No. 130137

IN THE ILLINOIS SUPREME COURT

MAURO GLORIOSO,

Plaintiff-Appellee

v.

SUN-TIMES MEDIA HOLDINGS, LLC, *et al.,*

Defendants-Appellants.

On Appeal from the Illinois Appellate Court District
Case No. 21-1526, there heard on review of an Order of the
Circuit Court of Cook County, Case No. 2021 L 00090
Hon. Patricia O'Brien Sheahan, Judge Presiding

BRIEF OF THE PLAINTIFF-APPELLEE MAURO GLORIOSO

ORAL ARGUMENT REQUESTED

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ISSUES PRESENTED FOR REVIEW

1. Did Defendants meet their burden to show that their false news articles sought favorable government action, result, or outcome so as to be within the scope of the Illinois Citizen Participation Act ("ICPA")?

    A. Does the ICPA protect false news articles which do not seek participation in government or petition the government or electorate for relief?

    B. Does the ICPA protect false news articles that merely report on a matter of public concern?

2. Did Defendants meet their burden of showing that Plaintiff's lawsuit was based *solely* upon Defendants engaging in protected activity under the ICPA?

    A. Did Defendants meet their burden to prove that Plaintiff's lawsuit was meritless?

    B. Did Defendants waive their argument that proof of a plaintiff's retaliation against Defendants' speech is not required in an ICPA motion to dismiss by consistently arguing to the contrary in the lower courts?

    C. Did Defendants show that Plaintiff's lawsuit was in retaliation for Defendants' speech in furtherance of participation in government?

STANDARD OF REVIEW

Review by this Court as to whether plaintiff's suit should have been dismissed as a SLAPP pursuant to the ICPA, is *de novo*. *Sandholm v. Kuecker*, 2012 IL 111443, ¶ 55.

STATEMENT OF FACTS

A. The Anonymous OEIG Complaint

On November 13, 2019, an anonymous complaint ("OEIG Complaint") was filed with the Illinois Office of Executive Inspector General ("OEIG") regarding the Illinois Property Tax Appeal Board ("PTAB"). SR 81-89.[1] The Complaint concerned a property

[1] References to the Supporting Record Defendants filed in the appellate court are preceded by the reference "SR" followed by a page reference. References to the Appellate Court's initial May 18, 2023 decision, designated as AC RECORD PART 2, are preceded by the

tax appeal of Chicago's Trump International Hotel and Tower ("Trump Tower Tax Appeal").[2] SR 85. Steven Waggoner, PTAB's chief administrative law judge ("ALJ") was named as the lead respondent. SR 82-83. It also named four other PTAB employees: Mauro Glorioso ("Glorioso"), PTAB's executive director and general counsel,[3] Katherine Patti ("Patti"), PTAB's Deputy Chief ALJ, and PTAB ALJ's Simeon Nockov ("Nockov") and Jennifer Vesely ("Vesely"). *Id*.[4] Glorioso had a 20-year tenure as a PTAB employee and no history of any misconduct or acts showing a want of integrity. SR 349.

The OEIG Complaint alleged that Nockov, Patti, and Vesley wrote a decision on the Trump Tower Tax Appeal, finding that no reduction was warranted. *Id.* Waggoner was then-Acting Executive Director and Chief ALJ of PTAB and Glorioso was Chairman of the Board. *Id*. at 85-86. The Complaint alleged that at some later unidentified time, Glorioso remarked to Waggoner that he "wanted a large reduction in the assessment because the taxpayer/owner was … the President of the United States." *Id*. Neither the basis

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reference "AC Pt. 2," followed by a paragraph designation. References to the Appellate Court's September 18, 2023 decision on rehearing, designated as AC RECORD PART 1, are preceded by the reference "AC Pt. 1," followed by a paragraph designation. References to Defendant's Rule 306(a)(9) Petition for Leave to Appeal in the Appellate Court, are preceded by the reference "Def't 306(a) Pet." followed by a page reference.

[2] Trump Tower is owned by 401 North Wabash Venture, LLC. (SR 255).

[3] Contrary to Defendants' Brief, Glorioso never held the title of Executive Director of the Cook County Property Tax Appeal Board. (Def't Br. at 1.)

[4] A Final Report of OEIG regarding the Complaint and OEIG's investigation of its allegations identifies the supervisor of PTAB ALJ's as "PTAB Employee 1" and the supervisor of Des Plaines PTAB ALJ's as "PTAB Employee 2". The report noted that PTAB's ALJ's have "full authority over the conduct of the hearing and the responsibility for submission of the matter to the Board for decision," and that the Board makes a final determination in its own name based on a majority vote. SR 311- 312. It identified Glorioso as PTAB's Executive Director, responsible for carrying out PTAB obligations, effectuating its mission statement, and complying with legal and regulatory reporting requirements. *Id.*

of the complainant's purported knowledge of the remark, nor the context in which it was made were alleged. *Id*. at 85-87. The complainant did not claim to have witnessed the acts or statements alleged in the OEIG Complaint. *Id.*

Some unidentified time later, *Waggoner* allegedly told Nockov that he should withdraw his written decision and rewrite it to give a large assessment reduction because the President was the owner and to "make America great again." *Id* at 86. The OEIG Complaint alleged that Nockov "*complied with Waggoner's command* and withdrew his written decision." *Id*. (emphasis added.) Nockov purportedly told PTAB employees that Waggoner had sent him emails and had telephone conversations with him telling Nockov the reasons for the reduction. *Id*.

The OEIG Complaint alleged that Nockov, with assistance from Patti and Vesely, rewrote his decision in the Trump Tower Appeal "*to comply with Waggoner's political directives*." *Id*. (emphasis added.) The new decision was entered in PTAB's database on June 29, 2018 but a PTAB employee *was directed by Waggoner* to withdraw it. *Id*. (emphasis added.) *Waggoner* allegedly withdrew the decision, took over the case, and rewrote it himself. *Id*. Nockov purportedly confirmed that Waggoner found the property warranted an assessment reduction of "many millions of dollars," which the complainant concluded was "consistent with Glorioso's directive," though no "directive" of Glorioso was set forth in the OEIG Complaint and no facts were alleged regarding Nockov's purported confirmation or the basis of the complainant's knowledge. *Id*.

The OEIG Complaint alleged that honest services and professionalism were denied to citizens by the prohibited unethical political activities and conflicts of interest perpetrated by Waggoner, Glorioso and the PTAB employees who participated in the

scheme, though no activities or conflicts of Glorioso were set forth. SR 87. It further alleged that "Waggoner, for prohibited political reasons, made sure that the decision in the [Trump Tower Appeal] would result in a large reduction, and that "Glorioso, Nockov, Patti and Vesely participated in this scheme." *Id*. No participation of Glorioso was alleged. The OEIG Complaint further alleged that by failing to report *Waggoner's conduct*, and engaging in it, Nockov, Patti and Vesely misappropriated State resources and were using "*Waggoner's unlawful political pressure and ethical lapses* as leverage to protect them from disciplinary actions." *Id*. (Emphasis added).

B. Novak and Sun-Times Publish a Story naming Glorioso as the Individual Responsible for the Scheme Alleged in the OEIG Complaint

On February 7, 2020, Defendants published a story on the OEIG Complaint in the Chicago Sun-Times electronic edition. A sub-heading for the story declared: "**State inspector general, Pritzker administration are looking into allegation a Republican state agency head pressured staff to slash by $1M the $2.5M in property taxes Donald Trump paid in 2012.**" SR 29 (emphasis in original). The OEIG Complaint did not contain allegations that Glorioso was a Republican, that he pressured PTAB staff to slash Trump Tower's property taxes, demanded that its taxes be cut, much less by $1 million, or that PTAB staff take any action relating to the Trump Tower Tax Appeal. SR 82-89.

Defendants reported that the investigations "center(ed") on whether a "Republican state official pressured his staff to cut the president a break." SR 81-89. Defendants published that the investigations were the "result of an anonymous complaint the inspector general's office received last fall that Mauro Glorioso, the executive director of [PTAB] pressured his staff to rule in the president's favor, rejecting the staff's decision to deny Trump any refund." SR 30. Nothing in the OEIG Complaint referenced Glorioso pressuring

PTAB staff to rule in the president's favor or rejecting any staff decision. SR 82-89. The article also stated that, "Glorioso is a Republican attorney from Westchester the Democratic governor appointed as the state property tax agency's executive director last summer" and included an oversized photograph of Glorioso. *Id*. The OEIG Complaint did not reference Glorioso's residence. The article made no mention of Wagner's multiple acts alleged in the OEIG Complaint and instead, depicted Glorioso as the sole respondent.

The article was republished on February 9, 2020 in Sun-Times' Sunday print edition with a front page headline: **PROBING PREZ'S CHICAGO TOWER TAX APPEAL** and subheading: "**Two investigations looking into allegation that a Republican state agency head pressured staff to slash property taxes Trump paid in 2012**." SR 37 (emphasis in original). On page 4, there was the subheading, "**State inspector, Pritzker administration looking into allegation a Republican state agency head pressured staff to slash $2.5M property taxes Trump paid in 2012 to $1M."** SR 38 (emphasis in original). Otherwise, the article republished the prior electronic version, including Glorioso's photograph. *Id*. at 38-39. At no point in the Articles did defendants request any relief from the State or suggest that any action be taken by the government or the public. SR 37-39.

C. Defendants Report on Glorioso's Termination from PTAB and Tell Readers That Glorioso, in Fact, Engaged in the Conduct They Falsely Reported

On September 23, 2020, seven months after Defendants' publication, Glorioso received notice of his imminent termination from PTAB, was told that the governor had decided to go in a "different direction," and that his last day at PTAB would be October

23. SR 316, 339, 347. On October 5, 2020, PTAB communicated Glorioso's termination and last day of employment to PTAB Staff. SR 316-17, 328, 339.

Defendants published a second news story concerning Glorioso on October 9, 2020. SR 41-47. The heading read: "**Pritzker dumps official who pushed for Trump to get $1 million refund on Chicago tower's taxes."** SR 41 (emphasis in original).[5] A subheading communicated that Glorioso was under state investigation "**over his Trump Tower recommendation**." *Id*. (emphasis in original) Each page of the online article contained the header, "*J.B. Pritzker dumps Mauro Glorioso, who pushed for $1 million property tax break for Chicago Trump tower – Chicago Sun-Times*." SR 41-47 (emphasis added). The article contained a full-page photo of Glorioso below the header. *Id*. at 43. It also included a hyperlink to Defendants' February 7th article. SR 42.

Defendants reported that Governor Pritzker was dumping "an Illinois official [identified as Glorioso] who is under investigation for trying to force a state agency to give President Donald J. Trump a refund of more than $1 million on the property taxes he paid on his Chicago skyscraper. ..." SR 41. Defendants published that the OEIG Complaint stated that "Glorioso ordered the agency to approve the $1 million payout for Trump, rejecting a staff report that found no valid reason to support the refund. SR 42. No such allegations were in the Complaint. SR 81-89. Defendants reported, "Glorioso, executive director and general counsel for [PTAB] will be out of his job as of Thursday as the Trump Case "continu(es) to cast a cloud over [PTAB]." *Id*. at 42. Defendants also published: "Any tax refund for Trump would come out of property taxes to the city of Chicago and eight

[5] Although Defendants refer to Glorioso's termination as a "resignation" (Def't Br. at 12), their record citation refers to Glorioso being "terminated." (SR 347, attached to Defendants' appendix as A163).

other government agencies, the Chicago Public Schools losing the biggest chunk of money: more than $540,000 if the president gets what Glorioso wants." SR 44.

