguments that were nearly identical to the holding of the Illinois Supreme Court. Specifically, the Illinois Supreme Court held that the ICPA only requires dismissal of a meritless suit brought solely based upon First Amendment protected activity. A non-meritless suit that properly seeks damages should not be dismissed under the ICPA. The underlying suit here

seeks damages for Fox and IR's defamations against Plaintiffs, and therefore should not have been dismissed.

II. To the extent that the ICPA offers any shelter for Defendants, it is nonetheless unconstitutional in that it infringes on the right to petition, and in that it is unconstitutionally vague. The District Court erred in ruling that the ICPA does not infringe on the right to petition. The penal aspect of the attorney's fees provision serves as a deterrent to potential plaintiffs from even filing claims seeking damages for defamation, even when such potential plaintiffs have legitimately suffered damages. Further, the penal aspect of the attorney's fees provision also makes the statute penal in nature – this requiring it to be clear and not unconstitutionally vague. In that the statute does not clearly set out what is and is not protected, it is an unconstitutionally vague penalty.

VII. Argument

a. Standard of Review

Appellate Courts review a district court's ruling on summary judgment *de novo*, construing facts and drawing inferences in the light most favorable to the non-moving party. Lucero v. Nettle Creek School Corp, 566 F.3d 720 (7 Cir. 2009); quoting Cooper-Schut v. Visteon Automotive Sys., 361 F.3d 421, 425 (7 Cir.2004). Summary judgment is proper if there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law, construing all facts and reasonable inferences in the non-movant's favor. Cracco v. Vitran Exp. Inc., 559 F.3d 625, 633 (7 Cir. 2009). An Appellate Court reviews a decision to dismiss a Complaint on a de novo basis. Reynolds v. Cb Sports Bar Inc., 623 F.3d 1143 (7 Cir., 2010). Further, questions of law are also reviewed on a de novo basis. Lino v. Gonzales, 467 F.3d 1077 (7 Cir., 2006). Though Defendants' Motions for Judgment were not standard Motions for Summary Judgment (IR, in particular, styled its motion a Motion to Dismiss, despite having previously filed a Motion to Dismiss, and despite attaching affidavits, which would not be proper in a

Motion to Dismiss), they functioned the same as a motions for summary judgment. The District Court's decision answered questions of law. No questions of fact were presented. Therefore, the District Court's decision should be reviewed *de novo*.

b. Plaintiffs' Complaint was not a meritless claim intending to punish protected speech; it therefore should not have been dismissed.

The District Court based much of its ruling on Sandholm v. Kuecker, 405 Ill.App.3d 835, 855 (Ill. App. 2 Dist. 2010), a decision of an Illinois appellate court. It is therefore important that the appellate decision in Sandholm was overturned by the Illinois Supreme Court. That importance was not lost in the District Court, which noted that the Court's decision was "very likely wrong." (Reference to the Sandholm decision is to the Supreme Court decision unless otherwise indicated). It would be unnecessary and repetitive for Plaintiffs herein to repeat the arguments made before the District Court that are nearly identical to the holding in Sandholm; Plaintiffs nonetheless ask this Court to take judicial notice of the fact that much of the Illinois Supreme Court's holding in Sandholm is identical to the arguments Plaintiffs have already made – prior to the Supreme Court's decision – before the District Court.

I. The Sandholm decision.

Since the facts in Sahdholm are important to the outcome, they will be detailed here to the extent necessary. The plaintiff in Sandholm had been hired as the head basketball coach at Dixon High School in 1999, and was made the athletic director in 2003. Sandholm, 962 N.E. 2d at 422-23, ¶ 4. In 2008, certain individuals, the defendants, began a campaign to have plaintiff removed from both positions due to a disagreement with his coaching style. *Id.* at 223, ¶ 5. During the course of

that campaign, the defendants made several statements, very publicly, that the plaintiff believed were defamatory.

The defendants established the "Save Dixon Sports Committee" and created a website called savedixonsports.com. *Id.,* ¶ 5. The named defendant, Richard Kuecker, posted a letter on the website entitled "Hostages in the Gym," in which he accused Sandholm of badgering and humiliating players. *Id.* ¶ 6. He called Sandholm's conduct "excessively abusive and bullying." *Id.* ¶ 6. Defendants later posted a letter on the website that claimed Sandholm abused his position of influence, and made demands that were "bordering on slavery." *Id.* ¶ 9. They claimed that Sandholm had chased away potential partners, and had "worn out his welcome in far too many circles to continue to do the complete and successful job [the school board pays] him to do. *Id.*

The school board nonetheless voted to retain him in both of his positions. *Id.*

Nonetheless, the defendants' campaign had not ended. They took to the radio, and appeared on WIXN Radio, AM 1460, and repeated many of their claims. *Id.* ¶ 10. The broadcast was posted on the website. They accused the school board of having "failed miserably," and stated that Sandholm had been "getting away with it for years." *Id.*

A month later, another defendant posted a comment on the Northern Illinois Sports Beat website, and on the saukvalleynews.com website, calling Sandholm a "psycho not who talks in circles and is only coaching for his glory." *Id.* at 424, ¶ 12. Another individual sent a letter to the school board president, stating that Sandholm

> "*tore down his players to the point of humiliation"; that the situation was akin to a "classic abuse situation" in which the abuser "tells them he loves them"; that parents and players felt they could not speak up for fear of retaliation by the coach against the players; and that plaintiff was the "exact opposite" of what an athletic director should be. Id. ¶ 14.*

Still another defendant sent a letter to the Dixon school board stating that Sandholm's "slave/dog treatment of [the assistant basketball coach]" should not be tolerated, and that "evil succeeds when

good people do nothing." *Id.*, ¶ 15. Another article in the saukvalleynews.com website asked, "Why does there have to be an instance of where someone is shoved and pushed? Why can't all these instances of abuse over 10 years… isn't that enough to fire him?" *Id.* ¶ 18.

Sandholm filed suit, alleging defamation *per se*, and claiming that the false and defamatory statements imputed an inability to perform and/or a want of integrity in the discharge of his duties as a basketball coach and athletic director. *Id* at 425, ¶ 20. They falsely imputed that he had engaged in criminal activity, and had caused presumed damages to his reputation. *Id.* The complaint further alleged false light invasion of privacy, and a civil conspiracy to interfere with prospective business advantage. *Id.*

Defendants brought a motion under the Citizens Participation Act, 735 ILCS 110/1 *et seq*, which was granted. *Id.* at 422, ¶ 1. The appellate court affirmed. *Id.*

