No. 23-

IN THE

Supreme Court of the United States

YUVAL GOLAN,

Petitioner,

v.

DAILY NEWS, L.P. AND NOAH GOLDBERG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In recent years, many States have enacted so-called anti-SLAPP statutes (Strategic Lawsuits Against Public Participation). These statutes have effectively eliminated the distinction between private figures and public figures, long established by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Philadelphia Newspapers, Inc. v. Hepps*, 475 U. S. 767 (1986), because their effect is to require every defamation plaintiff, whether a private or public figure, to prove (not merely plead) malice at the pleading stage, before any discovery. If they cannot do so, they are not only out of court, but often must pay legal fees to the media defendants who have libeled them.

The highest Courts of three States have declared their anti-SLAPP statutes to be unconstitutional, because they effectively deprive plaintiffs of the constitutional right to have a jury be the sole finder of the facts.

1. Is the New York anti-SLAPP statute unconstitutional as a violation of the First Amendment's distinction between private figures and public figures, as long established by this Court?

2. Is the New York statute unconstitutional as an infringement upon the right of a jury trial under the Seventh Amendment?

3. The right to file a court complaint is petitioning activity protected by the First Amendment. By imposing heightened pleading standards, and the mandatory award of legal fees against a plaintiff, does the statute violate the First Amendment by unduly burdening that right?

PARTIES TO THE PROCEEDING

Petitioner Yuval Golan is a citizen of New York State.

Respondent Daily News, L.P. is a New York limited partnership.

Respondent Noah Goldberg is a citizen of New York State.

RELATED CASES

There are no related cases.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Yuval Golan respectfully petitions this Honorable Court for a writ of certiorari to review judgments and orders of the New York State Court of Appeals and the Supreme Court of the State of New York, Appellate Division, First Department.

OPINIONS BELOW

The decision and order of the Supreme Court of the State of New York, Appellate Division, First Department is reported at 214 A.D.3d 558, 183 N.Y.S.3d 854, 2023 N.Y. App. Div. LEXIS 1589, 2023 NY Slip Op 01586, 2023 WL 2603164, and is reproduced in the Appendix at 1a-3a.

The decisions and orders of the Supreme Court of the State of New York, County of New York are reported at 77 Misc. 3d 258, 175 N.Y.S.3d 871 (original decision) and 2023 N.Y. Misc. LEXIS 5458, 2023 NY Slip Op 33135(U)(ruling on legal fees), and are reproduced in the Appendix at 6a and respectively.

The order of the New York State Court of Appeals denying leave to appeal is reported at 41 N.Y.3d 959, 2024 N.Y. LEXIS 387, 2024 NY Slip Op 64315, 2024 WL 1161444, and is reproduced in the Appendix at 27a.

JURISDICTION

The order of the New York State Court of Appeals denying leave to appeal was entered on March 19, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). The petition is timely, being filed

within 90 days of entry of the order denying leave, S. Ct. Rule 13 subd. 1.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The following provisions are set out in full in Appendix F:

U.S. Constitution, 7th Amendment

New York State Constitution, Article 1, § 2

New York Civil Rights Law § 70-a

New York Civil Rights Law § 76-a

New York Civil Practice Law and Rules § 3211(a) and (g)

New York Civil Rights Law § 74

STATEMENT OF THE CASE

Petitioner Yuval Golan has for many years been involved in the buying and selling of residential real estate in the New York City area, both as an individual and by means of corporate entities by whom he was employed. For purposes of defamation law, it is undisputed that he is a private citizen, and not a public figure. He has never sought publicity or participated in public debate on any controversial issue

The respondent Daily News, L.P. ("Daily News") is a New York limited partnership with an office at 4 New York Plaza, New York, NY 10004. It owns and operates both the New York Daily News, a daily newspaper, and an internet website, www. nydailynews.com. Respondent Noah Goldberg is

employed by the Daily News, and was the writer of the statements complained of herein.

On October 18, 2021, the respondents wrote and published an article (“the Article”) in the print edition and on the website of the Daily News, entitled "Brooklyn developer accused of swindling vulnerable homeowners out of valuable properties." The texts are identical, but the appearance and styles of the two differ slightly, and they have different headlines and sub-headlines. The Article is available on the internet to this day at this link:

www.nydailynews.com/new-york/ny-brooklyn-developer-accused-swindling-vulnerable-homeowners-20211018-cz2bomihdvbjxpsubxvuarr7iq-story.html

The Article describes a series of transactions in which Mr. Golan was involved, generally concerning distressed properties in less desirable neighborhoods in Brooklyn, New York. In particular, the large headline on the front page of the tabloid newspaper is "BKLYN LAND SHARK! / "Real estate baron ripped by families and courts, subject of several suits." It was accompanied by a photograph of Mr. Golan's face.

The Article itself, on pages 4 and 5 of the print newspaper, bore the headline "OWNERS: BEWARE OF THIS BUYER," and the sub-headline "Slam real-estate mogul as wolf preying on sellers in newly upscale B'klyn nabes." On the internet, the Article bore the headline "Brooklyn developer accused of swindling vulnerable homeowners out of valuable properties."

All in all, the headline and the text of the Article falsely portrayed Mr. Golan as an unscrupulous real

estate criminal who had cheated elderly people out of their homes by fraud. It had an immediate and devastating negative effect on his reputation in his local Orthodox Jewish community, and in New York City generally. His ten-year-old son was asked why his father "stole from old people." He has been personally devastated by the Article, and has lost many business opportunities.

PROCEDURAL HISTORY

Petitioner Golan commenced this action on February 7, 2022 by filing a summons and verified complaint The complaint attached as exhibits both a copy of the Article as it appeared in the print edition of the newspaper and on the internet. The complaint contained a single cause of action for defamation, based upon a series of false and defamatory statements of fact in the Article. Moreover, the headline itself was cited as defamatory *per se*, inasmuch as the phrase "Land Shark" implied criminality.

The respondents Daily News and Goldberg moved to dismiss the complaint on March 31, 2022. The basis for the motion was the anti-SLAPP statutes, Civil Rights L. §70-a and CPLR 3211(g), which had been amended by the New York State Legislature and enacted in November 2020.

On October 3, 2022, the lower court dismissed the complaint in its entirety, and awarded legal fees to the respondents. First, the lower court reviewed the records of some of the court proceedings in which Mr. Golan was involved, and his pointing out the many

errors and misstatements in the Article about those proceedings. It said:

> [T]he reporting in the articles was substantially correct. After a review of the court proceedings submitted, the Court finds that the statements in the articles regarding these proceedings are a fair and true report and that these statements are a privileged report of judicial proceedings under Section 74 of the Civil Rights Law.

In response to the argument that the Article contained additional materials, such as comments from the litigants and others on their behalf, which were outside of the court record, and therefore both outside of the privilege of Civil Rights L. § 74, and potentially defamatory by implication, the lower court said, "[a]fter reviewing the totality of the statements contained in the articles, the Court finds the articles to be substantially true." In response to appellant's argument that the headlines were themselves potentially defamatory, the lower court said:

> There is no doubt that the sub-headlines "Brooklyn developer accused of swindling vulnerable homeowners out of valuable properties"; "Real estate baron ripped by families and courts, subject of several suits"; and "slam real-estate mogul as wolf preying on sellers in newly upscale B'klyn nabes" when considered together with the underlying articles are fair indices of the matters to which they refer. The articles are primarily reports of land purchases made by Plaintiff which

> subsequently resulted in court proceedings in which there were findings that he had obtained interests in certain properties for below the market value of the property. Thus, these sub-headlines are not actionable.

With respect to the defamatory nature of the main headline "B'KLYN LAND SHARK!" and the sub-headline ""OWNERS: BEWARE OF THIS BUYER," the lower court said(citations and quotation marks omitted):

> Although Plaintiff contends that the headline "B'KLYN LAND SHARK!" implies that he is a criminal or that he engaged in fraudulent activities, there is nothing in the article which indicated that Plaintiff has engaged in criminal behavior. To the contrary, the article states that "[a] law enforcement source said that the developer's deals do not rise to the level of criminality." The article goes on to quote Plaintiff s attorney's declaration that his client was nothing but a savvy investor. Thus, the headline is not reasonably susceptible of a defamatory meaning and is not actionable. When reading the article and the statements therein, there is nothing to convey the concept of Plaintiff as a criminal. Accordingly, the Court finds that the headline cannot be found to be defamatory.

The lower court then said this about the issue of malice:

> In light of the Court's findings that the statements regarding judicial proceedings are privileged under Section 74 of the Civil Rights Law, or were not defamatory, this Court need not address whether Defendants acted with actual malice. Were this Court to consider that argument, it could make no finding of actual malice based on the conclusory allegations set forth in the Complaint. Plaintiff fails to establish by clear and convincing evidence that any of the communications contained in the articles were made with knowledge of its falsity or with reckless disregard of whether the statements were false.

Finally, the lower court ruled that respondents were entitled to recover their legal fees (Appendix C).

The Appellate Division affirmed the lower court's decision in a brief decision (Appendix A).

Petitioner then moved for leave to appeal from the affirmance by the Appellate Division, but the motion was denied on March 19, 2024 (Appendix E).

REASONS FOR GRANTING THE PETITION

This defamation case raises important issues regarding the application and constitutionality of so-called anti-SLAPP statutes. Short for "Strategic Lawsuits Against Public Participation," they were originally intended to protect persons who engaged in First Amendment-protected activities, such as protests, petitioning local and state governments, or lobbying against corporate activities which adversely affected their communities. Many ordinary citizens found

themselves haled into court by powerful corporations who claimed–usually frivolously–to have been defamed by such protests and activities. Originally intended to provide a higher standard of pleading and proof for such suits, they usually provided for fee shifting in favor of successful defendants, who were often individuals of limited means.

But in recent years, these statutes have been enacted and/or amended in many states (including New York), with the intent and effect of substantially increasing the pleading and evidentiary burdens on individual plaintiffs who bring defamation claims generally, with the effect of essentially making every one of them into a public figure, regardless of their status as such under *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and their progeny.

