SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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Richard Ottinger and June Ottinger,

Index No.: 08-16429

Plaintiffs,

-against-

Stuart Tiekert, John Doe 1-10, and
Jane Doe, 1-10 (potential computer
Users at 130 Beach Avenue
Mamaroneck, New York),

Defendants.

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MEMORANDUM OF LAW
IN SUPPORT OF DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
UNDER CPLR 3212 (H) AND RELATED RELIEF

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This Memorandum of Law is submitted in support of Defendant's Motion for Summary Judgment dismissing this action under the special provisions of CPLR 3212 (h) and for related remedial relief under Section 70-a of the N. Y. Civil Rights Law.

PRELIMINARY STATEMENT

This is a SLAPP – a "Strategic Lawsuit Against Public Participation."

As will become clear from the undisputed facts set forth in the Motion papers, this defamation action arises out of statements made by Defendant about the Plaintiffs' home reconstruction project, and the action is "materially related" to Defendant's efforts in the allegedly defamatory online posts "to report on, comment on … challenge or oppose" Plaintiffs' pending "public applications" and "permits" to rebuild their home.

As such, the action fits squarely within New York's statutory definitions of a SLAPP as set forth in the Section 76-a (1) (a) of the N. Y. Civil Rights Law and thus also within the statute's unique remedial scheme, Section 70-a, whose purpose is to minimize the chilling effects of SLAPPs on free expression by facilitating disposal of baseless SLAPPs at the earliest possible stage, while compensating the SLAPPed party for his costs, attorneys fees and damages.

SUMMARY OF ARGUMENT

New York's SLAPP statute, now codified in Section 70-a and 76-a of the N. Y. Civil Rights Law, was enacted specifically to protect the constitutional rights of those, like Defendant, who wish to comment on and oppose public applications and permits, from the chilling burdens and effects of retaliatory defamation actions like the one brought by the Plaintiff public applicants here. (Point I. A.) The statute, and its full panoply of remedies, is thus squarely applicable to the case at bar. (Point I. B.)

Under CPLR 3211 (g) and 3212 (h), a special, preferential standard has specifically been enacted mandating the earliest possible disposition of baseless SLAPPs on motions to dismiss or for summary judgment. (Point II)

Here, Plaintiffs will not be able to meet their special threshold burden of demonstrating a substantial basis in law for their action because, as properly construed by this Court in the first instance, Defendant's allegedly defamatory posts are non-actionable statements of constitutionally-protected "opinion" as a matter of law. (Point II. A.)

And as will also be established on this Motion, Plaintiffs will not be able meet their heavy burden of demonstrating a substantial basis in fact for their claims because any statements in the posts found to be factual, to the extent Plaintiffs can meet their heavy burden of also proving they are false, were not published with "actual malice," in the sense of Defendant's knowledge of their falsity or reckless disregard of their probable falsity, as constitutionally defined. (Point II. B.)

Because Plaintiffs cannot demonstrate a substantial basis in fact or law for their defamation claim, CPLR 3212 (h) mandates summary dismissal, as does the well-established practice in constitutional defamation actions generally. (Point II. C.)

PRELIMINARY STATEMENT

The undisputed facts relevant to this Motion are fully set forth in the supporting affidavits and exhibits and need not be repeated here.

As far as the applicability of the SLAPP statute to this action, it will be undisputed that the subject matter of Defendant's allegedly defamatory posts were the public applications "for building approvals and permits" sought by Plaintiffs (as alleged in Complaint ¶5) and that Defendants' posts were "material to" those applications in that they "report[ed] on, comment[ed] on … challenge[d and] opposed" Plaintiffs' public applications and permits. Tiekert Aff., McCrory Aff., passim.

As far as Plaintiffs' ability to demonstrate a "substantial basis in fact and law" for their defamation claim, in the end that will be Plaintiffs' threshold burden in order to defeat this Motion and justify continuation of their action.

In his moving papers Defendant has already shown, given all of the indicia of his posts as non-actionable, constitutionally-protected statements of opinion, that Plaintiffs will be unable to demonstrate a substantial legal basis for their claim. Tiekert Aff. ¶¶21-26. If this Court upholds Defendant's opinion defense, summary termination of this case would be mandated without the need to consider Plaintiffs' alleged factual basis for their claims.