The' article stated of Glorioso, "The 64-year-old Westchester resident and staunch Republican rejected a report from hearing officer Simeon Nockov, who found that Trump didn't merit a refund because Burke's law firm didn't present sufficient evidence to support one." (SR 44, 51.) Nothing in the OEIG Complaint referred to Glorioso's political party affiliation or his rejection of Nockov's report. SR 81-89. Defendants also reported that "a new report from PTAB's chief administrative law judge, Steven Waggoner, now says Trump is entitled to a refund because the property was over-assessed in 2011, but made no mention of the OEIG Complaint's multiple allegations against Waggoner. SR 44, 86.

The article was republished with a front-page byline in the Sun-Times Sunday print edition: "**Gov Axes Official Who Pushed for $1M Tax Refund on Trump Tower"** and the subheading, "**Mauro Glorioso, a Westchester Republican who Pritzker appointed to head the Illinois Property Tax Appeal Board, is under state investigation over his recommendation."** SR 49 (emphasis in original). On page 18, another headline declared: "**PRITZKER DUMPS OFFICIAL WHO PUSHED FOR TRUMP TO GET $1M REFUND ON TOWER'S TAXES."** SR 50 (emphasis in original). The October 9th article was then republished in full.[6]

D. Glorioso Sues Novak and Sun-Times for Defamation and the Court Denies Defendants' Combined Motion to Dismiss

[6] Defendants' February and October 2020 articles concerning Glorioso are collectively referred to herein as the "Articles."

On January 5, 2021, one month prior to the running of the statute of limitations on Defendants' February 2020 Articles, Glorioso filed a Complaint alleging that they constituted defamation *per quod* and that Defendants' October 2020 Articles were defamatory *per se*. SR 1-51. Glorioso also alleged counts for false light invasion of privacy and intentional infliction of emotional distress. *Id*. Defendants filed a combined motion to dismiss pursuant to 735 5/2-615, 2-619, and 2-619.1 and supporting brief. (SR 52-111.) Defendants argued that the Articles were substantially true, constituted fair reports, were capable of innocent constructions, constituted non-actionable opinions, and also claimed that Glorioso did not sufficiently allege actual malice or special damages. *Id*.

After full briefing, the court found that Defendants' Articles, when compared with the OEIG Complaint they purported to be reporting on, were misleading, not substantially true (SR 148-51.) With respect to allegedly pressuring or instructing of PTAB employees to rewrite the Trump Tower decision, the court found that the OEIG Complaint attributed that conduct to Steven Waggoner, not Glorioso. *Id*. The Court found that "in looking at the OEIG Complaint, it is clear that the Defendants' reporting on the related investigation is not consistent with the "gist" or "sting" of the allegations therein." (SR 151) The court further found that Defendants' Articles conveyed an "erroneous impression to the ordinary reader regarding the allegations against Glorioso and investigation into the OEIG Complaint." (SR 155.)

The court also rejected Defendants' arguments with respect to non-actionable opinion and innocent construction. (SR 145, 151-52). The court applied *Tuite v. Corbitt*, 224 Ill.2d 490, 512 (2006) and *Solaia Tech., LLC. V. Specialty Pbl'g Co*., 221 Ill.2d 558, 580 (2006) and found that contrary to the content of the OEIG Complaint, Defendants'

October 2020 Articles presented defendants' statements regarding a Glorioso-ordered, politically based million-dollar Trump Tower property tax benefit as a "fact" and inferred that Glorioso would be to blame for such an outcome. *Id*. Based upon *Tuite* and *Solaia*, the court declined to "*strain to find an unnatural innocent meaning for words when a defamatory meaning is far more reasonable*" and rejected Defendants' innocent construction argument. *Id*. (emphasis added.)

In finding that the Articles were similarly not protected by the fair report privilege, the court found: "[h]aving conveyed an erroneous impression to the ordinary reader regarding the allegations against Glorioso and investigation into the OEIG Complaint, defendants are not entitled to the protection afforded by the fair report privilege." (SR 155.) The court also denied defendants' arguments that the *per quod* counts did not sufficiently allege special damages and that the Complaint failed to allege actual malice. (SR 156-157.)

E. Defendants' Second Motion to Dismiss

More than 60 days after the trial court's Memorandum Opinion and Order, Defendants filed a new motion to dismiss, claiming that Glorioso lawsuit was a "SLAPP"[7] barred by the ICPA. SR 159-219. Although it was filed without leave of court and constituted a second motion to dismiss after the court had already found that Glorioso's Complaint had merit, the court considered the motion. SR 221, 363.

F. After Glorioso's Termination, PTAB Unanimously Grants Trump Tower a Property Tax Reduction

On June 8, 2021, nine months after Glorioso's notice of termination, PTAB issued a unanimous Final Administrative Decision, granting a $6,364,933 property tax assessment

[7] Strategic lawsuit against public participation. 735 ILCS 110/5.

reduction to Trump Tower, substantially more than what Defendants falsely published Glorioso "pressured PTAB staff" to award and would take money away from Chicago schools. SR 255-80. The Illinois Appellate Court affirmed PTAB's decision in *Cook County Board of Review v. Illinois Property Tax Appeal Board et al*, 2023 IL App (1st) 210799-U at ¶¶16-18, 37-42.

G. OEIG Finds That the Anonymous OEIG Complaint is "Unfounded"

After Defendants' second motion to dismiss was fully briefed (SR 220-35; 281-302), OEIG issued a Final Report regarding its investigation of the OEIG Complaint and a second investigation involving Glorioso which had not been initiated at the time of Glorioso's notice of termination. SR 310-349. It found that the OEIG Complaint was categorically "**unfounded**" and all content regarding OEIG's investigation of its allegations was redacted. SR 312-15, 319-21, 335-38 (emphasis in original). The Executive Ethics Commission of Illinois redacts information from Final Reports when it "*relates to allegations against a person who was found not to have committed a violation.*" SR 310, 333 (emphasis added).

Defendants moved to supplement their SLAPP motion to dismiss with the Final Report and Sun-Times publicly reported that the OEIG Complaint was determined to be "unfounded" (SR 303-08).[8] In their motion, Defendants simply stated that "several pages" of the Final Report were redacted due to non-identified "unfounded allegations." SR 305.

[8] Sun-Times reported on September 24, 2021 but did not concede in its motion or briefs: "**Complaint that state official pushed for Trump tax break ruled "unfounded** (emphasis in original)." Sun-Times published: "A complaint that a lawyer who headed a state agency that rules on property tax appeals pressured his staff to give former President Donald Trump a $1 million tax break on Chicago's Trump Tower was "unfounded," the Illinois Office of Executive Inspector General has determined." (SR 352.)

Defendants argued that the Final Report's details regarding a previously undisclosed second investigation, regarding Glorioso deleting emails from his PTAB desktop computer after he (i) had produced them to OEIG; (ii) had been assured by OEIG that it did not require further documents relating to the OEIG Complaint; and (iii) had been notified of his termination from PTAB, somehow showed that his Complaint regarding Defendants' Articles and the OEIG Complaint, was a retaliatory SLAPP. SR 305.

H. The OEIG Final Report Includes Content Regarding a Second OEIG Investigation, Unknown to Glorioso When he Filed his Lawsuit

By October 8, 2020, preparations were in process at PTAB to bring Glorioso's selected successor "up to speed" for his assumption of duties. (SR 340.) Notwithstanding his prior notice of termination, on October 14, 2020 Glorioso was removed from PTAB, one week before his designated "last day," after an employee reported that emails had been removed from Glorioso's PTAB computer's inbox and trash, including but not limited to those regarding the Trump Tower property tax appeal. A litigation hold notice had been circulated to PTAB employees on February 20, 2020, instructing them to maintain all materials related to the Trump Tower Appeal. SR 320.[9]

Prior to the time of the "deletions," Glorioso had produced all of his emails concerning the Trump Tower Tax Appeal to OEIG. SR 318, 347. He knew at the time that PTAB's email server was backed up nightly and that deletion of emails from his

[9] The Final Report states that Glorioso was removed from office and PTAB's network on October 14, 2020 after the deleted emails were reported to PTAB's chairman. SR 339. OEIG received a complaint regarding the alleged emails on October 15, 2020 and commenced a second investigation on that conduct notwithstanding that Glorioso was no longer a state employee. SR 311, 321, 326, 330, 341. Glorioso did not receive notice that the Second Complaint had been filed until he was provided a copy of the Final Report in August, 2021. SR 327, 330.

computer's inbox did not delete them from PTAB's records. SR 328, 340, 347. Prior to the deletions, OEIG told Glorioso that removal or deletion of documents from Glorioso's computer did not make them unavailable to OEIG, that it had his documents, and did not require further materials from him. SR 326-28, 330, 346, 348. However, in its Final Report issued in September 2021, one year *after* Glorioso was notified of his termination, OEIG found that Glorioso violated PTAB policy by deleting emails from his PTAB computer and recommended that he not be rehired by the State. SR 303, 317, 321.[10] [11]

After the Final Report was provided to Glorioso's counsel, William Quinlan in August 2021 for review and comment prior to its September, 2021 release in the form of a redacted summary. Quinlan urged that the determination that Glorioso intentionally destroyed PTAB emails and files on his PTAB desktop computer was erroneous as prior to the deletion, Glorioso knew that the emails had been backed up by PTAB and had been expressly told by OEIG that it had his emails and did not need further materials from him. SR 327, 329, 346-47. Quinlan noted that the Report acknowledged that the emails had been backed-up and recovered and that OEIG confirmed that they were "identical or highly similar to the emails it already obtained and … did not affect the outcome of the investigation of the First [OEIG] Complaint." SR 318-19, 327. Glorioso was also informed at his September 29, 2020 OEIG interview that OEIG had all of the documents relating to

[10] Defendants refer to OEIG's recommendation as an "employment bar" or "ban." Def't Br. at 12.

[11] Defendants represent that the Final Report was issued on May 25, 2021. (Def't Br. at 5.) However, it was not released until September of 2021, following receipt of Glorioso's September 9 Affidavit and attorney Quinlan's letter response of that date. (SR 325-332, 346-349.) It was first provided to Quinlan and Glorioso for their review and comment on or about August 17, 2021 (SR 326).

the OEIG Complaint and that he did not have to retain copies, including emails. SR 328-29. Glorioso so attested in a supporting Affidavit. SR 346-49. After receiving OEIG's assurances and instructions from PTAB's IT department, Glorioso deleted items from his PTAB computer prior to it going to his successor. SR 348.

