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 OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

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Plaintiff The New York Times Company ("The Times") respectfully submits this memorandum of law in opposition to Defendant Peter Brimelow's motion to dismiss the Complaint pursuant to the New York anti-SLAPP law, CPLR 3211(a)(7) and (g).

PRELIMINARY STATEMENT

This action is a simple one for attorney's fees and costs, to which The Times is entitled by statute. In 2020, Peter Brimelow ("Brimelow") brought a defamation lawsuit against The Times in federal court. The District Court dismissed his claims as legally deficient for multiple reasons. Shortly prior to the District Court's decision, New York amended its anti-SLAPP law to compensate defendants, like The Times, for the costs of defending against meritless defamation claims like Brimelow's. Despite knowing of the change in the law, Brimelow commenced an equally meritless appeal to the Second Circuit. It was rejected. Undeterred, he then petitioned for certiorari from the Unites States Supreme Court. It also was rejected. Under the fee shifting provisions of the New York anti-SLAPP law, The Times is entitled to the costs of defending against those meritless and harassing appellate proceedings. In response, Brimelow has moved to dismiss, further multiplying the proceedings by attempting to relitigate the merits of his failed claims, wrongly arguing that the anti-SLAPP law does not apply, and raising irrelevant issues like federal preemption. The motion should be denied.

STATEMENT OF FACTS

On January 9, 2020, Peter Brimelow, a prominent anti-immigration activist and the editor of the website www.VDARE.com, filed an action for defamation against The Times in the U.S. District Court for the Southern District of New York.[1] Compl. ¶ 6. Brimelow's claims were

[1] In addition to the allegations in the Complaint, the Court may properly take judicial notice of court filings, judicial decisions, and news articles that are offered not for their truth, but for the fact of their existence. *See, e.g.*, *Gomez-Jimenez v. N.Y.L. Sch.*, 36 Misc. 3d 230, 242 (Sup. Ct. N.Y. Cty. 2012); *In re Avon Prods., Inc. S'holder Litig.*, No. 651087/2021, 2013 N.Y. Misc.

premised on five news articles published in *The New York Times* between January 2019 and May 2020. Compl. ¶ 7 & Ex. A. The first article, published in January 2019, was about U.S. Congressman Steven King of Iowa, who had just been stripped of his House Committee seats after defending white supremacy. Compl. Ex. A ¶ 48. The article detailed his long history of racist comments including the fact that he had appeared on a panel in 2012 with "Peter Brimelow, an open white nationalist," where he made certain controversial remarks.[2] *Id.* The second and third articles, published in August and September 2019, reported on a public dispute between the union of immigration judges and the Department of Justice ("DOJ"). Compl. Ex. A ¶¶ 108-10, 133-34. The union had formally complained over the inclusion of an article from VDARE in DOJ's daily press briefing, because judges believed the article to contain an anti-Semitic word and VDARE to be a white nationalist website. *Id.* Neither article mentioned Brimelow. The fourth article was a profile of presidential advisor Stephen Miller and his beliefs and ideological influences. *Id.* ¶¶ 151-53. Those influences included Brimelow and VDARE. *Id.* ¶ 153. The article quoted statements that Brimelow has made about race and explained that the Southern Poverty Law Center categorizes VDARE as a "hate website." *Id.* The fifth and final article was a republication of a wire story from Reuters. Compl. Ex. B at 1 n.1 & 26. Reuters had reported that Facebook had removed a network of inauthentic accounts "with ties to white supremacist websites VDARE and the UNZ Review." Compl. Ex. A ¶ 171. The article made no reference to Brimelow.[3]

LEXIS 3506, at *1 n.1 (Sup. Ct. N.Y. Cty. Mar. 5, 2013).

[2] The article later was amended to refer to Brimelow as a "white nationalist" and to link to a Southern Poverty Law Center webpage regarding Brimelow. *See* Compl. Ex. B at 4-5.

[3] The articles may be accessed at the following websites: Trip Gabriel, *A Timeline of Steve King's Racist Remarks and Divisive Actions*, N.Y. Times (Jan. 15, 2019), https://tinyurl.com/2cey4un7; Christine Hauser, *Justice Department Newsletter Included Extremist Blog Post*, N.Y. Times (Aug. 23, 2019), https://tinyurl.com/bdhkxn6m; Katie Benner,

On December 17, 2020, the District Court dismissed all of Brimelow's claims with prejudice. *See generally* Compl. Ex. B. The District Court concluded, among other things, that all but one of the statements at issue were non-actionable opinion as a matter of law, many of the statements at issue were not even about Brimelow (three of the five articles do not refer to him at all), and "[t]here is no evidence" of actual malice set out in the complaint. *Id.* In other words, Brimelow failed to adequately plead multiple necessary elements of his claims.