In any event, in his moving papers Defendant has also already provided information foreshadowing that Plaintiffs will be unable to demonstrate a substantial factual basis for their action, given that it will be Plaintiffs' heavy burden to adduce "clear and convincing" evidence of Defendant's actual malice in regard to any false statement of fact in the posts.

In that regard, Defendant's submissions in support of this Motion already provide significant documentation establishing the extent to which Defendant relied in good faith in his posted comments on the information he obtained from public hearings and meetings regarding the controversy over Plaintiffs' public applications, on widely-circulated media reports on the dispute, and on other knowledgeable and credible sources. For these reasons, it will be impossible, it is respectfully submitted, for Plaintiffs to establish that they have any basis – much less a substantial one – for alleging that any false facts they are able to prove were published by Defendant with actual knowledge of their falsity or with reckless disregard as constitutionally-defined. Tiekert Aff. ¶¶29-35.

Finally, in his initial Motion papers, Defendant has already provided substantial evidence of Plaintiffs' intent to suppress and chill critical commentary. Tiekert Aff ¶¶37-44; McCrory Aff. ¶¶136-47.

ARGUMENT

POINT I

A.

THE LEGISLATIVE PURPOSE AND INTENT OF THE SLAPP STATUTE IS TO BROADLY PROTECT CITIZENS WISHING TO EXERCISE THEIR RIGHTS OF FREE EXPRESSION IN REGARD TO PUBLIC APPLICANTS AND PERMITTEES WITHOUT FEAR OF RETALIATORY LITIGATION

In enacting Chapter 767 of the 1992 Laws of New York, the Legislature for the first time formally recognized the serious problem that SLAPPs – "Strategic Lawsuits Against Public Participation" – pose for vouching safe the fundamental constitutional rights of petition, association and freedom of expression.

In passing that Law, effective January 1, 1993, and codified in §70-a and §76-a of

the N. Y. Civil Rights Law, and in CPLR 3211 (g) and 3212 (h), the Legislature adopted a package of extraordinary standards, procedures and remedies whose stated purpose was "to protect citizens who participate in public affairs against lawsuits brought in retaliation against their participation." (New York State Assembly Memorandum in Support of A. 4299, Bill Jacket at 8.)[1]

Section 76-a (1) of the N. Y. Civil Rights Law defines the parameters of an "action involving public petition and participation." Such an action is one brought by "public applicant[s]" and is "materially related to any efforts of the defendant to report on, comment on … challenge or oppose such application …." Plaintiffs concede, as they must, that they are public applicants, having "sought building approvals and permits" from a wide range of public agencies (as recited in their Complaint, ¶5).

Defendant Tiekert, for his part, is without question one of the intended beneficiaries of the Civil Rights Law, because, in the exercise of his rights of expression and association, he undertook to "report on, comment on … challenge [and] oppose" Plaintiffs' public applications and permits and was specifically responding to comments made about those applications and permits at a public meeting.

Finally, it can hardly be denied that this action is "materially-related" to such efforts by Defendant because it specifically contests and sets out to attack Defendant for his comments criticizing and opposing Plaintiff's applications and permits.

[1] The Preamble to Chapter 767 provides: "§1. Legislative findings and purpose. The legislature hereby declares it to be the policy of the state that the rights of citizens to participate freely in the public process must be safeguarded with great diligence. The laws of the state must provide the utmost protection for the free exercise of speech, petition and association rights, particularly where such rights are exercised in a public forum with respect to an issue of public concern. The legislature further finds that the threat of personal damages and litigation costs can be and has been used as a means of harassing, intimidating or punishing individuals, unincorporated associations, not-for-profit corporations and others who have involved themselves in public affairs." McKinney, Session Law, No. 6 at 2010 (August 1992).

B.

A SLAPP DEFENDANT IS ENTITLED TO THE FULL PANOPLY OF REMEDIAL PROTECTIONS PROVIDED FOR UNDER THE STATUTE, INCLUDING DISMISSAL AT THE EARLIEST POSSIBLE STAGE AND DAMAGES, INCLUDING COSTS AND ATTORNEYS FEES

New York's SLAPP statute provides a broad range of remedies intended to protect the rights of a party that has been SLAPPed. These remedies should be liberally applied not only to fully restore the SLAPPed party to his status quo ante but also, if the action is found to have been brought for the improper purpose of punishing or deterring speech, to compensate him for his damages and, in the most extreme cases, to deter the plaintiff and future litigants from such behavior by an award of punitive damages.