I. The Court's Ruling on Defendants' ICPA Motion to Dismiss

On October 29, 2021, the trial court denied Defendants' second combined motion. The court found that the ICPA motion should have been included in Defendants' initial 2-619 motion but elected to consider the motion's merits. (SR 363.) The court, *inter alia*, held that defendants did not prove that Glorioso's Complaint was meritless, citing *Sandholm v. Kuecker*, 2012 IL 111443, ¶33 and *Goral v. Kulys*, 2014 IL App (1st) at ¶¶ 32, 34, 38, 40:

> To dismiss the complaint under the Act, defendants have the initial burden to establish two elements – first, that their 'acts were in furtherance of their right to petition, speak, associate, or otherwise participate in government to obtain favorable government action;' and second, that the complaint is 'solely based on, related to, or in response to the defendants' acts in furtherance. (citations omitted). To satisfy the second prong, defendants must show the complaint lacks merit and was filed in retaliation for the defendants' protected activities.
>
> At this pleading stage, defendants have not established the subject complaint is meritless. Indeed, the Court previously denied defendants' section 2-619.1 motion to dismiss, which in of itself is evidence the complaint is not meritless. Moreover, to argue the complaint lacks merit, defendants have re-asserted the same arguments previously raised in their section 2-619.1 motion to dismiss. … The court previously denied such arguments in its order dated May 25, 2021. As will be discussed *infra*, the court reaffirms the denial of such arguments today. (SR 363-64.)

The court again rejected the Defendants' defense of substantial truth ("As the court explained in the previous order, the articles in their entirety including 'the highlight of the articles and the pertinent angle of [them] convey an erroneous message,'" and "a

reasonable jury could find that defendants misleadingly overstated plaintiff's involvement … by attributing all reported conduct to the plaintiff.)" (SR 365.) With respect to fair report, the court specifically found:

> A reasonable jury could find the articles erroneously conveyed the impression that plaintiff was the main participant of the scheme by omitting or misplacing certain allegations from the OEIG Complaint (i.e., conduct attributable to Waggoner, identifying information about others involved). The OEIG Complaint simply does not suggest Glorioso was the architect of the alleged scheme, nor does it highlight Glorioso' s culpability relative to other named individuals. Therefore, the Court finds Novak's articles were inaccurate when compared to the OEIG Complaint. (SR 366-367.)

The court further cited Restatement of Torts, §611, cmmt.f: "The reporter is not privileged under this Section to make additions of his own that would convey a defamatory impression, nor to impute corrupt motives to anyone, nor to indict expressly or by inuendo the veracity or integrity of any of the parties." (SR 367-68.) The court found that "the erroneous message of the subject articles was a combined product of Novak's omission of certain information and Novak's addition of his own assumption regarding Glorioso' s relative culpability. *Id*. It also found that defendants failed to demonstrate a basis for dismissal of Glorioso's Complaint based upon the innocent construction doctrine:

> Defendants seem to suggest some possible innocent construction of the articles but none that relates or rebuts the clear implications of the articles suggesting that plaintiff was the most responsible individual for the outcome of the Trump Tower Appeal. Courts are not required to strain to find an unnatural innocent meaning for words when a defamatory meaning is far more reasonable. *Solaia Tech* at 580.

SR 366. The court, citing *Sandholm*, thus found that Defendants did not demonstrate that Glorioso's Complaint was meritless and did not address Defendants' retaliation claim. SR 363-64. The court rejected Defendants' arguments that special damages were not

sufficiently pled and that Glorioso had to allege that Governor Pritzker read the Articles. SR 368.

The appellate court granted Defendants Rule 306(a)(9) Petition for Leave to pursue an interlocutory appeal of the trial court's Order denying their SLAPP motion. (Def't 306(a) Pet. at 1-30). Following full briefing, the court unanimously affirmed the trial court's Order, holding that Defendants failed to show that Glorioso's lawsuit was a meritless, retaliatory, SLAPP. (AC Pt. 2, ¶¶ 67-72, 79-87, 102-05, 107-09). The court further found that there was a question of fact whether Defendants' news articles sought favorable government action. *Id*. at ¶102. Citing *Ryan v. Fox Television Stations, Inc.,* 2012 IL App (1st) 122517 and *Hytel Group, Inc. v. Butler*, 405 Ill. App. 3d 113 (1st Dist. 2010), the court also rejected Defendants' retaliation argument. AC Pt. 2 at ¶112-13. The court found that the lawsuit was filed approximately 11 months after the publication of the Defendants' February 2020 Articles, "shortly before the running of the statute of limitations," and that the timing of Glorioso's lawsuit did "not indicate an attempt to silence the Sun-Times future reporting on Glorioso or PTAB." *Id*. at ¶113. The court further found that the approximately three months between the Defendants' October 2020 Articles and the lawsuit similarly also did not suggest retaliation. *Id*. In addition, the court found that the Complaint's prayer for relief, just over the jurisdictional minimum for the circuit court's law division, did not evidence that the lawsuit was retaliatory. *Id*., citing *Ryan* at ¶24 ("demanding damages in the millions for alleged defamation is a classic SLAPP scenario,") and *Hytel* at 126 (retaliation is shown where extraordinarily high damages are sought and are not supported by the facts pled). The court also rejected Defendants' argument that emails Defendants subsequently obtained, which were not referenced in their

Articles, supported retaliation. AC Pt. 2 at ¶114. The court found that none of the emails constituted an admission of the whistleblower's claims and that Glorioso's knowledge and summary of the OEIG Complaint's allegations did not show that his lawsuit was retaliatory. *Id*.

Defendants filed a Petition for Rehearing which was granted and on September 18, 2023, a revised decision was issued under the same case number, again affirming the trial court's order in all regards. (AC Pt. 1, ¶¶ 5, 53, 58-59, 61-64, 68-69). Notwithstanding that he joined in the court's initial decision unanimously affirming the denial of Defendants' SLAPP motion in all regards, Justice Hyman dissented on rehearing. (*Id.* at ¶¶ 71-108.)

SUMMARY OF ARGUMENT

As the Appellate Court correctly found, for the ICPA to apply, Defendants have the burden to prove (i) that the Defendants acts were "in furtherance of their right to petition, speak, associate or otherwise participate in the government to obtain favorable government action" and (ii) that Glorioso's suit was meritless and retaliatory. (AC Pt.1 ¶42). Only if Defendants meet their burden, would Glorioso have to prove by clear and convincing evidence that the Defendants acting were not genuinely aimed at solely procuring favorable government action. (AC Pt.1 ¶43).Defendants did not meet their burden to prove the first two elements -- Defendants' false news Articles were not in furtherance of their right to petition or otherwise participate in the government to obtain favorable government action and Glorioso's lawsuit is not meritless.

At its core, Defendants' brief asks this Court to judicially amend the ICPA. Knowing that their Articles did not constitute participation in government and did not seek governmental relief as required by the Act, they ask this Court to judicially expand the

scope of the ICPA to immunize media speech generally on matters of public concern. The ICPA, however, was never intended to serve as an extra layer of speech rights and protections for the benefit of the media. Nor does it enhance general speech rights — its name and substance both emphasize that the Act protects speech and acts in furtherance of citizen participation in government. 735 ILCS 110/15. The stated purpose of the ICPA is 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*." 735 ILCS 110/5 (emphasis added).

Defendants misconstrue the ICPA as it has been interpreted and applied since the Court's decision in *Sandholm*. There, this Court clarified that "the description of a SLAPP in section 5 [of the ICPA] mirrors the traditional definition of a SLAPP as a meritless lawsuit *intended to chill participation in government* through delay, expense, and distraction." 2012 IL 111443 at ¶44 (emphasis added). See *Goral v Kulys*, 2014 IL App (1st) 133326 at ¶ 61 ("The Act excludes from immunity those acts that are 'not genuinely aimed at procuring favorable government action, result, or outcome.'" 735 ILCS 110/15). "The [ICPA] was intended to protect individuals from lawsuits designed to prevent them from exercising their political rights." *Goral* at ¶ 32. By the ICPA's express language and this Court's pronouncements in *Sandholm*, where speech is not genuinely aimed at procuring favorable government action, result, or outcome, it is not shielded by the Act.

Defendants also failed to meet their burden to show that Glorioso's complaint was meritless and retaliatory. If a plaintiff's lawsuit genuinely seeks redress for damages from defamation, even if the defendants' actions were genuinely aimed at procuring favorable government action, result, or outcome, … plaintiff's suit is still not subject to dismissal

under the Act. *Sandholm* at ¶53. Glorioso's suit genuinely sought redress for damages from defamation and other wrongs as the trial court (twice) and the Appellate Court both held.

Defendants' Articles falsely reported to thousands of readers that Glorioso spearheaded a corrupt scheme to funnel a more than $1 million warranted property tax reduction to Trump Tower, based solely upon political allegiance. Defendants fabricated this story notwithstanding their knowledge that another individual was expressly alleged in the OEIG Complaint to have committed the acts. Contrary to Defendants' argument, they did not merely publish that Glorioso was "under investigation," nor was that the gist of their publications. (Def't Br. at 1, 5-6, 15, 20-21, 26, 28, 40-41.) The Articles charged Glorioso with committing acts in furtherance of a corrupt scheme involving the wrongful diversion of public funds, which the OIEG Complaint attributed to another person. Defendants further published content to thousands of readers that Glorioso, in fact, committed the acts they falsely reported. (SR 311-15, 319-21, 334-38, 342-45, 358-59.)

Defendants' belated ICPA motion was never well-founded because their Articles did not genuinely seek participation in government or government relief – they -falsely reported news, defaming Glorioso throughout the State and across the internet. As the trial and appellate courts repeatedly found, Defendants failed to show that Glorioso's lawsuit was meritless and that his Complaint was filed in retaliation for Defendants' claimed protected speech. Pursuant to *Sandholm*, Glorioso's lawsuit is the antithesis of a SLAPP.

The record firmly supports the lower courts' determinations that Defendants critically failed to demonstrate that Glorioso's lawsuit was meritless and that their articles were substantially true, constituted fair reports, or were reasonably capable of innocent constructions. Nonetheless, Defendants reach to attribute error through magnifying certain

language the courts used to explain their findings. For example, defendants emphasize that the appellate court described a SLAPP movant's burden as showing that the speech at issue was "solely" in furtherance of its political speech. (Def't Br. at 17, 23-24.) However, the record demonstrates that the word "solely," was immaterial to the court's findings. The court found that there was a question of fact whether defendants' speech constituted speech in furtherance of participation in government and explained that while "news reporting could include the goal of favorable government action as we found in *Ryan*, the facts of this case do not unquestionably lead us to the same result." AC Pt. 1 at ¶53.

Defendants similarly take issue with the court's use of the word "could," in its analysis of the innocent construction rule. Defendants claim that by saying that a reasonable jury "could" find that defendants' articles misrepresented the provisions of the OEIG Complaint and falsely attributed certain allegations to Glorioso, the court impermissibly applied a balancing of constructions. (Def't Br. at 39-43.) Critically, the lower courts never found that an innocent construction of Defendants' Articles was reasonable, a necessary predicate for applying an innocent construction. The trial court found that a "reasonable reader, in context, would take [Defendants'] words … to mean that Novak uncovered facts through his own investigation showing that Glorioso was a corrupt official, hijacking a PTAB tax appeal in a $1 million scheme, to further a political, not legal agenda" because they were not included in the OEIG Complaint defendants purported to be reporting on. (SR 151; AC Pt. 1 at ¶¶44, 71-72, 107-09; AC Pt. 2 at ¶¶58-59.) The court expressly recognized that a statement is not defamatory *per se* and is not actionable if it is reasonably capable of an innocent construction, but concluded, "this Court will not 'strain to find an unnatural innocent meaning for words when a defamatory

meaning is far more reasonable. *Solia Tech., LLC v. Specialty Pbl'g Co.*, 221 Ill.2d 558, 580 (2006).'" (SR 152, 366.) The appellate court found that the lower court's defamatory reading the Defendants' Articles was reasonable and supported by the record and that Defendants failed to prove that Glorioso's lawsuit was meritless. (AC Pt. 1 at ¶¶44, 71-72, 107-09; AC Pt. 2 at ¶¶58-59.)