Shortly prior to the District Court's decision, New York amended its anti-SLAPP law, in part to deter meritless defamation claims. Compl. ¶ 9; *see also* Sponsor Mem. of Sen. Hoylman (July 22, 2020), *available at* https://www.nysenate.gov/legislation/bills/2019/s52. The amended anti-SLAPP law achieves its objective in several ways. Most pertinent to this action, the law mandates that a successful defendant in a SLAPP lawsuit be awarded costs and fees. Compl. ¶ 9; N.Y. Civ. Rights Law § 70-a. The Legislature directed that the amendments were to "take effect immediately." *See* 2019 Bill Text N.Y. A.B. 5991-A § 4.

On January 12, 2021, after the amended anti-SLAPP had entered into force, Brimelow noticed his appeal to the Second Circuit. Compl. ¶ 13. The Times promptly wrote to counsel for Brimelow, bringing to his attention the amended anti-SLAPP law and advising him that, if he were to persist with his meritless appeal, The Times would seek an award of fees through a separate action against him, pursuant to N.Y. Civ. Rights Law § 70-a. *Id*. ¶ 14 & Ex. C. Brimelow nonetheless proceeded with the appeal, putting The Times to the cost of briefing and oral argument.

Top Immigration Judge Departs Amid Broader Discontent Over Trump Policies, N.Y. Times (Sept. 13, 2019), https://tinyurl.com/59rdbny5; Katie Rogers & Jason DeParle, *The White Nationalist Websites Cited by Stephen Miller*, N.Y. Times (Nov. 18, 2019), https://tinyurl.com/yc3t8xnp; Jake Stubbs & Katie Paul, *Facebook Says It Dismantles Disinformation Network Tied to Iran's State Media*, Reuters (May 5, 2020), https://tinyurl.com/3d92fz9w.

Indicative of the lack of merit in that appeal, Brimelow's brief to the Circuit begins not with substantive legal argument but with long expositions on Brimelow's theories on race. *See* Br. for Plaintiff-Appellant at 3-4, 18-30, *Brimelow v. New York Times*, No. 21-66-cv (2d Cir. Mar. 16, 2021), Dkt. 33.

The Second Circuit affirmed, by summary order, the dismissal of all of Brimelow's claims. Compl. ¶ 16 & Ex. D. In doing so, the court held that Brimelow's "Complaint provides no basis for plausibly inferring that The Times had any doubts about the truth of its statements regarding Brimelow or the VDARE website," and therefore he did "not plausibly allege[ ] that The Times acted with actual malice," an essential element of his claims. Compl. Ex. D at 3, 8, 10. The court noted that Brimelow also challenged the District Court's other, alternative bases for dismissal. But the court did not need to reach those other issues. *Id.* at 9 n.1.

Undeterred, Brimelow petitioned for writ of certiorari from the Supreme Court. Compl. Ex. E. His petition conceded that "the New York Times's speech amounts to little more than name calling," *id.* at 5, and engaged in more lengthy non-legal arguments about how Black Americans are "innately" less intelligent, *id.* at 2-3, 11-20, before urging the court to abandon the constitutional *Sullivan* standard for actual malice on policy grounds. The Supreme Court promptly denied the petition. Compl. ¶ 21.

On April 12, 2022, The Times filed this action pursuant to the New York anti-SLAPP law, seeking to recover its costs and fees and any other damages the Court deems fit and proper.

ARGUMENT

I. The Times Has Adequately Pled Entitlement to Costs and Fees Under the New York Anti-SLAPP Law

A. Awarding Fees Would Not Be a "Retroactive" Application of the Anti-SLAPP Law

Brimelow argues, first, that The Times is not entitled to any costs and fees because he

started his lawsuit prior to the amendments to the anti-SLAPP law and the law cannot be applied "retroactively."[4] Mot. at 3. But Brimelow's argument would insulate him only against costs for the proceedings before the District Court, which took place prior to the amendments. Brimelow's appeal to the Second Circuit and petition for certiorari, on the other hand, were commenced and continued *after* enactment of the amendments. The costs of the appellate proceedings are appropriately subject to the fee-shifting provisions of the amended anti-SLAPP law.

