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

- X

LUKASZ GOTTWALD p/k/a Dr. Luke, KASZ MONEY, INC.
and PRESCRIPTION SONGS, LLC,

Plaintiffs-Appellants,

– against –

KESHA ROSE SEBERT p/k/a Kesha,

Defendant-Respondent,

– and –

PEBE SEBERT, VECTOR MANAGEMENT, LLC and JACK ROVNER,

Defendants.

KESHA ROSE SEBERT p/k/a Kesha,

Counterclaim Plaintiff-Respondent,

– against –

LUKASZ GOTTWALD p/k/a Dr. Luke, KASZ MONEY, INC.
and PRESCRIPTION SONGS, LLC,

Counterclaim Defendants-Appellants,

– and –

DOES 1-25, inclusive,

Counterclaim Defendants.

- X

Notice of Motion

Index No 653118/14

Appellate Case No 2021-03036

NOTICE OF MOTION OF SAMUEL D. ISALY
FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

NOTICE that upon the annexed affirmation of Alan S. Lewis, dated February 4, 2022, and all exhibits attached thereto, including a copy of the proposed brief of *amicus curiae*, Samuel D. Isaly, by his attorneys Carter Ledyard & Milburn LLP, will move this Court, at the Supreme Court, Appellate Division, First Department, 27 Madison Avenue, New York, NY 10010, on February 14, 2022 at 10:00 a.m. or as soon thereafter as counsel may be heard, for an order

permitting the proposed amicus to serve and file a brief as *amicus curiae*. This motion is filed pursuant to CPLR §2214 and 22 NYCRR §600.4, relates to the appeal filed by Appellants, and should be heard by the same merits panel assigned to hear Appellants' appeal.

Dated: New York, New York
February 4, 2022

CARTER LEDYARD & MILBURN LLP

By: Alan S. Lewis

Alan S. Lewis
John J. Walsh
2 Wall Street
New York, NY 10005
(917) 533-2524
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Attorneys for Proposed Amicus Curiae Samuel D. Isaly

TO: Christine Lepera, Esq.
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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

- X

LUKASZ GOTTWALD p/k/a Dr. Luke, KASZ MONEY, INC.
and PRESCRIPTION SONGS, LLC,

Plaintiffs-Appellants,

– against –

KESHA ROSE SEBERT p/k/a Kesha,

Defendant-Respondent,

– and –

PEBE SEBERT, VECTOR MANAGEMENT, LLC and JACK ROVNER,

Defendants.

KESHA ROSE SEBERT p/k/a Kesha,

Counterclaim Plaintiff-Respondent,

– against –

LUKASZ GOTTWALD p/k/a Dr. Luke, KASZ MONEY, INC.
and PRESCRIPTION SONGS, LLC,

Counterclaim Defendants-Appellants,

– and –

DOES 1-25, inclusive,

Counterclaim Defendants.

- X

Affirmation of Alan S. Lewis

Index No 653118/14

Appellate Case No 2021-03036

AFFIRMATION OF ALAN S. LEWIS IN SUPPORT OF MOTION ON BEHALF OF SAMUEL D. ISALY FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Alan S. Lewis, an attorney admitted to practice before the courts of New York State, hereby affirms, under penalty of perjury pursuant to CPLR § 2106, as follows:

1. I am a partner at the law firm of Carter Ledyard & Milburn LLP, counsel for Samuel D. Isaly. I submit this affirmation in support of Mr. Isaly's motion for leave of this Court to file a brief as *amicus curiae.*

2. The notice of appeal invoking this Court's jurisdiction is attached as Exhibit A.

3. The order appealed from is attached as Exhibit B.

4. Appellant has consented to Mr. Islay's motion. I contacted counsel for Respondent by email on January 26, 2022 to request consent but have received no response.

5. A copy of the proposed amicus brief is attached as Exhibit C.

6. Mr. Isaly's interest in this appeal arises from his status as a plaintiff in a pending defamation cases in Supreme Court, New York County. *See Isaly v. Garde*, Index No. 160699/2018 (N.Y. Cnty. Sup. Ct.). Like Appellants, Mr. Isaly commenced his lawsuit prior to the enactment of the 2020 Anti-SLAPP Act and like Appellants, Mr. Isaly is engaged in a dispute over its retroactive application.

7. Mr. Isaly's own lawsuit derives from damage to his previously sterling reputation as a highly successful investor in the securities of healthcare companies. He founded OrbiMed Advisors, LLC and was its Managing Partner for decades. His outstanding professional and personal reputation was severely damaged by the publication of a false and defamatory article that made allegations of workplace misconduct.

8. The issue on this appeal is whether the 2020 Anti-SLAPP Act applies to defamation cases pending at the time of its enactment. The defendants in the

case brought by Mr. Isaly have raised the same issue. This Court's ruling in this case on this issue will no doubt be cited as precedent in Mr. Isaly's case, giving him an obvious interest in its proper resolution.

9. As more fully set forth in Mr. Isaly's proposed brief, the application of the 2020 revisions to the Anti-SLAPP Act would subject even private figure plaintiffs to a significantly higher burden of proof, *i.e.,* the "actual malice" standard that was previously borne only by public officials and public figures. Mr. Isaly's proposed brief makes clear that such retroactive application is contrary to New York law.

10. Mr. Isaly's proposed brief includes arguments and authorities not otherwise presented to this Court that underscore why the 2020 revisions cannot be applied retroactively: that is, they did not further the intention of the original legislation and were thus not "remedial." Respectfully, Mr. Isaly's proposed submission would greatly assist this Court in its consideration of the questions on this appeal.

11. This Court previously granted a request by Mr. Isaly to file an amicus brief supporting Mr. Gottwald in a prior appeal between the parties which, like this appeal, ultimately concerned whether Mr. Gottwald's claims were subject to the "actual malice" standard. This Court ultimately ruled in favor of Mr. Gottwald in that appeal. *See Gottwald v. Sebert*, 193 A.D.3d 573 (1st Dep't 2021). Mr. Isaly

was also granted leave to file an amicus brief in the appeal from this Court's decision now pending before the Court of Appeals. Granting Mr. Isaly leave is consistent with these decisions on Mr. Isaly's previous amicus applications as well as decisions from other courts granting leave to defamation victims to file amicus briefs on significant questions of defamation law. *See, e.g.*, *Gubarev v. BuzzFeed, Inc.*, Case 18-15295 (U.S. Ct. of App., 11th Cir., Apr. 4, 2019 and July 8, 2019) (two orders granting leave to file amicus brief and leave to file supplemental amicus brief).

12. Consideration of the proposed amicus brief will not impose a significant review burden on the Court, given that the proposed brief is only approximately 12 pages, and under 3000 words.

WHEREFORE, I respectfully request that the Court grant Mr. Isaly's motion for leave to file a brief in this appeal as *amicus curiae*.

Dated: New York, New York
February 4, 2022

Alan S. Lewis
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(917) 533-2524
lewis@clm.com

Attorneys for Proposed Amicus Curiae Samuel D. Isaly

EXHIBIT A

INDEX NO. 653118/2014

NYSCEF DOC. NO. 2348

RECEIVED NYSCEF: 07/28/2021

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

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC,

Plaintiffs,

-against-

KESHA ROSE SEBERT p/k/a KESHA,

Defendant.

Index No. 653118/2014

Justice Jennifer Schecter

IAS Part 54

NOTICE OF APPEAL

KESHA ROSE SEBERT p/k/a KESHA,

Counterclaim-Plaintiff,

-against-

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., PRESCRIPTION SONGS, LLC,

Counterclaim-Defendants.

PLEASE TAKE NOTICE that Plaintiffs and Counterclaim-Defendants Lukasz Gottwald p/k/a Dr. Luke, Kasz Money, Inc. and Prescription Songs, LLC (collectively, "Plaintiffs") hereby appeal to the Appellate Division of the Supreme Court of the State of New York, First Department, the Decision and Order of the Honorable Jennifer Schecter, dated June 30, 2021, which granted Defendant Kesha Rose Sebert's motion for a ruling that Civil Rights Law § 76-a applies to Plaintiffs' defamation claims and for leave to assert a counterclaim under Civil Rights Law § 70-a (the "Order"). The Order was entered in the above-entitled action in the Office of the Clerk of the Supreme Court of the State of New York, County of New York on June 30, 2021

13340954.1

and served with Notice of Entry on July 1, 2021 and July 7, 2021, copies of which are attached hereto as **Exhibit 1** and **Exhibit 2**, respectively.

DATED: New York, New York
July 28, 2021

MITCHELL SILBERBERG & KNUPP LLP

By: /s/ Christine Lepera

Christine Lepera (ctl@msk.com)
Jeffrey M. Movit (jmm@msk.com)
437 Madison Avenue, 25th Floor
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Telephone: (212) 509-3900
Facsimile: (212) 509-7239

Attorneys for Lukasz Gottwald p/k/a Dr. Luke, Kasz Money, Inc., and Prescription Songs, LLC

To: Clerk
New York County Supreme Court, Commercial Divison

To: O'MELVENY & MYERS LLP
Leah Godesky
Moshe Mandel
Times Square Tower
7 Times Square
New York, New York 10036
(212) 326-2000

Attorneys for Kesha Rose Sebert p/k/a Kesha

EXHIBIT B

DECISION AND ORDER OF THE HONORABLE JENNIFER SCHECTER, DATED JUNE 30, 2021, APPEALED FROM, WITH NOTICE OF ENTRY [5 - 62]

FILED: NEW YORK COUNTY CLERK 07/01/2021 11:42 AM
INDEX NO. 653118/2014
NYSCEF DOC. NO. 2344
RECEIVED NYSCEF: 07/01/2021

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

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC,	Index No. 653118/2014
	Hon. Jennifer Schecter
Plaintiffs,	Part 54
-against-	**NOTICE OF ENTRY**
KESHA ROSE SEBERT p/k/a KESHA, PEBE SEBERT, VECTOR MANAGEMENT, LLC, and JACK ROVNER,	**Motion Seq. No. 50**
Defendants.	
KESHA ROSE SEBERT p/k/a KESHA,	
Counterclaim-Plaintiff,	
-against-	
LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., PRESCRIPTION SONGS, LLC, and DOES 1-25, inclusive,	
Counterclaim-Defendants.	

PLEASE TAKE NOTICE that the enclosed is a true copy of the Court's Decision & Order, which the New York County Clerk entered on June 30, 2021.

Dated: July 1, 2021
New York, New York

Respectfully submitted,

/s/ Leah Godesky

O'MELVENY & MYERS LLP
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Attorneys for Kesha Rose Sebert

To: Clerk
New York County Supreme Court, Commercial Division

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Attorneys for Lukasz Gottwald p/k/a Dr. Luke, Kasz Money, Inc., and Prescription Songs, LLC

8

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER PART IAS MOTION 54EFM

Justice

---X

INDEX NO. 653118/2014

MOTION SEQ. NO. 050

LUKASZ GOTTWALD, KASZ MONEY, INC.,PRESCRIPTION SONGS, LLC,

Plaintiffs,

- v -

KESHA SEBERT,

Defendant.

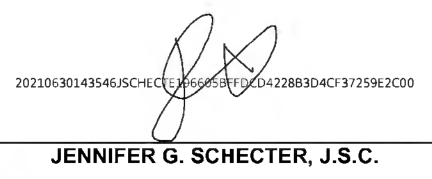
---X

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 050) 2302, 2303, 2304, 2305, 2306, 2307, 2312, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2335, 2336, 2337, 2338, 2339, 2340, 2341

were read on this motion to/for MISCELLANEOUS .

Upon the foregoing documents, it is ORDERED that this motion is decided in accordance with the decision on the record. Movant is to e-file the transcript within 30 days.



6/30/2021
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:				
	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[X] GRANTED	[ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER

1 SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY : CIVIL TERM : PART 54
2 ---------------------------------------
LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ
3 MONEY, INC., and PRESCRIPTION SONGS,
LLC,
4
Plaintiffs,
5
-against- Index No.
6 653118/2014
KESHA ROSE SEBERT p/k/a KESHA, PEBE
7 SEBERT, VECTOR MANAGEMENT, LLC, and
JACK ROVNER,
8
Defendants.
9 ---------------------------------------
KESA ROSE SEBERT p/k/a KESHA,
10
Counterclaim Plaintiff,
11
-against-
12
LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ
13 MONEY, INC., PRESCRIPTION SONGS,
LLC, and DOES 1-25, inclusive,
14
Counterclaim Defendants.
15 ---------------------------------------
16 June 30, 2021
17 Proceedings Held Via Microsoft Teams
18
19 B E F O R E:
20 HON. JENNIFER G. SCHECTER, Justice
21 A P P E A R A N C E S:
22 MITCHELL SILBERBERG & KNUPP LLP
Attorneys for the Plaintiffs-Counterclaim Defendants
23 437 Madison Avenue, 25th Floor
New York, New York 10022
24 BY: CHRISTINE LEPERA, ESQ.
JEFFREY M. MOVIT, ESQ.
25

1 A P P E A R A N C E S (Continued)

2 O'MELVENY & MYERS LLP
Attorneys for the Defendants-Counterclaim Plaintiff
3 7 Times Square
New York, New York 10036
4 BY: LEAH GODESKY, ESQ.
MOSHE MANDEL, ESQ.
5

6

7 Anne Marie Scribano
Senior Court Reporter
8

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1 THE COURT: Good morning, everyone.
2 MR. MOVIT: Good morning.
3 MS. LEPERA: Good morning, your Honor.
4 THE COURT: It's great to see you all.
5 I've read your papers and we're going to get
6 started with oral argument.
7 This is defendants' motion. That said, what I
8 think we'll do is I'd like to start with the plaintiff and
9 hear from Ms. Lepera and then what I'll do, Ms. Godesky, is
10 let you have the final say and respond after that.
11 Ms. Lepera, let me just say straight from the
12 outset, let's focus, really, most on the retroactivity here.
13 Because I just do not believe that law of the case would
14 have any impact on the ability to amend or to assert 76-a
15 here.
16 The fact is, this really is the first opportunity
17 that defendant had to meaningfully raise the issue. It
18 should go initially to the trial court before it makes its
19 way to the Appellate Division. That's how our law
20 developed. And I am not going to rule that it's precluded
21 by law of the case.
22 So, with that said.
23 MS. LEPERA: Okay. Understood.
24 I'll give it a little bit of argument on that front
25 after I go through the retroactivity, as you've requested.

1 And, actually, your Honor, that is where I was
2 planning on starting anyway, because I think that, with
3 respect to the retroactivity analysis, that, you know, that
4 defendant claims we, you know, halfheartedly or agree with.
5 Not so. Not so whatsoever.
6 We think that the retroactivity analysis that they
7 rely on is completely wrong and it starts from Palin.
8 THE COURT: Is it eight, now, judges who have
9 addressed the issue; all eight of them are wrong?
10 MS. LEPERA: Yes.
11 And the reason why they're all wrong is they all
12 follow Palin like a herd. They follow Palin -- you know,
13 with all due respect to, Judge Rakoff, I would like to
14 actually walk through the Palin decision with you very
15 carefully because it is in conflict with the higher courts
16 of this state. And I will give you specific references and
17 citations to it. And the cases, of course, which none of
18 them are binding on you, with respect to the post-Palin
19 decisions in the federal court, the lower federal court and
20 the lower state court all rely on Palin and they do very
21 little analysis, if any whatsoever.
22 So Palin is the leader of the pack and the rest of
23 them follow like a herd and they all get it wrong and here's
24 why.
25 First, if you look at the Palin case, in no less

1 than three to four places, Judge Rakoff mistakenly refers to
2 76-a as applying to public figures.
3 For example, he says: "This is a motion for an
4 order modifying the opinion" -- previous opinion -- "to
5 reflect the fact that on November 10, 2020, New York amended
6 its anti-strategic litigation against public participation
7 law to expressly require that public figures prove actual
8 malice by clear and convincing evidence."
9 THE COURT: But there, the provision had -- it
10 didn't dramatically change the landscape of the case by any
11 means --
12 MS. LEPERA: No, but --
13 THE COURT: -- but, constitutionally, it was always
14 going to be the same standard no matter what.
15 And I appreciate that Judge Rakoff does refer to
16 public figures several times in the analysis.
17 MS. LEPERA: Correct.
18 THE COURT: But, still, what's wrong with the
19 analysis in terms of focusing on the remedial purpose of the
20 statute and the presumption that, when statutes are enacted
21 for a remedial purpose, they can have -- they will have
22 retroactive effect if it's remedial?
23 MS. LEPERA: Because that's an incorrect statement
24 of the law of the highest court, the Court of Appeals.
25 Judge Rakoff relied on Gleason and he cited Gleason

1 in a cursory manner. But if you look at Gleason and the
2 case on which it relies, which is Majewski, Majewski versus
3 Broadalbin-Pert Cent. School District, 673 New York Sup. 2d
4 in 1998, when Judge Rakoff said that there's a presumption
5 that there's retroactive effect in remedial legislation,
6 he's completely incorrect.
7 And, in fact, the Court of Appeals has said:
8 "Classifying a statute as remedial does not automatically
9 overcome the strong presumption of prospectivity, since the
10 term may broadly encompass any attempt to supply some defect
11 or abridge some super-fluidity in the former law."
12 So the presumption against retroactivity, in which
13 the Court of Appeals in that particular case goes into great
14 detail, as does the Regina case, which we cite also from the
15 Court of Appeals, talks about the strength of this
16 presumption against retroactivity. So simply because a
17 statute may or may not be remedial -- and all statutes to
18 some extent are remedial -- that does not create a
19 presumption of retroactivity. Quite to the contrary.
20 That's an incorrect statement of law that Judge
21 Rakoff made.
22 THE COURT: Well, one moment.
23 What about Gleason? Doesn't Gleason say that there
24 are two different applicable principles, right? The
25 principles articulated in Gleason, I think they said there

1 are two axioms of statutory interpretation, that statutes
2 are presumed to have prospective effects unless the
3 legislative preference for retroactivity is explicit or
4 clearly stated.
5 MS. LEPERA: Correct.
6 THE COURT: However -- there's a however there --
7 remedial legislation should be given retroactive effect in
8 order to effect the beneficial purpose of a statute, right?
9 And, in Gleason, the Court looked through the
10 legislative history and saw the word "immediate" and said
11 immediate -- well, in Majewski at least, it said --
12 immediate is -- isn't so helpful --
13 MS. LEPERA: Correct.
14 THE COURT: -- in ascertaining whether or not
15 there's definitive legislative intent --
16 MS. LEPERA: Correct.
17 THE COURT: -- for retroactive or prospective. But
18 what it does do is it evinces a sense of urgency. And, in
19 Gleason, the Court laid out certain factors in terms of
20 whether or not there should be retroactive application of
21 the statute.
22 MS. LEPERA: In Gleason, however, there was a
23 decision that spurred the Court to make the change in the
24 legislation. There was a decision that they didn't like,
25 Solartechnik, which they basically said was not good law and

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1 they wanted, you know, to change that case that came down.
2 That factor doesn't apply here at all.
3 The immediate issue, I think, is the other reason
4 -- the other prong of the Palin case, where Judge Rakoff got
5 it wrong, because not only does Majewski say that, makes,
6 essentially, a neutral -- a neutral statement. It doesn't
7 show a clear expression of intent to go retroactive.
8 And, in fact, in the subsequent case, Spitzer
9 versus Daicel Chemical Industries, 42 A.D.3d 301, the First
10 Department actually said very specifically that this is not
11 to be deemed -- the language in the statute that it shall
12 take effect immediately does not support retroactive
13 application. Citing Majewski. Even remedial statutes are
14 applied prospectively where they establish new rights or
15 where retroactive application would impair a previously
16 available defense.
17 So in the two concepts that Judge Rakoff relied on,
18 which we think was a very facile, very sort of knee jerk,
19 not a substantive analysis, a full and fair vetting of all
20 the core principles behind why there's a fundamental body of
21 law, long-standing body of law that retroactivity is viewed
22 with suspicion and you need to have a clear expression of
23 intent.
24 (Discussion held off the record)
25 (Record read)

1 MS. LEPERA: There's a long-standing body of law
2 that makes it very clear that the courts in New York -- and
3 there's cases that say -- should look to legislation being
4 applied retroactively suspiciously, particularly if it does
5 impair rights.
6 So the two things that Judge Rakoff said, which are
7 his understanding of the expression of the legislative
8 intent, was: One, that it was said to be immediate. The
9 First Department said that's just not enough. Number two,
10 the fact that it's immediate --
11 THE COURT: Well, Majewsky says that's not enough.
12 MS. LEPERA: No. So does Spitzer in the First
13 Department --
14 THE COURT: I agree that immediately is not enough.
15 MS. LEPERA: Okay.
16 THE COURT: Though, again, it does convey a certain
17 sense of urgency, but I don't know what "immediately" means
18 in terms of prospective versus retroactive on a dispositive
19 level.
20 MS. LEPERA: Right.
21 THE COURT: I'm not even going to focus today on
22 Palin or the seven cases that were decided.
23 I really want to focus on the Court of Appeals
24 precedent here.
25 MS. LEPERA: Yes.

