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. Marcouiller, Judge Presiding**
CREATED EQUAL PAC, MARK HARRINGTON, and DOES 1 through 100, inclusive, **Defendants.**	)	

NOTICE OF MOTION

PLEASE TAKE NOTICE that at 9:00 a.m. on Thursday, June 2, 2016, counsel for Defendants will present Defendants' Unopposed Motion for Leave to File Motion to Dismiss Plaintiffs' Amended Complaint *Instanter* and Motion for Leave to File In Excess of 15 Pages, a copy of which is served herewith, including a copy of the Motion to Dismiss as Exhibit 1, at the already scheduled status hearing before the Honorable Margaret A. Marcouiller or any other judge sitting in her stead presiding over Courtroom C302 of the Lake County Courthouse located at 18 N. County St., Waukegan, Illinois, 60085.

Jocelyn Floyd

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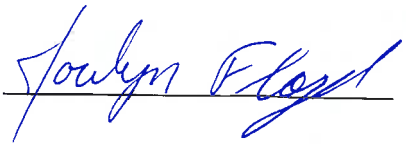
CERTIFICATE OF SERVICE

I, Jocelyn Floyd, an attorney of record in this matter, certify that I caused this Notice of Motion 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 May 26, 2016.



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DEFENDANTS' UNOPPOSED MOTION FOR LEAVE TO FILE MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT *INSTANTER* AND MOTION FOR LEAVE TO FILE IN EXCESS OF 15 PAGES

Defendants Created Equal PAC and Mark Harrington ("Defendants"), by their undersigned counsel, move that this Court grant them leave to file Defendants' Motion to Dismiss Plaintiffs' Amended Complaint ("Motion to Dismiss") *instanter* and in excess of 15 pages, and state in support as follows:

1. Defendants have communicated with Plaintiffs' counsel and been advised that they do not object to Defendants filing their Motion to Dismiss *instanter*, three days after this Court's deadline for Defendants' responsive pleading to Plaintiffs' Amended Complaint.

2. However, Defendants have not had the opportunity to discuss with Plaintiffs their position with regard to additional pages.

3. In light of the three separate causes of action (four separate claims) and the fundamental First Amendment concerns implicated both by the claims themselves and the types

of relief requested, Defendants cannot adequately brief this Court in 15 pages on the reasons they believe this Court should dismiss the Amended Complaint.

4. Defendants have spent a great deal of time revising their draft in order to shorten it as much as possible, but it has not been possible for Defendants to address all of the issues with Plaintiffs' Amended Complaint within this Court's 15 page limit. Any more revisions to attempt to shorten it further would serve as a disservice to this Court by failing to adequately explain the rationale for the arguments to dismiss.

5. Currently Defendants' Motion to Dismiss is 19 pages long. *See Exh. 1*, attached.

WHEREFORE Defendants respectfully request this Court grant them leave to file to file Defendants' Motion to Dismiss Plaintiffs' Amended Complaint in excess of 15 pages and three days late, *instanter*, and that it grant them all other relief to which they may be entitled on the premises.

Respectfully submitted,

Jocelyn Floyd
Counsel for Defendants

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CERTIFICATE OF SERVICE

I, Jocelyn Floyd, an attorney of record in this matter, certify that I caused this Motion 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 May 26, 2016.

Jocelyn Floyd

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

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DEFENDANTS' MOTION TO DISMISS AMENDED 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 "Defendants"), by their undersigned counsel and pursuant to Section 2-619.1 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-619.1, hereby move this Court to dismiss Plaintiffs' Amended Complaint with prejudice and, in support thereof, state as follows:

INTRODUCTION

In their Amended Complaint ("Complaint" or "A.C."), Plaintiffs, Stericycle, Inc. ("Stericycle"), and its Chief Executive Officer, Charles Alutto ("Alutto"), purport to state claims against Defendants for false light invasion of privacy (Alutto-Count I), intentional infliction of emotional distress ("IIED") (Alutto-Count II), and defamation (Alutto-Count III; Stericycle-Count IV). The Complaint, however, fails to allege facts establishing a colorable claim for relief under any of those legal theories. Moreover, notwithstanding endless conclusory assertions that Defendants' conduct is "unlawful" (*See* A.C., ¶¶ 2, 3, 9, 10), in fact that conduct is a lawful exercise of Defendants' constitutional rights, protected by the First Amendment.