The Supreme Court began its decision by noting that the ICPA was a response to the problem of Strategic Lawsuits Against Public Participation, or SLAPPs. *Id.* at 427, ¶ 33. Strategic Lawsuits Against Public Participation,' are lawsuits aimed at preventing citizens from exercising their political rights or punishing those who have done so." *Id.*; citing Wright Development, LLC v. Walsh,238 Ill.2d 620, 630 (Ill. 2010), Penelope Canan & George W. Pring, Strategic Lawsuits Against Public Participation, 35 Soc. Probs. 506 (1988) (hereinafter "Pring"). SLAPPs use the threat of money damages or the prospect of the cost of defending against the suits to silence citizen participation. *Id.*; citing 735 ILCS 110/5. The paradigm SLAPP suit is "one filed by developers, unhappy with public protest over a proposed development, filed against leading critics in order to silence criticism of the proposed development." *Id.* A SLAPP is "based upon nothing more than defendants' exercise of their right, under the first amendment, to petition the government for a redress of grievances." *Id.*

SLAPPs are, by definition, meritless. *Id.*, ¶ 34; citing John C. Barker, Common-Law and Statutory Solutions to the Problem of SLAPPs, 26 Loy. L.A. L.Rev. 395, 396 (1993) (hereinafter "Barker"). The act itself reflects this pragmatic understanding of what constitutes a SLAPP:

> *Pursuant to the fundamental philosophy of the American constitutional form of government, it is declared to be the public policy of the State of Illinois 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. The information, reports, opinions, claims, arguments, and other expressions provided by citizens are vital to effective law enforcement, the operation of government, the making of public policy and decisions, and the continuation of representative democracy. The laws, courts, and other agencies of this State must provide the utmost protection for the free exercise of these rights of petition, speech, association, and government participation.*
>
> *Civil actions for money damages have been filed against citizens and organizations of this State as a result of their valid exercise of their constitutional rights to petition, speak freely, associate freely, and otherwise participate in and communicate with government. There has been a disturbing increase in lawsuits termed `Strategic Lawsuits Against Public Participation' in government or `SLAPPs' as they are popularly called.*
> *The threat of SLAPPs significantly chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. This abuse of the judicial process can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs.*
>
> *It is in the public interest and it is the purpose of this Act to strike a balance between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government; to protect and encourage public participation in government to the maximum extent permitted by law; to establish an efficient process for identification and adjudication of SLAPPs; and to provide for attorney's fees and costs to prevailing movants." 735 ILCS 110/5, cited in full by Sandholm, 962 N.E. at 428, ¶ 36.*

In other words, the definition of a SLAPP as a *meritless* lawsuit intending to chill speech, rather than to redress actual grievances under the common law of defamation, is actually written into statute.

> *This Act applies to any motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or is 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.*

> *Acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome." 735 ILCS 110/15, cited in full by Sandholm, 962 N.E.2d at 428-29, ¶ 37.*

The act contains a provides that the court shall award a moving party who prevails in a motion under this Act reasonable attorney's fees and costs incurred in connection with the motion." *Id.* at 429, ¶ 40; citing 735 ILCS 110/25. The Act "shall be construed liberally to effectuate its purposes and intent fully." *Id.*; citing 735 ILCS 110/30(b).

The Supreme Court noted that the act's purpose was to establish an efficient process for identification and adjudication of SLAPPs. *Id.* at 430, ¶ 42; citing 735 ILCS 110/5. It therefore sets out guidelines establishing that a SLAPP lawsuit is one which chills and diminishes citizen participation in government, voluntary public service, and the exercise of these important constitutional rights. *Id.*; citing 735 ILCS 110/5. The SLAPP itself is not a lawsuit seeking legitimate damages, but rather is an "abuse of the judicial process," which "can and has been used as a means of intimidating, harassing, or punishing citizens and organizations for involving themselves in public affairs." *Id.*; citing 735 ILCS 110/5.

Therefore, in interpreting the statute's definition of a SLAPP as a suit that is "based on, relates to, or is in response to" any act of the moving party in furtherance of the moving party's right of petition, speech, association, or participation in government, the Supreme Court understands the statute as applying to suits that are *solely* "based on, relating to, or in response to" protected behavior. *Id.* ¶ 45 (emphasis in the original); citing 735 ILCS 110/15. Therefore,

> *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 defendants' rights of petition, speech, association, or participation in government. In that case, the suit would not be subject to dismissal under the Act. It is clear from the express language of the Act*

> *that it was not intended to protect those who commit tortious acts and then seek refuge in the immunity conferred by the statute. Id.*

The Supreme Court therefore sought to "ameliorate the particular danger inherent in anti-SLAPP statutes that when constructed or construed too broadly in protecting the rights of defendants, they may impose a counteractive chilling effect on prospective plaintiffs' own rights to seek redress from the courts for injuries suffered." *Id.* at 431, ¶ 48; citing Mark J. Sobczak, Comment, SLAPPed in Illinois: The Scope and Applicability of the Illinois Citizen Participation Act, 28 N. Ill. U.L.Rev. 559, 575 (2008) (hereinafter "Sobczak"). Confining the reach of the ICPA to *meritless* SLAPPs "accords with another express goal [in the Act], '*to strike a balance* between the rights of persons to file lawsuits for injury and the constitutional rights of persons to petition, speak freely, associate freely, and otherwise participate in government.'" *Id.* ¶ 49; citing 735 ILCS 110/5. Interpreting the Act otherwise might compromise "plaintiff's constitutional right of access to the courts to seek a remedy for damage to reputation." *Id.*; citing John C. Barker, Common-Law and Statutory Solutions to the Problem of SLAPPs, 26 Loy. L.A. L.Rev. 395, 397-98 (1993) (hereinafter "Barker"). The act therefore should not be interpreted to establish a new absolute or qualified privilege to defame. *Id.* ¶ 50.

This interpretation of the Act further jibes with the express purpose of the Act. The Illinois Supreme Court, in discussing the purpose of the act, cited to the Illinois legislature's discussions about the Act at length. For the purposes of this appeal, it is only necessary to note that the sponsor of the bill in the Illinois Senate gave, as an example of a SLAPP, the archetypal SLAPP referred to above, in which a community organization is sued by a landowner for opposing the landowner's position regarding changes to the zoning code. *Id.* at 432, ¶ 50; citing 95th Ill. Gen. Assem., Senate Proceedings, April 20, 2007, at 15-16 (statements of Senator Cullerton). The House sponsor's remarks invoked the same example, of a developer who sued those who objected to his position and

"threatened with bankruptcy, not being able to pay their legal fees, even though the developer's suit was thrown out [i.e., dismissed] on three separate occasions." *Id.* 95th Ill. Gen. Assem., House Proceedings, May 31, 2007, at 58 (statements of Representative Franks). "There was no discussion in the legislative debates about establishing a new privilege for defamation." *Id.,* ¶ 51.