Several Associate Justices of this Court have on numerous occasions expressed their disagreement with the negative effects upon defamation law created by these cases, see, e.g., *Blankenship v. NBC Universal, LLC*, ___US___ , ___, 144 S Ct 5, 5 (2023): "I continue to adhere to my view that we should reconsider the actual-malice standard" (Thomas, J., concurring in denial of certiorari); and see also the extensive dissenting opinion and numerous citations in *Counterman v Colorado*, 600 US 66, 105 (2023); *Berisha v Lawson*, ___US___ , ___, 141 S Ct 2424, 2425 (2021)(Gorsuch, J., dissenting from denial of certiorari); and *McKee v. Cosby*, 586 U. S. ___, ___, 139 S. Ct. 675, 203 L. Ed. 2d 247, 250 (2019) (Thomas, J., concurring in denial of certiorari). The dissenting

opinion in *Counterman* cites judicial statements and concerns regarding the correctness of *Sullivan* from seven present and prior Members of the Court.

In all, the many cases and exhaustive commentary on the correctness of *Sullivan* over the six decades since surely shows that the arguments here are not frivolous, and petitioner respectfully submits that the present case is worthy of consideration.

The highest Courts in three States with such statutes have ruled their anti-SLAPP statutes to be unconstitutional, because they remove from the jury part of the ultimate fact-finding responsibility, and place that determination with the trial judge, who determines facts regarding malice at the pleading stage, and usually does so without any opportunity for discovery.

It is not an exaggeration to say that New York's 2020 anti-SLAPP amendments, codified in Civil Rights L. §§70-a, 76-a and CPLR 3211(g), have abrogated centuries of common-law defamation cases, and so increased the burdens on private (and public) figure plaintiffs, who seek no more than to restore their reputations, as to make recovery practically impossible. By placing an automatic stay on discovery, and requiring every defamation plaintiff to not only plead but prove malice prior to discovery, the amendments have essentially barred any claims which fall within the broad definition, and given an undeserved gift to media organizations. The original laudable intention of the original 1992 enactment in New York, to protect private persons from frivolous

suits by wealthy developers, has apparently been forgotten.

Moreover, the amendments are arguably unconstitutional under both Article I, § 2 of the New York State Constitution and the 7th Amendment, in that they place fact-finding obligations upon the trial judge, and remove them from the jury's province. The highest Courts of three States have found similar provisions to be unconstitutional for this reason, and the highest courts in two other jurisdictions have struggled with their implications. New York federal courts interpreting the amendments in diversity cases have reached results which contradict those in state courts.

The broad scope of the anti-SLAPP amendments has in effect eliminated the prior distinction between the burdens of pleading and proof imposed upon private and public figures with defamation claims. Before, a private figure had only to demonstrate some degree of fault to be able to proceed. That supposedly remains the law: "In New York, the accepted standard for private figures is negligence." (*Gottwald v Sebert*,40 N.Y.3d 240, 220 N.E.3d 621,197 N.Y.S.3d 694 [2023]). Yet, in practical terms, both private and public figures must now not only allege malice at the pleading stage, but prove it, without discovery. If they cannot do so, they are subject not only to dismissal but to potential liability for a defendant's legal fees, and exposure to compensatory and punitive damages.[1]

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[1] There are many recent cases in New York dismissing genuine defamation claims brought by private (and public) figure (continued...)

If, according to the new law, everything, "construed broadly" is a matter of "public interest," then every libel case against a media organization as a practical matter becomes "an action involving public petition and participation," Civil Rights L., § 76-a(1)(a). After all, the media almost never writes about "purely private matter[s]," § 76-a(1)(d), because they are by definition not newsworthy and do not attract readers or viewers.

Thus, the definition becomes a meaningless tautology: if the media writes about it, it is *ipso facto* in the "public interest." So it is difficult to imagine a state of facts in which a non-public figure (which petitioner Golan undisputedly is) can ever recover against a media organization, no matter how defamatory the statements about him may be.

POINT I

THE NEW YORK COURTS' INTERPRETATION OF THE ANTI-SLAPP AMENDMENTS EFFECTIVELY ELIMINATES THE CONSTITUTIONAL DISTINCTION BETWEEN PUBLIC FIGURES AND PRIVATE ONES.

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[1](...continued)
plaintiffs against powerful media and institutions, and assessing substantial legal fees against them, in addition to the present one. *See, e.g.*, *Swiezy v Investigative Post, Inc.*, ___AD3d___, 2024 NY Slip Op 03257 (2024); *Karl Reeves, C.E.I.N.Y. Corp. v Associated Newspapers, Ltd.*, ___AD3d___, 2024 NY Slip Op 01898 (2024); *Goldman v Abraham Heschel Sch.*, ___AD3d___, 2024 NY Slip Op 02777 (2024); *Aristocrat Plastic Surgery, P.C. v Silva*, 206 AD3d 26 (1st Dept 2022).

Ever since *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the law of defamation has drawn a sharp distinction between public officials and public figures on the one hand, and anyone else on the other. The former must plead and prove malice in order to prevail on a defamation claim; the latter must only comply with a more lenient standard of negligence. But the anti-SLAPP amendments essentially now require every defamation plaintiff to prove, not just plead, malice at the initial stage. Moreover, discovery is stayed unless the plaintiff can prove entitlement to it, which does not appear to have happened in the reported cases.

Thus the amendments not only conflict with pre-existing law by eliminating the distinction between public and private figures, but they also effectively abrogate long-standing New York law that the existence of malice is only part of a plaintiff's burden of proof at trial, not a pleading burden. And that is true whether the plaintiff is a public figure or a private one. As long as malice is pleaded generally in a complaint, a motion to dismiss on that ground will be denied. A few of the many cases so holding are *People v. Grasso*, 21 AD3d 851, 853 (1st Dept.2005), *dism. on other grds.* 11 NY3d 64 (2008)("Whether Grasso [who concedes that he is a public figure] will be able to sustain his burden of proving actual malice at trial cannot be determined at this pre-discovery stage of the litigation"); *Sokol v Leader*, 74 AD3d 1180 (2d Dept. 2010); *Kotowski v Hadley*, 38 AD3d 499, 500 (2d Dept.2007)("plaintiff had no obligation to show evidentiary facts to support these allegations of malice

on a motion to dismiss"); *Arts4All, Ltd. v Hancock*, 5 AD3d 106 (1st Dept.2004); *Trump Village Section 4, Inc. v Bezvoleva*, 2015 N.Y. Misc. LEXIS 4848 (N.Y. Sup. Ct. Aug. 10, 2015)(citing cases).

Thus, it was previously sufficient at the pleading stage for any private defamation plaintiff to allege that the statements were false, and that defendants knew that they were false. But now, CPLR 3211(g) not only requires proof of malice at the pleading stage, but also obliges the trial court to determine facts which were previously committed to the jury, as a matter of constitutional law. Have all of these cases now been abrogated by the anti-SLAPP amendments? It certainly seems so, and that cannot be constitutionally permitted.

CPLR 3211(g) provides in pertinent part that if "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 [the motion] 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." What is the meaning of this vague language? What is "a substantial basis in law"?

To start with, one could rightly assume that the meaning of "a substantial basis in law" simply means that the complaint states a cause of action under the existing law. After all, every insufficient complaint (even taking every assertion as true) by definition "lacks a substantial basis in law," and the converse is

also true. But that assumption is flatly wrong. Before November 2020:

> The elements [of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se... CPLR 3016 (a) requires that in a defamation action, "the particular words complained of … be set forth in the complaint." The complaint also must allege the time, place and manner of the false statement and specify to whom it was made.

Dillon v City of NY, 261 AD2d 34, 38 [1st Dept 1999]).

But these venerable common-law elements are no longer enough. Although it might appear from the language that "a substantial basis in law" is identical to the requirement of CPLR 3211(a)(7), that "the pleading...state a cause of action"–after all, any pleading which states a cause action by definition has "a substantial basis in law"–that is not how it has been judicially interpreted. Courts have almost uniformly dismissed the cases which have been brought since the amendments became effective, because the mere assertion that the statements involve "public petition and participation" is *ipso facto* the death knell of the claim.

The anti-SLAPP laws were originally intended to protect public protestors, whistle-blowers and other

vulnerable parties from being sued and silenced by powerful corporations whom they had the audacity to criticize publicly. Yet media defendants have now stood this new law on its head, using it to defend their publishing false and defamatory disinformation about vulnerable private individuals who have done nothing to seek public attention, but nonetheless find their lives scrutinized by these news organizations for their own reasons, namely to sell newspapers and attract viewers. Is that what the Legislature intended? It seems so.

In one of the first cases to address the amended statute, *Project Veritas v NY Times Co.*, 2021 NY Slip Op 31908[U] (Sup. Ct. Westchester Co.2021), the court said:

> These recent amendments by the Legislature have turned the original purpose of the Anti-SLAPP law upside down. Here, one of the largest newspapers in the world since Abraham Lincoln was engaged in the private practice of law, is claiming protections from an upstart competitor armed with a cell phone and a web site. Not only does the amended Anti-SLAPP law grant protection to a Goliath against a David, but 16 years after the SLAPP law was enacted, a newspaper had never qualified for SLAPP protection for its written articles. Despite this dizzying turnabout created by the Legislature, the court agrees that this action meets the amended Anti-SLAPP standard, as it arises from NYT's reporting on an issue of public interest:

> allegations of systemic voter fraud and potential disinformation about such voter fraud. (citations omitted).

But is it not equally in the "public interest" to allow a defamed plaintiff to sue over the destruction of her reputation? Under the First Amendment, "public petition and participation" includes the right to petition the courts. The filing of a court complaint is petitioning activity protected by the First Amendment. *See McDonald v. Smith*, 472 U.S. 479 (1985); *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972)("The right of access to the courts is indeed but one aspect of the right to petition"). The right to petition government via the courts for redress of grievances as "among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222, (1967). Any law which substantially burdens that right of access is constitutionally suspect. *See Franco v Kelly*, 854 F.2d 584, 589 (2d Cir. 1988).

The present claim is not frivolous, and it deserves to be determined on its merits by the trial court and a jury.

POINT II

THE DEFINITIONS IN THE ANTI-SLAPP AMENDMENTS ARE BOTH CIRCULAR AND UNCONSTITUTIONALLY VAGUE.

The new definition in the statute of "public petition and participation" says that it covers "1) any communication in a place open to the public or public forum in connection with an issue of public interest; or

2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition." Civil Rights L.§ 76-a(1)(a).