Because Plaintiffs will be unable to demonstrate a substantial basis for their SLAPP, in fact or in law (Point II, infra), Defendant will be entitled to a mandatory award of his costs and attorney's fees under section 70-a (1) (a) of the Civil Rights Law.

And finally, because there is evidence that Plaintiffs commenced and continued this action, at least in part, for the purpose of punishing and inhibiting free expression, defendant will also be entitled to an award of compensatory damages and, potentially, punitive damages if the Court finds, on the Motion papers or at a subsequent inquest, that the sole purpose of the action was to punish or inhibit free expression.

It is also clear that the intent of the Legislature was that the statute's unique procedures and broad protections should be liberally applied to protect a defendant's rights of free speech and association at the earliest possible stage in order to avoid the costs and chilling effects of baseless SLAPPs. As noted at the time of its consideration:

> "The threat of personal damages and litigation costs must not be used as a method of stifling the participation of private citizens in public affairs. A free society must protect the rights of each citizen to speak out on matters

> involving government activity, without fear that one's personal assets will be put at risk by a baseless retaliatory lawsuit." New York State Assembly Memorandum in Support of Legislation, Bill Jacket at 8.

Obviously, this very same reasoning supports the Legislature's broad provision for the early, preferential dismissal of claims that are without a "substantial basis," under CPLR 3211 (g) and 3212 (h); for the extraordinary reimbursement of costs and attorneys fees, under Section 70-a (1) (a); and for the award of compensatory and even potentially punitive damages, under Sections 70-a (1) (b) and (c).

POINT II

UNDER THE SPECIAL REQUIREMENTS OF CPLR 3212 (H), SLAPP PLAINTIFFS ARE REQUIRED TO MAKE A THRESHOLD DEMONSTRATION THAT THEY HAVE A "SUBSTANTIAL BASIS" IN LAW AND FACT FOR THEIR CLAIMS OR ELSE SUMMARY JUDGMENT MUST BE GRANTED

Defendant is moving for summary judgment under the special provisions of CPLR 3212 (h), one of the integral components of New York's SLAPP law.[2] Under 3212 (h), the motion for summary judgment is given preference in its consideration and disposition for the intended purpose of protecting the SLAPPed defendant's constitutional rights of expression, petition and association.

To that end, an additional, threshold burden is imposed on the plaintiff who wishes to attempt to proceed with his case. That is, the SLAPP plaintiff must be able to

[2] The pending Motion asks this Court to grant the expedited summary judgment that is envisioned and accorded preference under CPLR 3212 (h). As will be substantiated in the parties' Motion papers, Defendant respectfully submits that the matter will be ripe for the pre-discovery dismissal uniquely available under 3212(h), unless Plaintiffs are able to make the requisite threshold demonstration of a "substantial basis in fact and law" for their action. Should this Court nonetheless conclude, for whatever reason, that at this time it is unable to rule on, or that it cannot grant, any aspect of the pending Motion, Defendant hereby reserves his right to proceed with his defense of this action in the normal course, including all of the ordinary avenues of pretrial discovery and disclosure. However, in that event, and to the extent warranted at a later stage, Defendant hereby reserves his right to renew the Motion for Summary Judgment, at the conclusion of discovery, either under 3212 (h) or under the traditional standards of CPLR 3212. In that regard, non-SLAPP 3212 motions have also been frequently granted in recognition of the "particular value" of summary judgment in avoiding the "chilling effects" of defamation actions on freedom of expression. (See Point II. C., infra)

make a sufficient demonstration that he has a "substantial basis" for his claims. Indeed, under 3212 (h), grant of summary judgment is mandatory – it "shall be granted unless the party responding to the motion demonstrates that the claim has a substantial basis in fact and law." (Emphasis added) This is a dramatic departure from the normal summary judgment standard.

The Legislature's intent in establishing a "substantial basis" test was made clear at the time of its passage:

> "For lawsuits involving speech and petition rights, greater protection is warranted. It is the intent of the legislation that the 'substantial basis' test creates a higher standard than the 'reasonable basis' test [applicable to finding a frivolous lawsuit]." Letter of Assemblyman William Bianchi to Governor Cuomo, July 14, 1992, re: A. 4299, Bill Jacket at 13-14. (Emphasis supplied) See also Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:73.