The "sham exception" contained in the act is not sufficient to protect plaintiffs who file legitimate, non-meritless, suits. The defendants in Sandholm specifically argued (as these Defendants essentially argued at the District level, and as the Court ultimately held) "that, where petitioning activities are genuinely aimed at procuring a favorable governmental result, a plaintiff's lawsuit for alleged defamation occurring in the course of petitioning is, by definition, without merit." *Id.* at 433, ¶ 52. The Court held that "[d]efendants' argument is unpersuasive." *Id.*

Based on the pleadings in Sandholm, the Court held that the lawsuit – despite the fact that the suit was, without a doubt, related to, or in response to, the acts of defendants in furtherance of the right to petition (in that defendants' intent was to coax or force the school board into firing coach Sandholm) – was not ***solely*** based upon the protected speech. *Id.* at 434, ¶ 57. Rather, "[i]t is apparent that the true goal of plaintiff's claims is not to interfere with and burden defendants' free speech and petition rights, but to seek damages for the personal harm to his reputation from defendants' alleged defamatory and tortious acts." *Id.*

II. Plaintiff's Complaint was not meritless.

Unlike the instant matter, Sandholm actually dealt with speech that was made for the express purpose of petitioning a government body. Defendants in Sandholm were attempting to remove a government employee from his position by pointing out to the school board, and media outlets, what they viewed as his failings as a government employee. Satkar is not (as in the archetypal

example) a developer suing innocent citizens hoping to simply scare them off and with no hope of success on the Complaint.

Far from a frivolous lawsuit that constitutes an abuse of the legal process – and nothing more – this lawsuit's purpose to make Plaintiffs whole after they were defamed publicly by Fox and the Illinois Review. The Complaint therefore stated claims that, if proven, would have entitled Plaintiffs to money damage. The District Court recognized this when it denied first Fox's Motion to Dismiss, and then Illinois Review's Motion to Dismiss. Documents 97, and Document 113.

A complaint or part of a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957); Strasburger v. Board of Educ., 143 F.3d 351, 359 (7 Cir.1998). A written or oral statement is to be considered in context, with the words and the implications therefrom given their natural and obvious meaning. Chapski v. The Copley Press, 92 Ill.2d 344 (Il. 1982). The Chapski rule, as it is called, marks a strong contrast to tendency of prior courts to "strain to find unnatural but possibly innocent meanings of words where such a construction is clearly unreasonable and a defamatory meaning is far more probable." *Id.*; Moriarty v. Greene, 732 N.E. 2d 730 (Il. App. 1 Dist. 2000). In other words, the mere fact that an innocent construction of a Defendant's statements is capable does not exonerate Defendants. Bryson v. News America Publications, 174 Ill.2d 77 (Il. 1996). "Courts must therefore interpret the allegedly defamatory words as they appeared to have been used and according to the idea they were intended to convey to the reasonable reader." *Id.*

The Illinois Review is a conservative weblog that was hell-bent on destroying the reputation of Rep. Paul Froehlich. The IR blog posts paint this picture perfectly. Whatever "information" the Illinois Review could dig up, it put to use and conveyed to its readership in such a way as to

demonstrate that Rep. Froehlich was involved in dishonest and even illegal activities. The posts, however, went further than merely claiming that Rep. Froehlich was a dishonest politician. They also identified plaintiffs as willing accomplices to Froehlich's illegal activities. Defaming individuals who were largely apolitical – businessmen constituents of Rep Froehlich who had made the mistake of exercising their constitutional right to donate money to their state representative – was therefore no problem for the Illinois Review.

When IR was attempting to bring down the great Benedict Arnold, the once-Republican State Rep. Paul Froehlich, they intended their messages to mean exactly what their audience intended them to mean: that Froehlich was aiding his "friends" by making illegal backroom deals for them, so as to save them money on property taxes. IR intended the accusations to be understood as indicating that Froehlich was involved in obtaining illegal tax breaks for constituents in exchange for contributions (that is, bribes). The comments on IR's blog make that much clear.

Fox's defamations were, if anything, even less subtle. Lest viewers of Fox's programs miss the point, Dane Placko assisted their imaginations by asking rhetorical questions throughout the broadcast about illegal or improper contributions, and referring to the States Attorney's involvement in the alleged investigation.

Fox acted as the Board's *de facto* public relations department. While the Fox story began by reporting alleged corruption at the Board of Review, Fox and Dane Placko apparently believed that they would get the most information for further (likely lucrative, and publicity inducing) news stories by teaming up with the Board: completely agreeing to be the Board's mouthpiece in exchange for prefabricated "investigative" stories implicating Satkar, and others.

Ironically, it was the Board Defendants who were apparently being investigated by the State's Attorneys' Office and used Fox as a pigeon to divert attention away from themselves-

effectively creating a smokescreen. The BOR defendants have asked for outside counsel as defense lawyers because, as they state in court documents (Case # 09 CH 39547), the State's Attorney's Office has an actual conflict of interest and cannot both prosecute and defend the same parties. One of the Fox news defendants admitted that their sole source for information about any Grand Jury investigation of anyone was from three separate Board Defendants and no further questioning or actual investigation was done. Fox was eager to comply in exchange for being handed a sensationalized, albeit planted, "investigative" story

The Complaint stated proper claims – and the claims only become stronger when the actual defamations are examined. Therefore, since these claims were not brought *solely* due to protected speech, but rather to seek damages from Defendants, dismissal under the ICPA was improper under Sandholm.

Satkar is not (as in the archetypal example) a developer suing innocent citizens hoping to simply scare them off, and with no hope of success on the Complaint. It is relevant that the District Court denied both of Fox's Motions to Dismiss, and IR's Motion to Dismiss, indicating that – all things being equal – if the Complaint is proven true after discovery, and in the absence of any affirmative defenses, Plaintiff is entitled to relief. In other words, Plaintiff's Complaint is not a legally meritless suit hoping to take advantage Defendants' economic weakness. This lawsuit was not intending to silence or intimidate anybody: Fox and IR can continue to broadcast whatever they choose to broadcast, and endorse whatever political candidate they choose to, from Michele Bachmann to Barrack Obama to Paul Froehlich, and it would not mean a whit to plaintiff so long as a.) they do not falsely accuse Plaintiffs of bribing public officials, and b.) Satkar is made whole from the damage suffered as a result of the malicious and highly public allegation of wrongdoing.

These Defendants' invocation of the CPA is a Sword of Damocles – intending to intimidate the victims of the media's haphazard and malicious defamation into crawling under a rock, licking their wounds, and limping away from the fight rather than file suit and face the specter of attorney's fees against them. This suit is not brought in retaliation for anybody's advocacy of any position, but rather in the hopes of being made whole for damages actually suffered.

The message sent by dismissing this Complaint pursuant to the Act would be that if a media outlet could feign some desire to promote some or another constitutionally protected political opinion, it can malign and defame at will (the worse the defamation, the better the take-home-pay) with no fear of being taken to task – thereby preventing the proverbial 'little guy' – from ever speaking truth to power, for fear of the newly immunized media backlash. New Corporation (or any other media outlet) could target the supporters of whatever former Republican (or individual of any other political persuasion) they wanted to, and scare them out of contributing to their chosen candidate for fear of being labeled a criminal on the evening news before a plentiful and pliable public-with absolute immunity from defamation or false light. That outcome is not what the Illinois legislature had in mind. It is at odds with the clear meaning and the spirit of the statute and should be rejected.

c. The ICPA is unconstitutional.