In addition, CPLR 3211(g) requires that a motion to dismiss must be granted where "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...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." Further raising an impenetrable barrier is CPLR 3211(g)(3), which stays discovery once the motion is made.

But defamation by definition is *not* "lawful conduct in furtherance of the exercise of the constitutional right of free speech;" it is one of the few exceptions to that right (along with obscenity, or imminent incitement to violence, or perjury), and it has always been recognized as such, even before the enactment of the First Amendment in 1787. See, e.g., *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571–72 (1942)(internal citations omitted):

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance

> inflict injury or tend to incite an immediate breach of the peace.

See also Herbert v. Lando, 441 U.S. 153, 171 (1979)("Spreading false information in and of itself carries no First Amendment credentials."); *Beauharnais v. People of State of Ill.*, 343 U.S. 250, 255 (1952)("In the first decades after the adoption of the Constitution...nowhere was there any suggestion that the crime of libel be abolished"); *Roth v. United States*, 354 U.S. 476, 483 (1957)("This phrasing [of the First Amendment] did not prevent this Court from concluding that libelous utterances are not within the area of constitutionally protected speech."). Finally, in *Dexter v. Spear*, 7 F. Cas. 624 (No. 3,867)(RI Circuit Court 1825), Justice Story, remembered for his 1833 Commentaries on the U.S Constitution, said:

> The liberty of speech, or of the press...are not endangered by the punishment of libelous publications. The liberty of speech and the liberty of the press do not authorize malicious and injurious defamation...Any publication, the tendency of which is to degrade and injure another person, or to bring him into contempt, ridicule, or hatred; or which accuses him or her of a crime punishable by law, or of an act odious and disgraceful in society, is a libel. If it is false, he who knowingly writes, publishes, or circulates it, is responsible, in a civil action, for damages to the party injured. No man has a right to state of another that which is false and injurious to him. A fortiori no man has a right

> to give it a wider and more mischievous range by publishing it in a newspaper.

Thus, the definition in Civil Rights L. § 70-a is circular. Lawful speech is of course not actionable, but if speech is arguably defamatory, it is not lawful, and is therefore excluded from the definition. The ambiguity and circularity are obvious; plaintiffs cannot recover over lawful speech, but they equally cannot be barred from suing over unlawful speech. The initial determination of whether a complained-of statement is susceptible of a defamatory connotation may properly be a threshold legal question for the court. But the ultimate determination of whether the speech is lawful or unlawful is constitutionally committed to the determination of a jury. Yet the 2020 anti-SLAPP amendments have vested the ultimate determination in the trial court, and that is arguably unconstitutional. Three State Supreme Courts have so ruled in similar cases, as we describe in the next section.

POINT III

THE NEW YORK ANTI-SLAPP AMENDMENTS ARE UNCONSTITUTIONAL. THE SUPREME COURTS OF THREE STATES HAVE SO RULED ABOUT SIMILAR STATUTES.

The Supreme Courts of Minnesota and Washington have ruled that anti-SLAPP laws in their states, with provisions nearly identical to the November 2020 amendments in New York, were unconstitutional. A third Supreme Court, of New Hampshire, also so held

in an advisory opinion requested by that state's legislature.

The basis for the rulings in those States is that they place an initial fact-finding burden on the trial court at the motion-to-dismiss stage, in violation of the plenary fact-finding responsibility reserved to the jury in every common-law tort suit. That responsibility is guaranteed by both the Seventh Amendment to the US Constitution, and Art. 1, § 2 of the New York State Constitution, and was also guaranteed by similar constitutional provisions in those States. The close similarities between the provisions of those laws and the 2020 amendments raise a serious question whether the latter are also unconstitutional.

Given the importance of the issue, and the fact that the highest courts of three states have declared unconstitutional statutes with almost identical provisions, the argument is a serious and meritorious one, and we respectfully urge this Court to address it.

1. The Minnesota Supreme Court Ruling.

In 2017, the Minnesota Supreme Court re-affirmed its prior ruling that its state's legislature violated their constitution in enacting an anti-SLAPP law. The case, *Leiendecker v Asian Women United of Minnesota*, 895 N.W.2d 623 (Sup.Ct. Minn.2017), was the last of a series of lawsuits between a nonprofit organization which operated a women's shelter, and its executive director. While the claims did not involve defamation, the New York anti-SLAPP amendments are not so limited either, but cover "public petition and participation," which is essentially anything "other

than a purely private matter." These definitions are not limited to defamation suits, and neither were the ones at issue in Minnesota and Washington.

Under the New York anti-SLAPP amendments, a plaintiff opposing a dismissal motion must show by "clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action" (Civil Rights L. § 76-a[2]). CPLR 3211(g) says that the motion must 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."

In *Leiendecker*, *supra*, the Court described the statute as nearly identical in its structure and obligations to the New York anti-SLAPP amendments:

> A party moving to dismiss a claim based on the anti-SLAPP law must make a threshold showing that the underlying claim materially relates to an act of the moving party that involves public participation. After the moving party makes this threshold showing, the burden shifts to the responding party. Clauses 2 and 3 of Minnesota Statutes § 554.02, subdivision 2, explain the responding party's burden:

(2) the responding party has the burden of proof, of going forward with the evidence, and of persuasion on the motion;

(3) the court shall grant the motion and dismiss the judicial claim unless the court finds that the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability under section 554.03...In the previous case involving these parties, we announced that the plain language of clause 3 requires the responding party to provide evidence—not mere allegations—to show by clear and convincing evidence that the moving party's acts are not immune. As we said then, under subdivision 2, the responding party bears the burden to persuade the trier of fact—here, the district court—of the truth of a proposition...

Subdivision 2 of Minnesota Statutes § 554.02 unconstitutionally instructs district courts to usurp the role of the jury by making pretrial factual findings that can, depending on the findings, result in the complete dismissal of the underlying action...Our 2014 decision stated that the responding party bears the burden to persuade the trier of fact—here, the district court by a showing of clear and convincing evidence that the acts of the moving party are not immune. But the role of resolving disputed facts belongs to the jury, not the court. Here, the district court made factual inferences on the

> probable cause element, while recognizing that by making these findings, [the district court] has taken away part of the jury's role: to determine the factual validity of Plaintiffs' claim.
>
> ....The two unconstitutional clauses of Minn. Stat. § 554.02 are inseparable from the remainder of the section...We therefore conclude that Minn. Stat. § 554.02 is unconstitutional when it requires a district court to make a pretrial finding that speech or conduct is not tortious under Minn. Stat. § 554.03, as was the case here. For the foregoing reasons, Minn. Stat. § 554.02 is unconstitutional as applied to claims at law alleging torts.

Leiendecker, supra, at 634-38 (quotation marks and citations omitted; brackets in original).

2. The Washington Supreme Court Ruling

In *Davis v. Cox*, 351 P.3d 862, 183 Wn.2d 269 (Wash.2015), *abrogated on other grds by Maytown Sand & Gravel, LLC v. Thurston Cnty.*, 423 P.3d 223 (Wash. 2018), the Washington Supreme Court invalidated the entirety of that State's anti-SLAPP statute. The Court considered the right to a jury trial in civil cases guaranteed by the State's Constitution, and cases considering the First Amendment right to petition under the U.S. Constitution. It explained that a plaintiff can only be deprived of a jury trial if it has filed a "frivolous" or "sham" lawsuit. However, it held that the anti-SLAPP statute's "clear and convincing"

evidence standard "is no frivolousness standard," but was an impediment to the right to trial by jury.

The case concerned a boycott of goods produced by Israel-based companies. The board of directors of the Olympia Food Cooperative, a nonprofit corporation, had adopted a boycott of such goods to protest Israel's perceived human rights violations. The plaintiffs, five members of the Cooperative, brought a derivative action against current or former members of its board, alleging that they had acted *ultra vires* and breached their fiduciary duties by adopting the boycott without staff consensus, which a prior resolution required.

The defendants moved to strike the plaintiffs' claims under the state's anti-SLAPP statute. The trial court granted the motion and entered substantial money judgments to the defendants, plus attorney's fees and statutory damages. The intermediate level appellate court had affirmed, but the State Supreme Court granted the plaintiffs' petition for review, held that the anti-SLAPP statute was unconstitutional, and denied the dismissal motion.

In its ruling, the Court rejected the defendants' argument that the statute was to be analyzed as if it were a summary judgment standard (and thus constitutional). In other words, in any case in which there are no issues of fact, summary judgment must be granted to one side or the other, because there is no fact issue for a jury to consider, by definition. But, said the Court,

> [T]he anti-SLAPP statute...requires the trial judge to make a factual determination of

> whether the plaintiff has established by clear and convincing evidence a probability of prevailing on the claim...[and] thus creates a truncated adjudication of the merits of a plaintiff's claim, including nonfrivolous factual issues, without a trial. Such a procedure invades the jury's essential role of deciding debatable questions of fact [and] violates the right of trial by jury under article I, section 21 of the Washington Constitution.

Davis v Cox, supra, 351 P.3d at 867-874 (quotation marks and citations deleted).

The Washington Supreme Court also cited with approval the earlier decision by the Minnesota Supreme Court which had initially invalidated the latter's anti-SLAPP statute:

> Similar to our statute's evidentiary standard...the Minnesota statute requires the trial court to determine whether the responding party has produced clear and convincing evidence...We believe the reasoning of the Minnesota Supreme Court, interpreting a statute close to ours, is persuasive...In sum, we hold RCW 4.24.525(4)(b) requires the trial judge to weigh the evidence and dismiss a claim unless it makes a factual finding that the plaintiff has established by clear and convincing evidence a probability of prevailing at trial.
> *Id.* at 870-71.

3. The New Hampshire Supreme Court Ruling.

In 1994, the New Hampshire Supreme Court issued an advisory opinion, at the request of the State Legislature, which concluded that a proposed anti-SLAPP law, similar in essential respects to those of Minnesota and Washington, would be unconstitutional. *See Opinion of the Justices*, 641 A.2d 1012 (1994):

> Unlike [motions to dismiss or for summary judgment], wherein the court does not resolve the merits of a disputed factual claim, the procedure in the proposed bill requires the trial court to do exactly that. In determining whether a plaintiff has met the burden of showing a probability of prevailing on the merits of his or her claim, the trial court that hears the special motion to strike is required to weigh the pleadings and affidavits on both sides and adjudicate a factual dispute. Because a plaintiff otherwise entitled to a jury trial has a right to have all factual issues resolved by the jury, the procedure in the proposed bill violates [that right].