1 THE COURT: But I want to go back to Gleason,
2 because there are many similarities here with Gleason. You
3 know, Gleason did have the word "immediate" and, again, the
4 Court cited Majewski, which does not one way or the other,
5 but it does evince some sense of urgency in terms of the
6 purpose. So that's all I would look at the word
7 "immediately" for.
8 But let's look at the factors that Gleason looks to
9 in terms of whether remedial legislation should be given
10 retroactive effect. And the one factor it raises is did the
11 legislature make a specific pronouncement.
12 MS. LEPERA: Correct.
13 THE COURT: And we'll talk about that in a minute.
14 But the other thing it looks to is whether or not
15 it conveyed a sense of urgency and, again, it looked to that
16 "immediate". And here I do think there is the sense of
17 urgency.
18 But the second issue that's a factor that the
19 Gleason court looked at is was the statute designed to
20 rewrite an unintended judicial interpretation or an
21 unintended interpretation.
22 So, Ms. Lepera, doesn't the legislative history
23 here weigh in favor of finding that that factor is
24 satisfied? Because when they passed the statute, the
25 sponsor's memo says that it was, in fact, to correct or to

1 further serve the purpose that the statute was originally
2 intended to satisfy.
3 MS. LEPERA: I think that it broadened it. The
4 language was not unclear. It was applied correctly. It was
5 applied too narrowly. So when you change the law and you
6 create a new body of law and new rights, you are immediately
7 also altering rights that previously exist on the other
8 side.
9 And that's why I respectfully submit that I do not
10 believe that the Gleason pronouncement, that in looking at
11 the take effect immediately itself, I think that's a neutral
12 comment, and particularly since the First Department in
13 Spitzer, after Gleason, six years later, said it had no
14 effect, does not support retroactive application. So
15 that --
16 THE COURT: It's not the immediate.
17 It's if we look at the memorandum, right, it talks
18 about:
19 Section 76-a of the Civil Rights Law was originally
20 enacted by the legislature to provide the utmost protection
21 for the free exercise of speech, petition and association
22 rights, particularly where such rights are exercised in a
23 public forum with respect to issues of public concern.
24 MS. LEPERA: Um-hum.
25 THE COURT: However, as drafted and as narrowly

1 interpreted by the courts, the application of 76-a has
2 failed to accomplish that objective. In practice, the
3 current statute has been strictly limited to cases initiated
4 by persons or business entities that are embroiled in
5 controversies over a public application or permit usually in
6 a real estate development situation. By revising the
7 definition of an action involving public petition and
8 participation, this amendment to section 76-a will better
9 advance the purposes that the legislature originally
10 identified in enacting New York's Anti-SLAPP law. This is
11 done by broadly widening the ambit of the law to include
12 matters of public interest, which is to be broadly
13 construed, anything other than a purely private matter.
14 Doesn't that indicate that what they're trying to
15 do is bring this provision into line with what the intent
16 always was?
17 MS. LEPERA: You know, that is possible.
18 But what it doesn't do is it doesn't address the
19 retroactivity issue, which it could easily have done in the
20 context of the statute and in the bill. On the other hand,
21 and the cases are very clear, including the Court of Appeals
22 discussion, if there's something in the body of amendment
23 that is different in one place than in the other, and that
24 is 70-a -- and here Judge Rakoff also gave short shrift to
25 the fact that 70-a said "continue" and he said "Well, of

1 course, because that doesn't matter, because it's for a
2 public figure." But it does matter because it's not in
3 76-a. You have two separate opportunities in both of these
4 to essentially allow for a statement to be made by the
5 legislation that essentially shows a clearly expressed
6 intent for retroactivity. It is not in 76-a. In 70-a, it
7 says if a case continues, it's going to be subsumed. And it
8 says it specifically. Because one of the things that the
9 legislation talks about a lot is that they didn't like the
10 fact that it said "may" for the legal fee issue, too much
11 discretion, and they changed it to "shall". And that, they
12 said, was erroneously done in the past or not done
13 sufficiently. So I think the fact that, actually, that they
14 speak to this issue in the legislative history and they had
15 the opportunity to clearly express their intent in one side
16 of the amendment and not -- and didn't do it in the other --
17 and, again, I would submit, under the highest courts of the
18 state, Gleason notwithstanding, the body of law consistently
19 down through Spitzer says that that's a neutral statement,
20 immediately".
21 You look at that and then you look at the absence
22 of what they put in 70-a and you do not have a clear
23 expression of intent.
24 But I think, even more importantly, and I know your
25 Honor doesn't like the law of the case argument, but here's

1 the point on that. If you look at the cases, and even if
2 there's, you know, arguably a remedial purpose to 76-a, you
3 have to still look at the impact on rights and whether or
4 not you are changing -- and also the longevity. Often cases
5 talk about how long is this retroactive period. This case
6 has been going on for eight years and none of the other
7 cases are remotely analogous to the situation of where we
8 are now. And the fact of the matter is that the appellate
9 court has determined that Mr. Gottwald is a private figure,
10 that's his vested right, that, now, a retroactive
11 application --
12 THE COURT: Isn't that the ultimate question?
13 MS. LEPERA: -- would deprive him of a vested right
14 of having pursued a matter under a particular burden that
15 has now been confirmed to exist by the Appellate Division.
16 And all of the cases that we've looked at have
17 absolutely no discussion of the substantive right issue.
18 And in the Palin case, of course it was given short shift
19 because it really didn't matter.
20 The only argument that defendant has is that "we
21 pled actual malice". Well, that is no longer relevant
22 because now it's been determined by the Appellate Division
23 to have a particular size of duty. And when you change
24 someone's duty retroactively, you are effectively changing a
25 right that has vested. And there's a balance that has to

1 happen here. And that has not happened in any of those
2 other cases because the circumstances are completely
3 different.
4 So, I would submit to you --
5 THE COURT: But, Ms. Lepera, the Appellate Division
6 decision was a three-to-two decision, so I don't know how --
7 in terms of the vested right, who knows how it would have
8 come out --
9 MS. LEPERA: Well, it exists, though.
10 THE COURT: -- it was a very close call in terms of
11 his argument.
12 But I didn't appreciate, when I read the brief,
13 what his due process argument is.
14 So, for example, when I look at Matter of Regina,
15 the other Court of Appeals case that you discussed --
16 MS. LEPERA: Yes.
17 THE COURT: -- and there, by the way, the Court
18 concluded that the legislature was clear that it was
19 intended to have retroactive effect, but, nonetheless, did
20 not apply it retroactively because it would disturb, you
21 know, the landlord's behavior in terms of they had reason to
22 believe that they were acting in a completely lawful manner.
23 They didn't have the records anymore in accord with
24 perfectly legal practice. And all of a sudden that would
25 undercut that in a substantial way.

1 And I don't appreciate here what would Mr. Gottwald
2 have done any differently.
3 MS. LEPERA: Well --
4 THE COURT: How would --
5 MS. LEPERA: -- he pursued this case -- he pursued
6 this case -- excuse me, I didn't mean to interrupt.
7 He pursued this case under a very specific set of
8 guidelines as to what his duty and burden was if he were to
9 be deemed a private figure. And he is now currently vested
10 with that particular set of duties. And if it's an increase
11 in his duty, to now increase his burden, it's similar to
12 essentially changing a defense or giving a new right. So
13 now you have a situation where there's a new right that's
14 being imbued to defendant to challenge his statement,
15 increasing his burden.
16 Under -- the reason why -- the First Department
17 decision that has come down and the reason why it would have
18 behooved O'Melveny and defendant to have raised it then is
19 that decision did vest him with something more significant
20 than had it been before as did your decision.
21 Certainly, if that SLAPP statute had been on the
22 books and they didn't raise it in summary judgment, they
23 would have waived it.
24 The progeny of case law that we do cite in the
25 brief, with all due respect, makes it very clear that they

1 had a full and fair opportunity to raise it and
2 strategically they decided not to.
3 And we may be in the same place, but, ultimately,
4 this has been delayed and deferred for a significant period
5 of time.
6 But he has a vested size of a duty, if you would.
7 And the cases talk about what's a substantive right. And a
8 change in duty is a substantive right that's impaired. And
9 a retroactive legislation that impairs a substantive right,
10 size of duty, gives somebody a larger right, takes away
11 something, that is something that needs to be balanced.
12 And none of these other cases have that quality or
13 characteristic.
14 So, if you look at the standard of looking to
15 whether the clear intent of the legislature is to be
16 retroactive, with this balancing act, which is not done
17 properly in Palin, I submit, but also has not been done in
18 any other cases.
19 And in this particular case, where we have a very
20 unique set of circumstances that distinguishes it
21 considerably from anything else that has come before, and
22 you view it in the context of where we are in this
23 litigation and the First Department's ruling, you look, on
24 the one hand, what is it that is supporting retroactivity
25 with a clear intent. Nothing, other than clear -- the

1 immediacy, which I say is a wash.
2 Then you have this legislative discussion, okay,
3 but you pair that up with 70-a and they had a clear
4 opportunity to say "Wait a minute, I'd better make sure,
5 since we want this to be retroactive, that we say so,
6 because we've said it for 70-a, why wouldn't we say it for
7 76-a." They did not. And the cases in the Court of Appeals
8 progeny are very clear that that's a significant difference
9 to evaluate.
10 THE COURT: But the legislature, Ms. Lepera, isn't
11 always careful and if it were, we wouldn't be here dealing
12 with this today, we'd have a pronouncement that's explicit
13 one way or the other.
14 But why, necessarily, when they said, you know,
15 commenced or continued in 70-a, why can't I even glean from
16 that that this is the same statutory scheme, the same
17 article, that they had that same intent in terms of the
18 urgency and wanted it to apply here? Why is that
19 dispositively not the case here? They could have said "here
20 too".
21 MS. LEPERA: I think it's very different. I think
22 it's very different.
23 And that also relates to the counterclaim, because
24 when you talk about something happening for the future
25 conduct of a case, okay, ultimately, then you're dealing

1 with how that case projects going forward.
2 (Discussion held off the record)
3 (Pause in proceedings)
4 THE COURT: Do you recall where you were, Ms.
5 Lepera?
6 MS. LEPERA: I was saying, you just said a minute
7 ago, your Honor, with due respect, you said that it's not
8 clear, you said that the pronouncement's not clear and
9 sometimes they don't say things clearly and here we are and
10 it's vague.
11 Well, the point is, you cannot have where
12 retroactive application under the Court of Appeals progeny
13 unless it is a clearly expressed intent, particularly if it
14 affects substantive rights. So --
15 THE COURT: One moment.
16 What about Gleason? Gleason had, you know,
17 retroactive effect and it wasn't clear --
18 MS. LEPERA: Because I believe, in that case, all
19 they were doing is essentially saying arbitration provisions
20 had to be consolidated. There wasn't a shred of discussion
21 about taking away substantive rights. It was completely
22 distinct.
23 In fact, if you look at the Spitzer case, there was
24 a right of action that was given to indirect purchasers to
25 sue, okay, for serious violations to protect New York

1 consumers. And even in that context, clearly, the
2 legislation was looking to give a remedial effect for
3 consumers to be able to have a broader cause of action, not
4 retroactive.
5 So, again, if you have to -- if you have to parse
6 it so that you can't see it, okay, there's got to be a
7 balance. And, ultimately, here, the balance, if you take
8 away the immediacy, which I think you have to under the case
9 law, and if you look at a statement by them, there is none,
10 except there's a contrary one in 70-a, I don't see how one
11 could reconcile them as moving that language over to 76-a,
12 when they had a full and fair opportunity to ultimately put
13 that in the statute.
14 Then you look at the other side of the equation
15 with the presumption against retroactivity and the strong
16 fundamental assessment of whether rights are being changed,
17 duties changed, substantive rights impacted. And here, I
18 would submit, we have such a now -- whether it's three-two
19 or not and whether it changes -- it's now a vested right
20 that the Court of Appeals -- that the First Department has
21 said we only have the burden of proof with respect to
22 preponderance and negligence. That is something that he
23 relied on in bringing the case and pursuing the case and is,
24 in fact, now established that he was correct in that
25 premise. That is something that has to be evaluated.

1 Whether you look at the law of the case or it's done in the
2 retroactivity analysis, I think that, ultimately, you have a
3 situation here where you do not have a clear expression of
4 intent. And the retroactivity would impair substantial
5 rights. So the presumption of being prospective obtained,
6 it has not been overcome by any -- certainly not by any of
7 the cases.
8 THE COURT: Ms. Lepera, he would not have brought
9 the action if the statute were in effect when he commenced
10 the case?
11 MS. LEPERA: Well, what is an interesting situation
12 is, obviously, when you ask anyone that question, and they
13 take a case under current laws and current reliance on laws,
14 that's a hindsight question. But there was a reliance. So
15 you don't -- you can't simply say "Well, okay, now,
16 ultimately, you know, you can't -- just destroy that
17 reliance on pre-existing, you know, case progeny and rights
18 and duties." It has to be evaluated in the context of an
19 impairment analysis, not whether someone would do it or not.
20 It's an objective look at what is occurring by a retroactive
21 application.
22 And, again, we start with this presumption, which
23 no one seems to be really paying much attention to,
24 including in the current eight cases, that it is
25 prospective. And the only thing that changes that is the

1 clear expression of legislative intent. You can't --

2 THE COURT: That's not what Gleason says.

3 What Gleason says is:

4 It's presumed to have prospective effects unless

5 the legislative preference for retroactivity is explicit.

6 However, the case continues, remedial legislation should be

7 given retroactive effect in order to effect the beneficial

8 purpose.

9 And then it goes through the factors, you know.

10 Was there a specific pronouncement? Here, there was not.

11 Was there a conveying a sense of urgency? And, again,

12 there, they looked at the language "immediate" for -- in

13 favor of urgency as opposed to explicit legislative

14 pronouncement. But was the statute designed to rewrite an

15 unintended judicial interpretation? Does the enactment

16 itself reaffirm legislative judgement about what the law

17 should be?

18 Don't all those factors that are announced in

19 Gleason weigh in favor of applying this retroactively?

20 MS. LEPERA: No, because there's not a single

21 discussion in Gleason about the substantial -- substantive

22 right issue.

23 And if you read Spitzer, which I urge you -- the

24 Court to do, it specifically says that even if there's --

25 remedial statutes are to be applied prospectively -- this is

1 the First Department -- when they establish new rights or
2 where retroactive implication would impair a previously
3 available defense.
4 Analogous to that is impairing a duty, changing a
5 duty, creating a new right, which is what now defendant
6 would urge she has, which is to defend in this manner in
7 connection with a lower -- with a higher burden.
8 So the First Department has said there is no
9 presumption of retroactivity, as the Palin court said and as
10 the Gleason court may seem to be suggesting, there's no
11 presumption of retroactivity just because there's a remedial
12 statute. Quite to the contrary. There's a continuing
13 presumption of prospectivity, unless there's a clear
14 expression of intent.
15 Here, in this particular statute, it is, I think,
16 quite clear that the legislature chose not to put anything
17 in 76-a, like 70-a, when they could have very easily. It
18 was two words, okay? They didn't do it. So that is -- that
19 goes on the side of the opposite of retroactivity.
20 Let's put on the columns pro and con for
21 retroactivity.
22 What they argue for retroactivity, other than these
23 eight cases, which don't mean anything, is the immediacy
24 language. Majewski and Spitzer says that's neutral at best.
25 It's remedial.

1 THE COURT: I'm not going to buy the immediacy.
2 MS. LEPERA: Understood, but I'm trying to put
3 everything on the column of what they say is pro retro.
4 THE COURT: Okay, but you got me at the immediacy.
5 MS. LEPERA: Pro retro, all they have is immediacy.
6 That's gone. We agree on that.
7 And then, on the other point, the remedial. As
8 Majewski and Spitzer both say clearly, that's not enough.
9 You have to look at the substantive right. It's not an
10 automatic shifting of going from presumption of
11 prospectivity to presumption of retroactivity just because
12 its arguably remedial. All statutes are remedial.
13 And if you look at Gleason, Gleason is extremely
14 different in the sense of both what the right was that they
15 were effecting, an arbitration consolidation; no one was
16 being deprived of any substantive right of a burden or a
17 defense or a claim. It was just a consolidation of
18 proceedings for judicial efficiency. There was a case that
19 came down that they took immediate issue to when they
20 basically said "This is a wrong decision. We have to change
21 the law now." So those senses of urgency in Gleason are
22 different.
23 And there's no substantive right impairment.
24 So on the pro retroactivity, you have no immediacy,
25 doesn't count; you have remedial, which is not enough to

1 change the presumption. And that's it.
2 Oh, excuse me -- right, that's it on the pro
3 retroactivity side.
4 On the pro prospectivity side, you have, you know,
5 no clear expression of intent in the statute; a contrary
6 expression in 70-a. You also have an impairment of
7 substantive rights.
8 So when you measure this balance, you have low
9 weighing on pro retroactivity and you have continued support
10 for the presumption of prospectivity.
11 And I say this because, if you really look at the
12 way that these eight -- and the fact that there's eight
13 courts that did this, all following Palin, which is just
14 wrong on the law and even its interpretation of the statute,
15 gives apparent weight to it, but it's really, effectively, a
16 meaningless body of eight cases that are not thoughtful, are
17 not looking at this issue under the Court of Appeals
18 precedent in Majewski and Spitzer and are not really
19 dealing, in any of those cases, with a substantive
20 impairment of rights, other than here.
21 And I think, ultimately, it would be error to allow
22 a finding of retroactivity when the pro retroactivity column
23 has nothing, no immediacy, we've agreed on that, and a
24 remedial which doesn't shift the burden.
25 And on the pro side, a statute that could have said

1 this applies going forward to retroactive -- cases that are
2 continued, meaning cases that are on the books already this
3 applies to. And they didn't do that. They only did it in
4 70-a.
5 And the reason it's, I think, a different concept
6 in 70-a is because, at the conclusion of the case, here,
7 obviously, there's nothing that would support the
8 counterclaim from a matter of fact or law because he has
9 proven, to this juncture, in this case, a substantial basis
10 in fact and law, under both your decision and the Appellate
11 Division decision.
12 So, in the event down the road, as a --
13 hypothetically say something magical happened at trial and
14 there will be something new. It's essentially equivalent to
15 a fee shifting that would happen in the event they prevail,
16 but not automatically, because it's not an automatic
17 shifting, it's only in the event they prevail and then the
18 Court would then look to see whether fees should be awarded
19 because, at that point, something occurred in the trial
20 where you could conclude there's no substantial basis in
21 fact and law.
22 So we think the counterclaim, while it could,
23 theoretically, at some point be ripe, right now it's
24 contrary to all of the jurisprudence in this case. There
25 is, at this moment, a substantial basis in fact and law.