EXHIBIT 1

STATEMENT OF FACTS

When Plaintiffs' rhetoric (*e.g.*, "Defendants have perpetrated an unlawful and falsehood-filled smear campaign in a deliberate effort to destroy [Plaintiffs'] reputations and business relationships" (A.C. 3)) and irrelevant allegations of criminal violations claimed "on information and belief" (A.C., ¶33), are stripped away, the facts upon which Plaintiffs rest their claims are:

1. Defendants distributed postcards "at the homes of residents in Lake Forest, Bannockburn, and Lincolnshire, Illinois," including "to Mr. Alutto's home in Lake Forest, and to the homes and offices of certain of Stericycle's Board members." (A.C., ¶¶23, 28, 36, 40; A.C. Ex. 4). Plaintiffs allege that the postcards "stated Alutto is a 'killer[]amongus'" (A.C., ¶28), "label[ed] him a '#killer[]amongus'" (A.C., ¶36), "alleged publicly that Mr. Alutto … was a 'killer[]amongus'" (A.C. ¶40), falsely stated that Alutto "is a '#killer[]amongus'" (A.C., ¶44) and falsely stated Stericycle "is a '#killer[]amongus'" (A.C. 49).

2. Defendants drove a van through local neighborhoods (Lake Forest, Bannockburn, and Lincolnshire), with a billboard "that contained a photo of Mr. Alutto and his name, home address, and office telephone number, side by side with graphic images of mutilated fetuses and the words 'killersamongus'" and "encouraged people to contact Mr. Alutto and demand that Stericycle terminate its business relationship with Planned Parenthood." (A. C., ¶29).

3. Defendants posted to Facebook a photo "displaying Mr. Alutto's home and home address along with one of the postcards delivered to homes" in his neighborhood." (A.C., ¶30).

Exhibit 4 to the Amended Complaint purports to be a copy of the postcards mentioned in #1 above and is comprised of two pages. (A.C. ¶23, "A copy of one such postcard is attached as Exhibit 4.") On the first page is a rectangular image that shows, left to right: (1) Alutto's picture with the caption "Stericycle CEO Charles Alutto" underneath, (2) headshots of four other individuals with names under the pictures, (3) a picture with the caption "Five Month Aborted Baby." Above the middle four headshots are the words "Stericycle Enables Killing Children"; below their names appears the website address "KillersAmongUs.org". The first page of Exhibit 4 also includes a copy of a document containing the following words:

#KILLERSAMONGUS7
Waste service provider **Stericycle** is enabling Planned Parenthood to kill babies by abortion.

Planned Parenthood depends on others to dispose of their victims' bodies. According to the Ohio Attorney General's office*, waste service provider **Stericycle** disposes of fetal remains for Planned Parenthood facilities, despite contractual language specifically stipulating **Stericycle** cannot accept human remains, including aborted fetuses.

So long as **Stericycle** disposes of Planned Parenthood's victims, they permit the killing to continue. **Stericycle** is enabling killers among us.

*Planned Parenthood Investigation Summary Regarding Disposal of Aborted Fetuses. (Emphasis in original.)

The second page of Exhibit 4 a rectangular image that mirrors the one on the first page, except that the far left image is labeled a 15 week aborted baby. The second page also includes a copy of a document with a picture of Alutto, a picture of what is identified as a 15 week aborted baby, and the following words juxtaposed with the images:

#KILLERSAMONGUS

[Image of Alutto]

Charles Alutto
CEO, Stericyle

CHARLES ALUTTO
ENABLES BABY KILLING
Alutto resides in our neighborhood:
1635 Paddock Ln, Lake Forest IL 60045

[picture identified as a 15 week aborted baby]

Take action! Contact Stericycle CEO Charles Alutto (847-607-2004).
Demand Stericycle stop doing the abortion industry's dirty work to enable them to kill preborn babies.

KillersAmongUs.org / #KillersAmongUs[1]

[1] Exhibit 4 also appears to include copies of the front and back of a business card for Defendant, Harrington, but it does not appear to reflect any words or images to which Plaintiffs object.

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 (2d 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 (2d Dist. 2005) (citations omitted). Both motions may be combined into a single motion, but the discussions of each must be specifically identified. *Howle v. Aqua Ill., Inc.*, 2012 IL App (4th) 120207, ¶ 75.

ARGUMENT

I. All of Plaintiffs' Claims are Wholly Based on First Amendment-Protected Speech and Therefore Should Be Dismissed Pursuant to §2-216(a)(9).

All of Plaintiffs' claims are predicated on Defendants' use of a website name "killersamongus.org," a Twitter hashtag "#killersamongus," and statements on website postings and leaflets (in the form of postcards) that claim Plaintiffs "enabl[e] killing children" by virtue of Stericycle's business relationship with Planned Parenthood ("PP"). All the statements made by Defendants are clearly tied to the abortion debate and are intended to initiate a boycott and public petition to influence Stericycle to stop its "collaboration with Planned Parenthood and the abortion industry though its collection, transportation and disposal of aborted children and the instruments used to kill them" (A.C., Ex. 1, p. 3), through a public campaign of people contacting Stericycle "to respectfully request [that] Stericycle discontinue providing Planned Parenthood with the services of collecting, transporting, and disposing of aborted children and the instruments used to kill them…." All of Defendants' speech is protected under the First Amendment.