These and other cases are discussed at length in Phillips & Pumpian, *A Constitutional Counterpunch to Georgia's Anti-SLAPP Statute*, 69 Mercer L. Rev. 407 (2018).

4. Rulings in Maine and the District of Columbia.

In *Franchini v. Investor's Business Daily, Inc.*, 268 A.3d 863, 2022 ME 12 (2022), the Maine Supreme Judicial Court refused to answer a certified question

from the U.S. First Circuit Court of Appeals. But the dissent wanted to answer the question:

> I point out finally and more generally that our jurisprudential efforts to properly interpret and determine the proper use of section 556 and the process governing it have been valiant, but the results have been nothing short of fluid. This is best demonstrated by multiple significant changes in our case law, over a relatively short period, relating to the procedure that we have struggled to create when a court is called upon to adjudicate a section 556 anti-SLAPP special motion to dismiss— attempts to construe the statute in a way that would be true to the Legislature's intent while also protecting the significant constitutional interests held by the litigants. If anything, the problems inherent in section 556, and our continuing efforts to fashion a constitutionally sound and workable process to implement the statute, make it difficult to conclude with assurance that there is clear controlling precedent for much of anything related to that statute.

268 A.2d at 876 (Hjelm, A.R.J., dissenting) (citations omitted; cleaned up).

See also Weinstein v. Old Orchard Beach Family Dentistry, LLC, 22 ME 16 at ¶¶ 37-38 (2022)("We were not alone in struggling to interpret the law. Anti-SLAPP statutes were being enacted all across the country...Courts struggled with the constitutional conflicts created by the statutes...We have a tortured

history as a court in dealing with many aspects of this statute")(Stanfill, C.J., *dubitante*).

In the District of Columbia, the D.C. Court of Appeals ruled in *Banks v. Hoffman*, No. 20-CV-0318 (D.C.Ct.App., Sept. 20, 2023) that the provisions of .the D.C. anti-SLAPP statute barring discovery in response to a motion to dismiss were invalid, because they conflicted with the general broad right to discovery of F.R.C.P. 56.

5. The New York Anti-SLAPP Amendments are Unconstitutional.

The New York statute is identical in its definitions and scope to those of the above-cited jurisdictions. It requires that, where the action involves "public petition and participation," a plaintiff must demonstrate with "clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action" (Civil Rights L. § 76-a[2]). Furthermore, CPLR 3211(g), says that the motion "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." And it imposes restrictions on a plaintiff's right to discovery.

CPLR 3211(g)(2) is similar to the Washington statute. It provides that:

the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the action or defense is based. No determination made by the court on a motion to dismiss brought under this section, nor the fact of that determination, shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

The Washington statute had a similar provision barring the later admissibility of any court determination on the motion. The Court there said that, according to the statute:

> If the trial court determines the responding party has met its burden to establish by clear and convincing evidence a probability of prevailing on the claim, the substance of the determination may not be admitted into evidence at any later stage of the case.....The legislature's apparent concern expressed in subsection (4)(d)(I) is that a jury at trial might give undue weight to a trial judge's factual finding that the plaintiff's claim establishes by clear and convincing evidence a probability of prevailing on the merits...[S]ubsection (4)(d)(I) confirms our reading that RCW 4.24.525(4)(b) requires the trial judge to make a factual determination on the probability of plaintiffs prevailing on their claims. It is not a mere summary judgment proceeding.

Id. at 868 (emphasis added)

The New York anti-SLAPP amendments at issue here have the same constitutional infirmities as the statutes struck down in Minnesota and Washington, and the one considered in New Hampshire. They require the trial court to make factual determinations at the pleading stage, which findings are exclusively the core function of the jury in any tort case. They eliminate the prior distinction between private figures and public figures, and require all defamation plaintiffs to prove malice at the pleading stage. And they violate the constitutional right to petition the courts to address grievances. Taken together, the New York's amended anti-SLAPP statutes are thus unconstitutional.

POINT IV

A HEADLINE CAN ALONE BE DEFAMATORY, AND THE TERM "LAND SHARK" HAS AN HISTORICALLY DEFAMATORY CONNOTATION.

It is long-established in New York that an article's headline can be defamatory, regardless of the statements in the article itself. In one of the earliest cases, *Shubert v. Variety, Inc.*, 128 Misc 428 (Sup.Ct.N.Y.Co.1926), *aff'd* 221 App.Div. 856 (1st Dept.1927), the Court refused to dismiss a libel claim based upon the headline "Shuberts Gouge $1,000 from Klein Brothers/Force Vaudeville Act to Buy Release." Citing dictionary definitions of "gouge," and concluding that the word could mean deception or fraud, the Court

held that the headline was libelous per se, and would be actionable even if the rest of the article was not:

> The head-line of an article or paragraph, being so conspicuous as to attract the attention of persons who look casually over a paper without carefully reading all its contents, may in itself inflict very serious injury upon a person, both because it may be the only part of the article which is read, and because it may cast a graver imputation than all the other words following it. There is no doubt that in publications concerning private persons, as well as in all other publications which are claimed to be libelous, the head-lines directing attention to the publication may be considered as a part of it, and may even justify a court or jury in regarding the publication as libelous when the body of the article is not necessarily so.

128 Misc. at 430 (citation and quotation marks omitted; emphasis added).

The Court also said:

> The fact that the alleged defamatory statement is contained in the headline, together with the further fact that the body of the article does not of necessity negative the libelous meaning of that headline, are circumstances which possibly render the article ambiguous and, therefore, capable of two constructions, one innocent and the other harmful. In that event, the question of which construction shall be adopted, would be one for the jury.

128 Misc. at 431.

The *Shubert* case has been frequently and favorably cited in the century since. *See, e.g., Schermerhorn v Rosenberg*, 73 AD2d 276, 287 (2d Dept 1980):

> That the defamatory meaning of the headline may be dispelled by a reading of the entire article is of no avail to the publisher. A headline is often all that is read by the casual reader and therefore separately carries a potential for injury as great as any other false publication.

See also Schermerhorn v Rosenberg, 73 AD2d 276 (2d Dept 1980)("A headline is often all that is read by the casual reader and therefore separately carries a potential for injury");

There are also federal cases citing New York law. In *Cianci v New Times Publishing Co.*, 639 F.2d 54 (2d Cir.1980), the headline was "BUDDY WE HARDLY KNEW YA," an innocuous phrase on the face of it. The cover of the magazine bore a photograph of the plaintiff, who had been the mayor of Providence, Rhode Island. The article contained a legend reading "Was this man accused of raping a woman at gunpoint 12 years ago?" Under the headline was this passage:

> Twelve years ago, in a suburb of Milwaukee a law student was accused of raping a woman at gunpoint. After receiving a $3,000 settlement, she dropped the charges and the incident was nearly forgotten. That student, Vincent

> "Buddy" Cianci, Jr., is now the mayor of Providence, Rhode Island.

The Second Circuit said that the headline itself could be considered defamatory: "A jury, considering this in light of the article as a whole, could surely conclude that New Times was saying that Mayor Cianci, instead of being the man of character he represented himself to be, was in fact a rapist and an obstructor of justice not simply a person who had been accused of being such." 639 F.2d at 60 (footnote omitted).

In *Celle v Filipino Reporter Enters.*, 209 F.3d 163 (2d Cir. 2000), the Second Circuit found a sub-headline defamatory as well, and affirmed a jury verdict of libel:

> The sub-headline stating that "US judge finds Celle negligent" has only one meaning, namely that plaintiff has been found to have libeled Ms. Ty. As a news commentator in a tightly-knit ethnic community, plaintiff Celle's professional reputation would turn in large measure on the community's faith in the accuracy and fairness of his reporting. The statement that a United States judge has found plaintiff negligent for spreading false information would leave readers with the conclusion that he abused his position as a news commentator.
> 209 F.3d at 185.

See also Rudin v. Dow Jones & Co., 510 F. Supp. 210, 215 (S.D.N.Y.1981)("Sinatra's Mouthpiece";"in the particular context of an attorney/client relationship the

reference to an attorney as his client's ‘mouthpiece' can reasonably be found to imply a lack of professional integrity").

Here, we have the front-page headline, in enormous type size, "B'KLN LAND SHARK!" next to a photograph of the plaintiff's face, along with a caption which reads "Ellen Harris says Yuval Golan (inset) still owes her hundreds of thousands of dollars for home in Boerum Hill, Brooklyn."

The term "land shark" has a long-established historical and potentially defamatory meaning. It refers, among other things, to someone who cheats people out of their lands by force or fraud. For example, the entry in the Oxford English Dictionary has accompanying quotations going back to 1769:

land-shark n. (a) one who makes a livelihood by preying upon seamen when ashore; (b) a land-grabber; (c) a lean breed of hog.

There is also case law support for the phrase's defamatory connotation. *See Heard v State*, 9 Tex. Ct. App. 1, 12 (1880):

> He stated that he knew M. M. Young...he was an operator in lands, and was known as a "land-shark." Witness also knew James Eeed..." Eeed's business," said the witness, "was to get up titles for Young; he did his work for him. James Eeed was a land-shark, and was associated with M. M. Young in making fraudulent land-titles."

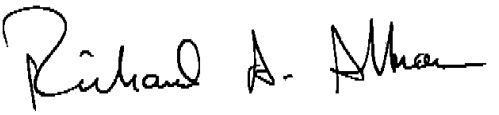
The Merriam-Webster Dictionary says that "land shark" is a synonym for "land grabber," and defines "land grab" as "a usually swift acquisition of property (such as land or patent rights) often by fraud or force" See https://www.merriam-webster.com/dictionary/land%20grab. Moreover, that dictionary also sets out negative connotations of "shark" as "a rapacious crafty person who takes advantage of others often through usury, extortion, or devious means." Plainly the term as used here implies criminal conduct, and of unethical business practices, both of which are defamatory *per se*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
June 17, 2024

Respectfully submitted,



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APPENDIX

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APPENDIX A — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, ENTERED MARCH 23, 2023

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

Renwick, J.P., Friedman, Scarpulla, Mendez, Rodriguez, JJ.