1 Down the road, I would submit, if they were to renew it, it
2 should be denied without prejudice to renewal after trail.
3 It's not a jury question, either. They're all
4 wrong on that. It's a judge's decision. The cases they
5 cite are all sanctions cases for post-trial activity.
6 THE COURT: How do we know it's a judge decision,
7 by the way?
8 MS. LEPERA: Because it's analogous to the fee
9 shifting statute. And the cases they cite in their own
10 brief where there had been a determination, for example,
11 that the case was solid through summary judgment, but then
12 something happened at trial which rendered it frivolous or
13 the like and, at that point, after that point, then there's
14 a determination by the judge as to whether or not sanctions
15 should be forwarded. And they cite to Title IX cases, they
16 cite to Rule 11 cases. So they're analogizing it. And I
17 think it is somewhat to be analogized. But, for now, that
18 counterclaim has no current merit, because the facts and the
19 law have already been determined at this stage to have
20 substantial basis in fact and law.
21 I say it's speculative, premature and not ripe.
22 Could it be after trial? Conceivably. But that's not a
23 ground for an amendment now, which would just give us a
24 right to basically amend as well, because there's nothing
25 different.

1 Frankly, if she has a claim now that seems to
2 stifle his speech for bringing a case, which is a
3 communication, okay, in a forum that is about a right,
4 ultimately, you know, we would be arguing the same thing.
5 So it just seems to me that that should be set for post
6 trial. It's premature. Otherwise, we could be back with
7 summary judgment on the counterclaim prior to trial, because
8 it's -- there is a substantial basis in fact right now, as a
9 matter of fact, as a matter of law and law of the case.
10 But I digress on the counterclaim and I do want to
11 make it really clear that -- and I know this is -- there's a
12 lot of -- what's the word? -- you know, sentiment about this
13 statute and its application. That doesn't mean it's
14 retroactive. There's a very clear line of demarcation in
15 the case law as to when that can occur. And it is an uphill
16 battle with a presumption of prospectivity. You can't take
17 that uphill battle of prospectivity and basically say it's
18 no longer valid unless you have factors that are sufficient
19 to remove that presumption.
20 And I will say again, and I submit that under the
21 cases, certainly, that I've read and that I've analyzed, the
22 core fundamental proposition of prospectivity has to be
23 given serious consideration in the context of where we are.
24 And if you agree with me that the immediacy is
25 irrelevant, the fact that it's remedial is not a change in

1 the presumption, particularly when there's a substantive
2 right involved.
3 And the remedial can also be looked at with the
4 legislative intent and the difference between 76 and 70-a.
5 And when Judge Rakoff basically said "Well, of course they
6 didn't have to put it in 76-a because there's actual malice
7 for public figures," again there's this facile sort of
8 suggestion that it's automatically retroactive, maybe
9 because of some sort of public, you know, sentiment that
10 seems to be in this whole movement issue. But that doesn't
11 change the clear body of law and the linear concepts that
12 have to be applied here strategically and sensibly with the
13 presumption in mind and with a substantive right being
14 changed.
15 The arbitration consolidation in Gleason, no
16 substantive right change. Case came down, it was -- okay,
17 they wanted for judicial efficiency to not have multiple
18 arbitration proceedings. Makes sense. Let's do it right
19 away. Let's apply it to cases that are in the can already.
20 Not analogous.
21 Majewski is more analogous. Spitzer is more
22 analogous dealing with consumers. Consumers clearly want to
23 sue. They've been given a right by the legislature to sue
24 for Donnelly violations. This is serious. It's a remedial
25 act to help New York consumers. Not retroactive. It's

1 impairing a right --

2 THE COURT: Does it matter, the significance of the

3 remedial purpose, in terms of affecting free speech and --

4 you know, again, I look at some of the things that the

5 legislators have said about this provision --

6 MS. LEPERA: I understand.

7 It doesn't make it retroactive -- sorry.

8 (Discussion held off the record)

9 THE COURT: For example, that the statute's enacted

10 to provide the utmost protection for the free exercise of

11 speech and how the original legislation intended to do that,

12 but failed to accomplish the purpose.

13 I mean, it seems so important to the legislature.

14 And, sure, would it have been better if I had the

15 explicit pronouncement one way or the other? Of course it

16 would be better. It would be better if we had that in all

17 legislation so that it's very clear and these issues don't

18 come up. But we don't have it in a lot of legislation. But

19 it's not just this section, it's we don't have it oftentimes

20 and that's why we have these cases that apply all these

21 different presumptions and principles and rules.

22 And in trying to harmonize them, you know, I keep

23 seeing the theme remedial legislation should be given

24 retroactive effect to, you know, effectuate the beneficial

25 purpose that was intended. And we have legislators talking

1 about how -- the fact that, you know, without this, our
2 democracy is threatened.
3 Why doesn't that evince that this has a significant
4 remedial purpose?
5 MS. LEPERA: Again, under Spitzer and the First
6 Department language -- excuse me -- "Even remedial statutes
7 are applied prospectively when they establish new rights or
8 where retroactive application would impair a previously
9 available defense." And there's cases that talk about what
10 these rights are that are impaired by retroactive. They
11 speak of duties. They speak of legal claims and rights.
12 So, again, just because it's remedial doesn't mean
13 it's retroactive. And this is where the facile concept
14 comes down the road, where it can be remedial and
15 prospective. It can be a deterrent for future situations so
16 there aren't frivolous cases brought in the future. It
17 doesn't mean if it's remedial, it's retroactive.
18 And here's why there needs to be a clear expression
19 of intent, because it tramples on substantive existing
20 rights. And we keep saying the same thing. There is no
21 clear expression here. Because there's no clear expression,
22 the presumption has to obtain her prospectivity. And they
23 had the opportunity to make the presumption -- excuse me --
24 to make it clear that it's retroactive and they chose not to
25 do that.

1 THE COURT: What about in the cases where there was
2 a remedial purpose and no explicit one way or the other in
3 those cases? Do I balance the substantive right --
4 MS. LEPERA: Yes.
5 THE COURT: Well, in Regina, the Court found there
6 would be a violation of due process.
7 What if I don't believe --
8 MS. LEPERA: That's what we're saying --
9 THE COURT: One moment.
10 MS. LEPERA: I'm sorry. It's hard for me to tell
11 when there's a lag.
12 THE COURT: I understand.
13 Welcome to the world of virtual proceedings.
14 MS. LEPERA: My apologies.
15 THE COURT: But if I don't buy the due process
16 argument, that this would work a violation of due process,
17 then why would it be incorrect to do -- go down the remedial
18 road and say remedial presumed retroactive and no due
19 process violation here?
20 MS. LEPERA: In Regina, they actually struck down
21 as unconstitutional a retroactive application that was in
22 there. Different. It doesn't have to be a violation of due
23 process in order to weigh it. It has to affect substantive
24 rights or impair them, which brings due process concerns.
25 Okay? That is the difference.

1 And I think that, ultimately, that is where we
2 stand now, having a duty expressed by the Court -- the First
3 Department as to what his legal right is that is going to be
4 vacated or taken away. That is taking away a right, taking
5 away his vested standard of duty. And that is something
6 that is a due process concern.
7 Is the statute violating -- violating due process?
8 No, because it doesn't say it's retroactive, so it doesn't
9 take that whole analysis that Regina did to determine
10 whether the statute is unconstitutional.
11 Here, we're just simply looking at the statute and,
12 as the cases make it very clear, there's three things.
13 One, there's a presumption of prospectivity. No
14 dispute. And it's a strong one. It's valued one. It's a
15 fundamental cannon that goes back prior to the republic.
16 Retroactive legislation is supposed to be looked at
17 suspiciously. These are not my words. These are the words
18 of the Court of Appeals and the First Department.
19 Two -- so you have the presumption.
20 Two, to overcome it you have to have a clear
21 expression of legislative intent. Clear. We don't have it.
22 We do not have a clear expression. We have immediacy, which
23 doesn't count. We have a suggestion of remedial. But
24 remedial, as the First Department has said, does not
25 overcome the presumption of prospectivity. Remedial

1 statutes can be deemed prospective. And so, then, you have
2 very little to establish anything overcoming the presumption
3 of prospectivity.
4 THE COURT: I feel like "the law is remedial"
5 doesn't work, except for when it does. That's how these
6 cases go.
7 MS. LEPERA: Everything is remedial, though. Every
8 statute tries to address something to make something better
9 in the law. Every statute is remedial. It's a very vague
10 and conclusory term. If you're remedying something, it
11 doesn't mean it's retroactive. That's why the First
12 Department said that in Spitzer. It doesn't mean it's
13 retroactive. There's a strong remedial purpose for just
14 enacting the statute prospectively.
15 THE COURT: Let me hear from Ms. Godesky.
16 MS. GODESKY: I'd like to open by saying that there
17 absolutely is a dispute with regard to this presumption of
18 prospectivity because, as your Honor pointed out, the
19 Gleason case makes clear that that presumption does not
20 apply in cases involving remedial legislation. And the
21 axiom of statutory interpretation is that, when you're
22 dealing a with a remedial statute, a statute that's intended
23 to fix or to cure something, it necessarily applies
24 retroactively.
25 THE COURT: What about Ms. Lepera's point that all

1 amendments are remedial, right, otherwise there wouldn't
2 need to be an amendment if the statute was perfect?
3 MS. GODESKY: That may be true, but I think your
4 Honor hit the nail on the head earlier when you went through
5 the legislative history and you pointed out how it is
6 abundantly clear, when you read the legislative history,
7 that the legislature felt there was a significant problem in
8 New York law that needed to be corrected; there was a
9 serious problem when it came to the protection of free
10 speech rights in this state and they wanted to fix it.
11 And, your Honor, this is exactly the type of case
12 that they had in mind when they decided to immediately
13 correct the statute. And that's because this is a case
14 where, under the old regime, even if Kesha were to prevail
15 at trial and the jury found that she's telling the truth
16 about her sexual assault, she wouldn't really win. She
17 would have lost 10 years of her life to this litigation with
18 absolutely no consequence to Dr. Luke, whose net worth means
19 that paying legal bills is really no obstacle to continuing
20 this case.
21 The effect on defendants of a case like this cannot
22 be overstated. When you are sued for money you don't have
23 because you reported a sexual assault, it is an
24 all-consuming source of stress, anxiety, depression,
25 financial stress, even physical pain.

1 And that's why, when you look at the legislative
2 history, you have one of the sponsors who says this law is
3 intended to fix and cure a problem because we currently have
4 survivors of sexual abuse who are being dragged through the
5 legislative system, the judiciary, through retaliatory
6 litigations. That's what they wanted to fix. That's what
7 they wanted to cure.
8 And so this needs to apply retroactively.
9 And your Honor's analysis is dead on under Gleason.
10 Gleason is a Court of Appeals case that is still good law.
11 It is controlling. And that is a case, just like this one,
12 where, you're right, the legislature didn't specifically say
13 this needs to take retroactive effect, but there, just like
14 here, the legislature said it needs to take immediate
15 effect. And that was a factor. That was something --
16 THE COURT: But, Ms. Godesky, not much was at
17 stake, really, in Gleason. I mean, whether or not you had
18 to buy a new index number doesn't seem like such a big deal.
19 MS. GODESKY: Well, I think the Court of Appeals
20 laid out three factors that the Court should consider when
21 it's conducting a retroactivity analysis. Right?
22 You look for urgency. We talked about that at
23 length. The fact that the statute takes immediate effect is
24 relevant to that.
25 Then you look to see whether the legislators were

1 intending to correct a problem in judicial interpretation.
2 Your Honor previously read out loud the stated justification
3 for this law, which is to correct the narrow application of
4 this law in the courts. They wanted to fix that and make
5 sure that there was the utmost protection for the free
6 exercise of speech.
7 And the third factor, your Honor, is whether the
8 amendment reaffirms a legislative judgment about what the
9 law should be. And we have that, too. We have the
10 legislators saying this amendment will better advance the
11 purposes that the legislature originally intended when it
12 enacted New York's Anti-SLAPP law.
13 All three criteria are satisfied.
14 And as for whether some sort of substantive rights
15 or due process rights are involved here, they are not. Dr.
16 Luke has not identified a single substantive right, some
17 action, some conduct that he previously undertook in
18 reliance on some idea that he wouldn't have to satisfy an
19 actual malice standard. And that's because this law isn't
20 really about Dr. Luke's conduct, it's about protecting
21 Kesha's conduct and the right to exercise free speech.
22 There is no impaired substantive right here.
23 And while Ms. Lepera keeps talking about a,
24 quote-unquote, vested right that the actual malice standard
25 will not apply, that is not right.

1 First of all, from the beginning of this case,
2 plaintiffs have pled that they could satisfy the actual
3 malice standard. That was not something that merely came up
4 at the pleading stage. That was something they used to
5 obtain far-reaching discovery throughout the pendency of
6 this case. We cited in our papers motion to compel after
7 motion to compel where the Court granted them leave to get
8 discovery so that they could prove actual malice. We
9 exchanged a trial exhibit list last year, your Honor. All
10 of the documents that Dr. Luke had continuously cited as
11 saying it proves actual malice, all of those are on his
12 trial exhibit list.
13 And, yes, most recently the First Department held
14 in a split decision that the actual malice standard won't
15 apply, but Kesha has not exhausted her appellate rights on
16 that issue. And there shouldn't have been a day that went
17 by where Dr. Luke felt that he had a vested right to that
18 legal standard because we filed this motion before the First
19 Department even issued its decision on the public figure
20 issue.
21 You do not have a right to a particular legal
22 standard. Judge Rakoff got it right in Palin where he said,
23 you know, "I don't need to think about private figures in
24 this case because Ms. Palin is obviously a public figure."
25 But he said "To be sure, states are free to subject to the

1 actual malice standard rule plaintiffs who otherwise
2 wouldn't fall within it under the First Amendment."
3 And that is exactly what the New York legislators
4 did here. Right? This is really targeted at private
5 figures, because there was no need to urgently protect
6 defendants in cases involving public figures, who are
7 already subject to the actual malice standard. This was
8 needed to protect plaintiffs in private-figure cases.
9 And you see this has been applied in the Coleman
10 versus Grand case, where you had a private figure,
11 saxophonist. The Goldman versus Reddington case, where you
12 had a college student, right, this is --
13 THE COURT: Well, that's the exact issue here.
14 I don't think anyone disputes that Palin was a
15 different case from this one in terms of changing the
16 trajectory of the case. In this situation, the Civil Rights
17 Law will change the case. And in Judge Rakoff's case, in
18 the Palin case, it did not have that type of impact.
19 What about the point that plaintiff makes about the
20 legislature could have explicitly said so and it could have
21 used the language that was in 70-a, the commenced or
22 continued, but it didn't do so?
23 So why shouldn't I take that as a clear indication
24 that maybe it meant take effect immediately, as in starting
25 now forward?

1 MS. GODESKY: First of all, your Honor, I want to
2 say that this wouldn't really change the case because,
3 again, we've been litigating this case from the beginning
4 under the actual malice standard and there still isn't
5 clarity on that issue.
6 And this is just like what the courts observed in
7 Coleman and Sackler. When you have hitched your wagon to
8 the actual malice standard from the beginning of the case,
9 it's not really changing anything that now there's a
10 separate, independent vehicle to that same legal standard.
11 And in response to your question about --
12 THE COURT: Well, I see it changing the case,
13 because I made the determination that actual malice wouldn't
14 apply without this law and the Appellate Division affirmed
15 that. So until the Court of Appeals speaks, that is clear.
16 And it would have a, you know, tremendous effect on this
17 case as it stands now.
18 MS. GODESKY: I understand, your Honor, that it
19 would have an effect on the way that the case -- the trial
20 -- the trial goes.
21 But I just want to make clear that it doesn't have
22 an effect on Dr. Luke's rights to this date because he has
23 litigated this case and found evidence that he says
24 satisfies the standard. That's the point I'm trying to
25 make.

1 THE COURT: What about the commenced or continued
2 language?
3 MS. GODESKY: So the commenced or continued
4 language, all that that does is show that Section 70-a, the
5 counterclaim section of the statute, obviously encompasses
6 cases like this one. It is not a magic term of art that
7 somehow signals retroactivity. In fact, that language has
8 been in the statute since its original form in the 1990s.
9 It's not something that was specifically added with the
10 amendment. And as your Honor observed before, you know,
11 sometimes the legislators aren't that careful. They didn't
12 include the language. But we know from Gleason that that is
13 not dispositive. And when you look at the language from the
14 legislators -- we quote this in our brief -- they say
15 "Together these two amendments, Section 70-a and Section
16 76-a, will work to protect the free speech rights that we
17 want to insure have protection in this state." Together.
18 And there's really no reason why you would give a
19 defamation defendant the right to assert a counterclaim but
20 not also impose the actual malice standard, because, again,
21 the two sections of the statute really need to work in
22 harmony in order to insure the utmost protection in this
23 state, which is what the legislators so clearly intended.
24 THE COURT: Okay.
25 MS. GODESKY: Your Honor, if I can turn to Section

1 70-a, I do want to say a few things about that.
2 As I noted before, there is no dispute about
3 retroactivity for 70-a and the legal standard is also not in
4 dispute. Right?
5 As your Honor held when plaintiffs sought to amend
6 their pleading, the only reason to deny leave to amend is if
7 the claim is clearly devoid of merit. This is not devoid of
8 merit. Dr. Luke's only argument for why she shouldn't be
9 allowed to assert a counterclaim was that he says, well, no
10 one could ever find that he brought this defamation suit
11 without a basis in law or fact because he survived summary
12 judgment and we're headed to trial. That's the argument
13 they made in their papers and it's dead wrong. Right?
14 Because, as everyone has known from the beginning, and no
15 one moved for summary judgment for this reason, this is a
16 he-said-she-said case where you need a credibility
17 determination from a fact finder. Your Honor observed in
18 the summary judgment ruling, by not moving for summary
19 judgment, the parties were, quote, "acknowledging the
20 obvious, it cannot be resolved until the jury hears from Dr.
21 Luke and Kesha."
22 And I hear Ms. Lepera now sort of retreating from
23 the argument they made in their briefs and she's now asking
24 you, well, the counterclaim may have merit down the road
25 after trial, let's just put it on the back burner.

1 No. There's no basis to delay. Kesha has shown
2 her entitlement --
3 THE COURT: One moment.
4 Does it really make a difference if I put it on the
5 back burner until after trial or allow the amendment now,
6 when there's still going to have to be the assessment of who
7 prevails in this case?
8 If I allow it now and, you know, and the plaintiff
9 prevails in this case, I just don't understand the
10 difference that it makes.
11 And you know what? I'll let you, Ms. Lepera, speak
12 to that and then I'll pick up with Ms. Godesky again.
13 But, Ms. Lepera, what difference does it make if I
14 allow it now versus if you're saying just defer it until
15 after trial? I'm not going to make the determination now.
16 MS. LEPERA: Exactly.
17 So here here's the distinction.
18 THE COURT: Who cares?
19 MS. LEPERA: I don't really think there's a
20 difference between what I said now and what we said in our
21 papers, because our point is -- and this is where -- you
22 can't assert a claim unless there's a basis in law and fact,
23 right? There's no basis in law and fact right now for her
24 entitlement under 70-a to anything, nothing. It only
25 arises -- so it's speculative, it's premature. And if she

1 asserts this now, it's going to make us want to assert one
2 back. And, ultimately, it becomes this never-ending --
3 never-ending set of claims under 70-a that are not ripe
4 because the predicate time to assert one -- and this is why
5 it's devoid of merit now, because of the summary judgment
6 decision affirmed by the Court of Appeals. There is, as a
7 matter of law, right now, a substantial basis in fact and
8 law. There's nothing new in their pleading to change that.
9 So the only time it could be changed and become ripe is if
10 they establish something post trial. I want to keep this
11 case in line. I believe they want to do this so they have
12 the specter that she has some counterclaim out there. And
13 the reality of the situation is this counterclaim only
14 arises in the event of a win by her and not even then an
15 automatic fee.
16 Because what the 70-a did -- and here's the
17 difference -- the 70-a, you know, which is talked a lot
18 about in the legislative history -- and to Ms. Godesky's
19 prior point about how the money is being siphoned off of
20 these people who have to defend themselves -- was meant to
21 protect them in a case, on an ongoing basis, that they could
22 prove after, whatever the time period was, summary judgment
23 or at trial, that there was no substantial basis in fact and
24 law.
25 They can never establish that under the current set

1 of circumstances, so the claim is not ripe, it is
2 speculative under all standards of --
3 THE COURT: One moment, Ms. Lepera.
4 The defendant here is asserting that she was, in
5 fact, drugged and sexually assaulted and that her speech was
6 true and she's asserting that the plaintiff knows that what
7 she's saying is true.
8 MS. LEPERA: Right.
9 THE COURT: So just because you have a claim
10 doesn't mean you win.
11 MS. LEPERA: It's not a question of being right.
12 It's also a question of where it stands in the case right
13 now, because the claim is that there is no substantial basis
14 in fact and law for his claim. As it stands right now, you
15 and the Appellate Division have said there is a substantial
16 basis in fact and law for his claim. So she has no
17 entitlement to any fees now. There would have to be new
18 facts and new evidence post trial to give rise to a claim to
19 say that there's no substantial basis in fact and law. It's
20 different than saying what they've been saying all along.
21 It's not that it's he-said-she-said. It's the standard.
22 The standard under 70-a is that there has to be a
23 determination that there's no substantial basis in fact and
24 law. And, right now, the claim is devoid of merit because
25 that's already been determined at this stage.