A core principle of free speech "under our system of government is to invite dispute." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). In fact, speech may "best serve its high purpose" when it unsettles people and causes anger as it pushes for new ideas—which is *why* it is "protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. *Id.*

Following this principle, the Supreme Court has made it abundantly clear that speech in the public arena, about public figures or on matters of public concern, is always protected under the First Amendment absent "actual malice." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (requiring actual malice for defamation of public figures); *Time Inc. v. Hill*, 385 U.S. 374 (1967) (actual malice required for invasion of privacy claims where matter is of public interest); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988) (actual malice required for IIED claims made by public figures); *Snyder v. Phelps*, 562 U.S. 443 (2011) (actual malice required for IIED claims where matter is of public concern; defining public concern as anything "'fairly considered as relating to any matter of political, social, or other concern to the community'" (citation omitted)).[2]

Further, the Supreme Court has repeatedly made clear that the "fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Hustler*, 485 U.S. at 55 (publication of parody cartoon depicting drunken incest with plaintiff's mother); *see also Snyder*, 562 U.S. at 443 (Westboro Baptist Church protest of marine funeral with signs including "Thank God for Dead Soldiers," "Fags Doom Nations," and "You're Going to Hell"). In these and so many other cases, the Supreme Court has consistently proclaimed that we cherish "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks" on figures involved in such public issues. *N.Y. Times*, 376 U.S. at 270.

[2] As discussed in detail *infra*, Plaintiffs have failed to adequately allege facts in connection with any of their claims which, even if take as true, would establish actual malice.

With respect to the issue of leafletting, such as the distribution of the postcards upon which Plaintiffs' claims are predicated, and picketing, the Supreme Court has held that peaceful leafletting may not be enjoined and only prohibitions that target the picketing of a *single home* are permissible—general prohibitions of picketing in residential areas are not. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419-20 (1971) (public awareness campaign against objectionable business practices including "peaceful distribution of informational literature," may not be enjoined by "[d]esignating the conduct as an invasion of privacy"); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (noting narrowness of ordinance prohibiting picketing single home in that protesters were not fully barred; "They may enter [residential] neighborhoods, alone or in groups, even marching. . . . They may go door-to-door to proselytize their views. They may distribute literature in this manner . . . or through the mails. They may contact residents by telephone."); *see also Watchtower Bible Soc'y v. Village of Stratton*, 536 U.S. 150 (2002) (permit requirement for door-to-door solicitation unconstitutional).

The facts the Supreme Court addressed in *Keefe* are closely parallel to the situation here. There, the defendant group engaged "openly and vigorously in making the public aware of [Keefe's] real estate practices" which "were offensive to them." *Keefe*, 402 U.S. at 419. There, too, the informational campaign was aimed at "forcing" Keefe to agree to stope said offensive real estate practices. *Id.* 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.* The Court further stated that "[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.

All of Defendants' conduct, as alleged by Plaintiffs, fall within these First Amendment protections of expressing information to add to the social and cultural debate on abortion and, as

there are no facts to support a legal conclusion of actual malice (*see infra* §[***]), this Court should dismiss the Complaint as barred by the First Amendment.

II. Counts III and IV of the Amended Complaint Should Be Dismissed Pursuant to §2-615 Because Plaintiffs Have Not Adequately Pled Facts Which, Even if Taken as True, Establish Viable Defamation Claims.

"To state a defamation claim, a plaintiff must present facts showing that the defendant made a false statement about the plaintiff, that the defendant made an unprivileged publication of that statement to a third party, and that this publication caused damages." *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009) (citation omitted). Although Plaintiffs fail to specify, it appears that they seek to allege defamation *per se* claims.[3] (*See* A.C. ¶¶47, 52, alleging Defendants' statements damaged the reputations of Alutto and Stericycle "by imputing the commission of a crime" by them). Defamation *per se* requires that the harm be apparent on the face of the statement and that it fall within one of five categories, one of which is words that impute the commission of a crime. *Green*, 234 Ill. 2d at 491-92.

A. Plaintiffs Fail to Adequately Allege Statements of Fact Imputing the Commission of Crimes by Alutto or Stericycle.

Review of Exhibit 4 to the Complaint contradicts and disproves the allegations made by Plaintiffs. "[I]t is well established that exhibits attached to a complaint become a part of a complaint, and if there is any conflict between the factual matters in the exhibits and those alleged in the complaint, the factual matters in the exhibit control." *Coghlan v. Beck*, 2013 IL App (1st) 120891, ¶¶24, 46 (citation omitted). Here, Plaintiffs repeatedly allege that Defendants have "falsely claimed" that Plaintiffs are "#killersamongus." (A.C., ¶1; *see also* A.C. ¶28 (Defendants' postcards "stated Mr. Alutto is a '#killer[]among us'"); A.C., ¶36 (Defendants labeled Alutto a "'#killeramongus'"); A.C., ¶40 (Defendants' postcards "alleged publicly" that Alutto "was a '#killeramongus'"); A.C., ¶44 (Defendants falsely stated that Alutto is a "'#killeramongus'"); A.C.