17568

YUVAL GOLAN,

Plaintiff-Appellant,

-against-

DAILY NEWS, L.P., *et al.*,

Defendants-Respondents.

Index No. 151135/22
Case No. 2022-04522

Order, Supreme Court, New York County (Lori S. Sattler, J.), entered on or about October 3, 2022, which granted defendants' motion to dismiss the complaint and awarded defendants attorneys' fees pursuant to Civil Rights Law § 70-a(1)(a), unanimously affirmed, without costs.

Appendix A

The court correctly determined that a news article published by defendants reporting on allegations that plaintiff, a real estate developer, took advantage of vulnerable homeowners by paying them less than fair market value for the homes in gentrifying neighborhoods was privileged under Civil Rights Law § 74. The article contained fair and true accounts of the judicial proceedings brought against plaintiff (*see Gillings v New York Post*, 166 AD3d 584, 586 [2d Dept 2018]).

Plaintiff was not defamed by implication because, contrary to plaintiff's contention, nothing in the article, headline, or subheadline suggested that he was a criminal (*Stepanov v Dow Jones & Co., Inc.* 120 AD3d 28, 37-38 [1st Dept 2014]). Furthermore, the headline and sub headlines were fair indices of the article and, therefore, were not actionable (*see Mondello v Newsday, Inc.*, 6 AD3d 586, 587 [2d Dept 2004]; *Gunduz v New York Post* Co. 188 AD2d 294, 294-295 [1st Dept 1992]).

Plaintiff's contentions challenging the constitutionality of the anti-SLAPP statute are raised for the first time on appeal, and we decline to address then.

The court properly granted defendants attorneys' fees under Civil Rights Law § 70-a(1)(a) (*see Aristocrat Plastic Surgery P.C. v Silva*, 206 AD3d 26, 32 [1st Dept 2022]).

We have considered plaintiff's remaining arguments and find them unavailing.

Appendix A

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 23, 2023

/s/ Susanna Molina Rojas
Susanna Molina Rojas
Clerk of the Court

APPENDIX B — NOTICE OF CLAIM OF UNCONSTITUTIONALITY IN THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, FILED JANUARY 3, 2023

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

New York County Clerk
Case No. 2022-04522
Index No. 151135/2022

YUVAL GOLAN,

Plaintiff-Appellant,

-against-

DAILY NEWS, L.P. and NOAH GOLDBERG,

Defendants-Respondents.

NOTICE OF CLAIM OF UNCONSTITUTIONALITY

Pursuant to Executive L. § 71, CPLR 1012(b) and 22 N.Y.C.R.R. § 1250.9(i), this Notice will inform the New York State Attorney General that appellant Yuval Golan is filing an appeal in this Court, claiming that certain portions of the so-called anti-SLAPP amendments of November 2020, Bills A.5991-A(Weinstein) S.52-A(Hoylman), are unconstitutional, under both the New York State Constitution and the U.S. Constitution.

Appendix B

Dated: New York, New York
January 3, 2023

/s/ Richard A. Altman
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APPENDIX C — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, ENTERED OCTOBER 3, 2022

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index No. 151135/22

YUVAL GOLAN,

Plaintiff,

v.

DAILY NEWS, L.P., ET AL.,

Defendants.

October 3, 2022, Decided

DECISION AND ORDER ON MOTION

HON. LORI SATTLER, *Justice.*

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32 were read on this motion to/for DISMISSAL.

In this defamation action, Defendants Daily News, L.P. and Noah Goldberg (collectively Defendants) move for an order dismissing the verified complaint with

prejudice pursuant to CPLR 3211 (a) (1), (7) and (g) (1) and for sanctions and/or costs pursuant to CPLR 8303-a and 22 NYCRR 130-1.1. Plaintiff Yuval Golan ("Plaintiff" or "Golan")opposes the motion.

BACKGROUND

Plaintiff commenced this action for defamation after he was named in online and print articles of the Daily News published on October 17, 2021 (collectively "articles"). The online version was entitled "Brooklyn developer accused of swindling vulnerable homeowners" (NY St Cts Elec Filing [NYSCEF] Doc No. 8). The front-page print version of the article had the headline "B'KLYN LAND SHARK! Real Estate baron ripped by families and courts, subject of several suits" (NYSCEF Doc No. 9). The print article included a photograph of Plaintiff which he characterizes as retouched to give him a "sinister appearance." The article continues on pages four and five with the headline "OWNERS: BEWARE OF THIS BUYER" with the sub-headline "Slam real estate mogul as wolf preying on vulnerable sellers in newly upscale B'klyn nabes" (NYSCEF Doc No. 10). The articles go on to report that Plaintiff participated in several purchases of real property which were later the subject of litigation.

Plaintiff states that the articles are false and defamatory. He contends that the articles contain several discrepancies including, *inter alia*, implying he is a criminal who has committed fraud and theft or stolen the land of others by fraud or artifice. In the complaint, he states that he has never been convicted of a crime and was

successful in certain suits discussed in the articles, and that the articles are a deliberate and malicious attempt to destroy his reputation (NYSCEF Doc No. 1 at 2-3).

Plaintiff further indicates that he is not a "shark" or "baron" as described in the articles but rather that he has made long-term investments that have proved to be successful. He further takes issue with the characterization of the litigation in which he has been involved. In the complaint he points to the articles' line "Golan, owner of pricey homes across Kings County, was sued at least five times since 2005 for allegedly taking advantage of sellers." He claims that this statement is incorrect because, he says, he has been sued only two times, not five, and that in two other lawsuits he or a company he represents was the Plaintiff. He further claims that in one action he "won" in the lower court and at the Appellate Division, Second Department. He states that a second suit was subsequently dismissed.

Plaintiff further asserts that while the articles state that he paid less than fair market values for properties, appraisals at the time of the transactions show that the properties were valued at "approximately" what he paid for them. He claims the articles omit the fact that in some of the purchases, he purchased only partial ownership of the property. The articles are allegedly also misleading because, he states, it is common knowledge that property values have risen sharply but only in the past few years. He further points to the mention of a website in his name that he contends is not his.

Appendix C

Finally, Plaintiff asserts that the article was reposted in its entirety on a separate website, lipstickalley.com, where Plaintiff claims he became the subject of "numerous ugly and threatening comments."

In support of their motion to dismiss the complaint, Defendants include papers from six court cases involving Plaintiff in some form. Goldberg submits an affidavit stating that to the best of his knowledge the photograph of the Plaintiff contained in both the print and online articles are the same and were not "retouched." He further states that while Plaintiff mentions that the article was published on Lipstick Alley, that website is not affiliated with the Daily News and neither he nor the Daily News authorized the republishing of the articles.

Defendants state that notwithstanding Plaintiff's claims, their statement in the articles that he was sued at least five times was accurate, as were the details provided of the lawsuits. They assert that his complaint must be dismissed as a matter of law because the articles are a fair and true report of judicial proceedings and are therefore privileged under Section 74 of the Civil Rights Law. They further contend that the alleged defamatory statements are not actionable because they are substantially true and that the headlines are not actionable as they are fair indices of the articles. They claim that the headlines are not defamatory as they are nonactionable hyperbole. Lastly, they assert that Plaintiff has not pleaded and cannot prove that the statements were published with actual malice, that is, with a knowledge of falsity or subjective awareness of falsity.

Appendix C

Although Defendants contend that dismissal is appropriate under CPLR 3211 (a) for the reasons set forth above, they assert that dismissal is more appropriately found under New York's recently revised anti-SLAPP statute because the instant action is a "lawsuit against public participation," thus requiring Plaintiff to satisfy a heightened burden of proof under CPLR 3211 (g). They further seek sanctions and costs for purported false allegations. They assert that an award of counsel fees is mandated under the anti-SLAPP statute.

Plaintiff opposes the motion. He appears to contend that the anti-SLAPP statute does not apply because under Section 76-a (1) (a) (1) of the Civil Rights Law the terms "public petition and participation" including "any communication in a . . . public forum in connection with an issue of public interest" are vague. He further argues that Section 74 of the Civil Rights Law does not apply because the articles are not a "fair and accurate report" of the court cases and contain defamatory statements that were not in the court papers. He also argues that these issues cannot be addressed in a pre-answer motion to dismiss but rather must be asserted as an affirmative defense in an answer.

Plaintiff states that contrary to Defendants' position, the headlines of an article can be defamatory. He points to the headlines in question and notes that the term "Land Shark" has a long-established and historical defamatory meaning as someone who cheats people out of their land by force or fraud. Lastly, Plaintiff contends that even if the motion is granted counsel fees are not appropriate,

asserting that the counsel fee portion of the anti-SLAPP statute does not apply to a motion to dismiss.

ANTI-SLAPP APPLICATION

The standard for motions to dismiss in cases involving public petition and participation is set forth in CPLR 3211 (g). It provides that a motion to dismiss interposed pursuant to 3211 (a) should be granted where "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 [Civil Rights Law § 76-a (1) (a)] . . . 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" (CPLR 3211 [g] [1]).

Section 76-a (1) (a) of the Civil Rights Law defines "an action involving public petition and participation" as:

> (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or
>
> (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.

The statute further directs: "'Public interest' shall be construed broadly, and shall mean any subject other than a purely private matter" (Civil Rights Law § 76-a [1] [d]).

The Court finds that, in addressing real estate transactions and issues of fraud and deceptive practices that could affect the public, the articles fall within the expanded definition of public interest. They are not matters related to a purely private matter. Indeed, there are multiple court actions discussed which are public record. Accordingly, the anti-SLAPP statute, as amended, does apply to this defamation action.

Where an action involves public petition and participation, a Plaintiff must demonstrate with "clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action" (Civil Rights Law § 76-a [2]).