First, in enacting the law, the legislature specified that the amended anti-SLAPP law would take "immediate" effect, *see* 2019 Bill Text N.Y. A.B. 5991-A § 4, and the law permits the recovery of fees not only in new claims, but also where plaintiff "continued such action" without a substantial basis in law, N.Y. Civ. Rights Law § 70-a. It is a basic principle of statutory construction that a statute should be construed "so that no part will be inoperative or superfluous." *Corley v. United States*, 556 U.S. 303, 314 (2009); *see also Lemma v. Nassau Cty. Police Officer Indemnification Bd.*, 31 N.Y.3d 523, 528 (2018). The most natural reading of Section 70-a's phrase "commenced or continued" is that the law applies not only to the initial commencement of an action by filing a complaint, but also to the continuation of an action through filing an appeal or the pursuit of other relief. And that makes sense: the purpose of the anti-SLAPP law is to deter plaintiffs from pursuing legal proceedings that are not well-founded in law or fact, at whatever stage that may be.

Second, applying the fee-shifting provisions of the amended anti-SLAPP law to the appellate proceedings would not be a retroactive application of the law. A statute is applied

[4] Brimelow elsewhere argues that California precedent should guide the court's interpretation of the New York anti-SLAPP law. Mem. in Support of Def.'s Mot. to Dismiss ("Mot.") at 8. It is well-settled that California's anti-SLAPP statute applies retroactively. *See Soukup v. Law Off. of Herbert Hafif*, 39 Cal. 4th 260, 280 (2006).

"retroactively" if it increases liability for *past* conduct, prior to enactment. *Regina Metro. Co. v. N.Y. State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 365 (2020); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994) (statute is retroactive if "the new provision attaches new legal consequences to events completed before its enactment"). Retroactivity is generally disfavored because it would deprive individuals of the "opportunity to know what the law is and to conform their conduct accordingly." *Landgraf*, 511 U.S. at 265. Those concerns are not present here.

Here, when Brimelow commenced his appeal, he knew the amended anti-SLAPP law was in effect. Compl. ¶ 14 & Ex. C. He knew, based on the District Court opinion, that his claims were legally deficient for multiple reasons. He had an opportunity to "conform [his] conduct accordingly," but nevertheless pursued an appeal—and then a petition for certiorari. Compensating The Times for its defense costs in those appellate proceedings would not be a retroactive application of the anti-SLAPP law and is entirely consistent with the language and purpose of the law.

Awarding costs for the appellate proceedings also would not conflict with precedent in this jurisdiction. In each of the cases relied on by Brimelow, the courts either held that defendants could not seek fees for proceedings that occurred prior to amendment of the anti-SLAPP law. *See, e.g.*, *Robbins v. 315 W. 103 Enters. LLC*, 204 A.D.3d 551 (1st Dep't 2022); Compl., *Robbins*, No. 150616/2021 (Sup. Ct. N.Y. Cty. Jan. 19, 2021), Dkt. 1. Or they held that defendants could not seek costs for trial court proceedings that began before the amendments and that remained active at the same stage, with the trial court. *Gottwald v. Sebert*, 203 A.D.3d 488 (1st Dep't 2022); Proposed Second Am. Countercl., *Gottwald*, No. 653118/2014 (Sup. Ct. N.Y. Cty. Apr. 6, 2021), Dkt. 2305; *Kurland & Assocs. v. Glassdoor, Inc.*, 205 A.D.3d 545 (1st Dep't 2022); Mem. in Supp. of Mot. to Award Fees & Costs, *Kurland*, No. 162083/2018 (Sup. Ct.

N.Y. Cty. May 12, 2021), Dkt. 236.[5] The courts held that awarding fees in those circumstances would present an impermissible retroactive application of the law. None of the cases address the circumstances of this case: where plaintiff commenced and pursued appellate proceedings *after* amendment.

B. The Times Has Adequately Pled All Elements of a Claim for Fees

Brimelow next argues that even if the anti-SLAPP law applies here, the Complaint fails adequately to plead the necessary elements for an award of fees. These arguments are meritless. Under New York Civil Rights Law § 70-a(1), The Times may bring an action against Brimelow to recover its defense costs and attorney's fees where two elements are met: 1) Brimelow brought an action against The Times based on its "public petition and participation," as defined by N.Y. Civil Rights Law § 76-a; and 2) Brimelow "commenced or continued such action . . . without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law." The Complaint adequately pleads both elements.