[3] In order to allege defamation *per quod* claims, Plaintiffs would have to allege special damages (*Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 390 (2008)), which they have not attempted to do.

¶50 (Defendants falsely stated that Stericycle is a "'#killeramongus.'")).

However, the documents referenced by Plaintiffs and attached as Exhibit 4 include no such statements. Nowhere do Defendants assert that Alutto and Stericycle are "killers" or "killers among us." Rather, it is clear that "killersamongus.org" and "#killersamongus" refer to the website and Twitter hashtag that direct viewers to further information at that website or identified by that hashtag. Contrary to Plaintiffs' repeated inaccurate assertions, the postcards do not state that Plaintiffs are killers.

To the extent the postcards assert any "killing" has been done by anyone, they identify Planned Parenthood and other members of "the abortion industry," not Plaintiffs, as the "killers," stating Planned Parenthood "kill[s] babies by abortion." (A.C., Ex. 4). The only claim made about either Plaintiff is that, by disposing fetal remains, they "enable" the "killers among us", and thus encourage listeners to "Demand Stericycle stop doing the abortion industry's dirty work to enable them to kill preborn babies." (*Id.*)

Moreover, even if Defendants had made statements that Plaintiffs were "killers among us," in the context of that abortion debate, such a statement would not qualify as defamation. *See Van Dyun v. Smith*, 173 Ill. App. 3d 523, 537-538 (3d Dist. 1988) (pro-life "Wanted" posters saying abortion doctor engaged in "killing" not actionable statements; held to be opinion in social debate, rather than factual assertion of criminal activity). "[T]he first amendment prohibits defamation actions based on loose, figurative language that no reasonable person would believe presented facts." *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill.2d 381, 397 (2008) (citations omitted). Courts have consistently held that a statement which, from its context, cannot reasonably be interpreted as a statement of fact that a plaintiff has committed a crime, does not give rise to a claim for defamation. *See Imperial Apparel*, 227 Ill.2d at 397-398 (collecting cases); *see also*, *Coughlan* at ¶¶40, 48-50 ("It should also be noted that '[o]nly statements capable of being proven true or false are actionable; opinions are not.'"; statements that former organization president engaged in "a conflict of interest" and operated a "fraud machine", not actionable.) (citation omitted); *Van Dyun*, 173 Ill. App. 3d at 536.

In *Van Dyun*, a pro-life advocate made public statements about an abortionist's practice to call attention to the horrors of abortion. *Id.* There, the defendant displayed posters with the abortionist's face under a "Wanted" label, with text saying she was wanted "'for prenatal killing in violation of the Hippocratic Oath and Geneva Code,'" that she "participated in killing for profit," and that her "*modus operandi* is a small round tube attached to a powerful suction machine that tears the developing child from limb to limb." *Id.* at 527. While acknowledging that "killing" is easily understood as the ending of a life, the Appellate Court noted that its "difficulty, however, is that the type of killing being referred to in this instance is not . . . objectively capable of being proven or disproven." *Id.* at 537. Recognizing that the alleged defamatory statement must be viewed in context, the Appellate Court noted that "[i]t becomes apparent when looking at the 'Wanted' poster in its entirety that defendant's use of the word 'killing' is his description of what takes place during an abortion procedure. We are not prepared to find that the word 'killing' in this context is verifiable and, thus, a defamatory statement of fact." *Id.* The court further looked at the social context of the post-*Roe v. Wade* debate on whether abortion, in fact, terminates a human life, and found it "quite clear that defendant's use of the word 'killing' merely describes his opinion of the results of an abortion procedure." *Id.*

> Regardless of which position may ultimately be considered correct, at the present we find that the average reasonable reader of the 'Wanted' poster would not believe as an actual fact that plaintiff has been involved in killing, as that word is commonly understood by our society. In fact, we believe that the average reader would quickly realize that the central theme of the 'Wanted' poster

was to express the opinion that abortion *should* be considered killing and thus a crime. *Id.* at 538.

Considered in their context, as they must be, none of the "statements" referenced by Plaintiffs could be reasonably construed to indicate, as a fact, that Alutto or Stericycle engaged in an actual crime related to the killing of babies or children. At most, they suggest non-actionable opinions that, by providing waste disposal services to Planned Parenthood and other members of the abortion industry, Alutto and Stericycle facilitate the industry's provision of abortions, which "enables" "killing" "babies" or "children." If, as the Appellate Court held in *Van Dyun*, calling

someone a "killer" in the context of the abortion debate is not an actionable, factual statement, then stating in that same context that someone "enables killing" or "enables killers" clearly cannot constitute a factual imputation of criminal activity actionable as defamation *per se*.