PRIVILEGED REPORTS OF JUDICIAL PROCEEDINGS

Defendants contend that the articles were a privileged report of judicial proceedings. Under Section 74 of the Civil Rights Law, civil actions "cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding . . . or for any heading of the report which is a fair and true headnote of the statement published." "For a report to be characterized as 'fair and true' within the meaning

of the statute, thus immunizing its publisher from a civil suit . . . , it is enough that the substance of the article be substantially accurate" (*Holy Spirit Assn. for Unification of World Christianity v New York Times Co.*, 49 NY2d 63, 67, 399 NE2d 1185, 424 NYS2d 165 [1979]). There must be a degree of liberality accorded to newspaper accounts of proceedings and "the language used therein should not be dissected and analyzed with a lexicographer's precision" (*id.* at 68). "Comments that essentially summarize or restate the allegations of a pleading filed in an action are the type of statements that fall within Section 74's privilege" (*Lacher v Engel*, 33 AD3d 10, 17, 817 NYS2d 37 [1st Dept 2006], citing *Ford v Levinson*, 90 AD2d 464, 454 NYS2d 846 [1st Dept 1982]).

The articles mention the following court proceedings in which Plaintiff is or was a party:

Matter of Vaughan, Supreme Court, Richmond County

Plaintiff indicates that the articles' discussion of Ms. Vaughan and the related lawsuit was inaccurate because the case was not about Ms. Vaughan but about her court-appointed guardian. While Plaintiff did prevail in that the transfer of property to him was not set aside, the court, in a decision dated January 6, 2010, noted that Ms. Vaughan, an elderly woman later diagnosed with dementia, made a bad deal (*Matter of Vaughan*, 26 Misc 3d 1211[A], 906 NYS2d 778, 2010 NY Slip Op 50052[U] [Sup Ct, Richmond County 2010, Aliotta, J.]). Although the court did not make a fraud finding, it found that there was "no doubt" that Ms. Vaughan had been taken advantage of by selling her

home for $250,000. The court found that the home had a value of $450,000 at the time of the sale.

As it relates to *Matter of Vaughan*, the articles are substantially correct in their reporting that Ms. Vaughan was elderly, as the Richmond County Supreme Court so stated in its decision, and in their acknowledgement that there was no finding of fraud against Plaintiff. Similarly, the print article accurately characterizes the portion of the court's decision stating that Ms. Vaughan was found to have dementia less than a year later.

Harris v Golan, Supreme Court, Kings County

Plaintiff asserts that it was deceptive of Defendants to include a picture of Ms. Harris walking with a walker in the article because it was her 49-year-old brother who sold his share of the property to Plaintiff. Plaintiff further claims that the articles' estimation of the value of their home at $3,000,000 was unsupported.

The articles state that the sales price was $700,000 for Mr. Harris's share and that Plaintiff still owes $400,000 on the property. This statement in the article is substantially true and, if anything, overstates the amount Plaintiff allegedly paid to Mr. Harris (*see Harris v Golan*, 2022 NY Slip Op 30558[U], *3 [Sup Ct, Kings County 2022] ["plaintiffs state . . . that defendant Kew Gardens fraudulently acquired title to Anthony Harris' entire interest in the subject property for $150,000.00 without paying the balance of $550,000.00"]). The court's published decision dismissing the case states that Plaintiff

(defendant in that action) contended that he completed the sale with a payment of $150,000 with Mr. Harris lending the balance to Mr. Golan's company (*see Harris* at *2). The article further notes that Plaintiff 's attorney stated that he had taken a purchase money mortgage allowing him to pay Mr. Harris over time. The decision to dismiss the action was made on February 17, 2022, after the articles were published.

Matter of Gray, Surrogate's Court, Kings County

Plaintiff contends that although the article stated that he had paid $50,000 for a property valued at approximately $3,600,000, the article did not mention that the seller was to get a condominium unit as part of the deal. He further notes that the seller was in her 40s.

Defendants submit the decision of Surrogate López Torres dated October 15, 2019, which declared null and void a second deed transferring the property located at 591 Carlton Avenue, Brooklyn, New York (NYSCEF Doc No. 14; *Matter of Gray*, Sur Ct, Kings County, file No. 2003-4544/B). As detailed in the decision, the deed was executed by L., an individual in her capacity as sole intestate heir of the decedent, and Plaintiff and his corporation for $50,000. The public administrator represented that at the time the deed was executed, the real property value was $3,645,000 and that L. had not demonstrated that she was a distributee. Plaintiff 's corporation, 591 Carlton Avenue Corp., submitted objections to the relief requested, arguing that L. was the sole distributee and that there were no other relatives. The Surrogate found that these

claims were not substantiated. The 2018 deed was vacated and expunged from the record. Thus, the court finds that the statements in the articles related to this judicial proceeding were substantially accurate.

72634552 Corp. v Okon, Surrogate's Court, Kings County

The article states that Surrogate López Torres revoked a deed to a Crown Heights home in 2018 after the buyer purchased one third of the $2,000,000 property from a terminally ill woman suffering from an Oxycontin addiction for the sum of $10,000.

Plaintiff states that the articles were wrong in reporting that the home was in Crown Heights, as it was in Lefferts Gardens. He further contends that it was an error to state that the seller was elderly, although the articles make no such contention. Plaintiff further points to the fact that she held a one-third interest, which was also addressed in the article. He claims that the value of that share was only worth $10,000 and that the appellate court agreed with him. These statements therefore make the articles "erroneous and misleading" according to Plaintiff.

The articles were substantially correct in that the facts were taken directly from the decision of the Surrogate (*see 72634552 Corp. v Okon*, 63 Misc 3d 1222[A], 114 NYS3d 813, 2018 NY Slip Op 51991[U] [Sur Ct, Kings County 2018, López Torres, S.]). In addition, the articles disclose that the decision to revoke the deed was reversed. Notably, in that decision, the Court found that the record supported

that the seller was "seriously ill and had been prescribed medication for her pain" (*72634552 Corp. v Okon*, 189 AD3d 1317, 1319, 134 NYS3d 812 [2d Dept 2020]). The report that the home was in Crown Heights as opposed to the neighboring Lefferts Gardens area is immaterial and does not affect the finding that the reporting in the articles was substantially correct.

After a review of the court proceedings submitted, the court finds that the statements in the articles regarding these proceedings are a fair and true report and that these statements are a privileged report of judicial proceedings under Section 74 of the Civil Rights Law.

ALLEGATIONS RELATING TO OTHER PURPORTED DEFAMATORY STATEMENTS

Having found that certain statements contained in the articles are privileged reports of judicial proceedings, the court now turns to Plaintiff 's claims of defamation for statements not related to court proceedings.

Plaintiff contends that the articles contain "numerous" statements that are actionable because they are "false and misleading." According to Plaintiff, these statements are defamatory in nature and show that Defendants acted in an irresponsible manner in publishing a story containing "lies, distortions, omissions, and half-truths." In addition, Plaintiff asserts that the headlines are defamatory.

Defamation has been defined as "the making of a false statement which tends to expose the Plaintiff to public

contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Foster v Churchill*, 87 NY2d 744, 751, 665 NE2d 153, 642 NYS2d 583 [1996] [internal quotation marks omitted]). To succeed on a defamation claim, a Plaintiff must show "(1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm, unless the statement is one of the types of publications actionable regardless of harm" (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34, 987 NYS2d 37 [1st Dept 2014]).

In a case of express defamation, a complaint must be dismissed where the statements in question are substantially true (*id.* at 37; *see also Birkenfeld v UBS AG*, 172 AD3d 566, 100 NYS3d 23 [1st Dept 2019]). "If an allegedly defamatory statement is substantially true, a claim of libel is legally insufficient and . . . should [be] dismissed" (*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 94, 21 NYS3d 6 [1st Dept 2015] [internal quotation marks and citations omitted]).

Plaintiff asserts that the statement "Golan, owner of pricey homes across Kings County, was sued at least five times since 2005 for allegedly taking advantage of sellers" is false. Plaintiff specifically notes that he was sued two times and not five and he further claims that in two additional suits, Plaintiff or his company was the Plaintiff and not the Defendant. He further asserts that he prevailed in the two lawsuits where he was the Defendant. Lastly, he claims that he is not an owner of "pricey homes" but rather is a businessman and that he is not wealthy.

Appendix C

The article is substantially true in stating that Plaintiff was sued at least five times since 2005. Plaintiff does not submit evidence to support his claim that he was only a Defendant in two cases and was a Plaintiff in two because he cannot do so. That statement is false, as can be evidenced by the various court pleadings and decisions cited in or annexed to the moving papers. Plaintiff was named as a Defendant in *Harris v Golan*, as well as in *Griffin v 72634552 Corp.* (Sup Ct, Kings County, index No. 502779/2016); *Kapase LLC v Hester* (Sup Ct, Kings County, index No. 6613/2013); and *Popalardo v Bapaz Aderet Props. Corp.* (Sup Ct, Kings County, index No. 10453/2010), and was named as a respondent in *Matter of Vaughan*. These cases are annexed as exhibits to the present motion. Plaintiff 's companies also filed objections in two estate administration proceedings, *Matter of Gray* and *Matter of Matthews* (Sur Ct, Kings County, 2013-1693/D). Thus, Plaintiff 's claim that he was only named as a Defendant in two cases is untrue and Defendants' statements regarding at least five suits are substantially true.

Although Plaintiff disputes that he is the owner of "pricey homes," more than one decision indicated that he had obtained property of significant value. In addition, the reports in the article of allegations that Plaintiff had taken advantage of sellers are substantially accurate given the facts contained in the various court documents as well as the findings of fact contained in certain decisions.

Plaintiff further points to the statement "[b]ut the judge has rescinded two other deals made by the

businessman." Although this court finds that the reports of the judicial proceedings are privileged under the Civil Rights Law, with respect to this specific statement, the documentary evidence demonstrates that there were two decisions declaring null and void certain deeds where Plaintiff purchased property. While the *Matter of Gray* decision rescinded the deed and declared it null and void, the article states that two other deeds were rescinded and that one of those actions was subsequently reversed. This report is accurate.

The complaint asserts that although the articles state that Plaintiff targeted "vulnerable elderly" individuals, the sellers were "neither unwell nor of advanced age." He lists four specific individuals. As to the first, Pamela McKenzie, it does not appear to be disputed that she suffered from chronic and terminal illnesses and addiction to pain medication (*Okon*, 63 Misc 3d 1222[A], 2018 NY Slip Op 51991[U], *8). As to Ms. Vaughan, the Richmond County Supreme Court decision specifically states that she was "elderly and in poor health" (*Matter of Vaughan*, 26 Misc 3d 1211[A], 2010 NY Slip Op 50052[U], *1). The complaints in the *Griffin* (NYSCEF Doc No. 16), *Kapase* (NYSCEF Doc No. 20), and *Popalardo* (NYSCEF Doc No. 18) cases all allege that owners were elderly, sick, or both.

