SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE NEW YORK TIMES COMPANY, Plaintiff, - against - PETER BRIMELOW, an individual, Defendant.	Index No. 153170/2022 **DEFENDANT'S NOTICE OF MOTION TO DISMISS (ANTI-SLAPP MOTION)** **ORAL ARGUMENT REQUESTED**

PLEASE TAKE NOTICE that upon the annexed memorandum in support of Defendant's motion, and upon the annexed affirmation of Jay M. Wolman dated July 6, 2022, Defendant Peter Brimelow will move this Court, in an IAS Part, located at the Supreme Court of the State of New York, Room 130, 60 Centre Street, New York, New York 10007, on Friday, July 22, 2022 at 9:30 A.M. Eastern Time, or as soon thereafter as counsel can be heard, to dismiss the above-captioned matter.

PLEASE TAKE FURTHER NOTICE that pursuant to CPLR 2214(b), answering papers, if any, are to be served at least seven days before the time at which the motion is noticed to be heard, and reply papers, if any, are to be served at least one day before that time.

Dated: New York, New York
July 6, 2022

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE NEW YORK TIMES COMPANY, Plaintiff, - against - PETER BRIMELOW, Defendant.	Index No. 153170/2022 **MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS (ANTI-SLAPP MOTION)**

Defendant Peter Brimelow, by his attorneys, Randazza Legal Group, PLLC, respectfully submits this memorandum of law in support of the motion for an Order dismissing the Complaint pursuant to the New York Anti-SLAPP law, C.P.L.R. § 3211(a)(7) & (g) for the failure to state a cause of action, directing that all the claims alleged in Plaintiff's Complaint be dismissed with prejudice and for such other and further relief as the Court may deem proper. Plaintiff states no viable claim. The Anti-SLAPP statute is not retroactive. Plaintiff knew that binding caselaw held as much before filing its complaint, yet filed anyhow. The claim is otherwise invalid on the merits. Moreover, by filing this action, Plaintiff The New York Times Company did the very thing it purports to abhor—it filed a SLAPP suit. The New York Times filed this case to punish Defendant for exercising his First Amendment rights. The Complaint should be dismissed, and Defendant should be awarded his fees and costs.

STATEMENT OF FACTS

As alleged in the Complaint (NYSCEF Doc. No. 1),[1] Plaintiff Peter Brimelow filed a defamation action in the U.S. District Court for the Southern District of New York on January 9, 2020. Complaint at ¶ 6. (A copy of the Complaint and the exhibits thereto are attached as Exhibit

[1] Unless otherwise indicated, for purposes of this motion only, the facts are as recited in the Complaint, taken in the light most favorable to Plaintiff, without admission.

A to Affirmation of Jay Wolman, Esq., dated July 6, 2022 ("Wolman Affm.")). The New York Times had accused Mr. Brimelow, *inter alia*, of being "animated by race hatred", being a "white nationalist," a "white supremacist," and an "anti-Semite." Id. at ¶ 7. Mr. Brimelow maintained (and continues to maintain) that these nefarious accusations were false. See generally, Exhibit A to Complaint (NYSCEF Doc. No. 2).

The District Court deemed the bulk of these hateful statements to be non-actionable "opinion" and other statements that referenced his organization (and, while implicitly about him, did not name him) as not being "of and concerning" him. Complaint at ¶ 12 and Exhibit B to Complaint (NYSCEF Doc. No. 3). The District Court did find that the New York Times falsely calling Mr. Brimelow an "open white nationalist" was defamatory, but then determined there were insufficient allegations of "actual malice" under the public-figure standard of N.Y. Times v. Sullivan, 376 U.S. 254 [1964]. See generally, Exhibit B to Complaint. On appeal, the U.S. Court of Appeals for the Second Circuit swept everything into the "actual malice" framework and determined that there were insufficient allegations that the New York Times "was purposely avoiding the truth", and, therefore, the statements were not made with reckless disregard for the truth. See generally, Exhibit D to Complaint (NYSCEF Doc. No. 5).

Mr. Brimelow filed a petition for a writ of *certiorari* to challenge, *inter alia*, the Sullivan standard. See Exhibit E to Complaint (NYSCEF Doc. No. 6). Multiple Supreme Court justices have questioned Sullivan. See, e.g., Coral Ridge Ministries Media, Inc. v. S. Poverty Law Ctr., No. 21-802, 2022 U.S. LEXIS 3099, at *2-3 [U.S. June 27, 2022] (Thomas, J., dissenting from denial of *cert.*). However, Mr. Brimelow's *certiorari* petition was denied on February 28, 2022. Complaint at ¶ 21.