1. News Articles Constitute "Public Petition and Participation"

Brimelow argues that the news articles he sued over are not "public petition and participation" protected by the anti-SLAPP law. Mot. at 4. This is specious. The anti-SLAPP law defines "public petition and participation" as "any communication in . . . a public forum in connection with an issue of public interest" or "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public

[5] The First Department recently granted leave to appeal in *Gottwald v. Sebert*, No. 2021-03036 (1st Dep't June 28, 2022), which held that certain provision of the anti-SLAPP are not retroactive. If the Court of Appeals reverses and holds that fees may be sought for proceedings prior to amendment of the anti-SLAPP, The Times reserves its right to seek costs for the proceedings before the District Court.

interest." N.Y. Civ. Rights Law § 76-a(1)(a). It is well-settled that news reporting meets this definition. *See, e.g.*, *Palin v. N.Y. Times Co*., 510 F. Supp. 3d 21, 27 (S.D.N.Y. 2020); *Sackler v. Am. Broad. Cos*., 144 N.Y.S.3d 529, 532 (Sup. Ct. N.Y. Cty. 2021); *Epoch Grp. Inc. v. Politico, LLC,* No. 652753/2021, 2021 N.Y. Misc. LEXIS 6367, at *6–7 (Sup. Ct. N.Y. Cty. Dec. 9, 2021).

The articles also plainly concern matters of public interest. The anti-SLAPP law directs that "'[p]ublic interest' shall be construed broadly and shall mean any subject other than a purely private matter." N.Y. Civ. Rights Law § 76-a(1)(d). Courts applying the law have, accordingly, given "public interest" a broad reading. *See, e.g.*, *Aristocrat Plastic Surgery, P.C. v. Silva*, No. 153200/2021, 2022 N.Y. App. Div. LEXIS 3233 (1st Dep't May 19, 2022) (negative experience at plastic surgery clinic was matter of public interest); *Coleman v. Grand*, 523 F. Supp. 3d 244 (E.D.N.Y. 2021) (account of sexual relationship with prominent jazz musician a matter of public interest). Here, two articles are profiles of national political figures; two are reporting on public conflict between federal immigration judges and the Department of Justice; and one is about Facebook's efforts to police inauthentic behavior on its global platform—all obviously matters of legitimate public interest and concern.

2. Brimelow's Lawsuit Lacked a Substantial Basis

Next, Brimelow argues that "merely because Brimelow lost" that does not mean his claim was meritless. But the decisions of the federal courts speak for themselves. Brimelow's Complaint was legally deficient for multiple reasons. Setting aside the issue of actual malice, addressed below, Brimelow sued over stories that were not about him and never mentioned him; he sued over subjective characterizations like "anti-Semitic" and "white nationalist" that are not

actionable based on well-settled precedent; and he sued over the mere republication of a story taken from the Reuters wire service, which is not actionable. A simple action for fees under the anti-SLAPP law is not an opportunity for Brimelow to relitigate the merits of claims that the federal courts have already considered at length and rejected.

3. Federal Preemption Is Irrelevant

Brimelow apparently argues that The Times cannot seek its fees because some federal courts have concluded that some provisions of the anti-SLAPP law are pre-empted in federal court. Mot. at 5-6. But federal pre-emption is relevant only in federal court. This is a state court action, appropriately brought under applicable state law. *See* N.Y. Civ. Rights Law § 70-a(1). Indeed, the federal courts have directed that a standalone claim for fees in state court is the appropriate means of seeking fees under the anti-SLAPP law. *See, e.g.*, *Lindell v. Man Media Inc.*, No. 21-cv-667, 2021 U.S. Dist. LEXIS 237022, at *17-18 (S.D.N.Y. Dec. 10, 2021).

Brimelow also argues that the heightened pleading standards of the anti-SLAPP law do not apply in federal court. Mot. at 5-6. It is unclear what the relevance is of this argument. Both the federal district and appellate courts found that Brimelow's claims failed to meet even the basic *Iqbal/Twombly* pleading standard. *See* Compl. Exs. B & D.

