IN THE CIRCUIT COURT FOR THE
NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS, CHANCERY DIVISION

STERICYCLE, INC. and CHARLES ALUTTO,	)	
Plaintiffs,	)	**Case No. 16CH522**
v.	)	**The Hon. Margaret A. Marcoullier, Judge Presiding**
CREATED EQUAL PAC, MARK HARRINGTON, and DOES 1 through 100, inclusive,	)	
Defendants.	)	

Defendants' Motion To Dismiss Complaint Pursuant To Section 2-619.1 Of The Illinois Code Of Civil Procedure

Now come Defendants, Created Equal PAC ("Created Equal") and Mark Harrington ("Harrington") (collectively referenced as "Defendants"), by their undersigned counsel and pursuant to Section 2-619.1 of the Illinois Code of Civil Procedure, hereby move this Court to dismiss Plaintiffs' Complaint with prejudice and, in support thereof, state as follows:

INTRODUCTION

In their Complaint, Plaintiffs, Stericycle, Inc. ("Stericycle"), and its Chief Executive Officer, Charles Alutto ("Alutto"), purport to state claims against Defendants for "private nuisance" (Count I) and "invasion of privacy" (Count II). The Complaint, however, fails to allege facts establishing a colorable claim for relief under either of those legal theories. Moreover, notwithstanding endless conclusory assertions that the conduct which is the basis for the claims against Defendants is "unlawful" (*See* Comp., paras. 1, 2, 3, 9, 10, 11, 20, 22, 24), in fact that conduct is protected by the First Amendment and constitutes a lawful exercise of Defendants' constitutional rights.

Standards Governing Motions To Dismiss

"A section 2–615 motion admits all well-pleaded facts as true, but not conclusions of law or factual conclusions which are unsupported by allegations of specific facts." *Lagen v. Balcor Co.*, 274 Ill.App.3d 11, 16 (2nd Dist. 1995). [Citation omitted.] Moreover, "If after disregarding any legal and factual conclusions the complaint does not allege sufficient facts to state a cause of action, the motion to dismiss should be granted." *Id.* [Citation omitted.]

"A motion to dismiss pursuant to section 2–619 admits the legal sufficiency of a complaint, but asserts affirmative matters that avoid or defeat the allegations contained in the complaint. A section 2–619 motion affords litigants a means of disposing of issues of law and easily proved issues of fact at the outset of a case." *Corcoran-Hakala v. Dowd*, 362 Ill.App.3d 523, 525 (2nd Dist. 2005). [Citations omitted.]

I. Plaintiffs' Private Nuisance Claim (Count I) Should Be Dismissed Pursuant To Section 2-615 Of The Code Of Civil Procedure For Failure To State A Claim.

A. Neither Plaintiff Has Stated A Viable Nuisance Claim.

In order to state a claim for nuisance, a plaintiff must establish an "interference with the use and enjoyment of property" that "must consist of an invasion by something perceptible to the senses." *In re Chicago Flood Litigation*, 176 Ill.2d 179, 205 (1997). Moreover, the invasion must be "substantial." *Schiller v. Mitchell*, 357 Ill. App. 3d 435, 441 (2d Dist. 2005). As the Supreme Court observed in the *Chicago Flood* case, "This court has repeatedly described a nuisance as 'something that is offensive, physically, to the senses and by such offensiveness makes life uncomfortable.' 'Typical examples would be smoke, fumes, dust, vibration, or noise produced by defendant on his own land and impairing the use and enjoyment of neighboring land.'" *Chicago Flood Litigation*, 176 Ill.2d at 205-206. [Citations omitted throughout.] *See*

also Schiller v. Mitchell, 357 Ill. App. 3d 435, 442 (2d Dist. 2005) (quoting *Chicago Flood Litigation*).

The Complaint is devoid of any allegations establishing any physical intrusion of real property owned or occupied by Stericycle. The Complaint alleges only the receipt of voicemails associated with Alutto's business telephone number (Comp., para. 16) and e-mails to Alutto's business e-mail address. (Comp., para. 17). Neither the voicemails nor the e-mails establish any physical intrusion upon property owned by Stericycle (or, for that matter, property owned by Alutto), let alone a substantial interference impairing Stericycle's (or Alutto's) use and enjoyment of real property owned or occupied by them.