Just as in *Van Dyun*, Defendants believe that abortion ends a human life and they oppose those who participate in or enable it. Accordingly, as they are entitled to do under the First Amendment, through their website, Facebook page, and postcards, Defendants are expressing their opposition to abortion, their beliefs that abortion terminates a human life, and that Plaintiffs, by their actions, "enable" Planned Parenthood and other members of the abortion industry "to kill preborn babies" and to "kill babies by abortion." The pictures of aborted fetuses accompanying the statement that Plaintiffs "enable[] killing children" make it clear that the statement "merely describes [Defendants] opinion[s] of the results of an abortion procedure." In context, the assertion "enables killing children" does not constitute an assertion of a verifiable statement of fact that Plaintiffs have committed a crime, but rather an opinion that cannot constitute a basis for a defamation claim.

B. Defendants' Statements are Subject to an Innocent Construction.

A statement is not "actionable *per se* if it is reasonably capable of an innocent construction." *Green*, 234 Ill. 2d at 499 (citation omitted). The innocent-construction rule requires the court to "consider the statement in context and give the words of the statement, and any implications arising therefrom, their natural and obvious meaning." *Id.* "Whether a statement is capable of an innocent construction is a question of law." *Anderson v. Vanden Dorpel*, 172 Ill. 2d 399, 413 (1996) (citations omitted).

Plaintiffs' claims of defamation *per se* fail because the statements, when viewed in full context, are capable of innocent construction. As noted *supra* at §II.A, all of Defendants' statements regarding Plaintiffs are clearly made in the context the on-going national abortion debate. While the debate rages on as to whether or not any abortion *should* be criminalized, the fact remains that, at this point in time, it is not. Further, the postcards and the websites make it

clear that Stericycle's business relationship *enables* Planned Parenthood to commit abortions—that is, PP and other members of the abortion industry are the "killers," not Stericycle. Therefore, the reasonable construction of the statements is that Plaintiffs have a business relationship with "killers" (providers of legal abortion procedures), not that Plaintiffs themselves are committing any crime involving killing or any crime related to "enabling" a crime involving killing.

C. Plaintiffs Fail To Adequately Allege Falsity.

Illinois defamation law places the burden on the plaintiff to show that the statement made by defendant is false. *Green v. Rogers*, 234 Ill. 2d 478, 491 (2009). Further, First Amendment jurisprudence requires that all plaintiffs, whether private or public figures, prove falsity of the allegedly defamatory statement when the topic is one of public concern. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776.

To the extent that Defendants' statements that Plaintiffs enable killing could be considered statements of fact (which, as discussed above, they cannot be), Plaintiffs' defamation claims fail because the allegations of the Complaint show the purportedly defamatory statements are true. Plaintiffs allege, "Defendants are supporters of the anti-abortion movement and have targeted Stericycle because Stericicyle, as part of its business of providing medical waste services, includes among its many clients a number of Planned Parenthood locations." (A.C., ¶1). Although Plaintiffs assert Stericycle has a strict nationwide policy against "accepting fetuses as 'medical waste'" and that it has taken some steps to enforce the Waste Acceptance Policy ("WAP") of its Service Agreement (A.C., ¶¶12-16, 18-20), Plaintiffs acknowledge the Ohio Attorney General's finding that a Planned Parenthood location used Stericycle to dispose of its aborted fetuses. (A.C., ¶17). Stericycle does not deny or dispute the Ohio Attorney General's finding, they do not deny they have accepted fetuses as medical waste, and they do not deny that they have accepted the instruments used in abortions. (*See* A.C., Ex. 3). Nor do they deny that they *continue* to accept fetal remains so long as such remains are not "complete" or that, as a result of their 400 terminated contracts, they have no relationship whatsoever with any abortion provider As the allegations of

the Complaint acknowledge, Stericycle "enables" abortion by providing waste disposal services to abortion providers.

D. Plaintiffs Do Not Allege Facts Indicating Actual Malice.

Where plaintiffs are public figures, they must show that the defendant made a false statement with actual malice—knowledge of falsity or reckless disregard as to truth or falsity. *Imperial Apparel, Ltd. v. Cosmo's Designer Direct, Inc.*, 227 Ill. 2d 381, 394 (2008) (citing *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964)). As evidenced by their attempt to plead actual malice, Plaintiffs concede that, as a major publicly-traded corporation and its CEO, they are at least limited-purpose public figures who must prove actual malice to succeed. (*Id.*, ¶¶46, 51).