1 THE COURT: But who's to say, in that respect, that
2 it should always wait to amend until the end when we know
3 one way or the other who's correct and who's incorrect?
4 There is no determination in this case as to
5 credibility.
6 MS. LEPERA: No. There is a determination that
7 there's a substantial basis in fact and law.
8 And the difference between this case and other
9 cases, where of course in the beginning you can assert
10 claims and counterclaims, here, this counterclaim is
11 currently barred by the existing facts and circumstance and
12 that's why it currently devoid of merit and that's why it is
13 speculative -- there's no new facts in it. You can't assert
14 a claim that is completely incorrect under the law now.
15 Under the law, the standard being substantial basis in fact
16 and law.
17 THE COURT: I don't know that it's incorrect. I
18 just know that it's undetermined.
19 MS. LEPERA: It's premature.
20 THE COURT: The fact that it's -- it's not that
21 it's premature. It's whenever there's this type of
22 situation, there has been no determination. And if what
23 she's saying is true, then there is absolute support for the
24 counterclaim. And I don't know one way or the other as I
25 sit here today.

1 MS. LEPERA: Only if that's what happens after
2 trial.
3 Again, the standard is very simply, there's no
4 substantial basis in fact and law to support the claim. The
5 claim now is precluded by the decisions that currently
6 exist, because if she were to seek fees right now -- let's
7 say she was to seek fees right now -- and this is what
8 happens in 3211(g) and (h) or (h) cases, where --
9 THE COURT: Ms. Lepera, one moment.
10 I'll ask Ms. Godesky if they're going to seek fees
11 now, but I'll be very clear, I'm not going to award fees
12 now.
13 And I appreciate what you're saying. Of course I
14 can't award fees in this case. Everyone knows the posture
15 of this case. And everyone knows that it is a
16 he-said-she-said situation. And until that is determined, I
17 don't know whether there's a substantial basis in fact. But
18 that has to be determined.
19 To be clear, if the next step was to move for
20 summary judgment at this point, on that counterclaim, before
21 a trial -- and I see Ms. Godesky shaking her head no -- that
22 would be nonsense.
23 But, go ahead, Ms. Godesky, let me let you finish
24 up.
25 MS. GODESKY: Thank you, your Honor.

1 Of course not. We're not going to seek an
2 immediate ruling for attorneys' fees or move for summary
3 judgment because we need a jury to decide whether Kesha's
4 counterclaim has merit and all that Kesha --
5 THE COURT: One moment.
6 To be clear, there is going to be no determination
7 of this counterclaim until the jury has spoken.
8 MS. LEPERA: Exactly.
9 THE COURT: I'm asking.
10 MS. GODESKY: No, no --
11 MS. LEPERA: Yes.
12 MS. GODESKY: What Kesha is asking for, your
13 Honor --
14 THE COURT: I'm confused.
15 You're saying you don't agree with that, that your
16 counterclaim will not be determined, as in decided, as in
17 adjudicated, until the jury has spoken?
18 MS. GODESKY: I do agree with that.
19 But we are asking -- what we are asking for is
20 leave to assert our counterclaim now, which Kesha is
21 entitled to do under the law, because it is certainly
22 possible under the rulings that exist in this case that the
23 fact finder could eventually find that Dr. Luke brought this
24 case without a basis in law or fact. So we would like leave
25 to assert our counterclaim now.

1 The Court does not make parties prove their claims
2 before they are allowed to plead them, as Ms. Lepera is
3 suggesting.
4 It would turn litigation on its head to say that
5 Kesha doesn't have a right to plead a claim at this stage,
6 that she's clearly entitled to, because she may not be able
7 to prove it.
8 And I'd like to refer the Court, if I could, to the
9 Goldman versus Reddington case, which was very similar to
10 this one. That is a case where there was a college student
11 at Syracuse University who sued a young woman who publicly
12 accused him of sexual assault. And she, like Kesha,
13 recently brought a motion seeking leave to assert a Section
14 70-a counterclaim. And Judge Lindsay, when she was
15 presented with that motion, the defamation plaintiff, the
16 man in that case, said "Oh, she shouldn't be allowed to
17 assert this counterclaim. The Court has already found that
18 I adequately pleaded defamation per se." And Judge Lindsay
19 emphasized that she absolutely had the right to assert the
20 counterclaim because it is not yet clear whether he will
21 prevail on the merits. And so, in that case, just like in
22 this one, she was allowed to assert her counterclaim and it
23 would be part of the trial, right alongside the underlying
24 defamation claim.
25 And that's what we're asking for here, your Honor.

1 The questions presented by Kesha's counterclaim,
2 whether Dr. Luke's lawsuit has a substantial basis in law or
3 fact or whether he initiated the suit simply to harass her,
4 those are questions that are the jury needs to decide. And
5 the same jury that's impaneled to hear all of the testimony
6 about the defamation case should, obviously, also rule on
7 these counterclaims. She's not bringing this as a separate
8 case.
9 THE COURT: Ms. Godesky, I have another question.
10 Ms. Lepera, I really just don't think I need more
11 in terms of --
12 MS. LEPERA: I just have to one make point, your
13 Honor. It's very important.
14 THE COURT: Please --
15 MS. LEPERA: It's very important because I think
16 what slipped by here is that intention that the jury is
17 going to decide this counterclaim, i.e. is there a
18 substantial basis in fact and law, as opposed to after the
19 jury speaking and we win or lose, then this counterclaim is
20 decided. That is a critical difference. Because they want
21 to try to bring this counterclaim in front of the jury and
22 there's absolutely no basis for that, including under the
23 cases you just cited.
24 THE COURT: You know what? You can argue that, who
25 gets to decide it later.

1 But the point -- all I'm trying to say now is that
2 it won't be decided until after the jury has spoken.
3 Whether it's the jury deciding it or whether it's me
4 deciding it, it will not be resolved until there is a
5 resolution in this case, whether it's at the same time or
6 whether it's afterward. So, in that respect, I don't see
7 the harm in the amendment at all, so long as everybody
8 understands that. Because that's the practical reality in
9 the case.
10 I have a question for you, Ms. Godesky.
11 I wanted to follow up on the Section 70-a, the
12 commenced or continued language.
13 Was that in the statute before the amendment?
14 MS. GODESKY: Yes.
15 THE COURT: So that appeared in Section -- that was
16 there before 2020?
17 MS. GODESKY: Yes.
18 MS. LEPERA: I don't think that's right because it
19 was highlighted and underlined in the amendment.
20 MS. GODESKY: Your Honor, I am almost certain. I
21 am certainly not intending to mislead the Court. We could
22 make a supplemental submission after this argument, but I do
23 believe it is long existing in the statute.
24 MS. LEPERA: We'll check.
25 THE COURT: I don't know that it makes that much of

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1 a difference to me, but I found it interesting because I
2 thought I heard you say that.
3 Because, at the end of the day -- look, again, I've
4 read the cases, I've read your submissions and there is
5 nothing explicit in the legislative history here to give me
6 the clear guidance in terms of there are no words themselves
7 that show whether it was intended to be prospective or
8 whether it was intended to be retroactive.
9 I am, however, going to follow the case of Matter
10 of Gleason, 96 New York 2d 117, a 2001 case decided by the
11 Court of Appeals.
12 The legislative history here does establish that
13 the amended statute was intended to conform with the
14 original intent of the provision and to have immediate
15 effect. And while, again, immediacy does not establish
16 retroactive intent, it does show a sense of urgency that I
17 can take into account.
18 Now, in addition, the statute was designed to
19 rewrite an unintended judicial interpretation or an
20 unintended interpretation altogether. And the enactment
21 reaffirms legislative judgment about what the law was
22 intended to have always been and be. In that sense, the
23 provision is clearly remedial.
24 And, in this case, it should be applied
25 retroactively in order to give effect to its beneficial

1 purpose.
2 I do not find that the plaintiff established that
3 retroactive application would affect his due process rights
4 nor is the Court convinced that use of the commenced or
5 continued language in Section 70-a -- that doesn't establish
6 that the legislature didn't intend for 76-a to have
7 retroactive effect and, given its remedial purpose, it
8 should here. There are many statutes that don't contain
9 explicit direction one way or the other.
10 But based on the important purpose that this
11 legislation has, it should apply to pending cases.
12 Additionally, defendant is permitted to amend her
13 answer to assert the counterclaim pursuant to Section 70-a.
14 Leave is freely given.
15 The amendment is not patently without merit, it is
16 not futile. Again, it will not be decided until there has
17 been a determination by the jury in this case and there
18 would not be any undue prejudice.
19 The defendant's motion is, therefore, granted.
20 Section 76-a applies in this action and leave to
21 amend is granted.
22 Defendant is to e-file the amended answer within
23 10 days and a copy of this transcript within 30 days.
24 And with that, I wish you a good summer.
25 Thank you very much.

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1 MS. LEPERA: Thank you, your Honor.

2 MS. GODESKY: Thank you, your Honor.

3 THE COURT: Be well.

4 (Proceedings adjourned)

5 Certified to be a true and
6 accurate transcript of the
foregoing proceedings

7 Anne Marie Scribano
8 Anne Marie Scribano

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EXHIBIT C

To be Argued by:
ALAN S. LEWIS
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

Appellate Case No.: 2021-03036

LUKASZ GOTTWALD p/k/a Dr. Luke, KASZ MONEY, INC. and PRESCRIPTION SONGS, LLC,

Plaintiffs-Appellants,

– against –

KESHA ROSE SEBERT p/k/a Kesha,

Defendant-Respondent,

– and –

PEBE SEBERT, VECTOR MANAGEMENT, LLC and JACK ROVNER,

Defendants.

KESHA ROSE SEBERT p/k/a Kesha,

Counterclaim Plaintiff-Respondent,

– against –

LUKASZ GOTTWALD p/k/a Dr. Luke, KASZ MONEY, INC. and PRESCRIPTION SONGS, LLC,

Counterclaim Defendants-Appellants,

– and –

DOES 1-25, inclusive,

Counterclaim Defendants.

BRIEF FOR *AMICUS CURIAE* SAMUEL D. ISLAY IN SUPPORT OF APPELLANTS AND REVERSAL

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PRELIMINARY STATEMENT

Legislation enacted in 2020 vastly expanded anti-SLAPP protection in New York. The legislation, which rewrote Civil Rights Law §§ 70-a and 76-a (the "2020 Anti-SLAPP Act"), redefined a "SLAPP", making that category of lawsuits much broader than it had been and expanded the arsenal of tools available to defendants in such cases. The new legislation substantially alters the playing field in nearly all defamation cases. *Before* the 2020 legislation, the "fault" burden assigned to those defamation plaintiffs adjudged "private-figures" was simple negligence. But as a result of the 2020 Anti-SLAPP Act, these private figure plaintiffs are subject to the significantly higher burden of proof previously borne only by public officials and public figures – "actual malice" – so long as their defamation lawsuit fits within the broad scope of the legislation.

The Plaintiff, Lukasz Gottwald, brought this lawsuit in *2014*, six years before the 2020 Anti-SLAPP Act was enacted. Like any potential plaintiff assessing whether to bring a lawsuit, Gottwald did so based on the laws existing at the time. Back then, Gottwald's case was not even arguably covered by an Anti-SLAPP statute. As a private figure, his fault burden was to prove that the defamatory statements were published negligently.[1] But six years into the case,

[1] *See Gottwald v. Sebert*, 193 A.D.3d 573 (1st Dep't 2021) (finding Gottwald was a private figure). Kesha's appeal of this determination is pending in the Court of Appeals. *See Gottwald v. Sebert*, New York Court of Appeals Index No. APL-2021-00131.

New York enacted legislation making any defamation plaintiff subject to its broad scope subject to an actual malice burden of proof. In short, a sea change. Soon thereafter, in this case, the Supreme Court permitted Defendant to amend her Answer to assert that the Anti-SLAPP defenses, newly created by the 2020 Anti-SLAPP Act, could be asserted in this 2014 lawsuit.

Can that be right? That is, does the 2020 Anti-SLAPP Act vastly and retroactively transform the rules for litigation commenced six years before its enactment, including the sudden imposition of a significantly enhanced proof burden? That is the issue in this appeal, and as explained below, the clear answer is no.

To understand why that must be the answer, the 2020 Anti-SLAPP Act must be compared to the predecessor anti-SLAPP statute that existed in New York when Gottwald brought this lawsuit. As demonstrated below, the new legislation is not "remedial." The 2020 Anti-SLAPP Act does not clarify or correct technical defects in the old anti-SLAPP Act - a law that had by 2020 been on the books for almost three decades. With the 2020 Anti-SLAPP Act, the Legislature entirely rewrote anti-SLAPP legislation in New York, making it *unrecognizable* when compared to the previously existing anti-SLAPP Act. The older legislation was very narrow in scope; it applied *only* to suits brought against citizens who participated in public proceedings. In that way, the old legislation applied only to an exceedingly narrow

subset of lawsuits that might be deemed "SLAPPS", and otherwise left undisturbed the citizenry's traditional right to seek redress for alleged injuries in the courts, under longstanding procedures and proof burdens.

The 2020 Anti-SLAPP Act dispenses with this careful balance. It enacts new and heavy burdens for defamation plaintiffs in a way that transforms the landscape of most defamation lawsuits, except those based on "purely private matters." Because the new legislation is transformational, not "remedial," it cannot be given retroactive effect.

QUESTION PRESENTED

1. Are the new standards imposed by the 2020 Anti-SLAPP Act on libel plaintiffs applicable to lawsuits brought well before the enactment of the 2020 Anti-SLAPP Act?

   No. The language of the 2020 Anti-SLAPP Act and New York law prohibit such retroactive application.

FACTS

The Legislature Passes an Anti-SLAPP Act in Response to Strategic Lawsuits Brought by Developers

In the 1980's and 1990's, citizens engaging in public petitioning found themselves the subjects of punitive lawsuits whose purpose was primarily to deter the citizens from acts of public and political advocacy. *See* Diana Jean Schemo, *Silencing the Opposition Gets Harder*, N.Y. TIMES, July 2, 1992, at B6. By the early 1990's, town and village boards had become "frequent targets" of strategic

lawsuits by developers to "deter participation in such matters as landfill location, the disposal of hazardous waste, and the development of land." *See* Addendum A, p. 19 (Mem. in Support by N.Y.S. Conference of Mayors and Municipal Officials);[2] *see also* Schemo, *Silencing the Opposition Gets Harder* (providing survey of lawsuits brought in New York State to stifle opposition to public projects).

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." *600 W. 115th Str. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 137 n.1 (1992); *see also* Opinion, *Protect Against Lawsuits Squelching Free Speech*, THE POST STANDARD (Syracuse, N.Y.), May 27, 2014, at A10 ("New York's anti-SLAPP law was passed in 1992 in response to lawsuits from real estate developers attempting to squelch opposition to their projects"). The legislation covered only claims (i) "brought by a public applicant or permittee" that (ii) "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." L. 1992, Ch. 767, § 2(a).

At the time, the Legislature expressed concerns about an anti-SLAPP law's potential to infringe citizens' right to seek redress in the courts. *See, e.g.,*

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[2] For the Court's convenience, a copy of the bill jacket for the original Anti-SLAPP Act (1992 N.Y. ALS 767, 1992 N.Y. LAWS 767, 1992 N.Y. A.N. 4299) is attached hereto as Addendum A.

Addendum A, p. 13 (Letter from Ass. Bianchi to Gov. Mario Cuomo). The Legislature recognized that developers were not alone in engaging in "abusive litigation tactics" by commencing strategic lawsuits (*id.* at 7 (Mem. filed with Ass. Bill 4299)) but took pains to draft the act so as to reflect a "careful balance between free speech rights and the right to bring a lawsuit for redress of injuries." *Id.* at 13 (Letter from Ass. Bianchi to Gov. Mario Cuomo). Indeed, the law was praised because while it "protect[ed] the First Amendment rights of the people to speak out, and guarantee[d] for government the benefits of their participation, the bill [did] not trespass on the legitimate rights of the people to seek redress in the courts." *Id.* at 7 (Mem. filed with Ass. Bill 4299).

Judicial Enforcement of the Anti-SLAPP Act Was Consistent for Decades with the Text of the Anti-SLAPP Act and the Legislative Intent

The Anti-SLAPP Act became effective on January 1, 1993. Even before it took effect, the New York Court of Appeals recognized it was "specifically aimed" only at protecting citizens' rights to "speak out at public meetings against proposed land use development and other activities requiring approval of public boards." *600 W. 115th Str. Corp.*, 80 N.Y.2d at 137 n.1. Thereafter, trial and appellate courts consistently enforced the plain text of the act, limiting its reach mainly to suits brought by developers relating to public projects. *See, e.g.,* Brief for Plaintiffs/Counterclaim Defendants-Appellants dated September 7, 2021 [NYSCEF Doc. No. 4] ("App. Br.") at 25, n.12 (citing authorities describing

"focus" of 1992 Act as preventing "retaliatory litigation commenced or maintained for the purpose of intimidating persons who have voiced opinions in public meetings. . .").

The Legislature Dramatically Expands Scope of Anti-SLAPP Act

Twenty years passed, without there being any perceived difference between how the courts were applying the relatively narrow 1992 legislation and how it had been intended to function. It was not until 2012 until a bill was introduced that sought to dramatically expand the reach of the Anti-SLAPP Act well beyond the original scope and intent of the 1992 legislation. *See* Sponsor Mem. of Sen. Hoylman, L. 2020, Ch. 250 (July 22, 2020) ("[t]he purpose of this bill is *to extend the protections* of New York's current law …"). The new legislation, finally passed in 2020, dispensed with the "careful balance" intrinsic to the original legislation – now altered to provide broad protections for "citizens' exercise of the rights of free speech and petition about matters of public interest." The effect of the new law was dramatic: New York's anti-SLAPP law went from one of the country's narrowest to perhaps the broadest. Adam P. Cohen & Derek Borchardt, *Significant Amendments to Anti-SLAPP Statutes Could Have Sweeping Ramifications*, NYLJ, Nov. 19, 2020. No longer did the statute carefully balance minimizing the extent of infringement on citizens' right to petition the courts against the value of providing limited protection from lawsuits based on citizens'

participation in government; instead, it created a new and expansive category of lawsuits, e.g., matters that were not "purely private", and created new and broad protections for everyone facing such suits, including large companies and giant news organizations. *See, e.g.,* Letter from New York City Bar Association Communications and Media Law Committee and Civil Rights Committee to Governor Andrew Cuomo in Support of Amendments to Civil Rights Law's Anti-SLAPP Statute, Oct. 15, 2020.[3]

Specifically, the proposed legislation broadened the definition of "action involving public petition and participation" to cover:

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.