Plaintiff further asserts that although the articles state that "[o]n his website, Golan writes 'Unlike other buyers we will pay you top dollars that your property is worthy of. We offer a buying price that meets prevailing market rates,'" he does not operate such a website (NYSCEF Doc No. 1 ¶ 64). Although the website quoted

by the article bears Plaintiff's name, Plaintiff contends that it was made by an imposter (*id.* ¶¶ 65-66). The Court finds this one statement, when read in context, does not contain any language that would create a false or negative impression of Plaintiff and therefore does not rise to the level of defamation. After reviewing the totality of the statements contained in the articles, the Court finds the articles to be substantially true.

DEFAMATION BY IMPLICATION

Most of the remaining arguments in the complaint relate to claims that the articles were defamatory because certain implications arose from the words in the article. For example, Plaintiff contends that Ms. Vaughan was only 64 years old and not elderly but that the article implies that she was older. He further contends that by printing a picture of Ellen Harris with a walker, it was a "deliberate act intended to make Plaintiff look bad." In addition, he claims that his photo was touched up to give him a sinister appearance.

[3] "Defamation by implication is premised not on direct statements but on false suggestions, impressions and implications arising from otherwise truthful statements" (*Armstrong v Simon & Schuster*, 85 NY2d 373, 380-381, 649 NE2d 825, 625 NYS2d 477 [1995] [internal quotation marks omitted]). The Court has found that where there is a claim for defamation by implication and the factual statements are found to be substantially true, "the plaintiff must make a rigorous showing that the language of the communication[s] as a whole can be

reasonably read both to impart a defamatory inference and to affirmatively suggest that the author intended or endorsed that inference" (*Stepanov*, 120 AD3d at 37-38).

After a review of the articles and Plaintiff's contentions, the Court finds that Plaintiff has not met the rigorous showing that the communication as a whole can be read to be defamatory by implication. Additionally, Plaintiff's bare allegations do not demonstrate that Defendants intended to endorse such an inference. Although Plaintiff takes issue with the characterizations of some of the Court cases, his own characterizations are sometimes misleading and untrue especially given the record of litigation in which he was involved.

With respect to the allegations that the photo was retouched to make his appearance more sinister, Goldberg submits an affidavit indicating that to his knowledge no such touch-ups were made. After a review of the two photos, the Court finds that they are identical in both print and online versions. Plaintiff offers no evidence to support his claims of touch-ups. Plaintiff fails to demonstrate that Defendants intended to endorse the implication that the photo implied he was sinister. Similarly, there can be no such finding based on the photograph showing Ms. Harris using a walker. As Plaintiff does not demonstrate Defendants intended or endorsed any purported inferences, the Court finds that there can be no finding of defamation by inference based on the photos contained in the article.

Appendix C

HEADLINES

Plaintiff contends that the headline "B'KLYN LAND SHARK!" is false and defamatory because the term implies that he is a criminal who has committed fraud and theft or stolen people's land and real property by fraud. He states that he has been convicted of no crimes and claims to have been successful in some of the litigations. He further points to the headlines "OWNERS: BEWARE OF THIS BUYER" and the sub-headline "Slam real estate mogul as wolf preying on vulnerable sellers in newly upscale B'klyn nabes" as well as "Brooklyn developer accused of swindling vulnerable homeowners." He claims that these headlines are false and misleading (NYSCEF Doc No. 1).

Defendants contend that the headlines are not actionable because they are fair indices of the articles and, when considered along with the articles as a whole, accurately summarize the matters on which Defendants have reported. They further claim that the term "B'KLYN LAND SHARK" is not reasonably susceptible to the meaning Plaintiff ascribes to it, namely, that he is a criminal. Last, they assert that the headlines are nonactionable opinion and/or rhetorical hyperbole.

Where a headline is a "fair index of the truthful matter contained in the related news article," it is not actionable (*Gunduz v New York Post Co.*, 188 AD2d 294, 294, 590 NYS2d 494 [1st Dept 1992]). When looking at a headline "[t]he rule is general[ly] that both the headline and the item to which it is attached are to be considered

as one document in determining the effect of an article" (*Cole Fisher Rogow, Inc. v Carl Ally, Inc.*, 29 AD2d 423, 426, 288 NYS2d 556 [1st Dept 1968], *affd* 25 NY2d 943, 252 NE2d 633, 305 NYS2d 154 [1969] [internal quotation marks omitted]).

There is no doubt that the sub-headlines "Brooklyn developer accused of swindling vulnerable homeowners"; "Real estate baron ripped by families and courts, subject of several suits"; and "Slam real estate mogul as wolf preying on vulnerable sellers in newly upscale B'klyn nabes" when considered together with the underlying articles are fair indices of the matters to which they refer. The articles are primarily reports of land purchases made by Plaintiff which subsequently resulted in court proceedings in which there were findings that he had obtained interests in certain properties for below the market value of the property. Thus, these sub-headlines are not actionable.

Although Plaintiff contends that the headline "B'KLYN LAND SHARK!" implies that he is a criminal or that he engaged in fraudulent activities, there is nothing in the article which indicated that Plaintiff has engaged in criminal behavior. To the contrary, the article states that "[a] law enforcement source said that the developer's deals do not rise to the level of criminality." The article goes on to quote Plaintiff 's attorney's declaration that his client was nothing but a savvy investor. Thus, the headline is not reasonably susceptible of a defamatory meaning and is not actionable (*Golub v Enquirer/Star Group*, 89 NY2d 1074, 1076, 681 NE2d 1282, 659 NYS2d 836 [1997]). When reading the article and the statements therein, there is

nothing to convey the concept of Plaintiff as a criminal. Accordingly, the Court finds that the headline cannot be found to be defamatory.

Lastly, the headline "OWNERS: BEWARE OF THIS BUYER" cannot be found to be a factual statement. Grammatically, the statement is a warning which, at best, can be said to be an opinion. The Court is tasked with determining whether a statement is fact or opinion (*see Parks v Steinbrenner*, 131 AD2d 60, 62, 520 NYS2d 374 [1st Dept 1987] ["In all defamation cases, the threshold issue which must be determined, as a matter of law, is whether the complained of statements constitute fact or opinion"]). Statements that clearly "constitute[ ] the expression of opinion" are not actionable (*Costanza v Seinfeld*, 279 AD2d 255, 256, 719 NYS2d 29 [1st Dept 2001]). Additionally, the headline is a fair index of the article, which discusses real estate transactions entered into by Plaintiff thereafter subject to court proceedings in which findings indicated that the seller had entered into an unfavorable deal, often without the benefit of an attorney.

ACTUAL MALICE

Under the anti-SLAPP statute as amended, in a case involving public petition and participation, damages may only be recovered if the Plaintiff, in addition to proving all other necessary elements, establishes by clear and convincing evidence that "any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action" (Civil Rights Law § 76-a [2]).

In light of the Court's findings that the statements regarding judicial proceedings are privileged under Section 74 of the Civil Rights Law, or were not defamatory, this Court need not address whether Defendants acted with actual malice. Were this Court to consider that argument, it could make no finding of actual malice based on the conclusory allegations set forth in the complaint (*see L.Y.E. Diamonds, Ltd. v Gemological Inst. of Am., Inc.*, 169 AD3d 589, 591, 95 NYS3d 53 [1st Dept 2019], citing *O'Neill v New York Univ.*, 97 AD3d 199, 212-213, 944 NYS2d 503 [1st Dept 2012]; *see also Jimenez v United Fedn. of Teachers*, 239 AD2d 265, 266, 657 NYS2d 672 [1st Dept 1997]). Plaintiff fails to establish by clear and convincing evidence that any of the communications contained in the articles were made with knowledge of their falsity or with reckless disregard of whether the statements were false.

Accordingly, Plaintiff fails to set forth a cause of action for defamation and Defendants' motion to dismiss will be granted.

LIPSTICK ALLEY

As Defendants are not affiliated with Lipstick Alley, a third-party website, Plaintiff cannot sustain an action against them with respect to that publication.

COUNSEL FEES

Section 70-a (1) (a) of the Civil Rights Law provides for mandatory counsel fees "upon a demonstration . . . that

[an] action involving public petition and participation was commenced or continued 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," including where such an action is dismissed pursuant to CPLR 3211 (g). Having found that Plaintiff 's action involves public petition and participation and that Plaintiff fails to establish a substantial basis in fact or law to sustain his defamation claims, the Court finds that Defendants are entitled to costs and counsel fees.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted and the action is dismissed with prejudice; and it is further

ORDERED that by November 30, 2022, Defendants shall file a fee application (billing records and an affirmation of reasonableness) that sets forth their fees in this action; by December 30, 2022, Plaintiff shall file any objections to the fee application; and Defendants shall notify the Court by email when these submissions are fully submitted.

All matters not decided herein are hereby denied.

10/3/2022
DATE

/s/ Lori S. Sattler
Lori S. Sattler, J.S.C.

APPENDIX D — DECISION AND ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK, ENTERED SEPTEMBER 11, 2023

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

Index No. 151135/2022

YUVAL GOLAN,

Plaintiff,

v.

DAILY NEWS, L.P., ET AL.,

Defendants.

September 11, 2023, Decided

DECISION AND ORDER ON MOTION

HON. LORI SATTLER, *Justice.*

The following e-filed documents, listed by NYSCEF document number (Motion 002) 40, 41, 42, 43, 44, 45, 46, 47, 48 were read on this motion to/for ATTORNEY – FEES.

In this dismissed defamation action, Defendants Daily News, L.P. and Noah Goldberg ("Defendants") move for counsel fees incurred defending against the unsuccessful appeal of Plaintiff Yuval Golan ("Plaintiff") pursuant to

Civil Rights Law ("CRL") § 70-a(1)(a). Plaintiff opposes the motion.

