eDrop-Off Chicago LLC, et al. v. Burke, et al., Case No. 2:12-cv-04095

For the reasons expressed in the tentative ruling issued in this case on June 1, 2012, *see* Docket No. 36,[1] as supplemented herein, the Court denies the motion to voluntarily dismiss this action. The Court takes this opportunity to address recent improper filings and Plaintiffs' argument that this case would still fit within the Illinois Supreme Court's decision in *Sandholm v. Kuecker*, 962 N.E.2d 418 (Ill. 2012) so as to give Midley a reasonable basis for believing that it might not be precluded from taking advantage of the Citizen Participation Act ("CPA") and thereby obviating any concern this Court might have about "plain legal prejudice" resulting from a decision to grant this motion.

In a "Stipulation That Illinois' Citizen Participation Act Applies to the Allegations of Plaintiffs' Complaint" (hereinafter "Stipulation"), *see* Docket No. 37 – which is, in reality, simply a further, uninvited[2] brief on the applicability of the CPA[3] – Plaintiffs take the position that, so long as they agree Midley's alleged conduct is conduct of the type that would allow for application of the CPA, the Illinois federal court is effectively bound to find the CPA applicable. Outside of *Sandholm*, they cite no authority in that "Stipulation" that even inferentially supports that proposition. In *Sandholm*, it is true that the Illinois Supreme Court noted that the intermediate appellate court had concluded that it was undisputed that the lawsuit was "based on or in response

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[1] That tentative ruling, among other things, set out the standard bearing upon a Rule 41(a)(2) motion. *See Smith v. Lenches*, 263 F.3d 972, 975-76 (9th Cir. 2001); *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996); *Hamilton v. Firestone Tire & Rubber Co., Inc.*, 679 F.2d 143, 145 (9th Cir. 1982). The same terms used to refer to the parties in that tentative ruling will be employed here as well.

[2] At best, the Court invited a submission bearing upon whether the parties would stipulate that *California's* anti-SLAPP law would be used in the Illinois action, not that the CPA would be an available avenue for Midley. *See* June 1, 2012, Transcript at 24:8-25:13. Obviously, the Court had its doubts about whether such a stipulation would even be effective.

[3] Remarkably, on June 7, two days after they filed their initial improper "Stipulation," Plaintiffs filed yet another uninvited submission: a "Supplement to Plaintiffs' Stipulation that Illinois' Citizen Participation Act Applies to the Allegations of Plaintiffs' Complaint." Docket No. 39. That filing seeks to inject into this Court's consideration a whole new "thread" of comments on Midley's blog that are not part of the Complaint on file in this action. That new thread has apparently now been injected into the Illinois litigation proceeding between these parties. *See* Footnote 5, *infra*. Even if the Court were to consider that thread, it would not change the analysis that follows.

to defendants' 'acts in furtherance,'" *Sandholm*, 962 N.E.2d at 426, and that the Illinois Supreme Court then went on to consider the actual applicability of the CPA. That does not necessarily mean, however, that the *Sandholm* court – or *any* court – would be bound by such a concession on what is, in effect, *an issue of law*. There is absolutely no reason to surmise that if the members of the Illinois intermediate appellate court disagreed with the parties' position on that point, they would have hesitated, in the slightest, from voicing their disagreement and altered their analysis accordingly.

In addition, what Plaintiffs leave out is that the Illinois Supreme Court ultimately determined that the CPA did *not* apply. Plaintiffs' "Stipulation" that "the *Sandholm* case demonstrates that if the Plaintiff does not dispute that Defendants are petitioning for government action, it is accepted as established," Docket No. 37, at 2:25-27, is, therefore, a mercurial, at best, assertion. Even faced with a concession from the litigants, any lower court would now have to take into consideration the *Sandholm* decision in determining whether there is any *chance* that the CPA would apply. For reasons addressed further below, this Court effectively believes that there is virtually *no* chance that the CPA would apply here.

Plaintiffs also attempt, in their "Stipulation," to supply support for the position that Arizona's anti-SLAPP law is limited in a similar fashion to Illinois's CPA, meaning that the Court should follow Judge Wright's analysis in *Davis v. Bonanno*, No. CV 08-03449 ODW (AJWx), 2008 U.S. Dist. LEXIS 79501 (C.D. Cal. Sept. 19, 2008). As an initial matter, whether or not the Illinois and Arizona statutes are similar, the Illinois Supreme Court has construed that State's CPA in a fashion that the Court believes very likely would preclude Midley from proceeding under that statute. Neither *Davis* nor Plaintiffs in their procedurally improper stipulation[4] discussed any similar authoritative judicial construction of Arizona's anti-SLAPP statute. Moreover, even if the Arizona Supreme Court had issued the exact same opinion as the Illinois Supreme Court and Davis still had come out the exact same way, this Court is not bound by *Davis* when it comes to an application of Federal Rule of Civil Procedure 41(a)(2) in this case.