Much of Defendants' Brief is premised on an argument they failed to raise in the lower courts, that a separate showing of retaliation is not necessary under the ICPA because any meritless lawsuit is retaliatory. In the courts below, Defendants consistently argued that Glorioso's lawsuit was in retaliation for their protected speech, and therefore a SLAPP. Defendants cannot now complain of the determination of an issue they affirmatively raised and argued in the courts below. Moreover, because Glorioso's lawsuit genuinely sought redress for damages from defamation and other wrongs and was not meritless, the ICPA does not apply and their retaliation argument is irrelevant. *Sandholm* at ¶53.

ARGUMENT

I. THE ICPA DOES NOT BAR GLORIOSO'S LAWSUIT

A. DEFENDANTS DID NOT SEEK FAVORABLE GOVERNMENT ACTION, RESULT OR OUTCOME

Defendants disregard that their Articles did not seek favorable government relief; they aggressively defamed Glorioso through fabrications masquerading as "news," falsely embellished an unfounded anonymous OEIG Complaint, and then told readers that Glorioso, in fact, engaged in the alleged acts, including unethical conduct not even alleged in that Complaint.

Defendants argue that reporting official investigations into whether PTAB's Executive Director improperly influenced the Trump Tower Tax Appeal is the "kind of

activity that the legislature sought to protect" in enacting the ICPA, citing *Goral*, 2014 IL App (1st) 133326 at ¶36. (Def't Br. at 17.) *Goral* not only does *not* stand for this proposition, it emphasizes that the "necessary hallmark of a SLAPP lawsuit … is that defendants' actions must be genuinely aimed at procuring favorable government action," an element entirely absent in this case. *Id*. at ¶61.

Contrary to Defendants' argument, in *Goral*, the publication did not involve "reporting on the fact of an investigation" (Def't Br. at 5, 15, 20.) At issue were blog articles challenging a political candidate's eligibility for office, not a news story. *Goral* at ¶3. The court found that the blogger's posts questioning plaintiff's qualifications to run for alderman, were political expressions in furtherance of his right to speak and participate in government through an appeal to the electorate, as expressly protected in the ICPA. *Id.* at ¶36. As the court found, the first prong to be established in a SLAPP motion to dismiss is "whether Defendant's acts were in furtherance of his right to speak and participate in government. *Id*. at ¶36; Accord, *Garrido v. Arena*, 2013 IL App (1st) 120466 at ¶¶3, 5-6 (negative advertisements critical of aldermanic candidate were in furtherance of participation in government as appeals to voters). Unlike *Goral* and *Garrido*, Glorioso was not a candidate running for office, nor did Defendants' Articles appeal to the government or the electorate for relief or action regarding his qualifications. The investigation they claimed to be reporting on was ongoing and Defendants took no position as to its outcome.

Ryan v. Fox Television Stations, Inc., 2012 IL App (1st) 120005, demonstrates the distinction between news reporting and speech related to government participation protected through the ICPA. Although Defendants cite *Ryan*, they disregard its facts and holding. There, a television series of news reports charged that several circuit court judges

repeatedly left their courthouses early, prior to the end of the workday. *Id*. at ¶ 1. Contrary to Defendants' argument, *Ryan* does not hold that a false report regarding a government investigation constitutes speech protected by the ICPA. (Def't Br. at 21.)

The *Ryan* court expressly found that the media reports at issue were protected by the ICPA *not* because they were news reports concerning public officials or public issues, but because the reports were specifically aimed at procuring favorable government action: "Perhaps *most importantly*, the report sought comment from the Illinois Supreme Court and Chief Judge Evans on the investigation's findings an urged them to take action. Such activity is well within the scope of the Act." *Id*. at ¶19 (emphasis added); Cf, *Hammons v. Society of Permanent Cosmetic Professionals*, 2012 IL App (1st) 102644 at ¶22 (speech posted on publicly disseminated blog critical of plaintiff's services in the permanent makeup industry and charging unsanitary conditions, was not in furtherance of the right to participate in government and therefore did not implicate the ICPA. "This case does not have the necessary hallmark of a SLAPP lawsuit which is that defendants' actions must be genuinely aimed at procuring favorable government action…").

Defendants reach to *Satkar Hospitality, Inc. v. Cook County Bd*., 2011 WL 4431029, *5 (N.D. Ill. September 21, 2011), claiming that it stands for the proposition that a news report on a matter of public concern is protected under the ICPA (Def't PLA at 2; Def't Br. at 22). However, that unreported memorandum decision was based upon a pre-*Sandholm* interpretation through which the district court speculated that "an objective person" could reasonably expect that "following defendants' news reports, the government … would call for an investigation into whether the Board's appeals process was tainted by

corruption." *Satkar* at *18.[12] *Satkar*'s reliance on speculation under a "sham" analysis conflicts with this Court's decision in *Sandholm*. When this Court expressly rejected the *Noerr-Pennington* "sham exception" in ICPA cases, it substituted in its place the requirement that a Defendant prove that the plaintiff's lawsuit is meritless: "If a plaintiff's complaint genuinely seeks redress for damages from defamation or other intentional torts and, thus, does not constitute a SLAPP, it is irrelevant whether the defendants' actions were 'genuinely aimed at procuring favorable government action, result, or outcome.' Thus, plaintiff's suit would not be subject to dismissal under the Act." *Id*. at ¶53.

Notwithstanding Defendants' argument, subjective speculation concerning what an objective person "could" expect is not applied in Illinois ICPA cases. The ICPA applies when a lawsuit is filed solely based upon defendant's petitioning conduct. *Id*; *Ryan* at ¶18. Accord, *Bock & Hatch, L.L.C. v. McGuireWoods, LLP*, 2017 IL App (1st) 160294-U, (blog posts on a law firm's website summarizing cases decided by the United States Court of Appeals for the Seventh Circuit did not reveal any advocacy of readily discernable political activity and were not the type of activity that the legislature sought to protect in the ICPA). *Id*. at ¶15. See also, *Trudeau v. ConsumerAffairs.com*, 2011 U.S. Dist. LEXIS 99852, at *19-21 (N.D. Ill. Sep. 6, 2011) involving a complaint based upon a news article reporting on multiple consumer fraud cases and judgments entered against the plaintiff. The court

[12] *Satkar* applied the *Noerr-Pennington* "sham" standard in determining whether the ICPA required dismissal. In *Sandholm*, this court specifically rejected the "sham" test's efficacy in ICPA cases. 2012 IL 111443 at ¶¶ 52-53. As this Court found, "The trouble with the standard as written, however, is that if it is applied to the letter then the Act would mandate dismissal of every lawsuit that implicated a defendant's first amendment activities regardless of whether the plaintiff's claims were meritorious or not, essentially creating absolute immunity for torts committed while exercising first amendment rights." *Sandholm* at ¶¶45, 51.

held that the complaint was not subject to dismissal under the ICPA as in the article the defendant publisher did not seek relief from government:

> "(I)t is disingenuous to claim that defendants were attempting to influence government action or gain public support by authoring and publishing a purely informative report on an appellate court decision. No reasonable person would consider the article to have been an act of participation in the government process or expect the article to influence the electorate to take some unspecified action with respect to consumer protection. … Because defendants' statements about Trudeau in the article were not genuinely aimed at procuring favorable government action, the CPA does not bar Trudeau's suit."

Id. at **12-13.

Not once in Defendants' Articles is there any express or implied request for governmental relief. Although the Articles published a quote from a spokesperson of the governor, it was merely reported on the status of the ongoing investigation. Defendants did not demand, petition, advocate or suggest that the government or citizens do anything, much less take any position regarding the on-going investigation.

B. THE ICPA DOES NOT IMMUNIZE SPEECH CONCERNING PUBLIC ISSUES OR PUBLIC OFFICIALS WHICH DOES NOT SEEK GOVERNMENTAL RELIEF

Contrary to Defendants' argument, in order for, speech or conduct to be protected through the ICPA, it must be aimed at procuring favorable government action: "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 (emphasis added).

Many states have enacted anti-SLAPP statutes. Some, like Illinois, are narrowly drawn to provide protection to speech and conduct in connection with participating in government. 735 ILCS 110/1; 735 ILCS 110/5. See *Wright Development Group, LLC v.*

Walsh, 238 Ill. 2d 620, 630 (2010) ("SLAPPs use the threat of money damages or the prospect of the cost of defending against the suits to silence citizen participation"). As the Court found in *Sandholm*:

> 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." 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. at ¶33 (internal citations omitted). This Court's language is important as it demonstrates the recognition that not all alleged First Amendment speech is protected under the ICPA, only speech or conduct in furtherance of seeking governmental relief.

Defendants argue that in *Wright Development* the Court found that the ICPA was to be interpreted broadly, thus protecting any speech about public affairs and subjects that are "newsworthy" or "of interest to the public. (Def't Br. at 17, 25). Neither *Wright Development* nor the ICPA supports Defendants' claim. In *Wright Development*, this Court found that a statement made to a reporter during a public forum concerning proposed legislation targeting condominium conversions, and advancing a position on that issue, was within the purview of the ICPA, particularly as "government" as defined in the Act, includes the "electorate." *Wright Development* at 638-39. In contrast to the ICPA's express language, *Wright Development*, and *Sandholm*, nothing in Defendants' Articles advocated any position or sought any government relief. See, *Goral,* 2014 IL App (1st) 133236 at ¶ 38 (to be protected under the ICPA, the speech or conduct must be in furtherance of the "defendants' exercise of his political rights").