Finally, as is discussed further in Point II. C., infra, even beyond that threshold burden of substantiality under 3212 (h), every public figure defamation plaintiff already faces heavy burdens that must also be met at the summary judgment stage. These include the burden of adducing proof that would meet the highest evidentiary quantum required for proof of falsity and of constitutional malice – i.e., "clear and convincing" proof.

A.

PLAINTIFFS WILL NOT BE ABLE MEET THEIR BURDEN OF DEMONSTRATING A "SUBSTANTIAL BASIS" IN LAW FOR THIS ACTION BECAUSE, AS A MATTER OF LAW, DEFENDANT'S POSTS WERE CONSTITUTIONALLY-PROTECTED STATEMENTS OF OPINION

There is little point in an extended discussion here of the law of opinion in New York, which is well and clearly developed and which has definitively been held to protect statements of opinion more broadly even than under the First Amendment. See Immuno AG v. J. Moor-Jankowski, 77 N.Y.2d 235 (1989), cert. denied, 500 U.S. 954 (1991).

There is no need to rehearse the long history of New York's state law of opinion, in its application to the facts presented here, because the Court of Appeals has already decided a case that is so close to the facts of the case at bar – in terms of the precise language found to be protected as opinion, in terms of the immediate and broader context of Defendant's posts and their tone and tenor, and in terms of the reasonable expectations and understanding of a listener or reader – as to be dispositive. 600 West 115th Street v. Von Gutfeld, 80 N.Y.2d 130 (1992).

The similarities between the alleged defamations in Von Gutfeld and this case are striking. In Von Gutfeld, the statements at issue were that a sidewalk café development permit, and a related lease, were "illegal" and "as fraudulent as you can get and it smells of bribery and corruption," words that might in some contexts suggest, according to the Von Gutfeld Court, "criminal behavior." Id. at 135, 143. (Emphasis supplied.)

Here, Plaintiffs complain that in his posts Defendant suggested, in almost identically hyperbolic language, that their home reconstruction permit, and a related deed, were part of an "illegal scam" and "criminal behavior" based on an [apparently] "fraudulent deed" suggesting "either brib[ery] or coerc[ion]" and complaining of Plaintiffs' "greasing the wheels of corruption." (Complaint ¶7; emphasis supplied)

The Court in Von Gutfeld concluded that the defendant's statements were constitutionally protected. It held that the allegations of "fraud," "bribery" and corruption," – "words commonly understood to mean criminal behavior" – were nonetheless the kind of "loose, figurative and hyperbolic" statements that, in the context, would be reasonably understood, not as actionable facts, but as protected opinions and on that basis the Court granted Von Gutfeld's motion for summary judgment.

Von Gutfeld involved comments at a public meeting where, the Court held, listeners and participants come expecting heated positions from lay persons, not necessarily well thought out, researched or finely-honed and crafted presentations and therefore do not expect that laypersons will necessarily be presenting, in the heat of the moment, factual as opposed to opinionated advocacy.

Here, Defendant's heated posts were not spoken at a public meeting. However, they were, in fact, posted in response to spoken comments at a televised, public meeting. And they were posted on an online community forum (Plaintiffs have not inappropriately labeled it a "blog") where, surely, readers come with an equally reasonable expectation that they will, in the words of Von Gutfeld, be exposed to "impromptu comments … more likely to be the product of passionate advocacy than careful, logically developed reason." Id. at 141.

As the Von Gutfeld Court wisely noted, in words equally if not more applicable to the freewheeling informality of a blog, "[c]itizens do not by their status invite listeners to make the assumption that they have researched the subject and found facts not generally known to others * * * They come with the expectation that they are, in all probability, going to hear opinion, much of it unpolished and uninformed." Id.

In Von Gutfeld, so close to this case in the allegedly defamatory statements under consideration, and so close in the context of a forum known to be the home of heated commentary, the Court of Appeals clearly stated its intention to tip the scales in favor of a broad interpretation of opinion that protects free expression from the chilling effects of defamation actions.