Plaintiff Alutto has similarly failed to allege a physical intrusion resulting in the substantial impairment of the use and enjoyment of real property owned or occupied by him. Alutto has alleged the receipt, via U.S. Mail, of one postcard and one letter on or around February 12, 2016 (Comp., pars. 13-15), and one postcard on or around March 29-30, 2016. The delivery to Alutto's residence of two postcards and one letter could not, as a matter of law, result in a substantial interference with the use and enjoyment of his property and did not cause him any physical discomfort. *See Schiller*, 357 Ill.App.3d at 441-442. Neither Plaintiff has alleged facts which, even taken as true, establish a claim for private nuisance.

B. Plaintiffs Have Failed To Allege A Theory Under Which Created Equal Or Harrington Could Be Held Vicariously Responsible For Any Nuisance.

Moreover, the factual allegations by which Plaintiffs seek to support their nuisance claims against Defendants fail to establish any basis for imposing liability upon Created Equal or Harrington. Plaintiffs allege that the voicemails and emails directed to Alutto at his business telephone and email were from "individuals affiliated with Created Equal, or other Defendants encouraged by Created Equal". (Comp., paras. 16, 17). They also allege that a postcard

delivered to Alutto's home was delivered by "individuals affiliated with Created Equal, or other Defendants encouraged by Created Equal". (Comp., para. 18). Plaintiffs, however, have failed to allege any legally cognizable theory under which Created Equal or Harrington can be charged with vicarious liability for the conduct of unnamed individuals alleged to be "affiliated" or "encouraged" by Created Equal but not alleged to be employed or acting as agents of Created Equal. *Alms v. Baum*, 343 Ill.App.3d 67, 74 (1st Dist. 2003). ("When an action is brought against a master based on allegedly negligent acts of the servant and no independent wrong is charged on behalf of the master, liability is entirely derivative, being founded upon the doctrine of *respondeat superior*. '[T]o impute the negligence of one person to another, such persons must stand in a relation of privity and there is no such thing as imputable negligence except in those cases where such a privity as master and servant or principal and agent exists.'" [Citations omitted.]

II. Plaintiffs' "Invasion of Privacy" Claim (Count II) Should Be Dismissed Pursuant To Section 2-615 Of The Code Of Civil Procedure For Failure To State A Claim.

A. As A Business Entity, Stericycle Does Not Possess A Right To Privacy.

Plaintiffs seek to state an invasion of privacy claim for the "false light in which Plaintiffs and Stericycle's Board members were placed." (Comp., para. 33). To the extent Count II of the Complaint purports to state an invasion of privacy claim on behalf of Stericycle, it must be dismissed. The right to privacy is *solely* an individual right, not one that belongs to a business. *See Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 359 Ill. App. 3d 872, 878 (Ill. App. Ct. 2d Dist. 2005) (stating that "business entities . . . do not have privacy rights"; interpreting statute that explicitly gave business entities privacy rights in specific, limited factual circumstances). Stericycle's false light invasion of privacy claim is additionally defective because, as discussed

infra, Plaintiffs have wholly failed to allege any of the elements of a false light invasion of privacy claim because they have not identified any statements by Defendants alleged to be false.

B. Plaintiffs Have Failed To State A Claim For False Light Invasion Of Privacy.

In order to state claim for false light invasion of privacy, a plaintiff must establish: (1) "the plaintiffs were placed in a false light before the public as a result of the defendants' actions"; (2) "the court must determine whether a trier of fact could decide that the false light in which the plaintiffs were placed would be highly offensive to a reasonable person" and (3) "the plaintiffs must allege and prove the defendants acted with actual malice". *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill.2d 1, 21 (1992). [Citation omitted.] *See also, Aroonsakul v. Shannon*, 279 Ill.App.3d 345, 349 (2nd Dist. 1996).