Some state legislatures[13] have enacted much broader anti-SLAPP acts which expressly extend legislative protection to speech regarding matters of public concern or interest, as defendants urge this Court to now expand the ICPA. Other states however, including Illinois, Arizona, Massachusetts,[14] Maine, Missouri, New Mexico, Hawaii, Nebraska, Delaware, and Pennsylvania, expressly limit the scope of their anti-SLAPP acts to speech in furtherance of government participation.[15] Pursuant to such "government participation" anti-SLAPP acts, news articles do not constitute participation in government and are not within the protections of the applicable statute. *Gaudette v. Mainely Media, LLC*, 2017 ME 87, ¶17, 160 A.3d 539, 543 (Maine, 2017) ("Maine's anti-SLAPP statute is not applicable to newspaper articles unless those articles constitute the newspaper petitioning the government for relief on its own behalf). Accord, *Fustolo v.Hollander*, 455

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[13] Texas, Kansas, Tennessee, California, Washington, Oregon, Nevada, Colorado, Indiana, Louisiana, Georgia, Virginia, Maryland, Rhode Island, Vermont, Utah, and New York. See Tex. Civ. Prac. & Rem. Code §27.001 (7) (2011); Kan. Stat. Ann. §60-5320 (c) (7) (2020); Tenn. Code Ann. §20-17-104(a) (2020); Cal. Civ. Proc. Code §425.169(e) (2019); Wash. Rev. Code §4.105.010(2); OR. Rev. Stat. Ann. §31.150(2) (2018); Nev. Stat. §41.637; Colo. Rev. Stat. §13-20-1101(2)(a) (2021); Ind. Code §34-7-7-2 (2021); LA. Code Civ. Proc. Ann. Art. 971 (A)(1) 2018); GA. Code Ann. §9-11-11.1(c); VA. Code Ann. §8.01-223.2(A) 2020); MD. Code Ann., Cts. & Jud. Proc. §5-807(c) (2019); R.I.Gen. Laws §9-33-2(e); VT. Stat. Ann. Tit. 12, § 1041(a) (2019); Utah Code Ann. §78B-25-102 (2023); and N.Y. Civ. Rights Law §70-a (1(a)).

[14] This Court specifically referenced the Massachusetts anti-SLAPP Act in finding that the ICPA applies only to meritless SLAPPs in *Sandholm* 2012 IL 111443, ¶¶45-47.

[15] Ariz. Rev. Stat. §12-751 (2020); Mass. Gen Laws Ann. Ch. 231, §59H (2020); ME. Rev. Stat. Ann. Tit.14, §556 (2019); Mo. Rev. Stat. §537.528(1) (2020); N.M. Stat. Ann. §38-2-9.1(A) 2020); Haw. Rev. Stat. Ann.§634F-1 (2020); Neb. Rev. Stat. §25-21,242 (2020); Del. Code Ann. Tit. 10, §8136 (2020); 27 PA Stat. and Cons. Stat. Ann. §§7707, 8301-03 (2020). Similarly, before Minnesota's anti-SLAPP law was held to be unconstitutional as infringing on the right to a jury trial, it similarly required that speech protected by the act be in furtherance of "public participation in government." "Public participation" in the Minnesota statute was expressly defined as speech or conduct genuinely aimed at "procuring favorable government action." *Id*.

Mass. 861, 869-71, 920 N.E.2d 837, 842 (2010) (newspaper articles were not protected by Massachusetts' anti-SLAPP act because they did not seek governmental relief). In addition to the articles not seeking government relief in contrast to reporting news, the *Fustolo* court found that there was "no reason to stretch the anti-SLAPP statute beyond its appropriate boundaries … to create a level of protection for reporters beyond that to which they are currently entitled under the existing defamation law." *Id*. at 871. Contrary to their argument, the ICPA similarly does not cloak Defendants in this case with extraordinary speech protections beyond the defenses they have under Illinois defamation law. If the ICPA is to be broadly expanded, as Defendants and Amici urge, the Illinois legislature, not this Court, must act.

In urging this Court to judicially engraft a public interest component onto the ICPA (Def't Br. at 21-23), Defendants embrace the dissenting opinion of Justice Hyman, which stated in pertinent part:

> Similarly, the Sun-Times's reporting on the OEIG's investigation into Glorioso, the executive director of the board deciding real estate tax appeals, was undeniably newsworthy and of interest to the public, regardless of his employment status and how he secured his position. Letting the public know about the OEIG investigation could pressure the PTAB to assess its operations and make reforms if needed. As in *Ryan*, the Sun-Times wholly satisfied the first prong.

(AC Pt. 1 at ¶95). Contrary to Justice Hyman's dissent, what is "newsworthy" or "of interest to the public" are distinctly different than being "genuinely aimed at procuring favorable governmental action, result, or outcome" as required in the ICPA. 735 ILCS 110/15. Justice Hyman's dissent calls for a return to pre-*Sandholm* decisions, like *Satkar*, where courts applied the *Noer-Pennington* sham standard and speculated about what governments "might do," based upon articles that simply appealed to public interest.

Pursuant to *Sandholm*, Defendants' false and defamatory publications are not shielded by the ICPA from being the subject of Glorioso's defamation action merely because they may have been of interest to the public. Like *Sandholm*, Glorioso's lawsuit was not a means to interfere with speech in furtherance of obtaining relief from government — Defendants engaged in no such conduct. Glorioso's lawsuit was based upon Defendants' false statements defaming him throughout Illinois and seeks relief for the reputational injuries proximately caused by their publications. *Sandholm* at ¶¶53, 57; See also, *Bock & Hatch, L.L.C. v. McGuireWoods, LLP*, 2017 IL App (1st) 160294-U at ¶15 ("It appears that the goal of plaintiffs' lawsuit was not to interfere with and burden McGuireWoods' free speech and petition rights, but rather to seek … relief for the … harm to their reputation from McGuireWoods' alleged acts").

C. GLORIOSO'S LAWSUIT IS NOT BASED *SOLELY* ON PETITIONING CONDUCT OR POLITICAL EXPRESSION PROTECTED BY THE ICPA

Pursuant to *Sandholm*, even if Defendants' Articles were genuinely aimed at procuring favorable governmental action (and they were not), Glorioso's lawsuit, by definition, would not be a SLAPP, because the ICPA "does not immunize defamation or other intentional torts." *Sandholm*, 2012 IL 111443 at ¶ 42. As this Court found:

> Stated another way, 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*. at ¶ 45.

A defendant raising a SLAPP defense has the burden of showing that plaintiff's suit is based *solely* upon its efforts to participate in government or engage in political

expression. *Id*. at ¶57. Whether a lawsuit is based "solely" on this protected conduct is subject to the defendant's affirmative proof that the plaintiff's lawsuit is meritless and filed in retaliation for the defendant's petitioning activities. As this Court found, "the legislative history of the Act further supports our conclusion that the legislature intended to target only meritless, retaliatory SLAPPS and did not intend to establish a new absolute or qualified privilege for defamation." *Id*. at ¶50. "We simply do not believe that in enacting the anti-SLAPP statute, the legislature intended to abolish an individual's right to seek redress for defamation or other intentional tort, whenever the tortious acts are in furtherance of the tortfeasor's rights of petition, speech, association, or participation in government." *Id*. at ¶51.

1. Glorioso's Lawsuit is not Meritless

To prevail on an ICPA motion to dismiss, Defendants have the burden to "show that there are undisputed facts that demonstrate plaintiff's claim is meritless." *Ryan*, at ¶ 26. The record in this case, as the courts below repeatedly found, demonstrates that Defendant's failed to make this requisite showing.

In arguing that Glorioso's lawsuit lacks any merit, Defendants repeat their claims of substantial truth, fair report, lack of actual malice, lack of special damages, opinion and innocent construction which were consistently rejected below. (SR 142-58, 361-69.) Defendants simply disregard that the OEIG Complaint expressly states that PTAB's Chief ALJ, not Glorioso, "directed" the hearing officer to withdraw his written decision on the Trump Tower tax appeal and rewrite it to give a large reduction to Trump Tower because President Trump owned the property and to "make America great again." SR 86. The OEIG Complaint further expressly charged that [the hearing officer] "complied with *Waggoner's*

command." (*Id*.) It alleged that the hearing officer changed the substance of the decision "to comply with *Waggoner's* political directives" and that *Waggoner* took over the case and rewrote the decision, warranting a large reduction of "many millions of dollars." (*Id*.)

The unfounded OEIG Complaint had a single conclusory remark, not linked to any fact, that the rewriting of the decision by the hearing officer was "consistent with Glorioso's directive." *Id*. Critically, no directive, conduct, or participation of Glorioso is set forth or described in the OEIG Complaint. Rather, it expressly charged that "*Waggoner*, for prohibited political reasons, made sure that the decision in the Trump Tower tax appeal would result in a large reduction." SR 86-87. Although the Complaint contained a conclusory allegation that Glorioso and three other PTAB staff members other than Waggoner "participated" in the scheme (*Id*.), no participation of Glorioso was described. Instead, the Complaint expressly charged that the three PTAB staff members did not report any of "*Waggoner's* conduct and their many communications with him" and "are using *Waggoner's* unlawful political pressure and ethical lapses as leverage to protect them from disciplinary actions." (*Id*.) (emphasis added).

The OEIG Complaint demonstrates the falsity of Defendants' publications and precludes Defendants' meritless defenses of substantial truth fair report and innocent construction. As the trial court particularly found, "Having conveyed an erroneous impression to the ordinary reader regarding the allegations against Glorioso and investigation into the OEIG Complaint, defendants are not entitled to the protection afforded by the fair report privilege." SR at 155. The appellate court similarly rejected the Defendants' arguments both in its initial decision and on rehearing (AC Pt. 2 at ¶¶ 68-72, 73-75, 76-77, 78-81; 108-09; AC Pt. 1 at ¶¶ 58-59.)

a. Defendants' Articles are not Substantially True

Defendants argue that their Articles are "substantially true." (Def't Br. at 32-33). The lower courts consistently rejected this claim. (SR 147; 15; 363-65; AC Pt. 2 at ¶¶ 35-37, 44; AC Pt. 1 at ¶¶ 58-59, 66). Contrary to their argument, Defendants did not simply report that Glorioso was "under investigation" (SR 53, 60, 209), they materially rewrote the anonymous OEIG Complaint they were purportedly reporting on and fabricated a false and defamatory storyline that Glorioso "pressured [PTAB] staff to slash by $1 M … property taxes Donald Trump paid in 2012," (SR 1-15, 28-51 Compl. Ex. 1, p.1, Ex.1(a) pp.1, 4; Ex. 2, p.2). No content is contained in the OEIG Complaint stating that Glorioso "pressured his staff to rule in the president's favor, rejecting the staff's decision to deny Trump any refund." (SR 81-87.) Nor is there any allegation in the OEIG Complaint that Glorioso pressured PTAB staff to slash property taxes by Trump in *any* amount, much less by $1 million as Defendants falsely reported. *Id;* SR 30, 38, 42, 51). Defendants' published reports of what the OEIG Complaint alleged with respect to Glorioso and what Glorioso said and did are not substantially true – they are decidedly false, unfounded and defamatory. As the appellate court found, "We agree with the circuit court that the Articles' descriptions of the alleged scheme and the investigation rose above being merely 'not technically accurate in every detail' to containing a series of omissions and/or misplaced statements that rendered the reporting an unfair summary of events that downplayed the involvement of anyone besides Glorioso." (AC Pt. 2 ¶71; AC Pt. 1 ¶58.)

Defendants' Articles disregarded the material allegations of the anonymous OEIG Complaint and instead, falsely reported that Glorioso singularly rejected the hearing officer's report, ordered the hearing officer to re-write the decision and award a seven-

figure reduction based purely on political motives, and "pressured," "pushed," and "tr(ied) to force" PTAB and PTAB staff to comply with a politically-based scheme which in reality, did not exist. (SR 40-41, 41, 49-51.) Defendants' front-page publications that "Glorioso ordered the agency to approve the $1 million payout for Trump, rejecting a staff report that found no valid reason to support the refund on the tax bill for [Trump Tower]," are material fabrications and the antithesis of fair reports and substantial truth. Defendants' argument disregards that a defense of substantial truth requires that the gist of the alleged defamatory statements is substantially true. *Bogosian v. Bd. Of Educ. Of Cmty. Unit Sch. Dist. 200*, 134 F. Supp.2d 952, 957-58 (N.D. Ill. 2001). Defendants' fabricated stories, regarding what was ultimately determined to be conclusively unfounded, do not approach this threshold.