Plaintiffs allege Defendants acted with actual malice, but they allege no facts at all to support that legal conclusion. (A.C., ¶¶46, 51). In fact, as noted above, Plaintiffs acknowledge that the Ohio Attorney General released a report in which it "alleged that a single Planned Parenthood location had for a stated limited period of time 'use[d] only Stericycle to dispose of its aborted fetuses.'" (A.C., ¶17). Plaintiffs nowhere allege that Defendants had or should have had knowledge of it ending its business relationship with the Planned Parenthood location named in the Ohio Attorney General's report, or with any other abortion provider locations.

In an apparent effort to suggest that Defendants acted with actual malice, Plaintiffs allege they took steps to enforce Stericyle's WAP (which, as discussed *supra* at §III, fails in any event to establish that Stericycle did not accept any fetal parts as waste). (*Id.*, ¶¶12-16, 18-20). However, even if Stericycle's WAP did prohibit acceptance of any type of fetal remains as waste, the existence of that policy does not support any actual malice by Defendants because Plaintiffs fail to allege any reason why Defendants would have any knowledge of the WAP or of Stericycle's purported efforts to enforce it. In fact, Defendants gave Plaintiffs an opportunity to provide them with such information but Plaintiffs refused to respond. Back in February 2016, Defendants wrote a letter to Alutto (A.C., ¶25) asking Stericycle to completely sever its ties with Planned Parenthood. Despite the fact that this letter came after the issuance of the report of the Ohio Attorney General's

investigation, and around the time Stericycle alleges it was renewing steps to enforce "its policy of not accepting fetuses" (A.C., ¶¶17-20), Plaintiffs fail to allege that Stericycle informed Defendants of this fact in response to their letter. Even if Plaintiffs' allegations regarding the WAP and attempts to enforce it constituted information demonstrating the falsity of Defendants' purportedly defamatory statements (which they do not), Plaintiffs have completely failed to allege that Defendants knew, or acted in reckless disregard of such knowledge. In the absence of such allegations, Plaintiffs have come nowhere near adequately pleading that Defendants acted with actual malice.

III. Plaintiffs' Defamation Claims are Subject to Dismissal Pursuant to §2-619(a)(9) Because "Other Affirmative Matter" Demonstrates that the Purportedly Defamatory Statements are not False.

Plaintiffs state that they have terminated certain business relationships, including with some PP locations. But they do not deny that they continue business relationships with others. Further, as previously discussed, Plaintiffs rely on Stericycle's Service Agreement, containing its WAP, as support for an (unstated) inference that Stericycle does not transport fetal remains. (A.C., ¶13, Ex. 1). However, the policy itself merely states that Stericycle does not accept "*complete* human remains, including heads, full torsos, and fetuses." (*Id.* (emphasis added)). On the other hand, the policy goes on to confirm that Stericycle *does* accept "Pathological Waste"—defined as "Human or animal body parts, organs, tissues and surgical specimen[s] . . . ." (*Id.*)

As Defendants note on their website, Stericycle's insistence that it does not accept "fetuses" appears to be nothing more than a semantic ploy. It is incontrovertible that, in the process of abortion, fetuses are often dismembered into small, sometimes unidentifiable pieces of tissue. They may be devoid of "complete human remains," but nonetheless are human remains defined by the WAP as "pathological waste." Decl. of Mark Harrington at ¶19. As noted above, Stericycle does not affirmatively allege it does not accept any fetal parts (it does not even deny it has accepted "fetuses"—just that it has a policy against it). Moreover, when asked by Defendants' counsel to

clarify the point, and deny that it accepts fetal parts as waste, Stericycle did not respond. Decl. of Mark Harrington at ¶30, 32.

IV. Alutto's Invasion of Privacy False Light Claim (Count I) Should Be Dismissed Pursuant to §2-615 for Failure to State a Claim. In the Alternative, Alutto's False Light Claim Should Be Dismissed Pursuant to §2-619(a)(9).

A. Alutto's Invasion of Privacy Claim Should Be Dismissed Pursuant to §2-615

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 Broad. Corp.*, 154 Ill.2d 1, 21 (1992) (citation omitted); s*ee also Aroonsakul v. Shannon*, 279 Ill.App.3d 345, 349 (2d Dist. 1996).

Alutto's claim of false light is predicated on the same postcards discussed *supra* at Argument II. (A.C., ¶36).[4] However, both falsity and actual malice are prerequisites to stating a claim for false light invasion of privacy. As detailed *supra* in Arguments II.C and II.D, the Complaint fails to adequately allege facts supporting either falsity or actual malice. Moreover, as discussed *infra* at Argument V.A, Plaintiff has not alleged facts showing that Defendants' conduct is "truly extreme and outrageous." Nor has he alleged facts showing that the conduct is "highly offensive to a reasonable person." In the absence of facts adequately alleging falsity and actual malice, Alutto has failed to allege a viable false light invasion of privacy claim.