In the first instance, as previously discussed, Stericycle, a corporation, does not have privacy rights. Moreover, the allegations of Plaintiffs' complaint fail to demonstrate any "falsity", a prerequisite to satisfying any of the elements of a false light claim. The alleged false light is, "Even though Plaintiffs take no part whatsoever in any abortions and take no position on that subject or any of the activities of Planned Parenthood, Defendants' illegal campaign is nonetheless calculated to attempt to imply the contrary by labeling Plaintiffs as enablers of killing children." (Comp., para. 1). None of the statements alleged by Plaintiffs and attributed to Defendants, however, assert that Plaintiffs take part in performing abortions, but it is undisputed that Stericycle disposes of the fetal remains of abortion thereby enabling Planned Parenthood to continue performing abortions.

Plaintiffs further allege, "On information and belief, in early 2016, Created Equal learned that Stericycle provided certain medical waste services for Planned Parenthood." (Comp., para. 11). Plaintiffs further allege that Created Equal's website "alleges that Stericycle is 'Planned

Parenthood's main medical waste service provider in America.'" (Comp., para. 12). The Complaint alleges that Created Equal's website asks, "What if Stericycle were to stop doing the dirty work of Planned Parenthood" and answers, "Planned Parenthood would be unable to dispose of the babies they kill, and the murder of millions of children by Planned Parenthood would likely halt." (Comp., para. 12). Nowhere, however, do Plaintiffs deny that Stericycle provides "medical waste services" for Planned Parenthood, that Stericycle is Planned Parenthood's "main medical waste service provider" in America, or that, without the benefit of Stericycle's "medical waste services" Planned Parenthood would be "unable to dispose of the babies they kill."

Instead, Plaintiffs allege in a conclusory fashion, "Defendants acted with actual malice because they knew the statements they made concerning Plaintiffs and Stericycle's Board members were false or were made with reckless disregard for whether the statements were true." (Comp., para. 34). As previously noted, however, Plaintiffs fail to identify in their Complaint any purportedly false statement of fact concerning Plaintiffs made by Defendants (let alone a knowingly false statement or a statement made with reckless disregard for its truth or falsity).

Plaintiffs also allege that postcards Created Equal "mailed or caused to be mailed" "contained highly offensive statements that cast Stericycle, Mr. Alutto, and certain of Stericycle's Board members in a false light, including a statement that Plaintiffs "'enable[] killing children'" and included pictures of Alutto and "mutilated fetuses." (Comp, para. 13; Comp., Ex. 2). The postcard itself, however, reiterates Stericycle's (uncontroverted) "waste service provider" relationship with Planned Parenthood and references an apparently undisputed statement that, "According by the Ohio Attorney General's office, waste service provider that Stericycle disposes of fetal remains for Planned Parenthood facilities, despite contract language

specifically stipulating Stericycle cannot accept human remains, including aborted fetuses." The postcard continues, "So long as Stericycle disposes of Planned Parenthood's victims, they permit the killing to continue. Stericycle is enabling the killers among us." (Comp., Ex. 2). These assertions are a reiteration of Stericycle's business relationship with Planned Parenthood as its "waste service provider" and Defendants' belief that, without the benefit of Stericycle's "medical waste services," Planned Parenthood would be unable to continue in the abortion business. Although Plaintiffs' complain of the postcard's assertion that "Stericycle enables the killing of children," Plaintiffs have failed to allege that any factual statement included in the postcard is false, including the statements set forth in the postcard itself as the basis for that conclusion.

Plaintiffs additionally allege letters, emails, calls to Stericycle and Alutto (as well as unidentified Stericycle Board members) demanded that Stericycle discontinue its business relationship with Planned Parenthood (Comp., para. 14-19), but as previously noted, Plaintiffs do not deny the existence of Stericycle's business relationship with Planned Parenthood. Ultimately, aside from a constant refrain that Defendants' conduct is "unlawful," and even an assertion "on information and belief" that Defendants' conduct is criminal (Comp., para. 21), Plaintiffs have failed to allege any facts establishing a viable false light invasion of privacy claim.