This is not a case like *Gist v. Macon County Sheriff's Dept*., 284 Ill. App.3d, 371 (4th Dist. 1996). *Gist* demonstrates that in determining substantial truth, the court looks at the "highlight of the article, the pertinent angle of it, and not to items of secondary importance which are inoffensive details, immaterial to the truth of the defamatory statement." *Id*. at 371. In *Gist*, the essence of the defamatory statements was "that plaintiff was wanted on an arrest warrant as of October 6, 1994, for burglary to a motor vehicle, which (was) true. *Id*. at 371. In contrast, in Defendants' Articles, they materially rewrote the OEIG Complaint to falsely depict Glorioso as the architect and sole actor in a corrupt political scheme to wrongfully provide a more than $1 million property tax windfall to Trump Tower. Contrary to Defendants' arguments, these aren't items of secondary importance or inoffensive details immaterial to the truth of the defamatory statements -- they go to the essence of Glorioso's causes of action. AC Pt. 2 ¶100; AC Pt. 1 at ¶59.

Defendants cite *Global Relief Foundation v. New York Times*, 390 F.3d 973 (7th Cir. 2003), in furtherance of their argument that their report of "an investigation" involving Glorioso's conduct at PTAB was substantially true. (Def't Br. at 28). In *Global Relief*, multiple news outlets published that the federal government was investigating whether the plaintiff was using charitable contributions it received to fund Osama bin Laden and terrorist organizations. *Id*. at 975-79. The court examined the content of the publications at issue and found no support for the argument that the publications affirmatively stated that plaintiff, in fact, was involved in funding terrorism. The court explained that "none of the articles concluded that GRF was actually guilty of the conduct for which it was being investigated." *Id*. at 987.

Unlike *Global Relief*, Defendants did not merely publish that Glorioso was being "investigated," they falsely told readers that he was singularly involved in the breach of duties and lack of ethics which they falsely represented had been alleged against him. Rather than simply stating that Glorioso was "under investigation," Defendants brazenly published:

> ● "Those are the result of an anonymous complaint the inspector general's office received last fall that Mauro Glorioso, the executive director of [PTAB] pressured his staff to rule in the president's favor, rejecting the staff's decision to deny Trump any refund." (SR 30, 38).
>
> ● **"Pritzker dumps official who pushed for Trump to get $1 million refund on Chicago tower's taxes**." (SR 41-47) (emphasis in original).
>
> ● "J.B. Pritzker dumps Mauro Glorioso who pushed for $1 million property tax break for Chicago Trump Tower. (SR 41-47).
>
> ● "(A)n anonymous complaint was filed with the Illinois Office of the Executive Inspector General, saying Glorioso ordered the agency to approve the $1 million payout for Trump, rejecting a staff report that found no valid reason to support the refund on the tax bill." (SR 42, 50).

> ●"Any tax refund for Trump would come out of property taxes to the city of Chicago and eight other government agencies, the Chicago Public Schools losing the biggest chunk of money …if the president gets what Glorioso wants." (S.R. 44, 50).
>
> ● "The 64-year-old Westchester resident and staunch Republican rejected a report from hearing officer Simeon Nockov, who found that Trump didn't merit a refund because Burke's law firm didn't present sufficient evidence to support one." (SR 44, 51).
>
> ● "**GOV AXES OFFICIAL WHO PUSHED FOR $1m TAX REFUND ON TRUMP TOWER**." (SR 49) (emphasis in original).
>
> ● **"Mauro Glorioso, a Westchester Republican who Pritzker appointed to head the Illinois Property Tax Appeal Board is under state investigation over his recommendation**." (SR 49) (emphasis in original).

Global Relief does not excuse Defendants' wildly defamatory reporting.

b. Defendants' Articles are not Fair Reports

Defendants argue that reporting the fact of an investigation is not defamatory. (Def't Br. at 27). As the circuit court found and the record demonstrates, Defendants went significantly beyond merely reporting "the fact of an investigation." (SR 148-49, 155, 363, 365, 367-68). Defendants cite *Harrison v. Chicago Sun-Times,* Inc., 341 Ill. App. 3d 555, 572 (1st Dist. 2003) (Def't Br. at 27), but *Harrison* recognizes that to constitute a fair report, the gist of the sting in an official report must be the same as the sting reported in the news account. Unlike *Harrison*, Defendants' publications in this case did not accurately abridge the allegations of an investigation, they grossly expanded them, materially distorted them, and falsely published that Glorioso, in fact, engaged in the wrongful conduct and other acts not even attributed to him in the OEIG Complaint Defendants purported to be reporting on.

As the trial court found, the fair report privilege requires that "nothing be omitted or misplaced in such a manner as to convey an erroneous impression to those who hear it

or read it." (SR 154-55; 366-68 citing Restatement Second of Torts, §611, comment (f), a report of the discreditable testimony in a judicial proceeding but failure to publish the exculpatory evidence would not constitute a fair report). Accord, *Solaia Technology, LLC, v. Specialty Publishing Company*, 221 Ill.2d 558, 590 (2006). See, *Eubanks v. Nw. Herald Newspapers*, 397 Ill. App. 3d 746, 749-50 (2nd Dist. 2010) ("A reporter is not privileged to make additions of his own that would convey a defamatory impression or to indict expressly or by innuendo the veracity or integrity of any of the parties"). *Snitkowsky v. NBC*, 297 Ill. App.3d 304, 314-15 (1st Dist. 1998) (media report did not constitute a fair report where accusations of wrongdoing exceeded content of police report).

Contrary to their argument, Defendants' Articles in this case are a textbook example of unfair and inaccurate reporting. The lower courts correctly found that Defendants failed to prove that Glorioso's Complaint lacked merit as a consequence of the fair report doctrine and that the record refuted their argument ("We agree with the circuit court that the Articles' descriptions of the alleged scheme and the investigation arose above being 'not technically accurate in every detail' to containing a series of omissions and/or misplaced statements that rendered the reporting an unfair summary of events," including additional claimed "facts" that were not included in the OEIG Complaint Defendants were purportedly reporting on. (SR 151; AC Pt. 2 ¶70-71, 108; AC Pt. 1 ¶¶58-59.)

c. Defendants' Articles are not Reasonably Capable of Innocent Constructions

The trial court twice rejected Defendants' innocent construction arguments. (SR 152, 356-66.) The court correctly applied *Tuite v. Corbitt*, 224 Ill.2d 490, 512, (2006) and *Solaia Tech., LLC v. Specialty Pbl'g. Co*. 221 Ill. 2d 558, 580 (2006), considered Defendants' publications in context, and found "this Court will not strain to find an

unnatural innocent meaning for words when a defamatory meaning is far more reasonable." (SR 365-66.) Contrary to Defendants' argument, the trial court did not find that a nondefamatory construction was "possible," much less reasonable – it found that Defendants' suggested innocent construction was not reasonable. *Id*. at 368.

The trial court's findings which the appellate court expressly adopted, were: "Glorioso argues a "reasonable reader, in context, would take these words … to mean that Novak uncovered facts through his own investigation showing that Glorioso was a corrupt official, hijacking a PTAB tax appeal in a $1 million scheme, to further a political, not legal agenda." …The court agrees." (SR 151; AC Pt. 2 at ¶¶ 71-72). In its decision denying the Defendants' motion for reconsideration, the trial court reaffirmed its initial decision, rejecting the innocent construction argued by defendants for a second time: "Defendants seem to suggest some possible innocent construction of the articles, but none that … rebuts the clear implication of the articles suggesting the plaintiff was the most responsible individual for the outcome of the Trump Tower appeal." (SR 366.)

Defendants' argument disregards that in applying the innocent construction doctrine, the defamatory publication must be viewed in context with the publication as a whole, and not through parsing out individual words or phrases. *Tuite* at 512. Defendants' argument that the Articles' false claims that Glorioso "pressured" PTAB staff to award a more than $1 Million property tax assessment refund to Trump Tower in furtherance of political allegiance is necessarily subjective and not actionable and that they in essence, merely reported that Glorioso was "under investigation," is a gross misapplication and disregard of both the record and *Tuite*. Contrary to their argument, Defendants did not merely report that Glorioso was "under investigation," they substantially misrepresented

the conduct he allegedly committed and additionally published that he, in fact, engaged in the conduct they fabricated in the Articles. When properly read in context, there is no reasonable innocent construction for Defendants' false Articles concerning Glorioso, nor was one found by the lower courts. Defendants' false publications that Glorioso was the architect of and primary actor in a corrupt political scheme involving more than $1 million of taxpayer funds in context, is the only reasonable reading of Defendants' Articles.

Defendants, materially elevating semantics over substance, claim that because the appellate court included in its holding the phrase, "we agree with the circuit court that the Sun-Times reporting could reasonably be read as not fair, accurate, or truthful" (AC Pt. 1 at ¶¶ 58-59), the Opinion somehow admitted that an innocent construction was reasonable. (Def't PLA at 19-20; Def't Br. at 39-43). Contrary to Defendants' argument, the appellate court not only did *not* find that Defendant's claimed innocent construction was reasonable — it rejected that hypothesis. The court specifically found that defendants' articles consisted of a "series of omissions and/or misplaced statements that rendered the reporting an unfair summary of events that downplayed the involvement of anyone besides Glorioso." (AC Pt. 2 at ¶71, 108-09; See also AC Pt. 1 at ¶58-59.) Indeed, Defendants' suggested innocent construction is necessarily unreasonable, as Defendants falsely told readers that Glorioso, in fact, engaged in the wrongful conduct they fabricated.

Defendants further argue that the appellate court's opinion improperly suggests that a balancing of reasonable constructions is appropriate under Illinois law. (Def't Br. at 39-40.) Defendants grossly misstate the court's findings. The trial court found that Defendants' articles were saturated with a series of omissions and misstatements when compared with the OEIG Complaint Defendants claimed to be reporting on and the

appellate court agreed (AC Pt. 2 at ¶¶44, 71, 107-09; See AC Pt. 1 at ¶¶ 58-59.) Moreover, if the Defendants' "balancing" argument was correct, a significant number of Illinois Supreme and Appellate Court decisions, which are cited regularly regarding the innocent construction rule, would require reversal as they *too* would be deemed to impermissibly invite a balancing of constructions. See *Bryson v. News America Publications, Inc*., 174 Ill. 2d 77, 94 (1996) ("The innocent construction rule does not require courts to strain to find an unnatural innocent meaning for a statement when a defamatory meaning is far more reasonable"). Accord, *Tuite,* 224 Ill. 2d at 513-14 (2006); Solaia Tech., LLC, 221 Ill.2d at 580 (2006); *Owen v. Carr*, 113 Ill. 2d 273, 279 (1986); *Chapski v. Copley Press*, 92 Ill. 2d 344, 350-51 (1982); *Tirio v. Dalton*, 2019 IL App (2d) 181019.

d. Defendants' Argument Regarding Tim Novak's Affidavit Does Not Show that Glorioso's Lawsuit is without Merit or that Glorioso Cannot Prove Actual Malice

Defendants take issue with Glorioso not filing a counter-affidavit to an affidavit of Novak in the trial court. (Def't Br. at 35-36) Defendants argue that the Novak issue is relevant to the question of actual malice and could therefore show that Glorioso's lawsuit lacked merit. *Id*. At the outset, Defendants' theory is simply incorrect. If an affidavit submitted by a section 2-619 movant consists of conclusions, rather than evidentiary facts, or contests material allegations of the Complaint, rather than accepts them as true, the affidavit, on its face, is improper and no counter-affidavit is required to defeat the motion. *Gajda v. Steel Solutions Firm, Inc.* 2015 IL App (1st) 142219, ¶¶32-34 ("Without a sufficient affidavit, defendants did not meet their initial burden of asserting an affirmative matter and plaintiffs were not required to provide a counter-affidavit."). See, Ill. S. Ct R.