Civil Rights Law § 76-a. Public interest was intended to be "construed broadly, and [ ] mean any subject other than a purely private matter." *Id.*

[3] Available at https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/new-york-anti-slapp-statute-amendments-press-freedom (last accessed Feb. 1, 2022).

ARGUMENT

I. THE REVISIONS TO THE ANTI-SLAPP ACT CANNOT BE APPLIED TO LAWSUITS PENDING BEFORE ITS EFFECTIVE DATE

A. There Is No Basis to Override the "Deeply Rooted Presumption Against Retroactivity"

"It is a fundamental canon of statutory construction that retroactive operation [of a statute] is not favored by courts." *Majewski v. Broadalbin-Perth Cent. Sch. Dist,* 91 N.Y.2d 577, 584 (1998). There is a "deeply rooted presumption against retroactivity" and retroactive application is viewed "with great suspicion." *Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 35 N.Y.3d 332, 370 (2020).

Retroactive application is only permitted in the face of "a clear expression" of such intent by the Legislature. *Gleason v. Gleason*, 26 N.Y.2d 28, 36 (1970); *accord In re Regina Metro*, 35 N.Y.3d at 370-71 (Legislature must clearly intend "extraordinary result" of retroactive application). In the absence of such clear expression, a court may not "substitute itself for the Legislature" or "enlarge the wording of a statute even in favor of what may be deemed an equitable construction." *State by Lefkowitz v. Parker*, 38 A.D.2d 542, 542 (1st Dep't 1971).

Here, there is no expression – much less a "clear expression" – that the 2020 revisions should be applied retroactively to pending cases. Had the Legislature intended for retroactive application of the law, it certainly knew how to do so. *See,*

e.g., Coffman v. Coffman, 60 A.D.2d 181, 186-87 (2nd Dep't 1977) (providing that the new legislation applies retroactively to "decrees, judgments or agreements . . . obtained prior to January 21, 1970"). While the 2020 revisions did "take effect immediately," this language speaks to the statute's effectiveness on a go-forward basis and "does not have any retroactive operation or effect." *Aguaiza v. Vantage Props., LLC*, 69 A.D.3d 422, 423 (1st Dep't 2010).[4]

In light of the absence of a "clear expression" of legislative intent for retroactive application, there is no basis to retroactively apply the 2020 revisions to pending litigation. *See Parker*, 38 A.D.2d at 542 (court may not "enlarge the wording of a statute even in favor of what may be deemed an equitable construction."). As such, the lower court's ruling, based on its perception of a "sense of urgency" was wrong and should be reversed.

B. The Revisions to the Anti-SLAPP Act Were Not Remedial and Cannot Be Given Retroactive Effect

In certain limited circumstances, New York courts have held that a "remedial" statute may be applied retroactively. Legislation is remedial where it seeks to correct "what the law was *always meant* to say and do." *Majewski*, 91 N.Y.2d at 585 (emphasis added). To determine whether legislation is remedial, the

[4] Even beyond the fact that the revisions were passed almost thirty years after the original statute, the fact that the revisions were not even proposed until 2012 and only passed in 2020 belies any argument that the Legislature as a body perceived any actual urgency in enacting the changes.

relevant inquiry is whether the subject revisions "carry out the reform intended" by the original legislation. *Matter of Jaquan L*, 179 A.D.3d 457, 459 (1st Dep't 2020); *see also Asman v. Ambach*, 64 N.Y.2d 989, 991 (1985) (remedial the legislation is "designed to correct imperfections in prior law"). Courts have found legislation to be remedial where it sought (i) to correct a judicial interpretation at odds with the intent of the original legislation,[5] (ii) effectuate remedies provided in the original statute,[6] or (iii) remove a "procedural obstacle" preventing fulfillment of the original statute.[7]

But the 2020 legislation was not "remedial" in any such sense, and therefore cannot be applied retroactively. The 2020 legislation does not "carry out the intended reform" of the original statute, as it is vastly different in scope than the original statute enacted almost 30 years earlier. In 1992, the Legislature enacted a narrowly tailored bill that achieved a "careful balance" between the right to participate in government, on the one hand, with the right to seek redress for

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[5] *See, e.g., Cady v. County of Broome*, 87 A.D.2d 964, 964-65, n. 2 (amendment was remedial where sponsor memorandum made clear that its purpose was to "cure the inequity" created by judicial interpretation of original legislation); *Nelson v HSBC Bank USA*, 87 A.D.3d 995, 996 (2d Dep't 2011) (amendment was remedial where City Council made clear that it was passed because courts had construed original legislation "too narrowly").

[6] *See, e.g., Hynson v. Am. Motors Sales Corp.*, 164 A.D.2d 41, 46 (2d Dep't 1990) (amendment creating mandatory arbitration was remedial because it was necessary to effectuate intent of original consumer-protection legislation).

[7] *See, e.g., Saratoga Water Servs. v. Zagata*, 247 A.D.2d 788, 789 (3d Dep't 1998) (amendment to remove unforeseen "procedural obstacle" to a municipality's ability to fulfill its statutory duties was remedial).

injuries, on the other. *See* Addendum A, p. 13 (Letter from Ass Bianchi to Gov. Mario Cuomo). It achieved these twin goals and careful by limiting the scope of the Anti-SLAPP Act *only* to suits brought against citizens who participated in public proceedings. *See id.* at 6-7 (Mem. filed with Ass. Bill 4299) (expressing concerns with other "abusive litigation tactics" but limiting bill to developer suits to address the "compelling need to protect public participation").

By contrast, in 2020, the Legislature dispensed with any concerns over infringing a citizens' right to seek redress in the courts and broadly "extended" the Act well beyond what the Legislature had enacted years earlier. *See* Sponsor Mem. of Sen. Hoylman, L. 2020, Ch. 250 (July 22, 2020). The legislation was not prompted by a judicial decision or a need to amend the statute to ensure the original beneficiaries obtained the intended benefits. Instead, the revisions expanded the Act's reach very substantially, imposing new and higher burdens of proof on a broad new category of plaintiffs. *Id.* These revisions did not carry out, but instead completely upended, the intent of the original legislation.

The notion that the 2020 Anti-SLAPP Act corrected a "defect" in the original statute and is thus "remedial" is not faithful to the original statute or the cases that have applied it. *See, e.g.,* Brief for Defendant/Counterclaim Plaintiff-Respondent dated October 20, 2021 [NYSCEF Doc. No. 8] at 15. As a threshold matter, the Court of Appeals has already stated that retroactive application is

unwarranted merely because a statute attempts to "supply some defect or abridge some superfluidity in the former law." *Majewski*, 91 N.Y.2d at 584. Indeed, this overly broad formulation would render virtually any legislation that touches upon an existing statute "remedial," and would result in the formerly narrow exception effectively usurping the "'deeply rooted' presumption against retroactivity." *In re Regina Metro*, 35 N.Y.3d at 370.

Moreover, the 2020 revisions did not fix a "defect" in the original statute, which for over almost three decades worked exactly how the Legislature intended, which it left untouched for all those years. It defies credulity to suggest that it took almost thirty years to correct a "defect" that was apparent before the original legislation even took effect. *See 600 W. 115th Str. Corp.*, 80 N.Y.2d at 137 n.1; *see also* App. Br. at 25, n.12. The more plausible explanation, and the one that is apparent when comparing the two statutes, is that the 2020 Legislature was not "correcting" any defect preventing the original beneficiaries from enjoying the benefits of the Act. Instead, animated by entirely new priorities and new concerns, the Legislature radically transformed what had been one of the country's most narrowly tailored anti-SLAPP laws to one of most expansive.

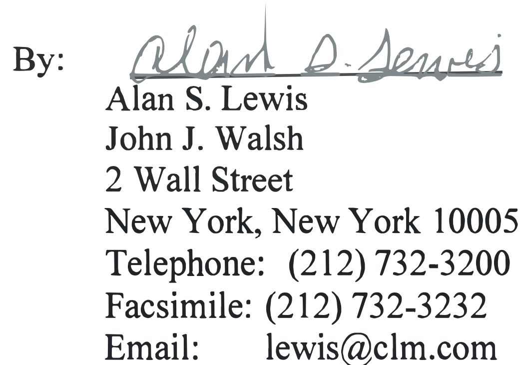
In short, the revisions were not "remedial" and cannot be applied retroactively. Respectfully, Supreme Court's contrary determination should be reversed.

CONCLUSION

For the reasons stated above, Amicus Curiae Samuel Isaly respectfully requests this Court reverse the lower court's decision.

Dated: New York, New York
February 4, 2022

CARTER LEDYARD & MILBURN LLP

By: 

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Dated: February 4, 2022

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ADDENDUM A

APPROVAL # 49

CHAPTER 767

LAWS OF 19 92 MEMORANDUM NO.

SENATE BILL ASSEMBLY BILL 4299

4299

1991-1992 Regular Sessions

IN ASSEMBLY

February 27, 1991

Introduced by M. of A. BIANCHI, NADLER -- Multi-Sponsored by -- M. of A. GRANNIS, HARENBERG, HINCHEY, KOPPELL, PILLITTERE, SEMINERIO -- read once and referred to the Committee on Judiciary

AN ACT to amend the civil rights law and the civil practice law and rules, in relation to actions involving public petition and participation

IN THE SENATE S. 5441 MARCHI

DATE RECEIVED BY GOVERNOR:

000C01

7/23

ACTION MUST BE TAKEN BY:

8/4

DATE GOVERNOR'S ACTION TAKEN:

AUG 3 1992

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SENATE VOTE 56 Y 2 N

DATE 7-1-92

ASSEMBLY VOTE 140 Y 0 N

DATE 2-3-92

HOME RULE MESSAGE ___ Y ✓ N

BILL IS DISAPPROVED

DATE ____________

COUNSEL TO THE GOVERNOR

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1992

SENATE JOURNAL
JUL 1 - 1992
PAGE 62

ASSEMBLY

The Assembly Bill by Assem. BIANCHI Calendar No. 1797 Assembly No. 4299 Sen. Rept. No. ______
Entitled: "

AN ACT to amend the civil rights law and the civil practice law and rules, in relation to actions involving public petition and participation

DEBATE WAS HAD THEREON

"was read the third time

The President put the question whether the Senate would agree to the final passage of said bill, the same having been printed and upon the desks of the members in its final form at least three calendar legislative days, and it was decided in the affirmative, a majority of all the Senators elected voting in favor thereof and three-fifths being present, as follows:

AYE	Dist.		NAY	AYE	Dist.		NAY
	17	Mr. Babbush	EXCUSED		46	Mr. McHugh	
	43	Mr. Bruno			23	Mr. Mega	
	25	Mr. Connor			30	Mrs. Mendez	
	40	Mr. Cook			22	Ms. Montgomery	
	61	Mr. Daly			42	Mr. Nolan	———
	44	Mr. Farley			27	Mr. Ohrenstein	
	31	Mr. Galiber			14	Mr. Onorato	
	13	Mr. Gold			36	Mrs. Oppenheimer	
	32	Mr. Gonzalez			11	Mr. Padavan	
	37	Mrs. Goodhue			29	Mr. Paterson	
	26	Mr. Goodman			54	Mr. Perry	
	18	Mr. Halperin			56	Mr. Present	
	6	Mr. Hannon			55	Mr. Quattrociocchi	
	48	Ms. Hoffmann			41	Mr. Saland	EXCUSED
	38	Mr. Holland			47	Mr. Sears	
	4	Mr. Johnson			50	Mr. Seward	
	53	Mr. Kehoe			60	Mr. Sheffer	
	33	Mr. Korman			9	Mr. Skelos	
	52	Mr. Kuhl	EXCUSED		20	Miss Smith	
	2	Mr. Lack			19	Mr. Solomon	
	39	Mr. Larkin			35	Mr. Spano	
	1	Mr. LaValle			57	Mr. Stachowski	
	28	Mr. Leichter			45	Mr. Stafford	
	8	Mr. Levy			12	Mr. Stavisky	
	51	Mr. Libous			3	Mr. Trunzo	
	49	Mr. Lombardi	———		7	Mr. Tully	
	15	Mr. Maltese			34	Mr. Velella	
	24	Mr. Marchi			59	Mr. Volker	
	5	Mr. Marino			10	Mr. Waldon	
	21	Mr. Markowitz			16	Mr. Weinstein	
	58	Mr. Masiello					

AYES 56

NAYS 2

Ordered, that the Secretary return said bill to the Assembly with a message that the Senate has concurred in the passage of the same.

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A.J. 49

NEW YORK STATE ASSEMBLY
TWO HUNDRED FIFTEENTH SESSION

REPRINT
DATE: 02/03/92

DATE: 02/03/1992
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BILL: A4299 R.R. NO: 88 SPONSOR: BIANCHI (MS)

Provides for recovery of damages in certain actions involving public petition and participation

Vote	Member	Vote	Member	Vote	Member
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EOR	Anderson RR	Y	Glick DJ	Y	O'Shea CJ
Y	Aubry JL	Y	Gottfried RN	Y	Parment WL
Y	Balboni MA	Y	Graber VJ	Y	Parola FE
Y	Barbaro FJ	Y	Grannis A	Y	Pataki GE
Y	Barnett HW	Y	Green RL	Y	Pheffer AI
Y	Barraga TF	Y	Greene A	Y	Pillittere JT
Y	Becker GR	Y	Griffith E	Y	Pordum FJ
Y	Behan JL	Y	Gromack AJ	Y	Prescott DW
Y	Bennett LE	Y	Harenberg PE	Y	Proskin AW
Y	Bianchi IW	Y	Hasper J	Y	Ramirez R
Y	Bonacic JJ	Y	Hawley RS	Y	Rappleyea CD
Y	Boyland WF	Y	Healey PB	Y	Ravitz J
Y	Bragman MJ	Y	Hevesi AG	Y	Reynolds TM
Y	Brennan JF	Y	Hikind D	Y	Robach JE
Y	Brodsky RL	Y	Hill EH	Y	Rosado D
Y	Brown HC	Y	Hillman MC	Y	Sanders S
Y	Butler DJ	Y	Hinchey MD	Y	Sawicki J
Y	Calhoun N	Y	Hoyt WB	Y	Schimminger RL
Y	Canestrari RJ	Y	Jacobs RS	Y	Schmidt FD
Y	Casale AJ	Y	Jenkins C	Y	Seabrook L
Y	Catapano TF	Y	John SV	Y	Seminerio AS
Y	Christensen JK	EOR	Kaufman SB	Y	Silver S
Y	Clark BM	Y	Keane RJ	Y	Singer CD
Y	Cochrane JC	Y	Kelleher NW	Y	Straniere RA
Y	Colman S	Y	King JP	Y	Sullivan EC
Y	Connelly EA	Y	Koppell GO	Y	Sullivan FT
Y	Conners RJ	Y	Lafayette IC	Y	Sullivan PM
Y	Conte JD	Y	Lasher HL	Y	Sweeney RK
Y	Cook VE	Y	Leibell VL	Y	Tallon JR
EOR	Coombe RI	Y	Lentol JR	Y	Talomie FG
Y	Crowley J	Y	Lopez VJ	Y	Tedisco J
Y	D'Andrea RA	Y	Luster MA	Y	Tocci RC
Y	Daniels GL	Y	Magee B	Y	Tokasz P
Y	Davidsen DR	Y	Mayersohn N	Y	Tonko PD
Y	Davis G	Y	McGee PK	Y	Townsend DR
Y	Dearie JC	Y	McMillen DH	Y	Vann A
EOR	Del Toro A	Y	Miller RH	Y	Vitaliano EN
Y	Diaz HL	Y	Morelle JD	Y	Warren GE
Y	DiNapoli TP	Y	Murphy MJ	Y	Weinstein HE
Y	Dugan EC	Y	Murtaugh JB	Y	Weisenberg H
Y	Eannace RJ	Y	Muscarella VT	Y	Wertz RC
Y	Eve AO	Y	Nadler J	Y	Winner GH
Y	Farrell HD	Y	Nagle JF	Y	Yoswein JA
Y	Faso JJ	Y	Nicoletti JA	Y	Young GP
Y	Feldman D	Y	Nolan CT		Mr. Speaker
Y	Flanagan JJ	Y	Norman C		
Y	Friedman G	Y	Nortz HR		
Y	Frisa D	Y	Nozzolio MF		
ELB	Gantt DF	Y	O'Neil JG		

YEAS: 140 NAYS: 0

CONTROL: 95425004

CERTIFICATION: /S/ FRANCINE M. MISASI
CLERK OF THE ASSEMBLY

LEGEND: Y=YES, NAY=NO, NV=ABSTAIN, ABS=ABSENT,
ELB=EXCUSED FOR LEGISLATIVE BUSINESS, EOR=EXCUSED FOR OTHER REASONS.

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A.4299

NEW YORK STATE ASSEMBLY
TWO HUNDRED FOURTEENTH SESSION

REPRINT
DATE: 05/16/91

DATE: 05/16/1991
TIME: 01:07:39 PM

BILL: A4299 CAL. NO: 390 SPONSOR: BIANCHI (MS)

Provides for recovery of damages in certain actions involving public petition and participation

Vote	Member	Vote	Member	Vote	Member
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NAY	Anderson RR	Y	Glick DJ	Y	Ortloff C
Y	Balboni MA	Y	Gottfried RN	Y	O'Shea CJ
Y	Barbaro FJ	Y	Graber VJ	Y	Parment WL
Y	Barnett HW	Y	Grannis A	Y	Parola FE
Y	Barraga TF	ABS	Green RL	Y	Pataki GE
Y	Becker GR	Y	Greene A	Y	Pheffer AI
Y	Behan JL	Y	Griffith E	Y	Pillittere JT
Y	Bennett LE	Y	Gromack AJ	Y	Pordum FJ
Y	Bianchi IW	Y	Harenberg PE	Y	Prescott DW
Y	Bonacic JJ	Y	Hasper J	Y	Proskin AW
Y	Boyland WF	Y	Hawley RS	Y	Ramirez R
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Y	Brennan JF	Y	Hevesi AG	Y	Ravitz J
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Y	Calhoun N	Y	Hinchey MD	Y	Sanders S
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Y	Christensen JK	Y	John SV	EOR	Seabrook L
EOR	Clark BM	EOR	Kaufman SB	Y	Seminerio AS
Y	Cochrane JC	Y	Keane RJ	Y	Silver S
Y	Colman S	Y	Kelleher NW	Y	Singer CD
Y	Connelly EA	Y	King JP	Y	Straniere RA
Y	Conners RJ	Y	King RL	Y	Sullivan EC
Y	Conte JD	Y	Koppell GO	Y	Sullivan FT
Y	Cook VE	Y	Lafayette IC	ELB	Sullivan PM
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ABS	Eve AO	Y	Morelle JD	Y	Weisenberg H
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Y	Flanagan JJ	Y	Nagle JF	Y	Yevoli LJ
Y	Friedman G	Y	Nolan CT	Y	Young GP
Y	Frisa D	Y	Norman C	Y	Zaleski TM
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ELB	Gantt DF	Y	Nozzolio MF		Mr. Speaker

YEAS: 134 NAYS: 1

CONTROL: 66223518 CERTIFICATION: /S/ FRANCINE M. MISASI
CLERK OF THE ASSEMBLY

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STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

AUG 3 1992

MEMORANDUM filed with Assembly Bill Number 4299, entitled:

CHAPTER 767
APPROVAL #49

"AN ACT to amend the civil rights law and the civil practice law and rules, in relation to actions involving public petition and participation"

APPROVED

Those who framed our American Constitution took care that we could speak freely, and that our right to petition government for redress of grievances would not be infringed. They knew, as we know, that a government attentive to the people's voice is the heart of self-government through elected representatives, and that self-government -- with faith in the emancipation of thought and commitment to the rights of all -- is the only alternative to a tyranny abnegating that central commitment, or anarchy based on doubt of humankind.

