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 **REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS (ANTI-SLAPP MOTION)**

Plaintiff The New York Times Company appears to agree that the motion to dismiss should be allowed (NYSCEF Doc. No. 15); its argument that an appeal constitutes a new action is unavailing and unsupportable. It otherwise fails to show it is entitled to relief or that it, itself, can avoid the imposition of Anti-SLAPP fees. The Anti-SLAPP motion (Mot. Seq. No. 1, NYSCEF Doc. Nos. 9-14) should, therefore, be allowed.

1.0 Plaintiff Cannot State a Claim Merely for Appellate Practice

Plaintiff admits on p. 5 of its opposition that the Anti-SLAPP law does not apply to the proceedings before the Federal District Court because the statute does not apply retroactively, *i.e.* to actions then-pending. But, applying the statute to the appeals is merely an application to a matter that was already pending and would constitute retroactive application.

In Gottwald v. Sebert, the First Department held that CVR §§ 70-a & 76-a, as amended, did not apply to "pending claims". (203 A.D.3d 488, 488 [App. Div. 1st Dept. Mar. 10, 2022]). The statutes themselves use the term "action involving public petition and participation". (CVR §§ 70-a & 76-a). Appeals are not separate actions, they are part of the "same action." (Compare Fox v. Matthiessen, 155 N.Y. 177, 179 [1898]("The object of the statutory provisions on this subject is to prevent multiplicity of appeals in the same action."); Fam. Ct. Act § 438 [a] (treating

an "appeal" as part of a "proceeding"). Thus, just as the Gottwald defendant could not add a counterclaim in a pending action, even though the plaintiff "continued" it after the date the amendments went into effect, The New York Times cannot recover against Mr. Brimelow for continuing to prosecute the same action on appeal.

This interpretation is consistent with interpretation of the California Anti-SLAPP statute. Under the California law,[1] because there was no preclusion of appellate attorneys' fees under the general fee-shifting provision, appellate fees could be awarded to the prevailing trial court litigant. (See Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, 47 Cal. App. 4th 777, 785, 54 Cal. Rptr. 2d 830, 835 (2nd Dist. Ct. of App., Cal. 1996]). That is, California Courts, applying the California Anti-SLAPP law, do not award fees on an appeal because they consider an appeal to be "a separate action"; rather, those appellate fees attach solely because the appeal is part of the *same* action. There has never been a case, under any Anti-SLAPP law, where a claim was dismissed, without an Anti-SLAPP motion pending, then a later appeal of that mere loss led to an Anti-SLAPP award. The New York Anti-SLAPP law evidences no intent to create this new species of never-before-seen Anti-SLAPP law.

Simply put, The New York Times cannot apply the statute retroactively to the action as a whole, whether to the part in the trial court or to the part on appeal. The statute does not apply retroactively. The New York Times cannot try and make it retroactive as to this action by calling an appeal a "separate action."

2.0 The New York Times Fails to State a Claim

Notwithstanding the lack of retroactivity, thereby precluding this action as a whole, The New York Times cannot recover under the statute for Federal proceedings.

First, Plaintiff utterly glosses over the pre-emption issue. It does not deny that the statute

[1] Although Mr. Brimelow refers to the general principle of following the substantive interpretation of the California Anti-SLAPP law, the law of retroactivity is separate from the interpretation of the substantive statutory provisions.

suffers from fatal conflicts with Fed. R. Civ. P. 8 & 12. A federal defendant, today, cannot invoke the New York Anti-SLAPP law in federal court precisely because it requires a different pleading standard than that required by Iqbal & Twombley, *i.e.* what Rules 8 & 12 require. It does not matter that Defendant did not survive a Rule 12 motion in Federal court, it only matters that the Anti-SLAPP statute would have required him to plead "substantial basis", which the Federal rules do not require. It is, therefore, pre-empted as a counterclaim in Federal court. (See 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)). A claim that is pre-empted in Federal court, even as a counterclaim, is necessarily pre-empted in a subsequent state court suit.

Second, Plaintiff fails to demonstrate "public interest". A matter is not "public interest" merely because The New York Times publishes something. This kind of self-serving argument would render the "public interest" requirement meaningless, because everything it publishes, or every publication by anyone who claims to be as important as them, automatically becomes a matter of public interest. A spurned reporter falsely writing about her love interest's infidelity would become "public interest". A sibling who thinks her brother was unduly favored in their parent's will could turn it into "public interest". A homeowner who does not like the music played a bit too loudly by his neighbor could plant false "public interest" stories. This Court cannot declare that The New York Times has *carte blanche* to determine what is a matter of statutory public interest.