As Justice Simons noted for the Court:

> "While conscious of their important role in providing protection to individual reputation, the courts since Sullivan have been vigilant about the potential "chilling effect" the threat of defamation actions can have on public debate. Where as here one of the most fundamental forms of citizen participation is implicated, that vigilance is especially well-founded. Because stringent defamation laws – or, more often, the fear of their imposition – can deter and silence people who would otherwise involve themselves in the public debate, the Supreme Court has fashioned broad protection under the Federal Constitution for civic participants, most notably by requiring plaintiffs who are public officials (New York Times Co. v Sullivan, supra) or public figures (Curtis Publ. Co. v Butts, 388 US 130) to show actual malice on the part of the defendant (see also, Gertz v Robert Welch, Inc., 418 US 323). * * *
> Implicit in the Sullivan-Gertz line of cases has been the understanding that, when the rules of defamation are drawn too finely, when any erroneous statement is likely to open the statement maker to liability, First Amendment values suffer because would-be communicators, fearing lawsuits, may be reluctant to risk expressing themselves. To avoid that result, and the resulting impoverishment of the public forum, the Court has been willing to allow in some circumstances otherwise valid claims of reputational harm to go uncompensated in order to encourage citizens and media outlets to express themselves freely when matters of public interest are at issue. In the balance to be struck between the State's interest in protecting its citizens from reputational injury and the Constitution's requirement that the State not unduly burden its citizens seeking to participate in the fundamental processes of governance, the scale is not even. We have been guided by these same considerations in explicating the scope of the broader protection [for statements of opinion] afforded by our State constitutional provision (see, Immuno AG. v Moor-Jankowski, 77 NY2d 235, 248, supra)." Von Gutfeld, supra, at 137-38.

Finally, and of especial relevance here, the Von Gutfeld case clearly and expressly linked these significant policy concerns regarding the burdens and chilling effects of defamation litigation, and the compelling need to broadly construe and protect statements of opinion, to the then recently-enacted SLAPP statute:

> "In recent years, there has been a rising concern about the use of civil litigation, primarily defamation suits, to intimidate or silence those who speak out at public meetings against proposed land use development and other activities requiring approval of public boards. Termed SLAPP suits – strategic lawsuits against public participation – such actions are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future (see,

e.g., Westfield Partners v Hogan, 740 F Supp 523; Pring and Canan, Strategic Lawsuits Against Political Participation, 35 Soc Probs 506). In response, New York State enacted a law specifically aimed at broadening the protection of citizens facing litigation arising from their public petition and participation (see, L 1992, ch 767). The statute was enacted after the events of this litigation and is not in issue on this appeal." Id. at 137, n.1.

B.

PLAINTIFFS ALSO CANNOT MEET THEIR BURDEN OF DEMONSTRATING A SUBSTANTIAL BASIS IN FACT BECAUSE THERE WILL BE NO EVIDENCE, MUCH LESS "CLEAR AND CONVINCING PROOF," THAT DEFENDANT POSTED ANY FACTUALLY FALSE STATEMENTS WITH "ACTUAL MALICE"

On this Motion Defendant has already documented the facts that were the occasion for, and underlay, his critical comments on Plaintiffs public applications and permits, identifying the public events and credible sources on which he relied in presenting his views and opinions. On the other hand, it is not yet known on what basis Plaintiffs will claim that Defendant's comments were not only factually false but also that they were published with actual malice.

What is clear at this stage, however, is that Plaintiffs must not only meet their heavy threshold burden of demonstrating a substantial factual basis for commencing this action, but that they must also do so in the context of their heavy substantive burden of proof in any defamation action of this kind.

Thus, both the SLAPP statute and the constitutional law standards applicable to public defamation suits, require proof of "actual malice," as constitutionally defined. And under New York Times Co. v. Sullivan, 376 U.S. 254 (1964), a public official or figure cannot recover in a defamation action without adducing "clear and convincing" proof that the Appellants published a defamatory statement "with knowledge that it was

false or with reckless disregard of whether it was false or not." Id. at 279-80.[3]

An indispensable, threshold component of the actual malice standard will be the requirement that, to be actionable, Plaintiffs must establish that a factual statement – not an opinion – is false. As the Court of Appeals has reasoned, "The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory. Since falsity is a sine qua non of a libel claim and since only assertions of fact are capable of being proven false, we have consistently held that a libel action cannot be maintained unless it is premised on published assertions of fact (Gross v New York Times Co., supra, at 152-153; Immuno AG v. Moor-Jankowski, supra; see also, Milkovich v. Lorain Journal Co., 497 U.S. 1, 17-21)." Brian v. Richardson, 87 N.Y.2d 46, 50-51 (1995).