[4] Plaintiffs' counsel has *repeatedly* ignored normal practice and procedure in federal court in favor of filing either emergency *ex parte* proceedings and/or motions or uninvited briefs disguised as one side's "stipulation."

It is not for this Court (at least not at this stage) to definitively rule on the applicability of the CPA to the allegations pled against Midley. Instead, the Court essentially must predict what it thinks would likely happen in the Illinois case if the Court were to grant voluntary dismissal here and if the anti-SLAPP applied in Illinois to this case would be the CPA, not California's anti-SLAPP law. Thus, the Court must return to application of the Illinois Supreme Court's *Sandholm* decision, addressed in some measure in the Court's June 1, 2012, tentative ruling.

Plaintiffs' counsel at oral argument on June 1 (and also in Plaintiffs' papers in advance of that oral argument), took the position that a number of the posts on Midley's blog were "directly calling for governmental action, criminal investigations of our client…calling for the U.S. Attorney's office in Illinois as well as the [Attorney General's] office in Illinois to undertake government's [*sic*] investigation of our client." June 1, 2012, Transcript at 8:7-12; *see also id.* at 21:4-9.[5] Plaintiffs' counsel submitted an exhibit to her declaration in this case whereby she highlighted aspects of the blog "thread" that fit within the category of statements calling for governmental action or an investigation. *See* Docket No. 24 (Shelton Supp. Decl.) ¶ 12; Docket No. 25-1, Exh. H. It largely consists of assertions by various individuals who assert that Plaintiffs' alleged behavior is "criminal" or "illegal" or recounts tales of other "shill bidders" who were criminally prosecuted and convicted.

The closest example to petitioning activity would be the statement by a blog poster identifying him/herself as "Apricot Summers":

> So if anyone wants to – you can report this seller to both Ebay (who will probably do nothing) and to the US Attorney's office in Chicago – who

[5] On June 8, 2012, Plaintiffs filed a "Notice of Filing First Amended Complaint in Chicago Action," Docket No. 41, along with an attachment of (part of) that pleading, *see* Docket No. 41-1. None of the exhibits referenced in that First Amended Complaint were provided to the Court. However, in their Notice of Filing First Amended Complaint in Chicago Action, Plaintiffs asserted that the new Illinois filing "makes clear that the false and defamatory comments about Plaintiffs, specifically calling for governmental action…are part of, and at issue in, the Chicago action," particularly calling the Court's attention to paragraphs 18, 31, 32 and 49 of the First Amended Complaint. What those paragraphs actually make clear – notwithstanding Plaintiffs' failure to attach to their filing here any of the exhibits to that First Amended Complaint – is that Plaintiffs are referring to some of the same comments Plaintiffs' counsel emphasized in advance of this Court's June 1 hearing. As addressed further herein, the Court is not convinced that those comments will bring this case within the CPA. Moreover, if the posts allegedly "calling for government action" on this blog are merely "part of" the action in Illinois, that, by definition, would not implicate the CPA under the *Sandholm* decision.

> will do something if it's this rampant. Shill bidding is against the law. And if it's this blatant, US Attorneys may prosecute because they can now go for RICO (organized crime scheme) charges and go for asset forfeiture – meaning take any assets of the owner, including their house, to pay for fines that levied [sic] against them as part of the criminal case.
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> It's worth reporting them. I hate dishonest scamming sellers. And **edropoff** appears to be one.

Docket No. 25, Exh. H, at pg. 39 of 120. Clearly "Apricot Summers" did not consider this posting to itself be directed at the government. "Apricot Summers" indicated that "if anyone wants to" they can "report" eDrop-Off Chicago LLC to the authorities, indicating a belief that authorities might very well investigate the company *if* the accusations were conveyed to the government. *See also id.* at pg. 49 of 120 (suggesting that some members of the forum might be willing to contact "investigative reporters"); *id.* at pgs. 51-52 of 120 (responding to investigative reporter suggestion). A later poster by the name "tutushopper" responded to "Apricot Summers's" suggestion: "I completely concur, and had I been involved with any of their auctions, I would do just that. I hope that some who have been will file." *See id.* at pgs. 41-42 of 120; *id.* at pg. 69 of 120 (posting by "Vegas Long Legs" – "Contact the IL attorney general & the IL business licensing division"); *id.* at pg. 83 of 120. Again, that response refers only to a *hope* for some *future* report to authorities.