LEGAL ARGUMENT

In considering a motion under CPLR 3211(a)(7), Plaintiff's pleadings are "afforded a liberal construction" with Plaintiff accorded "the benefit of every possible favorable inference." Goshen v. Mut. Life Ins. Co., 98 N.Y.2d 314, 326 (2002) (internal citations and quotation marks omitted). However, where documentary evidence that may be considered under CPLR 3211(c),

in connection with consideration of the complaint itself, utterly refute the factual allegations, defenses may be conclusively established as a matter of law. See id. As discussed below, Mr. Brimelow is entitled to judgment as a matter of law.

I. PLAINTIFF'S CAUSE OF ACTION FOR RECOVERY OF DAMAGES SHOULD BE DISMISSED

A. Binding Precedent Decided Prior to the Filing of This Lawsuit Establishes that Plaintiff's Claim is Not Retroactive

Plaintiff pleads a single cause of action under N.Y. Civil Rights Law § 70-a, for recovery of damages on account of Mr. Brimelow having lost his federal lawsuit. However, this cause of action was did not exist at the time Mr. Brimelow filed his case. It was created by the New York Legislature in 2020 N.Y. Ch. 250, approved on November 10, 2020.

The New York Times cannot bring this claim against Mr. Brimelow. Mr. Brimelow filed suit on January 9, 2020. The law was not enacted until November 10, 2020. The First Department definitively ruled that the law does not apply retroactively. (Gottwald v. Sebert, 203 A.D.3d 488, 489 [1st Dept. Mar. 10, 2022]). And, it has reaffirmed itself. (Kurland & Assocs., P.C. v. Glassdoor, Inc., 2022 NY Slip Op 03323, ¶ 1, 166 N.Y.S.3d 847, 848 [1st Dept. May 19, 2022] ("We perceive no basis for overruling that decision" citing Gottwald)); see also Robbins v. 315 W. 103 Enters. LLC, 2022 NY Slip Op 02640, ¶ 1, 204 A.D.3d 551, 164 N.Y.S.3d 823, 824 [1st Dept. Apr. 21, 2022] (reaffirming Gottwald)).

In Gottwald, the defendant sought leave to set up a counterclaim under the same statute as to a pending suit. The First Department, upon a thorough review of the statute, held that "there is insufficient evidence supporting the conclusion that the legislature intended its 2020 amendments to the anti-strategic lawsuit against public participation (anti-SLAPP) law (see Civil Rights Law § 70 et seq.) to apply retroactively to pending claims". 203 A.D. at 488. As a result, it determined that "leave to assert a Civil Rights Law § 70-a counterclaim premised on plaintiffs' claims being subject to the anti-SLAPP law must be denied". Id. at 489.

The Gottwald defendant would have been permitted to amend its answer to assert a counterclaim unless the proposed amendment is "palpably improper or insufficient as a matter of

law." (McGhee v Odell, 96 AD3d 449, 450, 946 N.Y.S.2d 134 [1st Dept 2012]). It, therefore, follows that the identical cause of action Plaintiff seeks to assert against Defendant, under the same circumstances, is palpably improper and/or insufficient as a matter of law. As a result, Plaintiff's claim must be dismissed.

B. Plaintiff's Claim Lacks Merit

Plaintiff cannot otherwise meet the elements of its cause of action. A plaintiff bringing a claim under Section 70-a must show:

1) That it was "defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a";
2) That "that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law"; and
3) That the action "could not be supported by a substantial argument for the extension, modification or reversal of existing law".

Civil Rights Law § 70-a(1). Plaintiff cannot meet these elements.

First, as set forth above, because the amendments are not retroactive, the New York Times does not allege itself to have been a defendant in an action involving public petition and participation within the meaning of Section 76-a prior to the amendment. Even if the amendments were retroactive, the Complaint would still fail. To survive a motion to dismiss, a complaint must provide more than conclusory allegations or a formulaic recitation of the elements of a cause of action (see O'Donnell, Fox & Gartner v R-2000 Corp., 198 AD2d 154, 154, 604 N.Y.S.2d 67 [1st Dept 1993]). Plaintiff pleads nothing more than the underlying articles being speech in connection with an issue of public interest (Complaint at ¶ 23) without any explanation thereof. Even in the light most favorable to the New York Times, the Times does not plead that its defamatory claims that Mr. Brimelow is a white nationalist and similar such comments were in the public interest. The allegation in the Complaint is purely conclusory.