At the outset, it should be noted that Sandholm rejected argument similar to the arguments that Plaintiff presented before the District Court. However, Sandholm's reasoning in denying constitutional objections to the ICPA was based upon its interpretation of the Act:

> *All of plaintiff's arguments alleging that the Act is unconstitutional are based on the assumption that the Act establishes a privilege for defendants who engage in defamatory acts in the process of petitioning the government. Because we hold that the legislature did not intend to establish such a privilege, we do not find the statute unconstitutional under any of the grounds raised by plaintiff.* Sandholm, *962 N.E.2d at 435, ¶ 60.*

Doubtless, Sandholm mitigates Plaintiff's concerns regarding the constitutionality of the ICPA. Nonetheless, to the extent that ICPA still may prevent a potential plaintiff from maintaining a legitimate claim against a given defendant, the constitutionality of ICPA remains questionable.

I. The ICPA violates the right to petition.

The First Amendment to the Constitution states, "Congress shall make no law… abridging… the right of the people… to petition the Government for a redress of grievances." Specifically, what the First Amendment prohibits are government *intrusions* into those rights (like the freedom of speech, and freedom to petition) that are held most sacred. That intrusion is prohibited even when it takes the form of a Court merely applying state laws (common or statutory) to dispose of private actions between private individuals in such a way as to punish speech that is subject to First Amendment protections. New York Times Company v. Sullivan, 376 U.S. 254, 265 (1964).

Nowhere in the First Amendment does it state that government has an affirmative duty to come to the aid of the press or advocacy organizations in the First Amendment's name. Therefore, when a law is passed that ties the Court's hands behind its back when the Court faces legitimate and actionable accusations of defamations and other torts, it is something other than a defense of the First Amendment. Rather, it is an *intrusion* into the First Amendment right to petition the Court for redress of grievances and a violation of state law claims of defamation, invasion of privacy and false light. It is simply incorrect to call the CPA a defense of the Constitution.

What the Constitution does protect is the right to petition. "The rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights." Mine Workers v. ISBA, 389 U.S. 217, 222 (1967). The right of access to the courts is one aspect of the right of petition. California Motor Transport Co. v.

Trucking Unlimited, 404 U.S. 508 (1972). When statutes passed by a legislature abridge First Amendment freedoms, the Supreme Court has stated that

> *The "usual presumption supporting legislation is balanced by the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment. That priority gives these liberties a sanctity and a sanction not permitting dubious intrusions. For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation. Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation." Thomas v. Collins, 323 U.S. 516 (1945).*

The Supreme Court heard a matter surprisingly similar to this one in Bill Johnson's Restaurants v. National Labor Relations Board, 461 U.S. 731 (1983). In that case, a restaurant owner filed suit against a number of employees and a former employee who were picketing the restaurant, alleging defamation among other counts. The defendants in that suit petitioned the National Labor Relations Board, calling the suit a wrongful retaliation in violation of federal statute. The NLRB agreed, and Ordered the plaintiffs in the state suit to withdraw their suit, and pay defendants all attorneys' fees. The matter came before the Supreme Court, which was understandably sympathetic to the wage-earning defendants:

> *As the Board has observed, by suing an employee who files charges with the Board or engages in other protected activities, an employer can place its employees on notice that anyone who engages in such conduct is subjecting himself to the possibility of a burdensome lawsuit. Regardless of how unmeritorious the employer's suit is, the employee will most likely have to retain counsel and incur substantial legal expenses to defend against it. Furthermore, as the Court of Appeals in the present case noted, the chilling effect of a state lawsuit upon an employee's willingness to engage in protected activity is multiplied where the complaint seeks damages in addition to injunctive relief. Where, as here, such a suit is filed against hourly-wage waitresses or other individuals who lack the backing of a union, the*

> *need to allow the Board to intervene and provide a remedy is at its greatest. Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 740-41 (1983)* (citations omitted).

Nonetheless, the Court recognized that the right to petition guaranteed by the First Amendment was more important:

> *There are weighty countervailing considerations, however, that militate against allowing the Board to condemn the filing of a suit as an unfair labor practice and to enjoin its prosecution. In California Motor Transport Co. v. Trucking Unlimited, we recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. Accordingly, we construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose in doing so, unless the suit was a "mere sham" filed for harassment purposes. We should be sensitive to these First Amendment values in construing the NLRA in the present context. As the Board itself has recognized: "[G]oing to a judicial body for redress of alleged wrongs . . . stands apart from other forms of action directed at the alleged wrongdoer. The right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in the court is to enjoin employees from exercising a protected right." Id at 741-42* (citations omitted).

In other words, when very legitimate and understandable principles are tested against the Constitutional right to petition, the right to petition must prevail, unless the petition itself (in this case, this lawsuit) is an all out sham. This is the true sham exception: the Constitution admittedly does not exist to protect sham lawsuits brought, for example, by developers against individuals protesting their developments, with no hope of success on the merits (for there are no merits), and only for the purpose of harassing the protesters. However, the Constitution *was* meant to protect those seeking redress of actual grievances (even grievances between private parties) from *intrusion* by statutes that protect tortfeasers by punishing victims for exercising their right to petition, and prevent them from exercising that right.

The right of access to a court is too important to be denied due to a statute that purports to protect media organizations such as News Corporation and rabidly partisan political blogs like the IR from legitimate defamation claims by owners of a small business in Illinois. The Constitution

demands either that the Illinois Citizens Participation Act be found unconstitutional, or that it be construed narrowly only to effect constitutional goals. Preventing a legitimate suit for defamation from going forward on the merits against a financial powerhouse like Fox, or even a political blog with no concern for the collateral damage it causes, would not be a constitutional goal.

The District Court held that the ICPA does not implicate the right to petition. It merely creates a substantive immunity or defense to a claim that has already been brought. But in light of the stiff penalties for bringing an action that is later dismissed under the Act (that is, potentially stiff attorneys fees), the Act functions to prevent plaintiffs from filing claims altogether. Sandholm, 962 N.E.2d at 432, ¶ 51.

II. The ICPA is unconstitutionally vague.

The US Supreme Court determined that an an ordinance was unconstitutional if it subjected , "the exercise of the right of assembly to an unascertainable standard. Coates v. City of Cincinnati 402 U.S. 611 (1971). The ordinance in question forbade conduct on a sidewalk that was "annoying to persons passing by." *Id.* In striking down the ordinance, the Supreme Court stated that any statute was unconstitutional if "men of common intelligence must necessarily guess at its meaning." *Id.* The Supreme Court later applied Coates in striking down a statute that attempted to regulate "offensive" speech and expression due to unconstitutional vagueness: "How we can deny Ohio the convenience of punishing people who "annoy" others and allow California power to punish people who publish materials "offensive" to some people is difficult to square with constitutional requirements." Miller v. California, 413 U.S. 15 (1973).

No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. Lanzetta v.