191 (An affidavit in support of a 2-619 motion to dismiss "shall not consist of conclusions but of facts admissible in evidence").

Defendants' citation to *Andrews v. At World Properties, LLC*, 2023 IL App (1st) 122095 at ¶¶30-33 does not change this result. Unlike this case, *Andrews* was not a limited interlocutory appeal based upon the denial of a SLAPP motion. It was an appeal of a final judgment and correctly considered all issues upon which plaintiffs argued that their Complaint should not have been dismissed with prejudice. Moreover, unlike this case, the plaintiffs in *Andrews* did not challenge the Defendants' affidavit in the trial court. *Id*. at ¶30. As a consequence, they could not challenge it for the first time on appeal. *Id*.

Unlike *Andrews*, Glorioso attacked the sufficiency of Novak's Affidavit in the trial court, including on the grounds that it improperly did not admit the legal sufficiency of the Complaint, but challenged it with conclusions through which Defendants sought to contest ultimate facts. (SR 235). Moreover, Novak's self-serving conclusions that he "had no reason to doubt the investigations" and no reason to doubt that officials were investigating "prohibited political activities and conflicts of interest," (SR 168) and that no facts were provided to him that contradicted his reporting (SR 169) are disproven on the face of the OEIG Complaint attached to and incorporated in his affidavit. (SR 173-79.)

The appellate court considered the content of the OEIG Complaint against defendants' Articles and correctly found that the Articles were "a series of omissions and/or misplaced statements that rendered the reporting an unfair summary of events." (AC Pt. 2 at ¶71; AC Pt. 1 at ¶¶ 58-59). Novak's conclusions regarding his state of mind do not constitute evidentiary facts requiring a counter-affidavit, much less demonstrate that Glorioso's lawsuit was meritless. (See Complaint, SR 9, ¶¶17-20, 26, SR 13, ¶¶31-32, SR

16, ¶¶42-43, 45,47, SR 56-57, 59, 61). See also, *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) ("The defendant in a defamation action … cannot … automatically ensure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Protestations of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call").

Further, Novak acknowledged that he reviewed the OEIG Complaint in conjunction with writing the Article. SR 30, 33, 74. His affidavit shows the postmarked envelope through which he received the OEIG Complaint from an anonymous sender, more than one-month prior to Defendants' publication of Defendants' February, 2020 Articles. SR 80. He therefore knew that what he wrote concerning the content of the OEIG Complaint and its allegations against Glorioso were false. (SR 2 *et seq*. Complaint at ¶¶16-17, 31-32, 43, 47, 55, 57, 61, 65, 69, 74, 87.) Glorioso's Complaint expressly alleged, that Novak knew at the time of publication "that there were no such allegations or suggestions in the anonymous complaint and there was no basis in fact for Novack's statements." (*Id*. See also ¶¶9, 18.) Notwithstanding that Novak had the OEIG Complaint prior to and during his writing of the Articles, Defendants falsely depicted Glorioso of engaging in conduct, including rejecting and preventing a hearing officer's decision from becoming finalized and published and demanding that PTAB staff instead, award an unwarranted and politically driven property tax reduction of more than $1 million to Trump Tower contrary to the allegations of the OEIG Complaint. (Complaint at ¶20, 35; SR 10, 14.) Defendants'

"proof," consisting of Novack's self-serving conclusions, demonstrates neither a lack of actual malice, nor proof that Glorioso's lawsuit lacked merit.

Defendants also draw the Court's attention to a PTAB email of Glorioso dated February 8, 2020. (Def't Br. at 8, citing S.R. 202-03). Defendants point to a single bullet point within the email where Glorioso stated that the OEIG Complaint alleged that "staff members, particularly the Executive Director and the Chief Hearing Officer sought a desired result based upon political bias." (*Id*.) That generic overview does not negate actual malice. Glorioso never disputed that he was named in the OEIG Complaint and "under investigation." The email cited by Defendants, in context, further states that "there was no directive issued by the Executive Director to have a certain result, there was no political bias on the part of the Executive Director or the Chief Hearing Officer, and "We have reviewed the complaint and find it to be without merit, lacking in factual material and making assumptions that were clearly erroneous." SR at 203. Ultimately, OEIG agreed, finding that the OEIG Complaint which Defendants falsely embellished was categorically "unfounded." SR 312-315; 358-60. The email further stated that "the final decision [in the Trump Tower appeal] is the board's decision, not the staff, the chief Hearing Officer or the Executive Director." *Id*. It also clarified that the only appraised value presented in the case was by Trump Tower's appraiser and that the board of review presented no rebuttal witness or appraisal. SR at 203. Indeed, those facts were material grounds for property tax reduction decision unanimously issued by PTAB *after* Glorioso's termination and the appellate court's affirmance of that decision. See p. 10, *supra*. As the appellate court found, the email did not disprove actual malice, much less show that Glorioso's lawsuit was meritless. AC Pt. 2 at ¶¶75, 83-84; AC Pt. 1 at ¶63.

e. The Court Correctly Affirmed the Denial of Defendants' SLAPP Motion Regarding Special Damages

With respect to their ICPA motion to dismiss, Defendants argued Glorioso's claimed special damages were "logically and chronologically impossible," and therefore, their articles could not "cause" special damages with respect to Counts I and II of Glorioso's Complaint. (SR 211). Defendants maintained that Glorioso could not prove that his PTAB termination was caused by their Articles because as of that time, they had not yet reported on his termination, citing *Kapotas v. Better Gov't Ass'n*, 2015 IL App (1st) 140534, ¶¶70-74. Contrary to Defendants' argument, Glorioso's special damages were alleged in conjunction with Defendants' February 2020 articles, published eight months prior to his notice of termination. (SR 2 *et seq.* Complaint at ¶¶19-25, 27-28, 30-32, 34-36, 38) Defendants' October 9 and 11 Articles, falsely reporting on Glorioso's PTAB termination, are unrelated to his *per quod* counts and are irrelevant to his special damage allegations. Moreover, the appellate court affirmed the denial of Defendants' motion to dismiss based on special damages. The court found that Glorioso did not have to prove that Governor Pritzker read Defendants' February 2020 Articles prior to Glorioso's termination from PTAB. (AC Pt. 2 at ¶77.) See *Tunca v. Painter*, 2012 IL App (1st) 093384 at ¶66 citing *Halpern v. News-Sun Broadcasting Co*., 53 Ill. App. 3d 644, 646-47 (2nd Dist. 1977) (A defamation plaintiff does not have to specify how or whether specific third parties became aware of a defamatory statement to allege special damages).

Defendants also argue that as a consequence of the Final OEIG Report, Glorioso cannot prove special damages because *in May of 2021*, OEIG recommended that Glorioso not be rehired by the State and its recommendation be placed in Glorioso's file, and in July, 2021 PTAB stated that it "implemented" OEIG's recommendations. (SR 321, 324; Def't

306 Pet. at 23-24). This argument borders on frivolous. Glorioso's lawsuit was filed on January 5, 2021, eight months prior to the issuance of the Final Report and six months prior to PTAB's "implementation" statement. Defendants' "proof" of May and July, 2021 administrative *recommendations* concerning an email issue unrelated to Defendants' false Articles upon which Glorioso's lawsuit was based, do not show that Glorioso's January 2020 lawsuit was meritless or a SLAPP.

Contrary to Defendants' argument, Glorioso was notified of his termination in September 2020, prior to (i) any email issue; (ii) the October 15, 2020 second OEIG Complaint regarding an email issue (which was never provided to Glorioso); and (iii) the unrelated email deletions addressed in that second OEIG investigation. That Glorioso's last day at PTAB was moved up by nine days, from October 23, 2020 to October 14, does not rebut Glorioso's allegations that he was terminated and sustained special damages as a consequence of Defendants' February 2020 articles. Indeed, Defendants have offered no facts demonstrating that *but for* his previously announced termination and departure date, Glorioso's deletion of emails from his personal PTAB computer (which had all been backed up by PTAB and produced by Glorioso to OEIG investigators), would have, by itself, been a basis for Glorioso's termination. The email/special damages issue raised by Defendants, does not show that Glorioso's *lawsuit* is a meritless, retaliatory SLAPP. Indeed, Glorioso's defamation *per se* counts and false light counts arising from Defendants' October 2020 Articles do not require special damages.

Defendants further claim that Glorioso did not sufficiently plead special damages, citing *Maag v. Illinois Coalition for Jobs, Growth & Prosperity*, 368 Ill. App. 3d 844 (5th Dist. 2006). *Kapotas v. Better Gov't Ass'n*, 2015 IL App (1st) 140534; *Rivera v. Allstate*

Ins. Co., 2021 Ill. App. (1st) 200735 and *Moon v. Liu*, 2015 IL App (1st) 143606.[16] (Def't Br. at 36-37.) However, Defendants' argument equating legal "insufficiency" of pleadings with lack of merit is unavailing, particularly because an ICPA motion to dismiss concedes the legal sufficiency of the claim. *Ryan* at ¶22. Contrary to Defendants' argument, section 2-615 insufficiency arguments are not considered in determining whether a lawsuit is meritless as a SLAPP. *Garrido v. Arena et al.*, 2013 IL App (1st) 120466 at ¶¶19, 22 ("A claim is not 'meritless' … merely because the complaint is subject to dismissal under Section 2-615. "A defendant 'cannot rely on alleged pleading defects' to prove that a 'case is a SLAPP'"). Accord, *Hammons v. The Society of Permanent Cosmetic Professionals,* 2012 IL APP (1st) 102644 at ¶21 ("meritless" pursuant to *Sandholm* does not extend to insufficient pleadings).

2. Defendants did not and cannot prove that Glorioso's Lawsuit retaliated against their efforts to participate in government

To prove that a lawsuit is based "solely" upon the defendants' protected activity, the defendant must show that the claim is a meritless, retaliatory SLAPP. *Sandholm* at ¶57.