Plaintiff's specific argument is similarly unavailing. There is nothing offered as to why calling Mr. Brimelow an "open white nationalist" or any other statement at issue is a statement on a matter of public interest. Plaintiff's one-sentence argument as to being profiles of national public figures, reporting on a public conflict, and Facebook's policing efforts is insufficient. By this token, all The New York Times would have to do to make something "public interest" is to

slip a matter of private interest into an article that is otherwise on a matter of public concern. Under California jurisprudence, there are some guiding principles:

> First, 'public interest' does not equate with mere curiosity. [Citations.] Second, a matter of public interest should be something of concern to a substantial number of people. (Dun & Bradstreet v. Greenmoss Builders, 472 U.S. 749, 762 [1985]) Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. (Ibid.; Hutchinson v. Proxmire, 443 U.S. 111, 135 [1979]). Third, there should be some degree of closeness between the challenged statements and the asserted public interest (Connick v. Myers,461 U.S. 138, 148–149 [1983]); the assertion of a broad and amorphous public interest is not sufficient (Hutchinson v. Proxmire, supra, 443 U.S. at p. 135.) Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort 'to gather ammunition for another round of [private] controversy. …' (Connick v. Myers, supra, 461 U.S. at 148.) Finally, 'those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure.' (Hutchinson v. Proxmire, supra, 443 U.S. at 135 … ." (Weinberg v. Feisel, 110 Cal.App.4th 1122, 1132–1133 [2003]).

(Thomas v. Quintero, 126 Cal. App. 4th 635, 658-59 [1st Dist. Ct. of App., Cal. 2005] (cleaned up)). Plaintiff does not argue or demonstrate that the statements were of concern to a substantial number of people. Plaintiff does not show the relationship of the statements to the asserted public interest—only asserting broad and amorphous interest in name-calling. Plaintiff does not show the focus is in the public interest. And, in fact, its own arguments are that its own conduct creates the defense. Thus, Plaintiff has failed to show the statements qualify under the statute.

Third, Plaintiff fails to show that Mr. Brimelow lacked a substantial basis for his claims. Instead, Plaintiff hand-waives at the prior decisions and, while disclaiming that it was not merely because Mr. Brimelow lost, offers nothing except that Mr. Brimelow lost. Plaintiff's argument is that because Mr. Brimelow was unable to show some of the statements were "of and concerning" him, that is automatically a lack of substantial basis. But, that is, again, merely pointing to his loss, which is itself insufficient. It is not, for example, insubstantial to claim that statements about VDARE, the publication with which Mr. Brimelow is closely associated, were implicitly about him. And, there is nothing "well-settled" about whether terms like "anti-semite" or "white nationalist" are not actionable in defamation. Just because the Federal court in this dispute chose

to view them as not actionable, does not mean that they got it right. In fact, New York courts actually say they are actionable. (Compare Morelli v. Wey, 2016 NY Slip Op 32487(U), ¶ 19 [N.Y. Cty. Sup. Ct. 2016] ("Sheridan v Carter, 48 AD3d 444, 446-447, 851 N.Y.S.2d 252 [2d Dept 2008] [domestic Worker's published statements which depicted couple that formerly employer her as racists were defamatory per se]; Herlihy v Metropolitan Museum of Art, 214 AD2d 250, 261, 633 N.Y.S.2d 106 [1st Dept 1995] [complaint stated cause of action for slander per se where it stated that volunteers made statements that former coordinator was anti-Semitic and was biased in her treatment of Jewish volunteers]"). Mr. Brimelow could not have predicted that a Federal court would contravene New York precedent.

Similarly, as to actual malice, Plaintiff fails to show a lack of substantial basis. It is only on an appeal that Mr. Brimelow could seek to challenge potentially vulnerable precedent. It does not matter how long the Sullivan standard has been in effect—it was questioned just last month by Justice Thomas in the same period Roe was overturned, a decision almost as old. The odious ruling in Plessy v. Ferguson, 163 U.S. 537 (1896), stood for 58 years, exactly the same length of time Sullivan has stood. By The New York Times's reasoning, the State of Mississippi, which prevailed in the recent Dobbs matter, made appellate arguments without a substantial basis for them. (Dobbs v. Jackson Women's Health Organization, No. 19-1392, 597 U.S. __ [2022]). This illogic is unsupportable. There is no rule that if a precedent is old enough, it cannot be challenged.