New Jersey, 306 U.S. 451 (1939). A statute may not be so vague as to allow for arbitrary enforcement. Kolender v. Lawson, 461 U.S. 352 (1983).

> *"If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application."* Grayned v. City of Rockford, *408 U.S. 104 (1972).*

The Citizens Participation Act gives almost no indication of what it intends to prohibit (and punish with potentially costly attorneys fees). The act

> *"applies to any motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or is 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.*
>
> *Acts in furtherance of the constitutional rights to petition, speech, association, and participation in government are immune from liability, regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome." 735 ILCS 110/15.*

This is so open-ended, it provides almost no clues as to what is prohibited and what is permitted. Clearly, retaliatory and meritless suits against people exercising the right of free speech to protest a development are prohibited (this is the only example of a SLAPP that is almost universally accepted as a SLAPP). But what about defamation suits against actual (and, frankly, repeated) defamers whose defamations happen to refer to matters of limited public concern? The CPA is silent. This statute is unconstitutionally vague, particularly as applied to the facts here.

The Statute's definition of persons, that includes, "any individual, corporation, association, organization, partnership, 2 or more persons having a joint or common interest, or other legal entity," gives unlimited immunity to the press and anyone with a blog or Twitter account, like the IR, to defame private citizens and place them in a false light with absolute immunity. In doing so,

the Statute negates existing state torts and grants the Media (from news titans like News Corp, to small political bloggers) absolute immunity from suit.

The District Court held that the Act is not penal in nature, and that it was therefore not *unconstitutionally* vague. However, the attorneys' fees provision of the Act is penal in nature. See Sandholm, 962 N.E.2d at 432, ¶ 51.

VIII. Conclusion

Plaintiffs were defamed by Fox and by the Illinois Review. The Illinois Review, in its crusade to end the political career of a Benedict Arnold, State Rep. Paul Froehlich, targeted individuals who had done nothing wrong, and falsely accused them of bribery, merely because they donated to Rep. Froehlich. Fox, eagerly picking up the story, falsely broadcasted on the evening news that Plaintiffs had bribed Rep. Froehlich and were under investigation by the States Attorneys office. The stories about Plaintiffs can still be found online. The District Court erred in dismissing Plaintiffs' suit based upon the ICPA. The ICPA does not create immunity to tortfeasors like Defendants. Finally, to the extent that Defendants' actions are shielded from liability, the Act is unconstitutional.

WHEREFORE, Plaintiffs request that this Honorable Court reverse the decision of the District Court, and remand this matter back to the District Court where a trial may be had on the merits of Plaintiffs' suit against the Fox Defendants, and the Illinois Review Defendants.

Respectfully Submitted,

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Certificate of Compliance

I, R. Tamara de Silva, an attorney, do hereby certify that this Brief contains fewer than 14,000 words in compliance with Federal Rules of Appellate Procedure § 32(A)(7)(b).

s/R. Tamara de Silva

Certificate of Service

I, R. Tamara de Silva, an attorney, do hereby certify that I caused a copy of this Brief to be served upon all parties of record by filing it with the Clerk of the United States Court of Appeals, Seventh Circuit, through the electronic filing/ECF system in compliance with the Federal Rules of Appellate Procedure, and all local rules, on November 13, 2012.

s/R. Tamara de Silva

Index of Appendix

United States District Court

Northern District of Illinois

Eastern Division

Satkar Hospitality, Inc.

v.

Coo County Board of Review

JUDGMENT IN A CIVIL CASE

Case Number: 10 C 6682

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the Court grants defendants' motion to dismiss and for judgment pursuant to the ICPA. Counts four and five of plaintiff's amended complaint are dismissed with prejudice. The Court finds, pursuant to Federal Rule of Civil Procedure 54(b), that there is no just reasons for delay and therefore enters judgment in favor of Fox Television Stations, Inc., Fox Chicago News, News Corporation, Illinois Review, Dane Placko, Fox Television Holdings, Inc., Carol Fowler, Marsha Bartel, Patrick Mullen, Frank Eaton, and Dennis G. Lacomb.

Michael W. Dobbins, Clerk of Court

Date: 9/21/2011

/s/ Olga Rouse, Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SATKAR HOSPITALITY INC., SHARAD K. DANI, and HARISH DANI,	)	
Plaintiffs,	)	
vs.	)	**Case No. 10 C 6682**
COOK COUNTY BOARD OF REVIEW, FOX TELEVISION STATIONS, INC., FOX CHICAGO NEWS, NEWS CORPORATION, ILLINOIS REVIEW, FRAN EATON, DENNIS G. LACOMB, DANE PLACKO, MARSHA BARTEL, CAROL FOWLER, PATRICK MULLEN, and FOX TELEVISON HOLDINGS, INC.,	)	
Defendants.	)	

MEMORANDUM OPINION AND ORDER

MATTHEW F. KENNELLY, District Judge:

Satkar Hospitality Inc. and its owners, Sharad Dani and Harish Dani (collectively Satkar) have sued the Cook County Board of Review and several of its personnel; the local Fox television station and several affiliates; and the Illinois Review and several affiliates. Satkar contends that the defendants defamed it and placed it in a false light and as a result, the Board revoked a reduction in Satkar's property tax assessment without due process and in violation of other constitutional provisions. The Court has ruled on multiple motions to dismiss filed by the defendants. *See Satkar Hospitality Inc. v. Cook Cnty. Bd. of Review*, No. 10 C 6682, 2011 WL 2182106 (N.D. Ill. June 2, 2011) (*Satkar III*); *Satkar Hospitality Inc. v. Cook Cnty. Bd. of Review*, No. 10 C 6682, 2011

WL 2011486 (N.D. Ill. May 20, 2011) (*Satkar II*); *Satkar Hospitality Inc. v. Cook Cnty. Bd. of Review*, No. 10 C 6682, 2011 WL 1303227 (N.D. Ill. Apr. 4, 2011) (*Satkar I*). In these decisions, the Court dismissed Satkar's claims against the individual Board defendants but otherwise denied defendants' motions.

The remaining defendants have answered Satkar's complaint. All of the defendants other than the Board have filed motions pursuant to the Illinois Citizen Participation Act (ICPA), 735 ILCS 110/15. Specifically, the Illinois Review, Fran Eaton, and Dennis G. LaComb (the Illinois Review defendants) have filed a "motion to dismiss" Satkar's claims with prejudice. Fox Television Stations, Inc., News Corporation, Dane Placko, Marsha Bartel, Carol Fowler, and Fox Television Holdings, Inc. (the Fox defendants) have filed a "motion for judgment" under the ICPA. The Court considers these motions collectively and, for the reasons stated below, grants them.

Discussion

The Court assumes familiarity with its May 20, 2011 decision, which provided a detailed summary of Satkar's allegations against defendants. *See Satkar II*, 2011 WL 2011486, at *1-2.