When those aggrieved speak out to government, it is wrong for the legal process to be misappropriated to silence them. That is the premise of this bill, which establishes standards for recovery of damages and dismissal in lawsuits intended to discourage public petition and participation.

The bill is New York's response to the "SLAPP" suit, that is, the strategic lawsuit against political participation, a lawsuit without substantial basis but asserting enormous damage claims, brought to intimidate those who would oppose a governmental act such as a permit.

In order to stifle opposition, plaintiffs in SLAPP suits say that the people opposing them have defamed them, have maliciously prosecuted them or have interfered with their businesses. Although the suits are without substantial basis, large damages are sought, and an individual unfamiliar with legal proceedings is forced to hire a defense as the price of speaking out in a public forum or urging on government an earnest belief. The aim of SLAPP suits is simple and brutal: the individual is to regret ever having entered the public arena to tell government what she thinks about something directly affecting her.

The bill responds to SLAPP suits in three ways. First, it provides that in an action involving public petition and participation, the plaintiff may recover damages only if, in addition to all other necessary elements of a cause of action, the plaintiff also establishes by clear and convincing evidence that any communication that has given 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 the communication is material to the cause of action at issue.

Second, the bill also authorizes a defendant in a SLAPP suit to advance a separate action, or a claim, cross-claim or counterclaim, to recover costs and attorneys' fees where the plaintiff's action was pursued without substantial basis in law and fact and could not be supported by a substantial argument for the extension, modification or reversal of existing law. Other compensatory damages may be recovered by a defendant upon an additional demonstration that the action was pursued to harass, intimidate, punish or maliciously inhibit free speech, association or the right to petition government. Punitive damages may be recovered upon a further demonstration that harassment, intimidation, punishment or inhibition of rights was the sole purpose of the plaintiff's action.

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Third, the bill also provides for resolving SLAPP suits quickly by granting a preference in hearing motions to dismiss or for summary judgment in actions involving public petition and participation. A substantial basis in law and fact must be established for the lawsuit to continue.

I have some concerns with the bill. Abusive litigation tactics are a problem not just in this context, but in others as well. One may question whether it is an adequate response to them to address only one facet of their impact, and to do so by announcing a new standard which, although purportedly more stringent, is no more exact than the one it appears to be replacing. Too, the bill creates a new preference without settling its priority against other preferences outstanding. In responding to the compelling need to protect public participation, our response must consider a rational ordering of the other priorities we impose on our judicial system as much as the felt response to the issue of the moment.

These problems will become acute if the bill is misused as an opportunity for irresponsible public advocacy, or an additional weapon by those who place self-interest, in the guise of public participation, above the public good.

But it is the measure of our commitment to free debate in this State that we value speech and public participation knowing that the power may be misused, aware that the advocacy of some may be injurious or false, refusing to judge in individual cases whether debate itself would be good or bad. We protect public participation regardless of the content of the views expressed. Punitive and needless lawsuits without substantial basis in fact or law should be generally discouraged. But they should be discouraged all the more if, as there is reason to believe, they deter public debate which we as a nation consistently protect without a value judgment about whether what is said is good, bad, ill-motivated, pretextual or welcome.

In protecting the First Amendment rights of the people to speak out, and guaranteeing for government the benefits of their participation, the bill does not trespass on the legitimate rights of the people to seek redress in the courts. By its terms, the bill does not affect or preclude the right of any party to any recovery otherwise authorized by common law, statute or rule, nor does it limit any constitutional, statutory or common law protections of defendants in actions involving public petition and participation.

We take an important new step today to guarantee the right to speak freely for those who, through their participation in public affairs, make <u>this</u> government <u>their</u> government.

The bill is approved.

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1797

NEW YORK STATE ASSEMBLY MEMORANDUM IN SUPPORT OF LEGISLATION

5441

ASSEMBLY: 4299 BY: WILLIAM BIANCHI

SENATE:__________ BY: JOHN MARCHI

TITLE: An Act to amend the civil rights law and the civil procedure law and rules, in relation to actions involving public petition and participation.

PURPOSE: The bill is designed to protect citizens who participate in public affairs against lawsuits brought in retaliation against their participation.

SUMMARY OF PROVISIONS: The bill provides that a plaintiff who is seeking or who has obtained a permit, license or other governmental permission must prove "actual malice" in a lawsuit that is based on the defendant's opposition to the permit. The bill also establishes expedited procedures for motions to dismiss such actions. The bill also establishes that a cause of action exists to provide relief for such defendants if the plaintiff brought the action without a substantial basis, or with the purpose of maliciously inhibiting the defendant's exercise of First Amendment rights.

EFFECTS OF PRESENT LAW WHICH THIS BILL WOULD ALTER: The bill would change the standard for obtaining dismissal or summary judgement in certain actions. The bill would change the standard for obtaining attorney's fees in certain action by requiring that an action be supported by a "substantial" basis, which is more support than the "reasonable" basis required in other actions.

JUSTIFICATION: 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 right of each citizen to speak out on matters involving governmental activity, without fear that one's personal assets will be put at risk by a baseless retaliatory lawsuit.

EFFECTIVE DATE: The act shall take effect on the first day of January upon the enactment into law by the State of New York.

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NEW YORK STATE ASSEMBLY
MEMORANDUM IN SUPPORT OF LEGISLATION
submitted in accordance with Assembly Rule III, Section 1(e)

A 4299 '91
Judi

Bill Number: Assembly: Senate:

Memo on Original Draft of Bill: x Amended bill:

Sponsors: Members of Assembly: RULES
Senate:

Introduced at the request of: BIANCHI

TITLE OF BILL:

AN ACT to amend the civil rights law and the civil procedure law and rules, in relation to actions involving public petition and participation

PURPOSE OR GENERAL IDEA OF BILL:

The bill is designed to protect citizens who participate in public affairs against lawsuits brought in retaliation against their participation.

SUMMARY OF SPECIFIC PROVISIONS:

The bill provides that a plaintiff who is seeking or who has obtained a permit, license or other governmental permission must prove "actual malice" in a lawsuit that is based on the defendant's opposition to the permit. The bill also establishes expedited procedures for motions to dismiss such actions. The bill also establishes that a cause of action exists to provide relief for such defendants if the plaintiff brought the action without a substantial basis, or with the purpose of maliciously inhibiting the defendant's exercise of First Amendment rights.

EFFECTS OF PRESENT LAW WHICH THIS BILL WOULD ALTER:

The bill would change the standards for obtaining dismissal or summary judgment in certain actions. The bill would change the standard for obtaining attorney's fees in certain actions by requiring that an action be supported by a "substantial" basis, which is more support than the "reasonable" basis required in other actions.

JUSTIFICATION:

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 right of each citizen to speak out on matters involving governmental activity, without fear that one's personal assets will be put at risk by a baseless retaliatory lawsuit.

PRIOR LEGISLATIVE HISTORY:

New bill.

FISCAL IMPLICATIONS FOR STATE AND LOCAL GOVERNMENTS:

None.

EFFECTIVE DATE:

First day of January after passage.

^D

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A. 4299

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

July 7, 1992

Honorable Mario M. Cuomo
Governor, New York State
Executive Chamber
The Capitol
Albany, NY 12224

Dear Governor Cuomo:

Legislation providing for the recovery of damages in certain actions involving public petition and participation (A. 4299, the SLAPP bill) passed both houses of the Legislature last week. It will be coming to you shortly for signature.

This landmark legislation codifies the right of individuals in the state of New York to express opinions regarding the activities that occur in their communities without fear of retribution through unjustified legal action.

Numerous individuals and civic groups throughout the state worked tirelessly to ensure the passage of this legislation. The Consumer Protection Board made the legislation its number one priority. It would be a great honor for me as well as the individuals and civic groups of Long Island, where the first SLAPP suit in New York State occurred, if the bill signing ceremony could take place on Long Island during August.

If I may be of any assistance, please call me in my district office. I look forward to hearing from you.

Thank you for your consideration.

With best wishes,

Wm Bianchi

William Bianchi
Member of Assembly

cc: Richard Kessel

000010

Room 734, Legislative Office Building, Albany, New York 12248 (518) 455-4901
228 Waverly Avenue, Patchogue, New York 11772 (516) 447-5393

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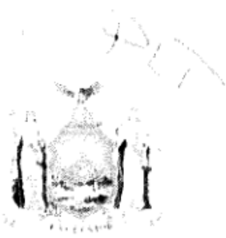

A-4299

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

July 9, 1992

Governor Mario Cuomo
Executive Chamber
State Capitol
Albany, NY 12224

Dear Governor Cuomo:

*It is with great pleasure that I write to you about the passage of my bill **A4299**, the so-called anti-SLAPP Suit (Strategic Lawsuits Against Public Participation) bill. I am writing to urge your support of this bill and request your approval for holding the official bill signing ceremony of this landmark legislation, the first of its kind in the country, in my district during the month of August or September.*

As you know, the anti-SLAPP Suit legislation recently passed both the Assembly and the Senate. This proposed law would protect innocent citizens from lawsuits brought against individuals who exercise their first amendment right to speak freely. These lawsuits, brought about by entities with superior financial resources against citizens trying to influence public policy, have had the effect of stifling important and legitimate public discussion on issues affecting the whole community, and intimidating the general public into inaction. As the prime sponsor of the Assembly bill, I fought (first legislation introduced in 1985) to curtail this abuse of the legal process to limit free speech by making it more difficult to bring such an action about. Plaintiffs would now be required to prove "substantial" cause for the action, as opposed to merely "reasonable" cause.

The signing into law of this important legislation reinforces basic First Amendment rights, and provides for the unfettered ability for this and future generations to participate in the public process.

*I believe it would be appropriate to have the bill signing in the Third Assembly district as it has the unfortunate claim of being the site of the first SLAPP Suit in the state of New York (A $12 million 1984 lawsuit brought about by a powerful developer against various civic associations and private citizens. Please see enclosed copy of lawsuit filed by **SRW Associates**). An official bill-signing in this district would thus lend a sense of triumph to all of those people who have fought to exercise their right to free speech against what once must have appeared to be insurmountable odds.*

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Once again, I would like to thank you in advance for your decision to support this landmark piece of legislation, and I await your decision regarding the site of the official bill-signing ceremony.

Sincerely,

William Bianchi
Member of Assembly

cc: Richard Kessel
Civic Leaders

000012

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WILLIAM BIANCHI
Assemblyman 3rd District

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

July 14, 1992

Governor Mario M. Cuomo
Executive Chamber
State Capitol
Albany, New York 12224

Dear Governor Cuomo:

I urge you to sign A.4229. This legislation is designed to protect the free exercise of speech, petition and association rights. In recent years, many citizens who have chosen to become involved in public issues have been subjected to, or threatened with, retaliatory lawsuits. Although such lawsuits are generally baseless, the high cost of litigation and the fear of multi-million dollar damages are often enough to force the average citizen to back down and stay quiet, for fear of losing one's house and life savings. People who have been exposed to the threat of a SLAPP suit are likely to withdraw from public matters altogether. When private citizens have become afraid to participate in the public process, our system of government has incurred incalculable damage.

On October 3, 1990 in Hauppauge, New York, the Assembly held a hearing on SLAPP suits. Thirty-one people testified, most of whom represented civic associations that have been involved with SLAPP suits in one way or another. The hearing documented the existence of the problem on Long Island. Other inquiries have revealed that the SLAPP suit phenomenon is a statewide, indeed a nationwide, problem.

The legislation which is before you represents a careful balance between free speech rights and the right to bring a lawsuit for redress of injuries. It is not the intent of this legislation to inhibit anybody from bringing a legitimate lawsuit where actionable conduct has occurred. However, the existing protections against frivolous lawsuits are inadequate to protect against SLAPPs, for two reasons. First, the existing cap of ten thousand dollars for recovery of attorneys' fees represents a mere cost of doing business for anybody who deliberately brings a SLAPP suit. For that reason, this legislation creates a new cause of action--the so-called "SLAPP-back" action, which should create a disincentive for anybody contemplating a SLAPP suit. Second, the threshold for finding a frivolous lawsuit--the lack of a "reasonable" basis--is very liberally construed. For lawsuits

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involving speech and petition rights, greater protection is warranted. For that reason, this legislation uses as a threshold the lack of a "substantial" basis. It is the intent of the legislation that the "substantial basis" test creates a higher standard than the "reasonable basis" test, but not so high as to prevent a lawsuit from being brought where there is significant and credible evidence that actionable conduct has occurred.

The scope of the legislation also reflects a balance. The legislation only applies to "actions involving public petition and participation," which are brought by a "public applicant or permittee." The definition of "public applicant or permittee" is intended to include anybody who has begun the process of seeking governmental approval for a proposed action, anybody who has obtained such approval, or anybody who is acting in the absence of a required approval. It is not intended that a formal application be the prerequisite for inclusion as a "public applicant or permittee"; frequently a great deal of public debate will occur prior to the submission of a formal application. The intent is generally to cover lawsuits stemming from proposed actions which have come to the attention of the public.

Finally, I must express my great admiration for the large number of bipartisan citizens' groups who were instrumental in the passage of this bill, particularly the Coalition Against Malicious Lawsuits. Many of these people have experienced SLAPP suits and, rather than quieting down, have banded together to insist on legislation to protect the rights of their fellow citizens. They represent American democracy at its finest.

Sincerely,

William Bianchi
Member of Assembly

WB:mr

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PLT

A.4299

B-203 (12/75) BUDGET REPORT ON BILLS Session Year 1992

SENATE NO RECOMMENDATION **ASSEMBLY**

No. No. 4299

Law: Civil Rights

Title: AN ACT to amend the civil rights law and the civil practice law and rules, in relation to actions involving public petition and participation

The above bill has been referred to the Division of the Budget for comment. After careful review, we find that the bill has no appreciable effect on State finances or programs, and this office does not have the technical responsibility to make a recommendation on the bill.

We therefore make no recommendation.

Sandra Shapard

000015

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NYCOM New York State Conference of Mayors and Municipal Officials

Edward C. Farrell
Executive Director

119 Washington Avenue
Albany, New York 12210
(518) 463-1185
Fax # (518) 463-1190

Memorandum in Support

June 17, 1992

A. 4299, by M. of A. Bianchi, Nadler, Zimmer

S. 5441, by Senator Marchi

This bill would amend the Civil Rights Law and the Civil Procedure Law and Rules to provide that a plaintiff who has obtained governmental permission must prove actual malice in a lawsuit based on the defendant's opposition to the permit. The bill also establishes an expedited procedure for motions to dismiss such actions. It also establishes that a cause of action exists to provide relief for such defendants if the plaintiff brought the action without a substantial basis, or with the purpose of maliciously inhibiting the defendants exercise of First Amendment rights.

This legislation is intended to protect innocent citizens from what has become known as a SLAPP Suit (Strategic Lawsuit Against Public Participation). A SLAPP Suit is a lawsuit brought against an individual who participates in public affairs in order to threaten the citizen with personal damages and litigation costs so that the individual will no longer participate in the public process. SLAPP Suits are usually brought to deter participation in such matters as landfill location, the disposal of hazardous waste, and the development of land. The complaint in a SLAPP Suit is usually based on liable, slander or tortious interference with business. Town and village boards have recently become targets of SLAPP Suits by developers who wish to politically retaliate against the boards for unfavorable decisions or to intimidate government officials into acting favorably towards their projects.

In America, where political participation is a favored value, such intimidation poses a serious threat. Citizens who actively participate in the political process may be deterred from running for office by the threat of a lawsuit. Currently, Part 130 of the New York Trial Court Rules provides for sanctions against attorneys for initiating frivolous law suits. These rules are however vague, and may do little to dissuade an attorney from filing a SLAPP Suit.

For the foregoing reasons the Conference of Mayors supports the enactment of this bill into law.

BJS:mc

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NEW YORK STATE BUILDERS ASSOCIATION, INC.

Ely Reiss
PRESIDENT

Robert A. Wieboldt
EXECUTIVE VICE PRESIDENT

5441

1797

MEMORANDUM IN OPPOSITION

A.4299 BY Bianchi, Nadler, et.al., Passed Assembly
S 5441 By Marchi, Senate Rules

ACTIONS INVOLVING PUBLIC PETITION AND PARTICIPATION

The New York State Builders Association opposes the subject bill which would grant special protection against libel and slander actions to only one class of participants in public proceedings related to permits, zoning, licensing and similar situations. Our members, builders, developers and contractors, are "public applicants or permittees" under the terms of this bill.

We recognize and do not condone lawsuits brought by permit applicants for the sole purpose of stifling criticism by an ividual, a civic or an environmental group. But, the subject .1 would have a chilling effect upon a builder's legitimate right to bring an action for damages in cases of slander or libel in connection with the dozens of approvals necessary to conduct a building business. Shielding all opponents from legal consequences of defamatory utterances or written attacks, however damaging to builders reputations and ability to earn their livelihoods, is not the proper answer to SLAPP suits.

In today's climate the rule of the NIMBY has replaced the rule of law at many informal hearings held before local planning , zoning appeals boards and similar groups. Often the project proponent is an isolated individual surrounded by a hoard of opponents. A hearing can rapidly degenerate into a builder bashing session with few holds barred. Project opposition leaders turn out and stir up crowds with circulars and phone networking designed to paint the blackest picture of a project and its sponsor. When truth is left behind in the heat of project opposition, real and often lasting damage can be done to the permit applicant.

Both the proponent and opponents of an application are simultaneously petitioners before their government. The proponent petitioner should be offered the same protection for any remarks directed against him by project opponents.

JUN 09 1992

Albany, NY 12207 (518) 465-2492

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(1797) S. 5441

Financial sanctions against any party or attorney engaging in frivolous conduct as well as reimbursement for costs and attorney's fees are available under the Rules of the Chief Administrator of Courts, 22 NYCRR 130-1, which are designed to prevent frivolous suits. The subject bill would allow recovery of a defendant's costs and attorney's fees, if an action was found to have been commenced without a "substantial basis in fact and law". The existing sanctions for frivolous conduct require that an action be deemed "completely without merit". The less burdensome rules of the subject bill protects only those who are not public applicants.

Damages may only be recovered by a permit applicant when it shall have been established by "clear and convincing" rather than a "preponderance" of the evidence that any communication giving rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false. This higher burden of proof would fall on permit applicants, in effect, making them public figures.

In the absence of any evidence that the existing Rules are not adequate, the subject bill would grant exceptional immunity to abusers of the reputation of permit applicants. The relative rarity of permit applicant lawsuits is demonstrated by the exaggerated media coverage given them. Do a few scattered instances of litigation really chill public participation? Or, do the suits give pause to those who would defame with impunity?

An alternative to the extreme approach of this bill would be to permit an expedited proceeding to determine whether an action constitutes a SLAPPsuit. If this were linked with an increase in the sanction applicable for such a fivolous suit, it would deter such lawsuits without requring any change in the current law of defamation.

The subject bill would affect many other interests besides builders. The same zoning and planning boards at which builders appear often have home owner and land owner applicants who can be subjected to vicious attack by neighbors. Additionally, licenses and permits are required from countless businesses by numerous state and local agencies. The number of individuals who would be deprived of protection in connection with their reputations arising from permit and licensing applications is legion.

We urge amendment as suggested or defeat.

Respectfully submitted

Robert A. Wieboldt
Executive Vice President

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S. 5441

1797

New York State Conference of Mayors and Municipal Officials

dward C. Farrell
xecutive Director

119 Washington Avenue
Albany, New York 12210
(518) 463-1185
Fax # (518) 463-1190

Memorandum in Support

June 17, 1992

A. 4299, by M. of A. Bianchi, Nadler, Zimmer

S. 5441, by Senator Marchi

This bill would amend the Civil Rights Law and the Civil Procedure Law and Rules to provide that a plaintiff who has obtained governmental permission must prove actual malice in a lawsuit based on the defendant's opposition to the permit. The bill also establishes an expedited procedure for motions to ismiss such actions. It also establishes that a cause of action xists to provide relief for such defendants if the plaintiff brought the action without a substantial basis, or with the purpose of maliciously inhibiting the defendants exercise of First Amendment rights.