B. Alutto's Invasion of Privacy Claim Should Be Dismissed Pursuant to § 2-619(a)(9).

Alutto's invasion of privacy claim is also subject to dismissal pursuant to Section 2-619(a)(9) because, as discussed *supra* at Argument III, "other affirmative matter" demonstrates

[4] Alutto repeats the demonstrably incorrect assertion that Defendants labelled him a "#killeramongus". (A.C., ¶36).

that Alutto's attempts to rely on Stericycle's WAP as establishing the falsity of the statements upon which his invasion of privacy claim rests are without merit.

V. Alutto's IIED Claim (Count II) Should Be Dismissed Pursuant to §2-615 for Failure to State a Claim.

Alutto has not even remotely alleged facts sufficing to his support a claim for IIED. To constitute IIED, the defendant's conduct (1) must be "truly extreme and outrageous," (2) must be done with the intent to cause severe emotional distress or with the knowledge that there is a high probability that the conduct will cause it, and (3) result in severe emotional distress. *McGrath v. Fahey*, 126 Ill. 2d 78, 86 (1988).

A. Defendants' Conduct Is Neither Extreme Nor Outrageous.

"Extreme and outrageous" is an objective standard, requiring that the action "go beyond all possible bounds of decency." *Kolegas*, 154 Ill. 2d at 20 (finding extreme mockery by DJs on a public radio station of callers's immediate family members suffering from a devastating disease to be IIED); *see also Public Finance Corp. v. Davis*, 66 Ill. 2d 85, 94 (1976) (no outrageous conduct where "no allegations of abusive or threatening language or conduct coercive in nature").

The case of *Van Dyun v. Smith* is again particularly instructive on this point. 173 Ill. App. 3d 523 (1988). As previously discussed, the defendant in *Van Dyun* was a pro-life advocate who used "Wanted" posters to inform the public of the doctor's practice of abortions. *Id.* at 526. The Appellate Court explicitly noted that it considered the posters "repulsive, explicit, unnecessary and in bad taste," but concluded that the First Amendment protected them. *Id.* at 538. The Appellate Court, however, reversed the dismissal of the plaintiff's IIED claim based solely on the fact that plaintiff alleged other conduct by defendant, including defendant following the plaintiff in her car multiple times, confronting her at an airport and tortiously "interfer[ing] with her ingress and egress . . . on at least two occasions," picketing her residence, and confronting her at her home and job. *Id.* The Appellate Court specifically observed that "[i]f the only alleged actions were the contents and distribution of the two posters, we would be inclined to affirm the trial court's dismissal." *Id.* at 533.

Completely aside from the fact that Defendants' postcards, akin to the posters in *Van Dyun*, are constitutionally protected under the First Amendment, they are not enough to sustain a claim of IIED. "Graphic material," the assertions reflected on them ("enables killing children" and "#killersamongus") and the encouragement by Defendants to contact Alutto to "[d]emand Stericycle stop doing the abortion industry's dirty work to enable them to kill preborn babies" is not conduce constitution extreme and outrageous conduct that goes beyond all possible bounds of decency. Defendants have not approached or confronted Alutto at his home or business, have not blocked his travel, and have not picketed his residence. Rather, Defendants engaged in First Amendment protected public expression of opinion and information regarding the business practices of the company Alutto runs.

B. Plaintiffs Fail to Allege Facts Establishing that Defendants Intended to Cause Alutto Severe Emotional Distress or Acted With the Knowledge that There Was a High Probability the Conduct Would Cause It.

Plaintiffs allege, as a conclusion, that "Defendants knew there was a strong possibility that their actions would cause severe emotional distress to Mr. Alutto." (A.C., ¶41). Plaintiffs, however, allege no facts in support of that assertion. Defendants' conduct was not intended or calculated to cause Alutto "severe emotional distress" but instead was explicitly intended to persuade him to end Stericycle's involvement in the abortion industry as a waste service provider

C. Defendants' Conduct Did Not Cause Plaintiff Extreme Emotional Distress.

Severe emotional distress must be "such that 'no reasonable man could be expected to endure it.'" *Van Dyun*, 173 Ill. App. 3d at 534 (quoting Restatement (Second) of Torts § 46, comment j (1965); citing *Public Finance Corp. v. Davis*, 66 Ill. 2d 85, 90 (1976))(noting that "[a]lthough fright, horror, grief, shame, humiliation, worry, etc. may fall within the ambit of the term 'emotional distress,' these mental conditions alone are not actionable"). While contemporaneous physical impact or injury are not required to prove "severe" emotional distress, *Knierim v. Izzo*, 22 Ill. 2d 73 (1961), courts have rarely found emotional distress to be severe in the context of IIED without some sort of physical manifestation of the distress, or medical

treatment for the mental anguish. *See, e.g., Graham v. Commonwealth Edison Co.*, 318 Ill. App. 3d 736, 740 (1st Dist. 2000) (finding severe emotional distress where plaintiff saw a psychologist); *Farnor v. Irmco Corp.*, 73 Ill. App. 3d 851, 857 (1st Dist. 1979) (finding that while plaintiff "was nervous and exhausted . . . and suffered the aggravation of a preexisting ulcer, she was able to perform her duties satisfactorily," and was justifiably upset, "the intensity and duration of her distress were not such as would . . . be the sort of severe upset to support a cause of action for [IIED]").