In a previous motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the Fox defendants argued that the ICPA immunizes them against liability to Satkar. The Court held that the Fox defendants were not entitled to dismissal under Rule 12(b)(6), but could re-assert their ICPA argument in a procedurally appropriate post-answer motion. *See Satkar III*, 2011 WL 2182106 at *5. The Fox defendants and the Illinois Review defendants have now done so by answering Satkar's complaint and

filing motions for judgment in their favor. *See* Fed. R. Civ. P. 12(c) ("After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.").

Motions under Rule 12(c) are analyzed under the same standard that applies to a Rule 12(b)(6) motion. *Buchanan-Moore v. Cnty. of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009). The Court takes the facts alleged in the complaint as true, draws all reasonable inferences in favor of Satkar, and will grant the motion unless Satkar's allegations state a plausible claim for relief. *See Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 633 (7th Cir. 2007). The Court is limited to considering the pleadings, but in this case the pleadings include the contents of defendants' news reports because the reports are central to Satkar's claims and Satkar referred to them in its complaint. *See Cont'l Cas. Co. v. Am. Nat'l Ins. Co.*, 417 F.3d 727, 731 n.2 (7th Cir. 2005).

1. Constitutionality of the ICPA

Satkar first argues that defendants' motions must be denied because the ICPA is unconstitutional on its face and as applied to Satkar's claims. *See* Pls.' Resp. at 7-13. Defendants counter that the Court should reject Satkar's constitutional challenge because Satkar failed to bring it to the attention of the Illinois Attorney General. *See* Fox Defs.' Reply at 10. They also contend that Satkar's arguments fail on their merits. *See id.* at 10-12; Illinois Review Defs.' Reply at 3-11.

a. Notice

Under Federal Rule of Civil Procedure 5.1, a party that raises an argument challenging the constitutionality of a state statute must file a notice of constitutional

question and serve it on the state's attorney general.[1] *See* Fed. R. Civ. P. 5.1(a). The district court must then "certify to the appropriate attorney general that a statute has been questioned." Fed. R. Civ. P. 5.1(b); *see also* 28 U.S.C. § 2403(b). The state's attorney general may intervene within sixty days after the party files its notice or the district court certifies the challenge, whichever date comes first. Fed. R. Civ. P. 5.1(c). The district court "may reject the constitutional challenge, but may not enter a final judgment holding the statute unconstitutional" until the time to intervene expires. *Id.*

Satkar does not appear to have notified the Illinois Attorney General of its constitutional challenge to the ICPA as required by Rule 5.1. Pursuant to Rule 5.1(b) and 28 U.S.C. § 2403(b), the Court will issue a separate order certifying to the Illinois Attorney General that Satkar has questioned the constitutionality of the ICPA. As discussed below, however, the Court finds Satkar's arguments to be without merit. The Court will therefore exercise its authority to reject Satkar's constitutional challenge. If the Attorney General chooses to intervene after receiving notice of Satkar's constitutionality challenge, the Court will reconsider its decision.

b. Merits

Satkar argues that the ICPA is unconstitutional because (1) it infringes plaintiffs' First Amendment right to petition; (2) it is void for vagueness; and (3) it violates Satkar's right to privacy under the Fourteenth Amendment. Pls.' Resp. at 7-13. The Court

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[1] Rule 5.1 requires a party to file a notice of constitutional question only if "the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity." Fed. R. Civ. P. 5.1(a)(1)(B). The only remaining government defendant in this case is the Cook County Board of Review, a "government office of Cook County." Am. Compl. ¶ 8. Because the Board is not a state agency, Rule 5.1 applies despite the Board's status as a defendant.

considers each argument in turn.

i. The right to petition

Satkar first contends that the ICPA violates the First Amendment because it unconstitutionally limits Satkar's access to the courts. In Satkar's view, "the right of access to a court is too important to be denied due to a statute that purports to protect" defendants "from legitimate defamation claims." *Id.* at 10.

"[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances." *Bill Johnson's Rests., Inc. v. Nat'l Labor Relations Bd.*, 461 U.S. 731, 741 (1983); *see also California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (same). As the Seventh Circuit has acknowledged, this right "constitutes a 'fundamental' right which would, if infringed, demand as justification a compelling state interest." *Bowman v. Niagara Mach. & Tool Works, Inc.*, 832 F.2d 1052, 1054 (7th Cir. 1987).

Satkar's argument lacks merit because the ICPA does not limit Satkar's ability to pursue a cause of action in court. Rather, the statute extends conditional immunity to entities engaged in First Amendment-protected activity. *See* 735 ILCS 110/15. Put simply, the ICPA limits a plaintiff's prospect of success in court, not its access to the courts in the first instance. The Seventh Circuit dealt with a similar argument in *Bowman*, in which the plaintiff argued that Indiana's ten-year statute of repose for products liability claims violated his right of access to the courts. *Bowman*, 832 F.2d at 1054. The court rejected this argument, reasoning that

> the concept of constitutionally protected access to courts revolves around whether an individual is able to make use of the courts' processes to

> vindicate *such rights as he may have*, as opposed to the extent to which rights are actually extended to protect or compensate him. Claims of violation of the right of access to courts have thus focused on the availability of suitable court processes to vindicate existing rights or, more commonly, the ability of an individual to make use of those processes. In contrast, Bowman's claim concerns specific substantive rights that the legislature has declined to extend to a group of persons that includes him. Bowman has not alleged that he has been denied access to either state or federal courts to enforce any right that has accrued to him.

Id. at 1055 (emphasis in original). Because "the judicial process [wa]s open to" the plaintiff "even if the cause of action he would pursue [wa]s not," the court rejected his right-to-petition argument. *Id.*

Similarly, though the ICPA curtails the substantive viability of causes of action against parties engaged in First Amendment activity, it does not bar Satkar or anyone else from accessing the courts to enforce rights that they possess. Accordingly, the Court concludes that the ICPA does not violate Satkar's First Amendment right to petition the government for redress of grievances.

ii. Vagueness

Next, Satkar asserts that the ICPA is unconstitutionally vague because its language is "open-ended" and "provides almost no clues as to what is prohibited and what is permitted." Pls.' Resp. at 11. Defendants counter, among other arguments, that the void-for-vagueness doctrine is inapplicable to the ICPA. *See* Fox Defs.' Reply at 12; Illinois Review Defs.' Reply at 7-8.

"[A] penal statute is void for vagueness if it does not define an offense with sufficient clarity to allow people of ordinary intelligence to understand what conduct is prohibited or if it is so vague as to allow for arbitrary or discriminatory enforcement."

United States v. Turcotte, 405 F.3d 515, 531 (7th Cir. 2005) (citing *Kolender v. Lawson*, 461 U.S. 352, 257 (1983)). The doctrine "has been applied to attacks upon both criminal as well as civil or regulatory statutes," *United States ex rel. Fitzgerald v. Jordan*, 747 F.2d 1120, 1129 (7th Cir. 1984), but it is inapplicable to non-penal statutes. *See, e.g.*, *Glauner v. Miller*, 184 F.3d 1053, 1055 (9th Cir. 1999).