This raises the question, if an accusation is lodged in the blogosphere, does the U.S. Attorney's Office/Attorney General's Office hear it? There is no apparent reason to conclude that any member of the blog forum was in any way connected with or affiliated with any law enforcement agency, much less the U.S. Attorneys' Office or the Illinois Attorney General's office, or even that they were Illinois citizens (for purposes of making out an "electorate" argument, *see Wright Dev. Group, LLC v. Walsh*, 939 N.E.2d 389, 398 (Ill. 2010)). Complaining or gossiping amongst a group of people on the Internet does not remotely amount to petitioning the government, in at least this Court's view. Short of one of the blog's posters bearing the handle "USAtty" or "FBIguy," the Court has no confidence that this activity could be reasonably viewed as petitioning the government. If indeed these commenters or posters were actually hoping to initiate or incite a governmental investigation of Plaintiffs, posting on Midley's blog would be like

releasing a captive butterfly in Alaska in the hopes that the beat of its wings would cause a hurricane in the Gulf of Mexico. *See also Hammons v. Soc'y of Permanent Cosmetic Prof'ls*, Nos. 1-10-2644, 1-11-1280, __ N.E.2d __, 2012 Ill. App. LEXIS 193, *10-11, 13-14 (Ill. App. Ct. Mar. 20, 2012). In short, to consider this petitioning activity is, in this Court's view, a reach.

At least prior to the filing of the First Amended Complaint in the Illinois action, *see* Footnote 5, *supra*, the Court would have observed that notwithstanding Plaintiffs' attempt to turn this case into something that would potentially squeeze through *Sandholm*'s analysis to allow for application of the CPA, their failure to do so is consistent with the issues the Complaint in this case presents. As at least originally pled, Plaintiffs' litigation was not about Plaintiffs' dismay about comments *anywhere* – let alone on a blog – hoping to set in motion a governmental investigation or action concerning Plaintiffs. They were complaining about the *falsity* of the allegations. *See, e.g.*, Complaint ¶¶ 3-4, 13, 15-19, 22, 30-31, 34, 39, 57, 64-65.[6] If anytime a plaintiff complains about accusations that plaintiffs are engaging in fraud it transforms the case into an implied call for a government action or investigation, the limits *Sandholm* set up for the Illinois CPA may turn out to be somewhat illusory.

Even if the Court would discern (contrary to its actual analysis set forth above) that there was *some* petitioning activity involved in Midley's alleged behavior in this case, the Illinois Supreme Court agreed with the plaintiff in *Sandholm* that the CPA "is intended to apply only to actions based *solely* on the defendants' petitioning activities." *Sandholm*, 962 N.E.2d at 429; *see also id.* at 430 ("[W]e construe the phrase 'based on, relates to, or is in response to' in section 15 to mean *solely* based on, relating to, or in response to 'any act or acts of the moving party in furtherance of the moving party's rights of petition, speech, association, or to otherwise participate in government.'") (quoting 735 ILCS 110/15); *id.* at 434 ("We conclude, based on the parties' pleadings, that plaintiff's lawsuit was not solely based on, related to, or in response to the acts of

[6] Indeed, the only suggestion in the Complaint's allegations about any "reporting" of Plaintiffs' alleged conduct is the concern that certain of the forum's posts "encourage[] consumers to report them *to VH1*," a television channel on which plaintiff McFadden has a "reality" show. *See id.* ¶ 18 (emphasis added); *see also* Docket No. 13-2, ¶ 19 (original Complaint in Illinois action, containing same allegation). So long as the Court is not mistaken in its belief that VH1 has not undertaken a *coup d'etat* in Illinois or the United States in general, any report to VH1 would plainly not implicate the CPA.

defendants in furtherance of the rights of petition and speech."). It is abundantly clear to this Court that the same conclusion reached in *Sandholm* would be reached here as well.

Finally, the Court notes that according to one of the recitals in Plaintiffs' procedurally improper "Stipulation," Plaintiffs' settlement with Burke in the Illinois action has been "unsuccessful" such that the case will proceed against Burke in Illinois no matter what happens here. *See* Docket No. 37, at 1:3-7. This nullifies the Court's concern, as expressed in the June 1, 2012, tentative ruling, that Burke's absence from the Illinois case would negate any need for Plaintiffs to proceed in Illinois based upon a concern about personal jurisdiction. Burke's continued presence as a defendant in that case, however, does raise the prospect that at least the parties in this case will continue to face litigation on two fronts for at least some time. To the extent Plaintiffs complain about the risk of inconsistent judgments and duplicative litigation, they have only themselves (and, perhaps, a fast-acting defendant) to blame. It is up to Plaintiffs to determine how to smooth out the creases in the bed they made.

The Court denies Plaintiffs' motion for a voluntary dismissal pursuant to Fed. R. Civ. P. 41(a)(2).