The only allegations in the Complaint regarding the purported emotional distress suffered by Alutto are two wholly conclusory assertions that Defendants' conduct caused "emotional, mental and physical distress" (A.C., ¶34), and "severe emotional distress," (A.C., ¶42), and an allegation that having to "repeatedly" "address the falsehoods Created Equal has spread publicly about him" has caused him to experience "intense embarrassment." (A.C., ¶42). Embarrassment, even if intense, is a far cry from the extremity of distress that "no reasonable man could be expected to endure" and is, in fact, even less than the "fright, horror, grief, [or] shame" that the Illinois Supreme Court has held *not* actionable for IIED. In addition to which, the First Amendment encompasses speech that has "profound unsettling effects." *Terminiello*, *surpa* §I.

VI. In No Event Are Plaintiffs Entitled to Injunctive Relief or "Reimbursement of Their Legal Fees."

A. Plaintiffs Are Not Entitled To Injunctive Relief.

In connection with each Count of their Complaint, Plaintiffs ask for injunctive relief. Each request for injunctive relief is a request that the Court impose prior restraints on Defendants' speech, which plainly violate the First Amendment. "[S]o long as the means [of expression] are peaceful," any injunction that "imposes a prior restraint on speech and publication, constitutes an impermissible restraint on *First Amendment* rights." *Keefe*, 402 U.S. at 418-19; *see also New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) ("There is a heavy presumption against the constitutionality of prior restraints due to the grave potential such regulations have to harm to the First Amendment"; finding even "national security" insufficient to support an injunction) (*quoting*

Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)); *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir. 1996) (injunction against speech on matters of public interest requires showing that the "publication must threaten an interest more fundamental than the First Amendment itself."). This is because "the injunction operates, not to redress alleged private wrongs, but to suppress . . . distribution of literature." *Keefe,* 402 U.S. at 418-19.

B. Plaintiffs Are Not Entitled To "Reimbursement Of Their Legal Fees."

Additionally, in connection with each count of the Complaint, Plaintiffs ask for "reimbursement of their legal fees." (A.C., pp. 10-13). All of Plaintiffs' claims are common law tort claims which give no right to the reimbursement of legal fees. Under the "American Rule," all parties are responsible for the payment of their own legal fees and, except as provided under 735 ILCS 5/5-108, all parties are responsible for the payment of their own costs. *See, e.g.*, *Sandholm v. Kuecker*, 2012 IL 111443, ¶64 ("Illinois follows the 'American rule,' which prohibits prevailing parties from recovering their attorney fees from the losing party, absent express statutory or contractual provisions").

VII. There Is No Basis for Holding Defendants' Liable for the Actions of Others.

Throughout their Complaint, Plaintiffs seek to impose liability upon Defendants for the acts of others. However, vicarious liability can be attributed to Defendants only if there is a basis to apply the doctrine of *respondeat superior*. *Alms v. Baum*, 343 Ill.App.3d 67, 74 (1st Dist. 2003). To impute the behavior of one person to another, "'such persons must stand in relation of privity'" and requires "'such a privity as master and servant or principal and agent.'" *Id.* (citations omitted).

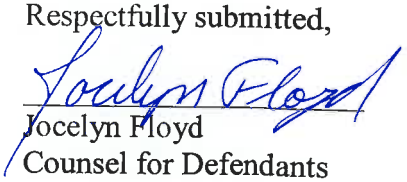
Plaintiffs allege actions by "individuals affiliated with Created Equal, or other Defendants encouraged by Created Equal" as the basis of holding Defendants liable. (*See, e.g.*, A.C. ¶26-29). They also allege Defendants "encouraged visitors [to Created Equal's website] to contact Mr. Alutto and demand that Stericycle discontinue its business relationship with Planned Parenthood," (A.C., ¶2), and "[o]n information and belief, Does 1-100 were either encouraged by Created Equal to perpetrate this unlawful campaign or did so at the behest of Created Equal" (A.C., ¶10).

There is, however, no legal basis for holding Defendants liable for conduct they "encouraged," that was undertaken at Defendants' "behest," or by individuals merely "affiliated" with Defendants. These do not constitute the allegation of facts which would support a basis for the imposition of vicarious liability upon Defendants. Plaintiffs 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 otherwise acting as legally authorized agents of Created Equal.

CONCLUSION

Wherefore, for the above and foregoing reasons, Defendants respectfully request that this Court dismiss Plaintiffs' Amended Complaint in its entirety, with prejudice.

Respectfully submitted,



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