The Court agrees that the void-for-vagueness doctrine is inapplicable in this case because the ICPA is not a penal statute. To qualify as a "penalty" under Illinois law, a statutory provision must "(1) impose automatic liability for a violation of its terms; (2) set forth a predetermined amount of damages; and (3) impose damages without regard to the actual damages suffered by the plaintiff." *Landis v. Marc Realty, L.L.C.*, 235 Ill. 2d 1, 13, 919 N.E.2d 300, 307 (2009). The ICPA does none of these things. Rather, as noted above, it simply gives rise to a conditional immunity from liability based on certain types of conduct. Though the statute does provide for the recovery of attorney's fees and costs incurred in seeking dismissal of a purported SLAPP suit, it does not set forth a predetermined amount of fees and costs. 735 ILCS 110/25. To the contrary, it provides for the recovery of "reasonable" fees and costs and thus implicitly requires a court to consider the degree of "injury" the moving party suffered in seeking dismissal of the SLAPP suit. *Id.* For these reasons, and because Satkar has cited no authority suggesting that the void-for-vagueness doctrine applies to statutes like the ICPA, the Court rejects Satkar's vagueness argument.

iii. The right to privacy

Finally, Satkar argues that "[s]uits against private tortfeasors and defamers [are]

the sole weapon otherwise powerless parties like [Satkar] have," and "[r]emoving that last line of defense implicates the government in a violation of the [Fourteenth] Amendment right to privacy." Pls.' Resp. at 13.

The Court rejects this argument. Satkar is, of course, correct that the due process clause of the Fourteenth Amendment protects liberty, which the Supreme Court has held includes a right of privacy. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 153 (1973). Satkar cites no cases or other authority, however, plausibly suggesting that this right applies in this context. It appears to argue that the ICPA unconstitutionally limits Satkar's ability to prevail in defamation actions against persons that reveal compromising or embarrassing information about it. *See* Pls.' Resp. at 12-13. This argument lacks merit. Even if the information in defendants' news reports was not publicly available, the Supreme Court "has never held that the disclosure of private information denies due process." *Wolfe v. Schaefer*, 619 F.3d 782, 784-85 (7th Cir. 2010). Although the Seventh Circuit and other courts have "recognize[d] a constitutional right to the privacy of medical, sexual, financial, and perhaps other categories of highly personal information," *id.* at 785, Satkar has not alleged facts suggesting that defendants' conduct resulted in the release of such information. To the contrary, Satkar's core allegation is that defendants reported that a state representative engineered a reduction in Satkar's property tax burden in exchange for campaign contributions. Am. Compl. ¶¶ 26-27. Such information does not constitute highly personal information; indeed, it likely involves matters of public record. For these reasons, and because Satkar cites no cases plausibly supporting its right-to-privacy argument, the argument fails.

2. Application of the ICPA

Turning to the merits, the Illinois Review and Fox defendants argue that the ICPA bars Satkar's claims against them. Satkar counters that the ICPA "does not apply to the facts here, and was not intended to protect major media organizations that defame citizens." Pls.' Resp. at 13. Satkar also contends that the ICPA is inapplicable because defendants actions were "not genuinely aimed at procuring favorable government action, result, or outcome." *Id.* at 18-19; 735 ILCS 110/15.

The ICPA applies to "any motion to dispose of a claim in a judicial proceeding on the grounds that the claim is based on, relates to, or is 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." *Id.* It extends immunity for "[a]cts in furtherance of" these rights, "regardless of intent or purpose, except when not genuinely aimed at procuring favorable government action, result, or outcome." *Id.*

The ICPA requires a court to dismiss claims to which it applies unless the plaintiff produces "clear and convincing evidence that the acts of the moving party are not immunized from, or are not in furtherance of acts immunized from, liability by this Act." 735 ILCS 110/20(c). In other words, the ICPA's immunity "will apply where: (1) the defendant's acts were in furtherance of his rights to petition, speak, associate, or otherwise participate in government to obtain favorable government action; (2) the plaintiff's claim is based on, related to, or in response to the defendant's 'acts in furtherance'; and (3) the plaintiff fails to produce clear and convincing evidence that the defendant's acts were not genuinely aimed at procuring favorable government action."

Sandholm v. Kuecker, 405 Ill. App. 3d 835, 855, 942 N.E.2d 544, 564 (2010).

The Court has little difficulty in concluding that the first two elements of the test outlined in *Sandholm* are satisfied. Satkar's complaint makes clear that its defamation and false light claims are premised upon the Illinois Review and Fox defendants' news reports. *See, e.g.*, Am. Compl. ¶ 95 ("The statements authored, published and otherwise propagated by the Defendants electronically and by the world-wide web are false and defamatory . . . ."); *id.* ¶ 100 ("Defendants publicized the false statements by means of television, electronically and through broadcast media outlets thereby making publication of them to the public at large"). These reports were directed at the public and addressed possible political corruption, an obvious matter of public concern. Particularly because the Illinois Supreme Court has held that the ICPA "expressly encompasses exercises of political expression directed at the *electorate* as well as government officials," defendants' reports were acts "in furtherance of" their right to speak freely. *Wright Dev. Group, LLC v. Walsh*, 238 Ill. 2d 620, 636, 939 N.E.2d 389, 398 (2010) (emphasis in original).

Satkar argues that the ICPA "was not intended to protect major media organizations that defame citizens." Pls.' Resp. at 13. The plain text of the statute, however, contains no such limitation. To the contrary, section 15 of the ICPA immunizes acts of the "moving party," which section 10 defines as "any person on whose behalf a motion . . . is filed seeking dismissal of a judicial claim." 735 ILCS 110/15, 10. Section 10 further defines "person" as "any individual, corporation, association, organization, partnership, 2 or more persons having a joint or common

interest, or other legal entity." 735 ILCS 110/10. Nothing in the ICPA suggests that the statute does not apply to media organizations like the Illinois Review or Fox.

It is also irrelevant that defendants' publication of the reports may have been motivated by profit, a fact which Satkar argues should render the ICPA inapplicable. *See* Pls.' Resp. at 15. As the Supreme Court once said, "[i]f a profit motive could somehow strip communications of the otherwise available constitutional protection," the Court's many pronouncements on the First Amendment "would be little more than empty vessels." *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989). Satkar also asserts that the ICPA cannot apply if the defendant's statements are false. *See* Pls.' Resp. at 14-15. As the Illinois appellate court has stated, however, the ICPA protects a person's "right to commit libel with impunity" so long as the person does so "with the genuine aim of procuring government action." *See Sandholm*, 405 Ill. App. 3d at 854, 942 N.E.2d at 563. In short, based on the allegations in Satkar's complaint, the Court concludes that Satkar filed its defamation and false light claims against the Illinois Review and Fox defendants in response to these defendants' acts in furtherance of their right to speak freely. *See* 735 ILCS 110/15.