Correlatively, because proof of false facts is integral to the actual malice standard, it has also been held that falsity, like actual malice, must be proven by clear and convincing evidence. DiBella v. Hopkins, 403 F.3d 102, 112 (2d Cir.), cert. denied sub nom, Hopkins v. DiBella, 546 U.S. 939 (2005). In DiBella, the Second Circuit systematically examined whether "clear and convincing" proof of falsity is required under New York law. It noted that "New York Appellate Divisions – with the exception of the Fourth Department, which does not appear to have written on the issue – have uniformly stated that a public figure in New York must prove falsity by clear and convincing evidence."

[3] "Clear and convincing" evidence has been defined as "[t]he measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to allegations sought to be established." Liberty Lobby, Inc. v. Rees, 667 F.Supp. 1, 4 (D.D.C. 1986), aff'd, 852 F.2d 595 (D.C. Cir. 1988), cert. denied, 489 U.S. 1010 (1989).

In addition, under both common law tradition and modern constitutional principles, in evaluating truth or falsity of an allegedly defamatory statement, the issue will not be whether the publication was precisely accurate in every minor particular. As the Supreme Court has instructed:

> "The common law of libel takes but one approach to the question of falsity …. It overlooks minor inaccuracies and concentrates upon substantial truth." Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 517 (1991)(emphasis supplied).

Thus, under the doctrine of "substantial truth," Plaintiffs' burden will be more than simply proving the literal falsity of a publication. The falsity must go to what has been described as the "gist" or "sting" of the defamation. The test is whether the alleged defamation, as published, "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." Id. at 517.

Turning to Plaintiffs' burden to prove "actual malice," by clear and convincing evidence, the definition of that term of art is restricted to a very particular state of mind. As noted in Prozeralik v. Capital Cities Communications, 82 N.Y.2d 466, 474 (1993): "'[t]he burden of proving "actual malice" requires the [plaintiff] to demonstrate with clear and convincing evidence that defendant realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement.'" (citation omitted).

Moreover, it would not be enough for Plaintiffs to prove that the Defendant was "reckless" in the common sense meaning of being careless – even extremely so – in publishing a false factual statement. As noted in Sweeney v. Prisoner's Legal Services, 84 N.Y.2d 786 (1995):

> "To satisfy the reckless disregard standard, plaintiff had to establish that

> defendants in fact 'entertained serious doubts as to the truth of [the] publication' … or that they actually had a 'high degree of awareness of its probable falsity.' " (Emphasis added)

As the Sweeney Court went on to note, the "reckless disregard" standard is subjective and the bar is extremely high:

> "We have observed that there is a genuine and critical distinction between lacking knowledge of a statement's falsity and being aware that it is probably false or entertaining serious doubts about its truth (see Liberman v. Gelstein, 80 N.Y.2d, at 483, supra). A qualified privilege may be sustained if the speaker is genuinely unaware that a statement is false because the failure to investigate its truth, standing alone, is not enough to prove actual malice even if a prudent person would have investigated before publishing the statement." Sweeney, supra, 84 N.Y.2d at 792-93 (citations omitted; emphasis supplied)

In addition, New York courts have held that a defendant charged with republishing the allegedly defamatory statements of others has a right to rely on the apparent credibility of the source in the absence of a showing by Plaintiffs that the republisher had or should have had substantial reasons to question the accuracy of the statements on which he relied or the good faith of their original author. See Rinaldi v. Holt, Rinehart & Winston, 42 N.Y.2d 369, cert. denied, 434 U.S. 969 (1977); Karaduman v. Newsday. Inc., 51 N.Y.2d 531 (1981).[4]

Finally, in determining whether Plaintiffs will be able to meet their special threshold burden of adducing a "substantial basis" for their factual allegation of actual malice, in consideration of all of the foregoing constrictions and limitations, it is clear that the substantial basis test must be assessed – even at the summary judgment stage – against Plaintiffs' ultimate burden to prove actual malice by "clear and convincing" evidence.

[4] Although the foregoing cases involved book and newspaper publishers and their freelance authors or reporters, there is no reason why these principles should not apply to reliance on other credible sources, particularly when the fact of reliance, and the source's identity, has been revealed.

As the Court of Appeals has expressly held: "[t]his standard of 'convincing clarity' applies even on a motion for summary judgment." Freeman v. Johnston, 84 N.Y.2d 52, 56 (1994), cert. denied, 513 U.S. 1016 (1994) (quoting the Supreme Court's seminal case on quantum of proof at the summary judgment stage, Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)).