4. Brimelow Did Not Advance a Substantial Argument for the Modification of Existing Law

Finally, Brimelow argues that he should not have to compensate The Times for its costs because he had a "substantial argument" for persuading the Supreme Court to abandon the actual malice standard. Mot. at 6. He did not: the Supreme Court's unanimous denial of his petition for certiorari is proof of that. The actual malice standard has been in effect since 1964. *See N.Y. Times v. Sullivan*, 376 U.S. 254 (1964). The Supreme Court has repeatedly affirmed that is a bedrock principle of the American commitment to freedom of expression enshrined in the

Constitution. *See, e.g.*, *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 247 (2014) (reiterating the "settled meaning" of actual malice in defamation). Brimelow overstates a single dissent from a denial of certiorari by Justice Gorsuch and badly misconstrues a thirty-year-old law review article by Justice Kagan in an attempt to suggest that he is not tilting at windmills. Mot. at 7. But only one justice—Justice Thomas—has ever called outright for the "actual malice" standard to be abandoned. And, notably, no other justice has joined Justice Thomas's dissents from denial of certiorari that Brimelow puts so much stock in. *See Coral Ridge Ministries Media, Inc. v. S. Poverty L. Ctr.*, No. 21-802, 2022 U.S. LEXIS 3099 (June 27, 2022) (Thomas, J., dissenting); *Berisha v. Lawson*, 141 S. Ct. 2424 (2021) (Thomas, J., dissenting); *McKee v. Cosby*, 139 S. Ct. 675 (2019) (Thomas, J., concurring). Brimelow may disagree with the *Sullivan* standard, but that does not make his claims legally sound.[6]

Brimelow's attack on *Sullivan* also would not revive his dismissed claims against The Times or relieve him of paying The Times's costs. The District Court held that only a single statement was potentially actionable in the absence of the actual malice standard: the description of Brimelow as an "open white nationalist." Compl. Ex. B at 14. All his other claims—and four of the five articles—were non-actionable as a matter of law on alternative grounds. Thus, regardless of the status of *Sullivan*, The Times still would be entitled to costs.

II. Brimelow Is Not Entitled to Fees and Costs

Lastly, Brimelow attempts to turn the anti-SLAPP on its head. The Times's action for fees, he argues, is an attempt to chill his rights to sue for defamation, and The Times must be deterred by paying his costs. Mot. at 7-8. Brimelow is not the first to try this

[6] It is important to note that Brimelow's theory, if adopted, would gut the New York anti-SLAPP statute. Under his theory, *any* plaintiff can evade fee shifting under the anti-SLAPP merely by claiming to challenge even the most well-settled, fundamental constitutional principles.

creative approach. *See, e.g.*, *Nat'l Jewish Democratic Council v. Adelson*, 417 F. Supp. 3d 416, 430 (S.D.N.Y. 2019) (seeking fees under equivalent provisions of the Nevada anti-SLAPP statute). But, as the court in *Adelson* observed, this approach is at odds with the objectives of an anti-SLAPP law: "It would be peculiar, to say the least, if Nevada wrote its anti-SLAPP statute to shield litigants who file SLAPPs from liability in a subsequent anti-SLAPP damages action." *Id.* at 431. This is because it would undermine the "twin aims" of any anti-SLAPP law: "to protect defendants from litigation costs and to deter plaintiffs from bringing SLAPP claims." *Id.* The New York anti-SLAPP law similarly is not designed to protect the right to sue; it is designed to protect the right to speak and participate in public affairs. This lawsuit, in no way, challenges Brimelow's right to speak about anything he wants. He was, and is, free to criticize The Times. What he is not free to do is bring meritless lawsuits aimed at punishing The Times for non-actionable reporting on him.

In any event, the court need not engage with these issues. For all of the reasons set out above, The Times's action for costs and fees is properly brought under the anti-SLAPP law and the well-pleaded allegations in the Complaint establish each requisite element of the claims. Whether evaluated under the ordinary standard for a motion to dismiss or the heightened pleading standard of the anti-SLAPP, Brimelow's motion is without merit and should be denied.

CONCLUSION

For all the reasons set forth above, Defendant respectfully requests that the Court deny Brimelow's motion to dismiss and provide such other and further relief as the Court deems appropriate.

Dated: New York, NY
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Respectfully submitted,

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WORD COUNT CERTIFICATION

I, Dana R. Green, hereby certify that this Memorandum contains 3,636 words and is in compliance with Section 202.8-b of the Uniform Civil Rules for New York State Trial Courts.

Dated: July 15, 2022
New York, New York

s/ Dana R. Green
Dana R. Green