Second, and again in conclusory fashion, Plaintiff asserts that the Federal action was commenced and continued without a substantial basis in fact and law (Complaint at ¶ 28) merely

because Mr. Brimelow lost. Half of all litigants whose cases reach judgment lose—that does not mean that they are automatically without substantial basis in fact and law. If that were the case, the legislature could have drafted the statute to state merely that the defendant in a subject lawsuit was the prevailing party. The courts recognize this distinction, noting:

> A dismissal for failure to state a claim does not necessarily determine that a claim lacks a substantial basis in fact and law. The "substantial basis in fact and law" standard is distinct from the standard to grant dismissal for failure to state a claim under Rule 12(b)(6), which requires a plaintiff to "state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 [2009] (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 [2007]). While the defendant need not demonstrate that the plaintiff's claim was frivolous as defined by New York law ("completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," N.Y. Comp. Codes R. & Regs. 22 § 130-1.1(c)(1)), the defendant needs to demonstrate that the claims were not tenable, or lacked considerable factual or legal basis.

Egiazaryan v. Zalmayev, 2014 U.S. Dist. LEXIS 36285, at *17-18 [S.D.N.Y. Mar. 19, 2014]. Thus, as to the second element, the allegations are merely conclusory.

Moreover, if Section 70-a requires a defamation plaintiff in a Federal court to plead more than just plausibility, it is pre-empted. On the same day the First Department decided Gottwald, supra, the Southern District of New York, in two separate cases, determined that the "substantial basis" requirement impermissibly conflicts with the Federal Rules of Civil Procedure and, therefore, the New York anti-SLAPP law cannot be invoked as to Federal proceedings. See Kesner v. Buhl, No. 20-cv-3454-PAE, 2022 U.S. Dist. LEXIS 43094, at *43-47 [S.D.N.Y. Mar. 10, 2022]; and Carroll v. Trump, No. 20-cv-7311 (LAK), 2022 U.S. Dist. LEXIS 43512, at *15-16 [S.D.N.Y. Mar. 10, 2022]; see also Nat'l Acad. of TV Arts & Scis., Inc. v. Multimedia Sys. Design, Inc., No. 20-cv-7269-VEC, 551 F. Supp. 3d 408, 431-32 [S.D.N.Y. 2021](dismissing counterclaim under Section 70-a under Erie doctrine as "substantial basis" requirement conflicts with Federal Rules); and Maron v. Legal Aid Soc'y, Case No. 21-cv-5690-KPF, 2022 U.S. Dist. LEXIS 99225, at *39 n.11 [S.D.N.Y. June 2, 2022]. Four separate Federal judges in the

Southern District of New York have, therefore, concluded that Plaintiff's claim is pre-empted.[3]

Third, the underlying action was otherwise supported by a substantial argument for the reversal of Sullivan's "actual malice" test. In a heavily-watched case, the Supreme Court recently declined to grant *certiorari* in a petition challenging "actual malice". Dissenting from the denial, Justice Thomas wrote:

> Coral Ridge now asks us to reconsider the "actual malice" standard. As I have said previously, "we should." Berisha v. Lawson, 594 U. S. ___, ___, 141 S. Ct. 2424 [2021] (opinion dissenting from denial of certiorari) (slip op., at 2). "New York Times and the Court's decisions extending it were policy-driven decisions masquerading as constitutional law." McKee [v. Crosby], 586 U. S., at ___ [2019] (opinion of Thomas, J.) (slip op., at 2). Those decisions have "no relation to the text, history, or structure of the Constitution." Tah v. Global Witness Publishing, Inc., 991 F. 3d 231, 251 [D.C. Cir. 2021)] (Silberman, J., dissenting in part). This Court has never demonstrated otherwise. In fact, we have never even inquired whether "the First or Fourteenth Amendment, as originally understood, encompasses an actual-malice standard." McKee, 586 U. S., at ___ (opinion of Thomas, J.) (slip op., at 10).
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> I would grant certiorari in this case to revisit the "actual malice" standard. This case is one of many showing how New York Times and its progeny have allowed media organizations and interest groups "to cast false aspersions on public figures with near impunity." Tah, 991 F. 3d, at 254 (opinion of Silberman, J.). SPLC's "hate group" designation lumped Coral Ridge's Christian ministry with groups like the Ku Klux Klan and Neo-Nazis. It placed Coral Ridge on an interactive, online "Hate Map" and caused Coral Ridge concrete financial injury by excluding it from the AmazonSmile donation program. Nonetheless, unable to satisfy the "almost impossible" actual-malice standard this Court has imposed, Coral Ridge could not hold SPLC to account for what it maintains is a blatant falsehood. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U. S. 749, 771, 105 S. Ct. 2939, 86 L. Ed. 2d 593 (1985) (White, J., concurring in judgment).
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> Because the Court should not "insulate those who perpetrate lies from traditional remedies like libel suits" unless "the First Amendment requires" us to do so, Berisha, 594 U. S., at ___, 141 S. Ct. 2424, 210 L. Ed. 2d 991, at 992 (opinion of Thomas, J.), I respectfully dissent from the denial of certiorari.