Freeman explained the unavoidable logic of looking to the ultimate liability standard on the issue of actual malice — not only at trial but also on summary judgment – and this reasoning would be applicable as well at the threshold stage under 3212 (h):

> "Just as the 'convincing clarity' requirement is relevant in ruling on a motion for directed verdict, it is relevant in ruling on a motion for summary judgment. When determining if a genuine factual issue as to actual malice exists in a libel suit brought by a public figure, a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability under New York Times [v. Sullivan]. For example, there is no genuine issue if the evidence presented in the opposing affidavits is of insufficient caliber or quality to allow a rational finder of fact to find actual malice by clear and convincing evidence." 84 N.Y. 2d at 58.

In sum, there cannot be a "substantial basis" for Plaintiffs'' factual claim as to the falsity of the allegedly defamatory posts, or as to Defendant's actual malice in publishing them, unless Plaintiffs have a substantial basis for alleging that they will be able to adduce falsity and actual malice by clear and convincing evidence.

C.

BECAUSE PLAINTIFFS CANNOT DEMONSTRATE A SUBSTANTIAL BASIS IN FACT OR LAW FOR THEIR DEFAMATION CLAIM, CPLR 3212 (H) MANDATES SUMMARY DISMISSAL AS DOES THE WELL-ESTABLISHED CASE LAW THAT FAVORS SUMMARY JUDGMENT IN CONSTITUTIONAL DEFAMATION ACTIONS GENERALLY

Under general New York practice courts at times take a cautious approach toward

summary judgment, describing summary judgment as a "drastic remedy." For purposes of the instant Motion however, the "drastic remedy" approach to summary judgment would be wholly inapposite, as the Legislature has expressly mandated that summary judgment in a SLAPP under 3212 (h) must be granted unless the plaintiff can meet its unique and high threshold burden of a "substantial basis" in law and fact. The result is not discretionary with the Court, as in the normal case, but it is mandatory.

Even in cases not governed by the special 3212 (h) preference and mandate, summary judgment has long been recognized as the preferred method for disposing of defamation claims that threaten to chill freedom of speech. And this is particularly so in cases where it has been established that statements of opinion are present or predominate. Summary judgment on the issue of actual malice has also been frequently granted.

In constitutional defamation actions generally, even in the absence of the special burdens and preference accorded to summary disposition under the SLAPP statute and 3212 (h), the Court of Appeals has, on several occasions, "reaffirmed [its] regard for the particular value of summary judgment, where appropriate, in libel cases." This is because of the Court's recognition of "[t]he chilling effect of protracted litigation." Immuno AG , supra, 77 N.Y.2d at 256. See also Karaduman v. Newsday, Inc., 51 N.Y.2d 531, 545 (1980) (observing that "[t]he threat of being put to the defense of a lawsuit … may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself."); Gross v. New York Times Co., 82 N.Y.2d 146, 156 (1993) (observing that protecting "defendants' expressional rights as well as the cherished values embodied in the First Amendment guarantees" in the context of a public official defamation action requiring proof of actual malice "is well suited to testing, at

least in the first instance, on a motion for summary judgment …"); Armstrong v. Simon & Schuster, 85 N.Y.2d 373, 379 (1995) ("We recognize that summary judgment has particular value, where appropriate, in libel cases, so as not to protract litigation through discovery and trial and thereby chill the exercise of constitutionally protected freedoms") (internal citations omitted). See also Mann v. Abel, 10 N.Y.3d 271 (2008) (reversing denial of summary judgment in a defamation case where statements of opinion had erroneously been tried as statements of fact).

The tradition of early dismissal in defamation actions, where appropriate, is particularly well suited to the case at bar because protection of opinion raises issues of constitutional privilege under the state as well as federal constitution that can frequently be determined as matter of law by the court in the first instance.

As a result, the Court of Appeals has on a number of occasions upheld or granted summary judgment under the general provisions of CPLR 3212 in defamation cases involving the defense of opinion. See, e.g., Immuno AG, supra (upholding summary judgment based on protection for statements of opinion in a letter to the editor of a scientific journal); 600 West 115th Street Corp. v. Von Gutfeld, supra (granting summary judgment based on protection for opinion in hyperbolic statements that could not be viewed as stating defamatory facts); Millus v. Newsday, Inc., 89 N.Y.2d 840 (1996) (upholding summary judgment based on protection for opinion in a newspaper editorial evaluating legislative candidates). See also Mann v. Abel, supra.[5]