And, while Plaintiff waves away the positions of Justices Gorsuch and Kagan, it was highly anticipated by many that the Supreme Court would revisit the standard this term, and it may yet do so in another matter. (See, e.g., Volokh, Eugene "*Perhaps the S. Ct. Will Reconsider the "Actual Malice" Libel Test -- but Not in Palin v. N.Y. Times*", REASON [Feb. 15, 2022];[2] Clary, Grayson, "At the Supreme Court, another hint of trouble for New York Times v.

[2] Available at https://reason.com/volokh/2022/02/15/perhaps-the-s-ct-will-reconsider-the-actual-malice-libel-test-but-not-in-palin-v-n-y-times/ .

Sullivan?", TECH. & PRESS FREEDOM [Jan. 18, 2022][3]). It is not unreasonable to believe that reversing Sullivan may have at least three votes, from both sides of the Conservative-Liberal divide. It is understandable that The New York Times wishes to downplay the potential that its namesake case might be overturned, but it does not render Mr. Brimelow's appellate arguments insubstantial. The Anti-SLAPP statute does not and cannot interfere with a litigant seeking to overturn precedent, and the most recent U.S. Supreme Court term shows that even the most "well-settled" precedents are not immune from reconsideration. Thus, Plaintiff fails to meet the requirement of a lack of substantial basis

3.0 Mr. Brimelow is Entitled to His Fees for Defending this SLAPP Suit

Mr. Brimelow recognizes that it is unusual for someone to file an Anti-SLAPP motion against a suit to purportedly recover from a prior, alleged SLAPP suit. But, the statute is designed to thwart punitive litigation, which is exactly what this case is. It is designed to punish Mr. Brimelow merely for having stood up for himself and, unfortunately, lost.

Plaintiff's sole citation against Mr. Brimelow's ability to fight Plaintiff's SLAPP suit is Nat'l Jewish Democratic Council v. Adelson. (417 F. Supp. 3d 416 [S.D.N.Y. 2019]). However, in Adelson, it had already been determined that Mr. Adelson had filed a SLAPP suit in violation of Nevada law. The court found it peculiar that a SLAPP plaintiff could invoke the Anti-SLAPP post-suit cause of action. (Id. at 431). A prerequisite in that case was the demonstration by a prior court that Adelson had, indeed, violated the Anti-SLAPP law when he filed his lawsuit. In contrast, Mr. Brimelow could not have violated the Anti-SLAPP law at the time he filed his lawsuit, because the New York Anti-SLAPP law, in its current form, did not exist.

Here, there was no determination that Mr. Brimelow was a SLAPP plaintiff; he was not. Thus, there is nothing inequitable or incompatible with a good faith litigant invoking the Anti-SLAPP statute against a Plaintiff determined to punish him for having the audacity to seek good

[3] Available at https://www.rcfp.org/supreme-court-ny-times-sullivan/ .

faith redress in the courts. Simply put, the fact is that the New York Times is the party, in this case, who has filed a lawsuit to punish another citizen for exercising his First Amendment rights. This is impermissible.

Other than this failed argument that Mr. Brimelow is categorically barred from seeking Anti-SLAPP relief, Plaintiff makes no specific argument as to why Mr. Brimelow is not entitled to relief. Instead, Plaintiff points to its arguments in opposition to dismissal in general. Thus, Plaintiff functionally concedes that, should this Court dismiss the action, which it should for the reasons set forth in the motion and this reply, there is nothing standing in the way of Mr. Brimelow recovering his fees under the statute.

CONCLUSION

For the foregoing reasons, defendant respectfully reaffirms his request that this Court dismiss plaintiff's complaint in the entirety and with prejudice and award fees under the Anti-SLAPP law.

Dated: Hartford, Connecticut
July 21, 2022

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CERTIFICATION OF WORD COUNT

Pursuant to Section 202.8-b of the Uniform Civil Rules for New York State Trial Courts, I hereby certify that this memorandum is in compliance with Section 202.8-b and contains 2,258 words.

Dated: Hartford, Connecticut
July 21, 2022

By: /s/ Jay M. Wolman
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