This legislation is intended to protect innocent citizens from what has become known as a SLAPP Suit (Strategic Lawsuit Against Public Participation). A SLAPP Suit is a lawsuit brought against an individual who participates in public affairs in order to threaten the citizen with personal damages and litigation costs so that the individual will no longer participate in the public process. SLAPP Suits are usually brought to deter participation in such matters as landfill location, the disposal of hazardous waste, and the development of land. The complaint in a SLAPP Suit is usually based on liable, slander or tortious interference with business. Town and village boards have recently become targets of SLAPP Suits by developers who wish to politically retaliate against the boards for unfavorable decisions or to intimidate government officials into acting favorably towards their projects.

In America, where political participation is a favored value, such intimidation poses a serious threat. Citizens who actively participate in the political process may be deterred om running for office by the threat of a lawsuit. Currently, rt 130 of the New York Trial Court Rules provides for sanctions against attorneys for initiating frivolous law suits. These rules are however vague, and may do little to dissuade an attorney from filing a [illegible] Suit.

For the foregoin[illegible] the Conference of Mayors supports the enactment of this bill into law.

JUN 18 1992

BJS:mc

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C. 767

Memorandum

1797

S.5441 A.4299

To: MEMBERS OF THE SENATE

From: RICHARD M. KESSEL, EXECUTIVE DIRECTOR
STATE CONSUMER PROTECTION BOARD

Date: JUNE 30, 1992

The New York State Consumer Protection Board **SUPPORTS**:

S.5441	Marchi	Limits on Strategic Lawsuits Against Public Participation ("SLAPP Suits")

Comments:

The Consumer Protection Board (CPB) supports S.5441, which would limit the ability of companies to file malicious lawsuits popularly known as "SLAPP Suits" (Strategic Lawsuits Against Public Participation.)

SLAPP suits are lawsuits brought by companies, such as developers, in retaliation against citizens who attempt to influence permit and other governmental actions affecting their businesses. Many SLAPP suits allege that citizen statements about the company constituted libel or slander. According to a 1989 survey by two University of Denver professors, the largest number of the hundreds of SLAPP suits filed nationally involved development and zoning issues (25%). However, consumers reporting problems with products and services, tenants reporting problems to city health authorities, and citizens opposing incinerators, bars and garbage dumps have all been subject to such suits.

Surveys indicate that a majority of SLAAP suits are eventually dismissed. However, unfortunately, they succeed in their real purpose: to intimidate citizens in the exercise of their First Amendment rights. Even where a SLAPP suit lacks merit, the citizens may have to expend thousands of dollars and hours defending themselves in court. Just as importantly, SLAAP lawsuits impede the effective functioning of government, as they deter citizens from providing evidence of wrongdoing to government agencies concerning matters under their jurisdiction.

These concerns are illustrated by two recent SLAAP suits in our state. Earlier this year, a State Supreme Court Justice dismissed libel charges in a $6.6 million SLAAP suit filed in 1987 by a developer alleging libel against Betty Blake, the President of the Wantagh Woods Neighborhood Association in Long Island. Blake objected to the demolition of a house across the

JUL 01 1992

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street from her and the destruction of large stately trees on the property. Several other citizens who were previously named in the lawsuit settled with the company and ended their opposition to the project. However, Blake reports that she had to spend most of her free time defending against the suit.

Further, a lawsuit was brought by a Manhattan nursing home against the Friends and Relatives of the Institutionalized Aged, Inc. (FRIA) as a result of the organization's investigation of the home. FRIA's actions helped spur a New York State Department of Health investigation of the facility which uncovered serious lapses in patient care.

This bill is intended to penalize frivolous SLAPP suits--not prevent companies from raising legitimate legal claims against citizens. Specifically, the bill would: (1) require that the plaintiff establish by clear and convincing evidence that the citizens' statements were made with knowledge or with reckless disregard of their falsity in lawsuits where the truth or falsity of the defendant's statements was "material" to the cause of action (i.e. libel and defamation suits); (2) give citizens who were defendants in any SLAPP suit found to lack merit the right to recover attorney's fees and costs, with punitive damages available upon a showing that the suit 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;" and (3) require courts to hear motions to dismiss or for summary judgment in a SLAAP suit on an expedited basis so that citizens are not dragged through protracted court proceedings.

This bill ensures that citizens may raise legitimate concerns to governmental authorities without the prospect of retaliation. Nothing in this bill prevents businesses from pursuing any other avenues presently available to them, including disputing the citizen contentions in permit and other governmental hearings.

For these reasons, the Consumer Protection Board urges swift enactment of S.5441.

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STATE OF NEW YORK
DEPARTMENT OF LAW
ALBANY 12224

MEMORANDUM FOR THE GOVERNOR

RE: Assembly 4299

This bill amends the Civil Rights Law and the Civil Practice Law and Rules with regard to legal actions "involving public petition and participation". Its purpose, according to the legislative findings, is to prevent lawsuits and the threat of lawsuits from being "used as a means of harassing, intimidating or punishing" those "who have involved themselves in public affairs."

The bill, which would take effect on January 1, 1993, creates a new type of legal action called an "action involving public petition and participation". It then sets forth specific rules governing such an action, which rules are different from those governing other legal actions.

This new type of action is one brought by a "public applicant or permittee," which is defined as "any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission." An action brought by such a plaintiff[1] involves "public petition and participation" when it is "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission."

The bill sets forth the special rules governing these types of actions. First, section 2, adding a new section 70-a to the Civil Rights Law, authorizes sanctions against a plaintiff who brings such an action in certain circumstances. If the action is without a "substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law", the defendant who is being sued may recover costs and attorneys' fees. In addition, if a court finds that the suit was brought for the purpose of "harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights", other compensatory damages beyond costs and attorneys' fees may be awarded. If any of these factors is found to be the sole purpose of the suit, punitive damages may also be awarded.

---

[1] Plaintiff is used here, as in the CPLR, to mean a person asserting a claim, cross claim or counterclaim.

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Secondly, section 3 of the bill, which adds a new section 76-a to the Civil Rights Law, provides that a plaintiff, to recover damages in such an action, must prove by clear and convincing evidence that any communication giving 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."

Lastly, sections 4 and 5 of the bill, which amend sections 3211 and 3212 of the Civil Practice Law and Rules, provide for special rules for motion practice in these types of cases. A motion to dismiss or a motion for summary judgment brought by a defendant seeking the protection given by the special rules governing these actions must be granted unless the plaintiff can demonstrate that the claim has "a substantial basis in law" (in the case of a motion to dismiss) or "a substantial basis in fact and law" (in the case of a motion for summary judgment), "or is supported by a substantial argument for an extension, modification or reversal of existing law." The courts are directed to grant a preference in the hearing of such a motion.

The type of lawsuit this bill addresses has become known as a SLAPP suit, an acronym for "strategic lawsuit against public participation." In recent years SLAPP suits have been brought with increasing frequency with the clear purpose of discouraging potential opponents from involving themselves in a public debate in which the person initiating the SLAPP suit has a stake. For example, an applicant for a government permit may file baseless claims of libel or harassment against a citizen who protests the granting of the permit, or a plaintiff may file such claims against someone who, in the exercise of his or her first amendment rights, speaks out against the plaintiff.

Although such a suit is rarely successful on the merits, it succeeds in its real purpose of stifling public debate on the issue in question. The defendant in such an action is forced to hire an attorney and incur potentially great costs in the defense of the action. Frequently, the victims of these SLAPP suits suffer physical and psychological effects from the anxiety that comes from being named as a defendant in a case sometimes claiming millions of dollars in money damages.

Over the past several years, I and my staff have been greatly troubled by the growing use of SLAPP suits. We have been particularly concerned about the use of this insidious tactic in stifling citizen initiative in cases where there is a significant disparity in the respective resources of the parties involved, which is most often the case, and in areas such as environmental protection, in which public involvement is a critical part of the process.

Recently, a decision by the Westchester County Supreme Court made a very strong statement against SLAPP suits. In this case, a real estate developer used the courts to contest the tax exempt status of the Nature Conservancy. The Court concluded that the purpose of the suit was clearly to harass this environmental organization for its lawful challenge to a

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subdivision. My office submitted an amicus brief in support of the Court's order of sanctions against the plaintiff.

The decision in this case, Gordon v. Marrone, Index #18554/90, Judge Colabella, dated April 13, 1992, is particularly important on the issue of sanctions. The Court deplored the fact that under current court rules it could only penalize the SLAPP plaintiff up to $10,000, clearly less than the actual costs to the SLAPP defendant. This case underscores the need for legislation in this area.

However, an appropriate legislative solution to the problems raised by SLAPP suits is not easy. Any bill must be carefully drafted so as to discourage SLAPP suits while, at the same time, not acting as an obstacle to the commencement of legitimate lawsuits. Distinguishing between the two can be difficult.

This bill attempts to prevent the risk of its being applied too broadly by limiting its application to actions "materially related" to a governmental application submitted by the plaintiff. This should effectively prevent its being used to limit legitimate legal actions, but it also means that certain SLAPP suits will not be covered. For example, a SLAPP suit brought by a landlord against a tenants' organization protesting housing conditions will not be covered by the bill if it does not relate to a governmental application filed by the landlord. Given the risk of being overbroad, this bill represents a good first step. Whether plaintiffs will be able to avoid its provisions by suing over matters not related to a governmental application remains to be seen.

The value of the bill will depend, to a large extent, on its interpretation by the courts. It contains many new definitions, terms and standards which the courts will have to construe. For example, the courts can limit plaintiffs' ability to avoid the provisions of the statute if they hold that any suit is "materially related" to an application if it is meant to be retaliatory or would otherwise not have been brought were it not for the act of public participation. Especially important is how the courts will treat the new motion practice.

Whether or not a motion falls within the special provisions of the bill, which are designed to quickly terminate SLAPP suits, depends upon whether the action to which it is addressed falls within the bill's provisions. If a court were to hold an extensive hearing to determine whether an action is one "involving public petition and participation" before deciding a motion to dismiss or a motion for summary judgment, the bill's purposes will have been defeated. Hopefully, courts will construe the bill's complex language in a manner consistent with its objectives.

In addition, the bill does not cover actions seeking only injunctive relief. Whether this proves to be a problem remains to be seen.

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While this bill is clearly not a panacea to the problems created by SLAPP suits, it does represent the Legislature's first attempt to deal with this type of misuse of the courts. Given the difficulties of drafting a workable bill, this bill should be permitted to be tested. With what I believe should be the appropriate construction of the bill by the courts, it could be effective. To the extent that problems continue, additional corrective legislation can be enacted in the future.

For the reasons stated above, I urge approval of the bill.

Dated: July 27, 1992

Respectfully submitted,

ROBERT ABRAMS
ATTORNEY GENERAL

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A. 4299

New York State Conference of Mayors and Municipal Officials

119 Washington Avenue, Albany, New York 12210 (518) 463-1185
Toll free number for NYCOM members 1-800-446-9266
Fax # (518) 463-1190

Executive Committee

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Mayor, Stewart Manor

Shawn Hogan
Mayor, Hornell

Thomas M. Whalen III
Mayor, Albany

James P. Caruso
Mayor, Altamont

Kevin D. Earl
Mayor, LeRoy

Peter Iasillo
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Richard G. Lockwood
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Francis X. O'Keefe
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Peter D. Quinzi
Mayor, East Rochester

Joel E. Rosenthal
Mayor, Spring Valley

Dorothy Storm
Mayor, Freeport

Thomas G. Young
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Richard Falanka
NYS Association of City and Village Clerks

William H. Kelly
Mayor, Asharoken

Juanita M. Crabb
Mayor, Binghamton

Louis C. Mancuso
Mayor, Fredonia

Robert J. Peacock
Mayor, Lake Placid

Robert G. Gardner
Mayor, Wellsville

Executive Director
Edward C. Farrell

July 27, 1992

Hon. Elizabeth D. Moore
Counsel to the Governor
Executive Chamber
State Capitol - Room 225
Albany, New York 12224

RE: A. 4299

Dear Ms. Moore:

The Conference of Mayors has reviewed this legislation and recommends that it be approved.

This bill would amend the Civil Rights Law and the Civil Procedure Law and Rules to provide that a plaintiff who has obtained governmental permission must prove actual malice in a lawsuit based on the defendant's opposition to the permit. The bill also establishes an expedited procedure for motions to dismiss such actions. It also establishes that a cause of action exists to provide relief for such defendants if the plaintiff brought the action without a substantial basis, or with the purpose of maliciously inhibiting the defendants exercise of First Amendment rights.

This legislation is intended to protect innocent citizens from what has become known as a SLAPP Suit (Strategic Lawsuit Against Public Participation). Town and village boards have recently become targets of SLAPP Suits by developers who wish to politically retaliate against the boards for unfavorable decisions or to intimidate government officials into acting favorably towards their projects. Citizens who actively participate in the political process may be deterred from running for office by the threat of a lawsuit. Currently, Part 130 of the New York Trial Court Rules provides for sanctions against attorneys for initiating frivolous law suits. These rules are however vague, and may do little to dissuade an attorney from filing a SLAPP Suit.

Sincerely,

Edward C. Farrell
Executive Director

ECF/bs/mc*

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PLT

C. 767

A. 4299

Memorandum

To: Elizabeth D. Moore
Counsel to the Governor

From: Lynn Fitzgerald, Acting Counsel
State Consumer Protection Board

Date: July 24, 1992

Bill No.: A.4299 (Bianchi)

Recommendation: Approval

The Consumer Protection Board (CPB) strongly supports A.4299, which would limit the ability of companies to file malicious lawsuits popularly known as "SLAPP Suits" (Strategic Lawsuits Against Public Participation.)

SLAPP suits are lawsuits brought by companies, such as developers, in retaliation against citizens who attempt to influence permit and other governmental actions affecting their businesses. Many SLAPP suits allege that citizen statements about the company constituted libel or slander. According to a 1989 survey by two University of Denver professors, the largest number of the hundreds of SLAPP suits filed nationally involved development and zoning issues (25%). However, consumers reporting problems with products and services, tenants reporting problems to city health authorities, and citizens opposing incinerators, bars and garbage dumps have all been subject to such suits.

Surveys indicate that a majority of SLAPP suits are eventually dismissed. However, unfortunately, they succeed in their real purpose: to intimidate citizens in the legitimate exercise of their First Amendment rights. Even where a SLAPP suit lacks merit, the citizens may have to expend thousands of dollars and hours defending themselves in court. Just as importantly, SLAPP lawsuits impede the effective functioning of government, as they deter citizens from providing evidence of wrongdoing to government agencies concerning matters under their jurisdiction.

These concerns are illustrated by two recent SLAPP suits in our state. Earlier this year, a State Supreme Court Justice dismissed libel charges in a $6.6 million SLAPP suit filed in 1987 by a developer alleging libel against Betty Blake, the President of the Wantagh Woods Neighborhood Association in Long

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Island. Blake objected to the demolition of a house across the street from her and the destruction of large stately trees on the property. Several other citizens who were previously named in the lawsuit settled with the company and ended their opposition to the project. However, Blake reports that she had to spend most of her free time defending against the suit.

Further, a lawsuit was brought by a Manhattan nursing home against the Friends and Relatives of the Institutionalized Aged, Inc. (FRIA) as a result of the organization's investigation of the home. FRIA's actions helped spur a New York State Department of Health investigation of the facility which uncovered serious lapses in patient care.

This bill is intended to penalize frivolous SLAPP suits--not prevent companies from raising legitimate legal claims against citizens. Specifically, the bill would: (1) require that the plaintiff establish by clear and convincing evidence that the citizens' statements were made with knowledge or with reckless disregard of their falsity in lawsuits where the truth or falsity of the defendant's statements was "material" to the cause of action (i.e. libel and defamation suits); (2) give citizens who were defendants in any SLAPP suit found to lack merit the right to recover attorney's fees and costs, with punitive damages available upon a showing that the suit 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;" and (3) require courts to hear motions to dismiss or for summary judgment in a SLAPP suit on an expedited basis so that citizens are not dragged through protracted court proceedings.

This bill ensures that citizens may raise legitimate concerns to governmental authorities without the prospect of retaliation. Nothing in this bill prevents businesses from pursuing any other avenues presently available to them, including disputing the citizen contentions in permit and other governmental hearings.

For these reasons, the Consumer Protection Board urges approval of A.4299.

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C. 767

STATE OF NEW YORK
DEPARTMENT OF TRANSPORTATION
ALBANY, N.Y. 12232

July 31, 1992

Elizabeth D. Moore
Counsel to the Governor
State Capitol
Albany, New York

Dear Ms. Moore:

Re: ASSEMBLY 12138-A
TEN DAY BILL
RECOMMENDATION: APPROVAL

Thank you for providing us with the opportunity to review and comment on the above-listed Ten Day Bill which would amend the Canal Law, the Public Authorities Law and the State Finance Law, in relation to expanding the powers and duties of the New York State Thruway Authority, transferring jurisdiction over the New York State Canal System (Canal System) to the Thruway Authority, creating the New York State Canal Recreationway Commission, and creating a New York State Canal System Development Fund, and to repeal certain provisions of the Canal Law and the Public Authorities Law relating thereto.

Since it was established in 1967, this Department has been responsible for the operation and maintenance of the Canal System and has worked with great effort to operate, enhance and preserve the Canal System in times of ever more scarce State resources. During the past 50 years, the use of the Canal System has gradually changed from one serving as a major commercial artery, to one serving recreation and tourism-related activities. The recently approved Constitutional Amendment, which authorized leasing of canal property and charging tolls for its use, heralds a new era for the Canal System and the subject bill will provide the stimulus for the creation of a world class recreationway. This will result in the enhancement of the economy and the betterment of communities along the Canal System and the enhancement of the historic, environmental, scenic and recreational aspects of the 524 mile Canal System. The time for change in mission for this Waterway has arrived. The New York State Thruway Authority has a strong record of accomplishment and the location of its existing facilities makes it well-suited to undertake this responsibility. The bill provides for this new mission as well as the financing which is

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necessary to preserve and enhance the natural beauty and environmental integrity of the Canal System.

Accordingly, it is our strong recommendation that the Governor approve Assembly 12138-A.

Sincerely yours,

ROBERT A. RYBAK
Associate Attorney
Office of Legal Affairs

A12138A

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C 467 A

New York State Housing Finance Agency

3 Park Avenue, New York, N.Y. 10016/(212) 686-9700

July 21, 1992

Hon. Elizabeth D. Moore
Executive Chamber
State Capitol
Albany, New York 12224

Re: Assembly Bill 4299

Dear ~~Ms.~~ Moore:

We have no recommendation with respect to this bill.

Sincerely,

Mozelle

Mozelle W. Thompson
Counsel

cc: Legislation File
Bobby Berlin

207211LX

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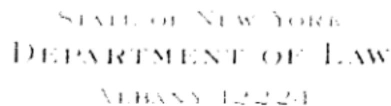

STATE OF NEW YORK
DEPARTMENT OF LAW
ALBANY 12224

MEMORANDUM FOR THE GOVERNOR

RE: **Assembly 4299**

This bill amends the Civil Rights Law and the Civil Practice Law and Rules with regard to legal actions "involving public petition and participation". Its purpose, according to the legislative findings, is to prevent lawsuits and the threat of lawsuits from being "used as a means of harassing, intimidating or punishing" those "who have involved themselves in public affairs."

The bill, which would take effect on January 1, 1993, creates a new type of legal action called an "action involving public petition and participation". It then sets forth specific rules governing such an action, which rules are different from those governing other legal actions.

This new type of action is one brought by a "public applicant or permittee," which is defined as "any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission." An action brought by such a plaintiff[1] involves "public petition and participation" when it is "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission."

The bill sets forth the special rules governing these types of actions. First, section 2, adding a new section 70-a to the Civil Rights Law, authorizes sanctions against a plaintiff who brings such an action in certain circumstances. If the action is without a "substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law", the defendant who is being sued may recover costs and attorneys' fees. In addition, if a court finds that the suit was brought for the purpose of "harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights", other compensatory damages beyond costs and attorneys' fees may be awarded. If any of these factors is found to be the sole purpose of the suit, punitive damages may also be awarded.