[16] Each of these cases involve the sufficiency of pleadings relating to special damages pursuant to section 2-615 of the Code and not whether the lawsuit itself was meritless. As this Court found in *Sandholm*, the clear legislative intent expressed in the ICPA is to "subject only meritless, retaliatory SLAPP suits to dismissal." 2012 IL 111443 at ¶45. Glorioso specifically pled that his damages were proximately caused by defendants' February 2020 publication and identified the loss of his salary, health, welfare, and insurance benefits. (Compl. ¶¶24, 34, 68, 73). See *Tunca v. Painter*, 2012 Ill. App. (1st) 93384, ¶¶60, 75 (Plaintiff's allegation that physicians stopped referring him patients after defendants' false statements satisfied special damages notwithstanding that plaintiff did not plead whether or how they were aware of the defamatory statements). *Halpern vs. News-Sun* at 646-47 (allegation that plaintiff sustained lost patients after defendants' newspapers articles were published satisfied special damages notwithstanding standing that plaintiff did not plead that such patients read the article).

In response to the issues raised in Defendants' SLAPP motion, he courts below correctly found that Defendants failed to make this showing.

a. Defendants Waived their Argument that the Appellate Court Erred in Considering Whether Defendants Demonstrated Retaliation by Expressly Raising the Retaliation Issue in the Lower Courts

Defendants claim that the appellate court committed reversible error for *considering* the issue whether Glorioso's lawsuit was in retaliation for speech protected by the ICPA (Def't Br. at 17-20). This argument, articulated for the first time in Defendants' PLA, quotes from and adopts Justice Hyman's dissenting opinion, including his stated thesis, "How the Illinois Appellate Court Went Astray with the ICPA." *Id*. Defendants now echo Justice Hyman's view that retaliation is not a separate element of proof in an ICPA motion to dismiss. *Id*.

Defendants' argument is a red herring. Defendants failed to meet their burdens to demonstrate that: (i) their false Articles were "genuinely aimed at procuring favorable governmental action, result, or outcome" as the ICPA requires in the ICPA, 735 ILCS 110/15; and (ii) Glorioso' suit was meritless. Thus, the issue of retaliation is irrelevant and not a basis for reversal.

Moreover, because Defendants failed to make their argument in the trial or appellate courts, and instead, repeatedly raised that Glorioso's lawsuit was retaliatory, as an independent basis in support of their ICPA motion to dismiss, they have forfeited review on this issue. See Defendants' ICPA Motion to Dismiss at ¶4, SR 161 ("Plaintiff's nine count complaint satisfies ICPA's indicia for retaliation on merits, temporal proximity and excessive damages"); memorandum in support of ICPA Motion at pp.8-9, SR 212-13 ("**B. This case easily meets the criteria for retaliation**, citing *Ryan* at ¶23 (emphasis in

original) and "Courts also examine proximity in time between speech and the lawsuit and whether the *ad damnun* represents a good-faith estimate of damages and argued that these factors proved the independent element of retaliation"); Petition for Rule 306(a) Interlocutory Appeal at pp.27-29 ("**Glorioso's Conduct Easily Meets Retaliation Criteria Under the ICPA** (emphasis in original).

Defendants cannot now seek review in this Court on the ground that the lower courts below *considered* the argument Defendants affirmatively raised and argued. *PML Development LLC v. Village of Hawthorn Woods*, 2023 IL 128770, ¶48, n.2 (where a party fails to present an argument in the appellate court, it forfeits the right to make the argument in the Illinois Supreme Court). *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000) ("it is fundamental to our adversarial process that a party waives his right to complain of an error where to do so is inconsistent with the position taken by the party in an earlier court proceeding."); *Auton v. Logan Landfill, Inc.*, 105 Ill 2d 537, 543 (1984) (A party cannot complain of error which he induced the court to make).

b. Defendants Cannot Show that Glorioso's Lawsuit was in Retaliation for Their Claimed Exercise of Rights under the Act

Despite their new argument adopting Justice Hyman's dissenting viewpoint, Defendants also repeat their previously articulated argument that Glorioso filed his lawsuit in retaliation for Defendants' participation in government. (Def't Br. at 25-27).

"To determine whether [a] claim was retaliatory within the meaning of the Act, [courts] consider (1) the proximity in time between the protected activity and the filing of the complaint, and (2) whether the damages requested are reasonably related to the facts alleged in the complaint and present a good-faith estimate of the injury sustained," though other factors can be considered as well. *Prakash v. Parulekar*, 2020 IL App (1st) 191819,

at ¶ 38. Glorioso' lawsuit was filed 11 months after Defendants' first article, one month prior to the running of the statute of limitations on Defendants' February 2020 Articles. 735 ILCS 5/13-201(actions for defamation and false light have a one-year statute of limitation). By filing suit, Glorioso was not acting to stifle Defendants' participation in government, he prudently acted to preserve his damages claims for Defendants' materially false publications before his claims were time-barred.

Further, Glorioso's Complaint requested relief slightly more that the jurisdictional minimum for the law division ("in excess of $50,000", rather than $30,000). They are by definition, not "extraordinarily high" so as to constitute indicia of a SLAPP. See, *Samoylovich v. Montesdeoca*, 2014 IL App (1st) 121545, ¶¶10, 30, 46 ("in excess of $50,000" *ad damnum* in each of the complaint's counts was not extraordinarily high and did not support a claim of retaliation).

Defendants' cases cited in the trial and appellate courts, *Ryan*, *Goral* and *Hytel Group, Inc., v. Butler*, 405 Ill. App.3d 113 (2nd Dist. 2010), never supported their retaliation argument. In *Ryan*, the court found evidence of retaliation because the Complaint, filed in the midst of an ongoing investigative series which unlike this case, expressly sought government relief, sought damages of $7 million. The court found that a Complaint "demanding damages in the millions for alleged defamation is a classic SLAPP scenario." *Ryan* at ¶24. The court concluded, "given the timing of the Complaint and the speed with which it was filed, the high damages demand, and the type of relief requested, we must conclude that the defendants have shown evidence of retaliatory intent." *Id*. at ¶26. However, retaliatory intent notwithstanding, the Court held that dismissal was not appropriate because the defendants had not borne their burden of proving the suit was

meritless. *Id*. at ¶30. In this case, Defendants lack any indicia of retaliation *and* cannot demonstrate that Glorioso's lawsuit is meritless.

In *Hytel Group, Inc.*, the Court similarly found that a retaliatory motive was shown through the Complaint's "extraordinarily high" $8 million damages demand. 405 Ill. App.3d at 116. In *Goral*, although the Complaint's damages compensatory damages request was "in excess of $50,000." (Def't Pet. at 29), the Complaint also expressly sought more than $1 Million for attorneys' fees, costs, recoupment of campaign expenses and *per se* damages. *Goral* at ¶56. The court found that such requests, collectively, in addition to punitive damages, resembled the *ad damnun* found to be retaliatory in *Hytel*. Goral's lawsuit was also filed three months after the publication and was timed to immediately precede plaintiff's upcoming campaign for state representative. *Id*. at ¶57. No analogous facts are present in this case, particularity as the limitations period concerning Defendants' February 2020 articles was about to run when Glorioso filed suit.

Defendants also argue that lack of merit alone proves retaliation. (Def't Br. at 19-20.) However, the lower courts consistently found that Glorioso's lawsuit was not meritless. Defendants cite *Midwest REM v. Noonan*, 2015 IL App (1st) 132488, but that case is inapposite. Only after a full evidentiary hearing amounting to a trial on the merits, did the court find that "the complete absence of *evidence* that [defendant] said anything untrue to investigators or the court shows both that plaintiffs filed a meritless claim against [defendant] and that they named her as a defendant solely to punish her for her participation in government." *Id*. at ¶86. Defendants also cite *Herman v. Power Maint*., 388 Ill. App. 3d 352 (4th Dist. 2009), which did not involve the ICPA. There, the plaintiff claimed a retaliatory discharge and the court found that there was a material fact issue as to whether

the employer's reasons for discharge were pretextual. *Id*. at 364. *Herman* is inapposite. Here, Defendants' publications concerning Glorioso are materially false and are refuted by the OEIG Complaint defendants purported to be reporting on. Defendants further told readers that Glorioso, in fact, engaged in the conduct they fabricated in the Articles. The record in this case demonstrates that Glorioso's lawsuit was warranted, not retaliatory.

Defendants go so far as to argue that Glorioso's not attaching the OEIG Complaint to his Complaint is somehow proof of retaliation. (Def't Br. at 26.) Though the OEIG Complaint is *evidence* of the falsity of and misrepresentations in Defendants' Articles, it is the antithesis of demonstrating that Glorioso's lawsuit is meritless. The Complaint was founded upon Defendants' Articles, which were attached to the Complaint. 735 ILCS 5/2-606. Contrary to Defendants' argument, documents which are a link in establishing liability, like the OEIG Complaint, are not required to be attached to a Complaint. *In Re Estate of Garrett*, 24 Ill. App. 3d 895, 899 (2nd Dist. 1975). Defendants also ignore that the trial court, which had both the Articles and OEIG Complaint before it, found that Defendant's Articles misrepresented that Complaint's content. S.R. 149, 155, 367-68.

Defendants' reference to the OEIG "Final Report" in support of their retaliation argument is particularly specious. (Def't Br. at 25-27.) Defendants gloss over that part of the Final Report which conclusively found that the anonymous OEIG Complaint their Articles falsely reported on and embellished, was categorically "unfounded." Instead, they focus on a separate portion of the Final Report which addresses a separate email investigation initiated *after* Glorioso's notice of termination, *after* Defendants' February 2020 Articles, and which was unrelated to and not mentioned in Defendants' Articles or Glorioso's lawsuit concerning them. It is further uncontested that no notice of the "email

investigation" was provided to Glorioso or his counsel until August 2021, more than seven months *after* he filed suit. SR at 326, 330.

Defendants' argument that Glorioso filed his lawsuit to try "to block publication of the Final Report's revelation that news reports did not cause his removal and Statewide bar on employment" (Def't. Br. at 28-29) is a gross mischaracterization. Contrary to Defendants' argument, the Report, bears no indica of retaliation. The email issue, *for which Glorioso did not sue Defendants,* and which Defendants' Articles did not report on, does not demonstrate that Defendants' Articles, falsely publishing that Glorioso orchestrated and directed a corrupt scheme to award a more than $1 million property tax assessment refund to Trump Tower for political purposes, were substantially true, fair reports, non-actionable opinions or reasonably capable of innocent constructions. It similarly does not demonstrate that Defendants' false and defamatory Articles constitute activity protected by the ICPA or that Glorioso's lawsuit was in retaliation for their publication.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellee Mauro Glorioso respectfully requests that the appellate court's opinion, affirming the circuit court's denial of Defendants' SLAPP motion to dismiss, be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Phillip J. Zisook, an attorney, certify that the foregoing Brief of Plaintiff-Appellee Mauro Glorioso conforms to the requirements of Illinois Supreme Court Rules 341 (a), (c), and (d) and 367 (c) and (d). The length of this brief, excluding the pages or words contained in the Rule 341 (d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341 (c) certificate of compliance, and the certificate of service, is 50 pages.

/s/ Phillip J. Zisook

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalties of perjury as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, that the statements set forth in this instrument are true and correct, and the above Brief of The Plaintiff-Appellee Mauro Glorioso was filed by electronic means on the Clerk's office on May 21, 2024, and she served a copy of the foregoing ***Brief of The Plaintiff-Appellee Mauro Glorioso***, via email upon the following:

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