Plaintiff, a real estate developer, commenced this action alleging he was defamed by Defendants when they published an article reporting that Plaintiff took advantage of vulnerable New Yorkers by convincing them to sell their homes for below fair market value. In a Decision and Order dated October 3, 2022 (NYSCEF Doc. No. 42), the Court found that the action involved public petition and participation and therefore New York's anti-SLAPP law applied. The Court further found that Plaintiff failed to meet the heightened pleading standard applicable to anti-SLAPP cases (*see* CPLR 3211 [g]) and dismissed the action. The Court found that Defendants were entitled to counsel fees and costs pursuant to CRL § 70-a(1)(a), which mandates the award of counsel fees where a matter subject to anti-SLAPP laws "was commenced or continued without a substantial basis in fact and law." The Court set a deadline by which Defendants were to file a fee application.

Plaintiff appealed. While the appeal was pending, the parties entered into a stipulation (NYSCEF Doc No. 43) in which they agreed to a fee amount for "any claim for attorneys' fees and costs that Defendants have asserted or could have asserted in this action, inclusive of all proceedings before this Court through and including the date of this Stipulation" (*id.* at 1). They further agreed that the sum would be held in abeyance pending Plaintiff's appeal and any additional appeals (*id.* at 2). The Stipulation provides: "the agreed amount does not include any additional fees or costs that Defendants might

seek in connection with any appellate proceedings, or in connection with any further proceedings before this Court subsequent to the date of this Stipulation. Defendants remain free to seek such additional fees or costs, and Plaintiff remains free to oppose any such request" (*id.* at 2-3).

The October 3, 2022 Decision and Order was affirmed by the Appellate Division, First Department on March 23, 2023 (*Golan v Daily News, L.P.*, 214 AD3d 558 [1st Dept 2023]). In addition to holding that the action was correctly dismissed, the Court held that it was proper to grant counsel fees under CRL § 70-a(1)(a) (*id.* at 559).

Defendants now seek counsel fees and costs incurred defending against Plaintiff's appeal. Defendants submit billing statements and an affirmation of counsel as to the reasonableness of the fees sought. Counsel notes that Plaintiff raised new arguments on appeal, specifically challenging the constitutionality of the anti-SLAPP law as amended in 2020 and contending that it was procedurally improper to award CRL § 70-a(1)(a) fees on a motion to dismiss. Counsel further argues that the statute entitles Defendants to fees incurred to make the fee application. In total, Defendants seek $46,432.50 in fees for the appeal, $1,165.61 in appellate costs, $6,325 for the instant motion, and $1,527 for the reply papers.

In opposition, Plaintiff contends that the Appellate Division, not the trial court, must decide whether Defendants are entitled to fees for the appeal. The opposition papers do not cite any case law to support this

position, nor do they challenge or otherwise address the reasonableness of the fees sought or Defendants' ability to seek fees for the instant motion.

CRL § 70-a(1)(a) provides that "costs and attorney's fees shall be recovered" when, *inter alia*, an anti-SLAPP matter is dismissed upon a demonstration that the case "was commenced *or continued* without a substantial basis in law or fact" (emphasis added). This specifically includes adjudication pursuant to CPLR 3211(g) (*id.*). It therefore cannot be disputed that Defendants are entitled to fees and costs for the appellate proceedings here.

The Court further finds that the statute entitles Defendants to fees for filing and briefing the instant motion, so-called "fees on fees." An award of fees on fees must be based on a statute or agreement (*Sage Realty Corp. v Proskauer Rose LLP*, 288 AD2d 14, 15 [1st Dept 2001]). Section 70-a(1)(a) was amended in 2020 to make the award of counsel fees mandatory rather than at a court's discretion (*Gottwald v Sebert*, — NY3d —, 2023 NY Slip Op 03183 *4 [2023]). The purpose of the amendment was "to extend the protection" of New York's anti-SLAPP law (Sponsor's Mem, Bill Jacket, L 2020, ch 250). "The amendment will protect citizens' [sic] from frivolous litigation that is intended to silence their exercise of the rights of free speech and petition about matters of public interest" (*id.*). Given the fee-shifting nature of the statute, the practicality of seeking fees at the pre-answer motion to dismiss stage, and the intent of the legislature to protect defendants like those here, the Court finds that fees on fees are permitted.

Appendix D

Plaintiff's argument in opposition that Defendants should have sought this relief directly from the Appellate Division is not supported by any case law or the statute. To the contrary, § 70-a(1) allows defendants to "maintain an action, claim, cross claim or counterclaim" for compensatory damages and fees. It is a trial court's role to adjudicate actions and claims in the first instance (NY Const, Art IV, § 7; *see also Pollincina v Misericordia Hosp. Med. Ctr.*, 82 NY2d 332, 338 [1993]).

As to the reasonableness of the fees sought, the Court is to consider "time and labor required, the difficulty of the questions involved, and the skill required to handle the problems presented; the lawyer's experience, ability, and reputation; the amount involved and benefit resulting to the client from the services; the customary fee charged by the Bar for similar services; the contingency or certainty of compensation; the results obtained; and the responsibility involved" (*Matter of Freeman*, 34 NY2d 1, 9 [1974]). When considering, *inter alia*, the issues presented by the recent amendments to the statute, the fact that new arguments were raised on appeal, the area of expertise of counsel and the firm's billing statements, as well as the fact Defendants prevailed on appeal, and in the absence of any opposition on the issue of reasonableness or a request for a hearing, the Court finds that the fees sought are reasonable. Accordingly, the motion is granted, and it is hereby:

ORDERED that Plaintiff shall pay the sum of $55,450.11 as and for counsel fees and costs for the services set forth herein within sixty (60) days; and it is further

Appendix D

ORDERED that, in the event of non-payment, the Clerk of the Court, upon service of a copy of this Decision and Order with Notice of Entry and an Affidavit of Nonpayment, shall enter a money judgment against Plaintiff Yuval Golan and in favor of Miller Korzenik Sommers Rayman LLP in the amount of $55,450.11 as set forth herein and Miller Korzenik Sommers Rayman LLP shall have execution thereon without further order of this Court.

This constitutes the Decision and Order of the Court.

9/11/2023	/s/ Lori S. Sattler
DATE	Lori S. Sattler, J.S.C.

APPENDIX E — NOTICE OF ENTRY OF THE ORDER OF THE NEW YORK COURT OF APPEALS, DATED MARCH 19, 2024

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

Index No. 151135/22

YUVAL GOLAN,

Plaintiff,

-against-

DAILY NEWS, L.P. AND NOAH GOLDBERG,

Defendants.

NOTICE OF ENTRY

PLEASE TAKE NOTICE that attached is a true and correct copy of a Decision and Order of the Court of Appeals of the State of New York, duly entered in the office of the clerk of the within named court on March 19, 2024.

Dated: New York, NY
March 26, 2024

Appendix E

STATE OF NEW YORK
COURT OF APPEALS

Mo. No. 2023-697

YUVAL GOLAN,

Appellant,

v.

DAILY NEWS, L.P., *et al.*,

Respondents.

Decided and Entered on the nineteenth day of March, 2024

Present, Hon. Rowan D. Wilson, Chief Judge, ***presiding.***

Appellant having moved for leave to appeal to the Court of Appeals in the above cause;

Upon the papers filed and due deliberation, it is

ORDERED, that the Motion, insofar as it seeks leave to appeal from the Appellate Division order, is dismissed as untimely (*see* CPLR 5513 [b]); and it is further

ORDERED, that the motion for leave to appeal from the 2023 Supreme Court judgment is denied.

/s/ Lisa LeCours
Lisa LeCours
Clerk of the Court

APPENDIX F — RELEVANT STATUTORY PROVISIONS

U.S. Constitution, 7th Amendment

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Appendix F

New York State Constitution, Article 1 § 2:

Right to trial by jury; waiver thereof.

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime is punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.

Appendix F

New York Civil Rights Law § 70-a:

Actions involving public petition and participation; recovery of damages

1. A defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of this article, may maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that:

(a) costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven or subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules, that the action involving public petition and participation was commenced or continued 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;

(b) other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights; and

(c) punitive damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.

2. The right to bring an action under this section can be waived only if it is waived specifically.

3. Nothing in this section shall affect or preclude the right of any party to any recovery otherwise authorized by common law, or by statute, law or rule.

Appendix F

New York Civil Rights Law § 76-a:

Actions involving public petition and participation; when actual malice to be proven

1. For purposes of this section:

(a) An "action involving public petition and participation" is a claim based upon:

(1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or

(2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.

(b) "Claim" includes any lawsuit, cause of action, cross-claim, counterclaim, or other judicial pleading or filing requesting relief.

(c) "Communication" shall mean any statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression.

(d) "Public interest" shall be construed broadly, and shall mean any subject other than a purely private matter.

2. In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

3. Nothing in this section shall be construed to limit any constitutional, statutory or common law protections of defendants to actions involving public petition and participation.

Appendix F

New York Civil Practice Law and Rules § 3211(a) and (g):

(a) Motion to Dismiss Cause of Action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

...

7. the pleading fails to state a cause of action; or

...

(g) Stay of proceedings and standards for motions to dismiss in certain cases involving public petition and participation.

1. 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.

2. In making its determination on a motion to dismiss made pursuant to paragraph one of this subdivision,

the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the action or defense is based. No determination made by the court on a motion to dismiss brought under this section, nor the fact of that determination, shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

3. All discovery, pending hearings, and motions in the action shall be stayed upon the filing of a motion made pursuant to this section. The stay shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and upon a showing by the nonmoving party, by affidavit or declaration under penalty of perjury that, for specified reasons, it cannot present facts essential to justify its opposition, may order that specified discovery be conducted notwithstanding this subdivision. Such discovery, if granted, shall be limited to the issues raised in the motion to dismiss.

4. For purposes of this section, "complaint" includes "cross-complaint" and "petition", "plaintiff" includes "cross-complainant" and "petitioner", and "defendant" includes "cross-defendant" and "respondent."

Appendix F

New York Civil Rights Law § 74:

A civil action cannot be maintained against any person, firm or corporation, for the publication of a fair and true report of any judicial proceeding, legislative proceeding or other official proceeding, or for any heading of the report which is a fair and true headnote of the statement published.

This section does not apply to a libel contained in any other matter added by any person concerned in the publication; or in the report of anything said or done at the time and place of such a proceeding which was not a part thereof.