III. Plaintiffs' Private Nuisance And "Invasion Of Privacy" Claims Should Be Dismissed Pursuant To Section 2-619(a)(9) of the Illinois Code Of Civil Procedure. The Conduct Alleged As The Basis For Those Claims Is Lawful Conduct Protected By The First Amendment.

The conduct of which Plaintiffs complain consists of: (a) a Facebook post (truthfully) identifying Stericycle as Planned Parenthood's medical waste provider and expressing the belief that, if Planned Parenthood was unable to "dispose of the babies they kill, and the murder of innocent children by Planned Parenthood would likely halt," providing contact information for

Alutto and asking people to contact Alutto to request that Stericycle discontinue its business relationship with Planned Parenthood (Comp., para. 12); (b) postcards and letters reiterating this link between Stericycle and Planned Parenthood, including photos of Alutto, certain Stericycle Board members and "mutilated fetuses" and stating, "Waste service provider Stericycle is enabling Planned Parenthood to kill babies by abortion" (Comp., para. 13); (c) a Facebook post providing Alutto's contact information and encouraging people to contact Stericycle's CEO (Alutto) to demand that Stericycle terminate its business relationship with Planned Parenthood (Comp., para. 14); (d) sending letters to Alutto and other Stericycle board members demanding that Stericycle discontinue business with Planned Parenthood (Comp., para. 15); (e) "encouraging" others to leave voice mails for Alutto demanding that Stericycle discontinue business with Planned Parenthood (Comp., para. 16); (f) "encouraging" others to send emails to Alutto demanding that Stericycle discontinue business with Planned Parenthood (Comp., para. 16); (g) distributing postcards to homes in Lincolnshire and Lake Forest, Illinois, including Alutto's home, reiterating the link between Stericycle and Planned Parenthood, with photos of Alutto and "mutilated fetuses", setting forth Alutto's contact information and asking people to contact Stericycle to demand discontinue business with Planned Parenthood (Comp., para. 18); and (h) driving a van through Lincolnshire and Lake Forest, Illinois with signs depicting photos of Alutto and "mutilated fetuses", setting forth Alutto's contact information and asking people to contact Stericycle to demand discontinue business with Planned Parenthood (Comp., para. 19). The United States Supreme Court, however, in addressing a factual situation analogous to the facts alleged by Plaintiffs, held that the courts may not enjoin "peaceful distribution of informational literature" by "[d]esignating the conduct as an invasion of privacy." *Org. for a*

Better Austin v. Keefe, 402 U.S. 415, 419-20 (1971). The same holds equally true for an attempt to enjoin protected expression by mis-labeling it as a private nuisance.

In *Keefe*, the defendant organization engaged "openly and vigorously in making the public aware of [Keefe's] real estate practices" which "were offensive to them." *Id.* at 419. The record and Court acknowledged that the informational campaign was, at least in part, aimed at "forcing" Keefe to sign an agreement not to engage in said offensive real estate practices. *Id.* Nonetheless, the Supreme Court held that the fact that "the expressions were intended to exercise a coercive impact on respondent does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper." *Id.*

In this case, as in *Keefe*, Defendants find certain of Plaintiffs' business practices offensive. As in *Keefe*, Defendants have engaged in a campaign to alert the public to those business practices, with the goal of inducing Plaintiffs to halt the offensive practices. *Id.* As in *Keefe*, Plaintiffs, seek to censor Defendants' expression by hiding behind private tort claims and ignoring the constitutional protections for free expression. As the Court stated in *Keefe*, however, "[n]o prior decisions support the claim that the interest of an individual in being free from public criticism of his business practices in pamphlets or leaflets warrants use of the injunctive power of a court." *Keefe*, 402 U.S. at 419. Since the conduct alleged as the basis of Plaintiffs' nuisance and invasion of privacy claims constitutes speech protected by the First Amendment, Plaintiffs claims must be dismissed.

IV. Plaintiffs' "Invasion Of Privacy" Claims Should Be Dismissed Pursuant To Section 2-619(a)(2) and (9) Of The Illinois Code Of Civil Procedure To The Extent That They Seek To Assert Claims On Behalf Of Unidentified Stericycle Board Members.