[5] Other lower courts, including the Second Department, have also frequently followed Court of Appeals lead in approving summary judgment under CPLR § 3212 based on an opinion defense. See, e.g., Gilliam v. Richard M. Greenspan, P.C., 17 A.D.3d 634 (2d Dept. 2005); Dancer v. Bergman, 246 A.D.2d 573 (2d Dept. 1998), appeal dismissed, 92 N.Y.2d 876 (1998); Gatto v. Callaghan, 231 A.D.2d 552 (2d Dept. 1996); Mogil v. Mark B. Zaia Enters., 230 A.D.2d 778 (2d Dept. 1996); Guarneri v. Korea News, 214 A.D.2d 649 (2d Dept. 1995); Morrison v. Poullet, 227 A.D.2d 599 (2d Dept.1996).

For similar reasons the Court of Appeals has also affirmed CPLR 3211 dismissals on the face of defamation complaints on grounds of opinion, again because a finding of protected opinion is considered to be a matter of law for the court in the first instance. See Steinhilber v. Alphonse, 68 N.Y.2d 283, 289 (1986) (affirming grant of motion to dismiss based on protection for opinions displayed on a labor banner and stated in a tape-recorded union message); Brian v. Richardson, 87 N.Y.2d 46 (1995) (upholding grant of motion to dismiss based on protection for opinion in statements made in an "Op Ed" article in the New York Times).[6]

Finally, summary judgment on grounds of lack of "clear and convincing" proof of "actual malice" has also been frequently granted or upheld. See, e.g., Freeman v. Johnson, supra; Roche v. Hearst, 53 N.Y.2d 767 (1981); Rinaldi v. Holt, Rinehart & Winston, 42 N.Y.2d 369, cert. denied, 434 U.S. 969 (1977); James v. Gannett Co., 40 N.Y.2d 415 (1976) (summary judgment as to lack of defamatory meaning and actual malice); Trails West, Inc. v. Wolff, 32 N.Y.2d 207 (1973); Gross v. New York Times Company, 28 Med. L. Rptr. 1378 (N.Y. Co. 1999), aff'd, 281 A.D.2d 299 (1st Dept. 2001); Dancer v. Bergman, 246 A.D.2d 573 (2d Dept. 1998) (summary judgment as to opinion and lack of actual malice); Goldblatt v. Seaman, 225 A.D.2d 585 (2d Dept.

[6] And other lower courts have also granted dismissals in defamation actions similar to the case at bar as a matter of law. See, e.g., Klepetko v. Reisman, 2007 NY Slip Op 5231 (2d Dept. 2007); Galasso v. Saltzman, 2007 NY Slip Op 5830 (1st Dept. 2007) (statements made in the context of a heated dispute among residential property owners that plaintiff was a "criminal," had engaged in "criminal conduct" and had "committed crimes" against the property, with implication that defendant was "connected" to organized crime, constituted non-actionable opinion); The Renco Group, Inc. v. Workers World Party, Inc., 13 Misc. 3d 1213A (Sup. Ct. N.Y. Co. 2006) (accusation that plaintiff was guilty of "robbing the pension" fund constituted nonactionable opinion); Shinn v. Williamson and Sony Music Entertainment, 225 A.D.2d 605, 606 (2d Dept. 1996) ("two-faced backstabber" constituted "personal opinion and rhetorical hyperbole"); Vengroff v. Coyle, 231 A.D. 2d 624 (2d Dept. 1996) (letter questioning whether plaintiff had engaged in arson for profit and urging an investigation was an expression of opinion); Bryant v. Ford Kinder et al., 204 A.D.2d 377, 378 (2d Dept. 1994); Lukashok v. Concerned Residents of North Salem, 160 A.D.2d 685, 686 (2d Dept. 1990) (statement that plaintiff "resorted to what can only be called terrorism" did not accuse plaintiff of criminal activity).

1996); Roche v. Mulvihill, 214 A.D.2d 376 (1st Dept. 1995); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

CONCLUSION

For all of the foregoing reasons, this Court should, as mandated by the SLAPP statute, and in order to fulfill that statute's protective legislative intent, firmly enforce Defendant's rights under the statute by granting his Motion for Summary Judgment and dismissing the baseless and abusive SLAPP claims Plaintiffs have brought against him in their entirety, with costs and attorney's fees. Defendant should also be awarded compensatory and, if warranted, punitive damages.

Dated: New York, New York
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Respectfully Submitted,

HENRY R. KAUFMAN, P.C.

/s/

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