Coral Ridge Ministries Media, Inc. v. S. Poverty Law Ctr., No. 21-802, 2022 U.S. LEXIS 3099, at *3-5 [U.S. June 27, 2022](Thomas, J., dissenting). This is now the third time Justice Thomas

[3] Another Federal judge in the Second Circuit concurs that Section 70-a is preempted. See Friedman v. Bloomberg, L.P., No. 3:15-cv-443 (AWT), 2022 U.S. Dist. LEXIS 62141, at *2 [D. Conn. Apr. 4, 2022] (denying leave to assert counterclaim under Section 70-a).

has called for the Supreme Court to revisit Sullivan, having done so in the Berisha and McKee cases cited in his Coral Ridge dissent. Justice Gorsuch similarly questioned in a separate dissent in Berisha whether the Sullivan standard should remain operable. 141 S.Ct. at 2429-30 (Gorsuch, J., dissenting from denial of certiorari). Justice Kagan has questioned whether Sullivan "cut[s] against the very values underlying the decision." Kagan, *A Libel Story: Sullivan Then and Now*, 18 L. & Soc. Inquiry 197, 207 (1993) (reviewing A. Lewis, *Make No Law: The Sullivan Case and the First Amendment* (1991)). Whether one likes the "actual malice" standard or agrees with Justices Thomas, Gorsuch, and/or Kagan is irrelevant. However, that at least three Supreme Court justices seem ready to re-examine Sullivan renders it impossible that Mr. Brimelow's claims in the underlying matter were not supported by a substantial argument for the reversal of existing law.

Additionally, the New York Times also asserts it is entitled to "other compensatory damages" where the action was "commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights". Complaint at ¶¶ 27 & 29, quoting Civil Rights Law § 70-a(1)(b). Plaintiff pleads nothing except the conclusory allegation that Mr. Brimelow's corpus of pleadings and unspecified statements somehow demonstrates this element. Thus, Plaintiff's claim for "other compensatory damages" must be dismissed.

II. DEFENDANT IS ENTITLED TO HIS FEES AND COSTS

Pursuant to CPLR 3211(g), Mr. Brimelow is entitled to *his* fees and costs for defending this action. Mr. Brimelow's underlying suit was not a SLAPP suit, but *this* one certainly is. As set forth by CPLR 3211(g):

> A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law , shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law. The court shall grant preference in the hearing of such motion.

The subject action is the underlying Federal lawsuit. Section 76-a(1)(a)(2) includes in the definition of "public petition and participation" includes "any other lawful conduct…in furtherance of the exercise of the constitutional right of petition." In interpreting the New York Anti-SLAPP law, the First Department has followed "California courts applying the California Anti-SLAPP statute, which is similar to the applicable New York Civil Rights Law provision[.]" Aristocrat Plastic Surgery, P.C. v. Silva, 2022 NY Slip Op 03311, ¶ 4 [1st Dept. May 19, 2022]. As observed in California, "[f]iling a lawsuit is an act in furtherance of the constitutional right of petition, regardless of whether it has merit." Trapp v. Naiman, 218 Cal. App. 4th 113, 120, 159 Cal. Rptr. 3d 462, 467 [2013](citations omitted). Thus, the instant motion to dismiss qualifies under CPLR 3211(g).

It is now incumbent upon the New York Times to show that its complaint has "a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law". (CPLR 3211[g]). Plaintiff filed and served its Complaint, despite controlling law dictating that the amendments do not apply retroactively, which the First Department reaffirmed twice before Plaintiff served the Summons in this matter. Plaintiff filed and served its complaint despite every court to consider whether the "substantial basis" requirement could apply to Federal proceedings found they conflicted with the Federal Rules of Civil Procedure. The only SLAPP suit is *this* suit.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that this Court dismiss plaintiff's complaint in the entirety and with prejudice.

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Dated: Hartford, Connecticut
July 6, 2022

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