Plaintiffs' Complaint contains repeated references to "certain members of Stericycle's Board of Directors" (Comp., paras. 2, 13), "at least four of Stericycle's Board members" (Comp., para. 15); and "certain of [Stericycle's] officers and directors" (Comp., para. 20), and seeks relief on behalf of "any person known or believed to be a current or former employee, officer or director of Stericycle." (Comp., Prayer for Relief, paras. c, d, e). To the extent that Plaintiffs purport to assert any claims on behalf of any Stericycle Board member, officer, director, and current or former employee, those claims should be dismissed (and all such references stricken). Plaintiffs have no standing to sue on behalf of those unnamed individuals. *See Scachitti v. UBS Financial Services*, 215 Ill.2d 484, 493 (2005). ("A party lacking an interest in the controversy has no standing to sue." [Citation omitted.])

V. Plaintiffs' "Invasion Of Privacy" Claims Should Be Dismissed Pursuant To Section 2-619(a)(9) Of The Illinois Code Of Civil Procedure Because, In Light Of The Public Statements Made By The Ohio Attorney General, Plaintiffs Cannot Establish The "Malice" Element Of Their Claim.

As previously stated, in order to adequately allege a false light claim, Plaintiffs must allege false statements by Defendants regarding Plaintiffs and that Defendants made the statements "with actual malice, that is, with knowledge that the statement was false or with reckless disregard for whether the statement was true or false." *Aroonsakul*, 279 Ill.App.3d at 249, citing *Kolegas,* 154 Ill.2d at 17-18. In this case, Plaintiffs cannot demonstrate that Defendants acted with knowledge that the statements alleged by Plaintiffs to be contained in Created Equal's Facebook posts, postcards, letters and van signs were false, or that they made the statements with reckless disregard for whether they were true or false, since the statements were based on the publicly announced results of an investigation conducted by the Attorney

General of Ohio. The results of that investigation indicated, among other things: that Stericyle is responsible for the disposal of the bodies of aborted babies from Planned Parenthood clinics nationwide; that documents provided to the Ohio Attorney General from Planned Parenthood indicated that Stericycle disposed of Planned Parenthood's aborted fetuses; that, despite a contractual provision with respect to one Planned Parenthood location that Stericycle would not accept fetuses, according to Planned Parenthood "Stericycle out of Illinois is the company that they give the fetuses to, transport the fetuses;" and that Planned Parenthood's attorney confirmed that (aborted) fetuses were going to Stericycle. (Harrington Declaration, paras. 11-15). In addition, to this information, Harrington had received reports from eyewitnesses who observed (and provided photographic evidence) of Stericycle picking up waste from Planned Parenthood facilities. (Harrington Declaration, paras. 28-29). In view of the information publicly announced by the Ohio Attorney General regarding his investigation, as well as the other information available to Harrington, Plaintiffs cannot demonstrate that any statements by Defendants were made with knowledge that any of the complained of statements were false or made with reckless disregard for whether the statements were true or false." *See Aroonsakul*, 279 Ill.App.3d at 249.

VI. The Complaint Should Be Stricken Because It Is Not Properly Verified.

Plaintiffs' Complaint is verified by a person claiming "knowledge of the facts contained in this Complaint" identified as Stericycle's "EVP and General Counsel". The allegations of the Complaint, however, make clear that, unless the signing Stericycle "EVP and General Counsel" is a member of Alutto's household, he or she does not have personal knowledge of many of the facts alleged in the Complaint. (*See e.g.*, Comp., paras. 13, 15-19). Accordingly, the Complaint or at least the purported verification of the Complaint, should be stricken.

WHERERFORE, for the above and foregoing reasons, Defendants respectfully request that the Court dismissing Plaintiffs' Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jocelyn Floyd, an attorney with the Thomas More Society, certify that I caused this Motion to Dismiss to be served on Frank J. Favia, Jr., and Jason Marsico, Plaintiffs' attorneys of record, by e-mail at ffavia@sidley.com and jmarsico@sidley.com, respectively, on April 5, 2016.