Because the Illinois Review and Fox defendants have satisfied the first two elements of the test from *Sandholm*, the burden of proof under the ICPA shifts to Satkar to provide "clear and convincing evidence that" defendants' actions "are not immunized from, or are not in furtherance of acts immunized from, liability by" the ICPA. 735 ILCS 110/15, 20(c); *see also Walsh*, 238 Ill. 2d at 636, 939 N.E.2d at 398. In this regard, Satkar contends that defendants' actions were not genuinely aimed at procuring

a favorable government outcome. *See* Pls.' Resp. at 18-19. Defendants argue, among other things, that their actions in publicizing the alleged corruption scheme were "unmistakably those an objective person could have expected to procure a favorable government outcome," such as an investigation into the Board of Review's appeal process. Illinois Review Defs.' Opening Br. at 9-10.

To determine whether defendants' actions were genuinely aimed at procuring favorable government action, the Court applies a two-part test derived from the "sham exception" to the so-called *Noerr-Pennington* doctrine. *See Sandholm*, 405 Ill. App. 3d at 861-62, 942 N.E.2d at 568. First, the Court must ask "whether objective persons could have reasonably expected to procure a favorable government outcome." *Id.* at 862, 942 N.E.2d at 568. If the answer to this question is yes, and the ICPA otherwise applies, the defendant's activity is protected. Id. at 862, 942 N.E.2d at 569. By contrast, if the answer is no, then the Court must consider "whether defendants' subjective intent was not to achieve a government outcome that may interfere with plaintiff but rather to interfere with plaintiff by using the governmental process itself." *Id.*

Applying this standard and considering the allegations in Satkar's complaint and the contents of defendants' news reports, the Court concludes that objective persons in defendants' shoes could have reasonably expected to procure a favorable government outcome by publishing the reports. The defendants published information relating to a matter of significant public concern: potentially corrupt behavior by a state legislator, a quasi-judicial municipal body, and private entities seeking relief from that body. The reports published by Illinois Review further reveal that Illinois Review contacted the Inspector General of the Illinois legislature to request that he open an investigation into

practices at the Board of Review. *See* LaComb Decl., Ex. 1 at 25 (July 6, 2009 report stating that "Illinois Review requested an investigation of [Representative] Froehlich be launched" and containing an e-mail response from Inspector General Thomas J. Homer agreeing to open such an investigation). In addition, Satkar admits that defendants' actions led to further action by the Board of Review. *See* Am. Compl. ¶ 37 ("In response to the Fox News Report, and the Illinois Review postings, and for the appearance of clean hands, the Board required Plaintiffs to appear and answer questions regarding the relationship between Rep. Froehlich and Plaintiffs."). Put simply, it would be perfectly reasonable to conclude that, as a result of defendants' reports, government entities might open an investigation into how the Board of Review appeals process worked in Satkar's case.

Satkar nevertheless argues that the ICPA is inapplicable because "[n]o government process was at issue here." Pls.' Resp. at 18-19. This argument gives the Court some pause in weighing whether defendants' actions were genuinely aimed at procuring a favorable government outcome. This Court's respected colleague, Judge Joan Lefkow, accepted a similar argument. *See Trudeau v. ConsumerAffairs.com, Inc.*, No. 10 C 7193, 2011 WL 3898041, at *6 (N.D. Ill. Sept. 6, 2011) (Lefkow, J.) (concluding in an analogous context that because "[t]here was no use of the governmental process involved in authoring and publishing" a news article, defendant's statements in the article "were not genuinely aimed at procuring favorable government action"). The Illinois Supreme Court, however, has unequivocally stated that the ICPA's immunity is not limited to cases in which the moving party reached out directly to a government entity. *Walsh*, 238 Ill. 2d at 638, 939 N.E.2d at 399 ("[N]othing in the words

'any act or acts' suggests a requirement of direct appeal to a government official"). In reaching this conclusion, the court reasoned that "the electorate" is included in the definition of "government" in section 10 of the ICPA.[2] *Id.; see also id.* at 636, 939 N.E.2d at 398 (noting that "the [ICPA] expressly encompasses exercises of political expression directed at the electorate as well as government officials").

In light of *Walsh*, the Court cannot conclude that defendants' actions do not satisfy the objective prong of the modified "sham exception" test from *Sandholm*. An objective person could reasonably expect that following defendants' news reports, the "government" (whether in the form of the Legislative Inspector General, the Board of Review, or the electorate) would call for an investigation into whether the Board's appeals process was tainted by corruption. Therefore, defendants' alleged actions were "genuinely aimed at procuring favorable government action, result, or outcome," and the Court need not consider defendants' subjective intentions. *See Sandholm*, 405 Ill. App. 3d at 862, 942 N.E.2d at 569; 735 ILCS 110/15.

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[2] The Court doubts that this interpretation is consistent with what the Illinois legislature actually intended in adopting the ICPA. Section 10 of the statute says that "government" includes entities or persons acting under color of law of various public authorities—the United States, individual states, subdivisions of states, or other "public authorit[ies] including the electorate." 735 ILCS 110/10. This likely was not intended to equate the "electorate" with the "government" for purposes of the ICPA but rather to broadly cover governmental entities or public officials or employees acting on *behalf of* the electorate. Despite this, the Court is bound by *Walsh* and cannot substitute its own interpretation of section 10 for that of the Illinois Supreme Court. *See Williams, McCarthy, Kinley, Rudy & Picha v. Nw. Nat'l Ins. Grp.*, 750 F.2d 619, 624 (7th Cir. 1984) ("[T]he Illinois Supreme Court is the final authority on the meaning of Illinois statutes"). Any further modification must come from that court or from the Illinois legislature.

3. Summary

Satkar has failed to show that the ICPA is unconstitutional or inapplicable to Satkar's claims against the Illinois Review and Fox defendants. Because Satkar brought these claims in response to these defendants' acts in furtherance of their right of free speech, and because the allegations in Satkar's complaint do not constitute clear and convincing evidence that defendants' actions were not genuinely aimed at procuring favorable government action, the ICPA's immunity bars Satkar's claims against these defendants. The Illinois Review and Fox defendants are entitled to recover reasonable attorney's fees and costs incurred in connection with the present motions. *See* 735 ILCS 110/25.

Conclusion

For the reasons stated above, the Court grants defendants' motions to dismiss and for judgment pursuant to the ICPA [docket nos. 127 & 131]. Counts four and five of plaintiffs' amended complaint are dismissed with prejudice. The Court finds, pursuant to Federal Rule of Civil Procedure 54(b), that there is no just reason for delay and therefore directs the Clerk to enter final judgment in favor of Fox Television Stations, Inc., Fox Chicago News, News Corporation, Illinois Review, Dane Placko, Fox Television Holdings, Inc., Carol Fowler, Marsha Bartel, Patrick Mullen, Fran Eaton, and Dennis G. Lacomb.

MATTHEW F. KENNELLY
United States District Judge

Date: September 21, 2011