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[1]Plaintiff is used here, as in the CPLR, to mean a person asserting a claim, cross claim or counterclaim.

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Secondly, section 3 of the bill, which adds a new section 76-a to the Civil Rights Law, provides that a plaintiff, to recover damages in such an action, must prove by clear and convincing evidence that any communication giving 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."

Lastly, sections 4 and 5 of the bill, which amend sections 3211 and 3212 of the Civil Practice Law and Rules, provide for special rules for motion practice in these types of cases. A motion to dismiss or a motion for summary judgment brought by a defendant seeking the protection given by the special rules governing these actions must be granted unless the plaintiff can demonstrate that the claim has "a substantial basis in law" (in the case of a motion to dismiss) or "a substantial basis in fact and law" (in the case of a motion for summary judgment), "or is supported by a substantial argument for an extension, modification or reversal of existing law." The courts are directed to grant a preference in the hearing of such a motion.

The type of lawsuit this bill addresses has become known as a SLAPP suit, an acronym for "strategic lawsuit against public participation." In recent years SLAPP suits have been brought with increasing frequency with the clear purpose of discouraging potential opponents from involving themselves in a public debate in which the person initiating the SLAPP suit has a stake. For example, an applicant for a government permit may file baseless claims of libel or harassment against a citizen who protests the granting of the permit, or a plaintiff may file such claims against someone who, in the exercise of his or her first amendment rights, speaks out against the plaintiff.

Although such a suit is rarely successful on the merits, it succeeds in its real purpose of stifling public debate on the issue in question. The defendant in such an action is forced to hire an attorney and incur potentially great costs in the defense of the action. Frequently, the victims of these SLAPP suits suffer physical and psychological effects from the anxiety that comes from being named as a defendant in a case sometimes claiming millions of dollars in money damages.

Over the past several years, I and my staff have been greatly troubled by the growing use of SLAPP suits. We have been particularly concerned about the use of this insidious tactic in stifling citizen initiative in cases where there is a significant disparity in the respective resources of the parties involved, which is most often the case, and in areas such as environmental protection, in which public involvement is a critical part of the process.

Recently, a decision by the Westchester County Supreme Court made a very strong statement against SLAPP suits. In this case, a real estate developer used the courts to contest the tax exempt status of the Nature Conservancy. The Court concluded that the purpose of the suit was clearly to harass this environmental organization for its lawful challenge to a

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subdivision. My office submitted an amicus brief in support of the Court's order of sanctions against the plaintiff.

The decision in this case, Gordon v. Marrone, Index #18554/90, Judge Colabella, dated April 13, 1992, is particularly important on the issue of sanctions. The Court deplored the fact that under current court rules it could only penalize the SLAPP plaintiff up to $10,000, clearly less than the actual costs to the SLAPP defendant. This case underscores the need for legislation in this area.

However, an appropriate legislative solution to the problems raised by SLAPP suits is not easy. Any bill must be carefully drafted so as to discourage SLAPP suits while, at the same time, not acting as an obstacle to the commencement of legitimate lawsuits. Distinguishing between the two can be difficult.

This bill attempts to prevent the risk of its being applied too broadly by limiting its application to actions "materially related" to a governmental application submitted by the plaintiff. This should effectively prevent its being used to limit legitimate legal actions, but it also means that certain SLAPP suits will not be covered. For example, a SLAPP suit brought by a landlord against a tenants' organization protesting housing conditions will not be covered by the bill if it does not relate to a governmental application filed by the landlord. Given the risk of being overbroad, this bill represents a good first step. Whether plaintiffs will be able to avoid its provisions by suing over matters not related to a governmental application remains to be seen.

The value of the bill will depend, to a large extent, on its interpretation by the courts. It contains many new definitions, terms and standards which the courts will have to construe. For example, the courts can limit plaintiffs' ability to avoid the provisions of the statute if they hold that any suit is "materially related" to an application if it is meant to be retaliatory or would otherwise not have been brought were it not for the act of public participation. Especially important is how the courts will treat the new motion practice.

Whether or not a motion falls within the special provisions of the bill, which are designed to quickly terminate SLAPP suits, depends upon whether the action to which it is addressed falls within the bill's provisions. If a court were to hold an extensive hearing to determine whether an action is one "involving public petition and participation" before deciding a motion to dismiss or a motion for summary judgment, the bill's purposes will have been defeated. Hopefully, courts will construe the bill's complex language in a manner consistent with its objectives.

In addition, the bill does not cover actions seeking only injunctive relief. Whether this proves to be a problem remains to be seen.

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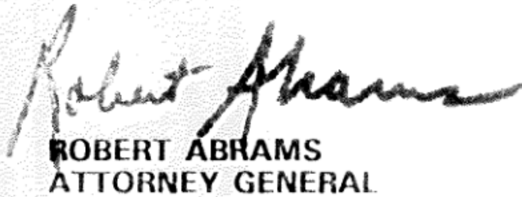
While this bill is clearly not a panacea to the problems created by SLAPP suits, it does represent the Legislature's first attempt to deal with this type of misuse of the courts. Given the difficulties of drafting a workable bill, this bill should be permitted to be tested. With what I believe should be the appropriate construction of the bill by the courts, it could be effective. To the extent that problems continue, additional corrective legislation can be enacted in the future.

For the reasons stated above, I urge approval of the bill.

Dated: July 27, 1992

Respectfully submitted,



ROBERT ABRAMS
ATTORNEY GENERAL

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PLT

C 767

7/23

MEMORANDUM FROM
LANGDON MARSH, *Executive Deputy Commissioner*

New York State
Department of Environmental Conservation

July 23, 1992

TO: Elizabeth D. Moore, Esq.
Counsel to the Governor

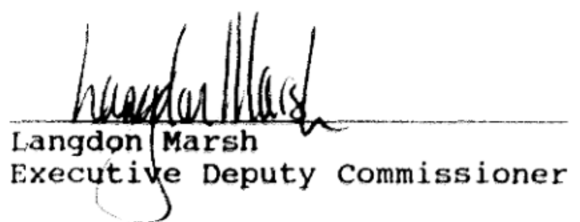
RE: Assembly 4299

At your request, we submit the following comments on A.4299 which has passed both houses and has been delivered to the Governor.

Purpose: This bill protects citizens who participate in public affairs, including regulatory proceedings, against lawsuits brought by regulated parties in retaliation against the citizens' participation.

Discussion: This legislation provides that the burden is on the applicant or permittee to demonstrate that a lawsuit, which is instituted against persons as a result of their participation in a governmental proceeding, has a "substantial" basis in fact and law in order to avoid dismissal of an action against such persons. On the other hand, in order to establish a right to attorney's fees, the defendants in such a suit must bear the burden of demonstrating that the lawsuit is without substantial basis. Similar shifts in the burden of proof are set forth for the recovery of compensatory damages and punitive damages. This bill is a reasonable approach to address the increasingly frequent practice by the regulated community to bringing "SLAPP" suits in an effort to inhibit public input into the regulatory processes.

Recommendation: Approval.



Langdon Marsh
Executive Deputy Commissioner

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PLT

A.4299

STATE OF NEW YORK
DEPARTMENT OF STATE
ALBANY, N.Y. 12231-0001

MEMORANDUM

TO: Hon. Elizabeth D. Moore
Counsel to the Governor

FROM: James N. Baldwin
Executive Deputy Secretary of State

RE:

A.1604-B	A.6909-A
A.1667-A	A.6970-B
A.2098	A.7595-C
A.2696-A	A.7996-B
A.3033-A	A.8066-A
A.3834-B	A.8774-A
A.4299	A.9204-A
A.6212-A	A.9585-A
A.6747	A.9665-A
A.6840	A.9733-B

DATE: July 8, 1992

RECOMMENDATION: No Recommendations

The Department of State offers no recommendations on the above numbered proposals.

JNB:dec

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PLT

A. 4299

LAWRENCE KUNIN
GENERAL COUNSEL

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF HUMAN RIGHTS
55 WEST 125 STREET
NEW YORK, NEW YORK 10027

July 6, 1992

Hon. Elizabeth D. Moore
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: An Act to amend the Civil Rights Law and the Civil Practice Law and Rules in relation to actions involving public petition and participation
A. 4299

Dear Ms. Moore:

Thank you for your request to comment on the above-referenced legislation. The bill is not Division sponsored and we take no position with respect to it.

Very truly yours,

Lawrence Kunin
General Counel

LK/CJD

000038

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STATE OF NEW YORK
UNIFIED COURT SYSTEM
OFFICE OF COURT ADMINISTRATION
270 BROADWAY
NEW YORK, NEW YORK

MATTHEW T. CROSSON

MICHAEL COLODNER

A. 4299

July 20, 1992

Hon. Elizabeth D. Moore
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Re: Assembly 4299

Dear Ms. Moore:

Thank you for requesting the comments of this Office on the above-referenced measure, which would amend the Civil Rights Law and CPLR in relation to lawsuits brought against persons who contest applications for governmental permits or licenses.

In sum, this measure would:

• require that, before damages may be recovered in an action "involving public petition and participation" (defined generally as one brought by a person who has sought some governmental permission or entitlement against a defendant who, in some material way, commented upon, ruled upon or challenged such person's efforts), plaintiff must establish actual malice by clear and convincing evidence.

• set certain standards for obtaining costs and attorney's fees and compensatory and punitive damages in actions, etc., brought against persons who commence actions involving public petition and participation.

• amend the CPLR to revise the standards for obtaining dismissal or summary judgment in actions involving public petition and participation. Under the revision, motions for such relief must be granted unless the parties contesting them "[demonstrate] that the action, claim, cross claim or counterclaim has a substantial basis in fact or is supported by a substantial argument for an extension, modification or reversal of existing law". Also, this measure would create a court calendar preference for such motions.

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This Office has no objection to the policy at the heart of this measure, nor for the most part, to its procedural provisions. Our sole concern goes to so much of this measure as treats dismissal and summary judgment motions in public petition and participation actions. First, we do not understand how the standard for determination fixed by this measure can be applied to summary judgment motions. Such motions, by their nature, are procedural vehicles for enabling courts to dispose of actions wherein the disputes go to legal, not factual questions. Of what significance can it be to such a motion, then, that the claim to which it is directed has "a substantial basis in fact"? Or, for that matter, that the claim "is supported by a substantial argument for an extension, modification or reversal of existing law".

Second, we note that motions for summary judgment may be brought either by a claimant or one resisting his or her claim. This measure, however, is drawn to anticipate only motions brought by the latter.*

We also are discomfited by the court calendar preference this measure would accord dismissal and summary judgment motions in public petition and participation actions. It has long been our position that, both legally and practically, the availability of calendar preferences should be left to the courts to resolve. To do otherwise is to invite the disorder and confusion that can ensue where multiple statutes accord preferences to a variety of cases - with no guidance for courts to determine which takes precedence when they compete.

Very truly yours,

Michael Colodner

/ybs

---

*In other words, there is no provision for the situation whereby a claimant in an action involving public petition and participation brings a motion for summary judgment on his or her own claim. As the measure is written, all the claimant need do is establish the nature of the claim, which is then to be granted unless the person resisting the motion "demonstrates that the action ... has a substantial basis in fact and law ..." - which makes no sense since such person seeks to defeat the claim.

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C.767

NEW YORK STATE THRUWAY AUTHORITY

PETER TUFO
CHAIRMAN

July 31, 1992

Honorable Mario M. Cuomo
Governor
State of New York
Executive Chamber
State Capitol
Albany, NY 12224

Dear Governor Cuomo:

I am writing to express my strong support and recommend that you sign into law A.12138-A, the "Thruway 2000" bill. The bill will promote economic development in New York State by authorizing the Thruway Authority to operate and develop the New York Canal system and to undertake and participate in three additional transportation related projects across the state.

Staff from the Executive Chamber and the Thruway Authority have been working closely since January when you and I first discussed this concept. I am pleased to say that throughout the negotiations with the Legislature, the essential elements of the concept were preserved in this bill. The Thruway is grateful for your vision and strong leadership in the evolution of Thruway 2000. While Governor Dewey had an original vision for the Thruway, your signature will set us on a new course. At the same time we will not diminish our commitment to our principal and abiding mission -- operating and maintaining the Thruway system at a high level of safety and service.

The Authority is poised and ready to move on each new element in the legislation. If the bill is enacted, the Waterways Division of the Department of Transportation will move to the Authority. We have also prepared the documents to secure the necessary financing for the 1992 and 1993 expenditures required for this program. In addition, we are recruiting a few key staff people that would bring to the agency economic development as well

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as transportation and land use planning expertise to augment an already diverse and capable staff. The recruitment of women and minorities will receive emphasis.

The bill provides for the Canal Recreationway Commission to play a strong advisory role in many matters relating to canal planning, operation, maintenance, and development. We look forward to the appointment of and to working with the Commission.

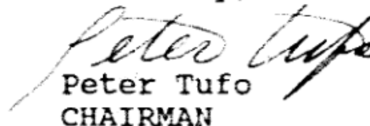
Our first duty will be to preserve the pristine beauty, ecological integrity, and marvelous history of this unique part of New York's heritage. Any development will reflect those values.

The Authority's financial plan to implement the initiative represents a good balance of pay-as-you-go for operating and capital expenses and debt financing for a significant portion of our reconstruction and economic development efforts in the future. We also believe that the plan represents appropriate utilization of our financial resources without straining our financial capacity.

Lastly, the transition of canal operations to the Authority as soon as possible will result in addressing the "up to $20 million" reimbursement aspect of the bill in two separate parts. Most of the $20 million will represent our assuming this expenditure soon and thus relieving the 1992/1993 canal appropriation. The complementary portion would represent a smaller amount as a cash reimbursement on March 31, 1993.

In closing, Jane Starosciak, the staff and I are very excited about this new Thruway role. We strongly urge you to sign the bill into law and put in place a new direction for the New York State Thruway Authority.

Sincerely,



Peter Tufo
CHAIRMAN

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C-767   A. 4299   S. 5441

NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC.

184 Washington Avenue • Albany, NY 12210 • 518-436-0876 • FAX 518-432-6178

OFFICES IN: ALBANY, BINGHAMTON, BUFFALO, CORTLAND, LONG ISLAND, NEW PALTZ, NEW YORK CITY, OSWEGO, PURCHASE & SYRACUSE

July 31, 1992

Governor Mario Cuomo
Capitol Building
Albany, N.Y. 12224

RE: RECOMMENDATION FOR APPROVAL OF S.5441/A.4299

Dear Governor Cuomo:

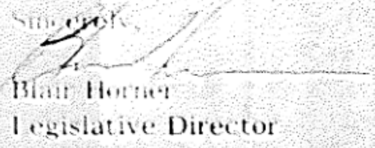
I write to urge your approval of S.5441/A.4299 which will give the public protection from businesses or developers who file lawsuits designed to stifle citizen activism. All too often, businesses or developers abuse the legal system by suing a citizen or community group solely for the purpose of harassing or intimidating them because the citizen(s) may have criticized or opposed a housing development, zoning change, garbage incinerator, or other project. These lawsuits are known as "SLAPP" suits, or Strategic Lawsuits Against Public Participation.

A survey in 1989 by two University of Denver professors found that hundreds of these SLAPP actions are brought nationwide. One quarter of them involved development and zoning changes, and others involved projects ranging from tenant problems, to garbage incinerators, to faulty products.

While many SLAPP suits allege that citizen statements about a project or permit application constitute slander or libel, most are dismissed because they are found to lack merit or basis in law. Yet even if the lawsuits are thrown out of court, they often succeed in achieving their goal of stifling public participation and citizen involvement in the decision-making process. Any individual or local civic association would be daunted by the prospect of a multi-million dollar lawsuit from a major company or developer armed with many professional attorneys and substantial financial resources. Consequently, the emergence of SLAPP suits as a tactic by developers and others has caused concerned citizens to think twice about even simply commenting on proposed projects that may have major impacts on their community.

In short, SLAPP suits are typically frivolous, but they give an evil, modern day twist to the David and Goliath story. They are a slap in the face to democracy and the fundamental rights of citizens and community groups to speak out for what they believe is right or wrong. Approval of this bill, however, would provide essential protections to individuals who may be faced with the prospect of a SLAPP suit. It would restore a sense of confidence to the public to voice their justified concerns about their health, environment, property, and neighborhoods. NYPIRG urges your approval of this important bill.

Sincerely,



Blair Horner
Legislative Director

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The New York Public Interest Research Group, Inc. (NYPIRG) is a not-for-profit, nonpartisan research and advocacy organization established, directed and supported by New York State college and university students. NYPIRG's staff of lawyers, researchers, scientists and organizers works with students and other citizens, developing citizenship skills and shaping public policy. Environmental preservation, consumer protection, energy, fiscal responsibility, political reform, and social justice are NYPIRG's principal areas of concern.

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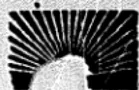
S.5441



NYPIRG SUPPORTS

Legislative Memorandum No. 89-1992 Contact: Steve Romalewski Phone: (516)673-5536

1797

IN THE SENATE, S.5441. INTRODUCED BY SENATOR MARCHI

AN ACT to amend the civil rights law and the civil practice law and rules, in relation to actions involving public petition and participation

Summary of Provisions

This bill would require that a person who has applied for or obtained a permit for a project, and who has brought an action against a citizen who has commented on or criticized that project, to show that the citizen knew his/her statements were false, or made with "reckless disregard" for the truth, in order to win damages from the citizen. The bill would also give citizens who were sued in such an action that was found to lack merit the ability to countersue to recover attorney's fees and costs. Punitive damages could also be recovered by the citizen if the action was intended solely to harass, intimidate, or otherwise inhibit the free speech of the citizen. Finally, the bill would require courts to hear any such action on an expedited basis.

Statement in Support

All too often, businesses or developers abuse the legal system by suing a citizen or community group solely for the purpose of harassing or intimidating them because the citizen(s) may have criticized or opposed a housing development, zoning change, garbage incinerator, or other project. These lawsuits are known as "SLAPP" suits, or Strategic Lawsuits Against Public Participation.

A survey conducted in 1989 by two University of Denver professors found that hundreds of these SLAPP actions are brought nationwide. One quarter of them involved development and zoning changes, and others involved projects ranging from tenant problems, to garbage incinerators, to faulty products and services.

While many SLAPP suits allege that citizen statements about a project or permit application constitute slander or libel, most are dismissed because they are found to lack merit or basis in law. Yet even if the lawsuits are thrown out of court, they often succeed in achieving their goal of stifling public participation and citizen involvement in the decision-making process. Any individual or local civic association would be daunted by the prospect of a multi-million dollar lawsuit from a major company or developer armed with professional attorneys and substantial financial resources. Consequently, the emergence of SLAPP suits as a tactic by developers and others has caused concerned citizens to think twice about even simply commenting on proposed projects that may have major impacts on their community.

In short, SLAPP suits are typically frivolous, but they give an evil, modern day twist to the David and Goliath story. They are a slap in the face to democracy and the fundamental rights of citizens and community groups to speak out for what they believe is right or wrong. Passage of this bill, however, would provide essential protections to individuals who may be faced with the prospect of a SLAPP suit. It would restore a sense of confidence to the public to voice their justified concerns about their health, environment, property, and neighborhoods.

NYPIRG strongly urges you to support passage of S.5441.

JUN 08 1992

New York Pu... 184 Washington Avenue • Albany, N.Y. • (518) 436-0876

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S. 5441

1797

SIERRA CLUB ATLANTIC CHAPTER

Dr. Marian H. Rose - 9 Old Corner Road, Bedford, N.Y. 10506

To: Senator Manfred Ohrenstein
From: Marian H. Rose
Conservation Co-Chair, Sierra Club - Atlantic Chapter
Re: Senate bill S.5441, Senator Marchi's "SLAPP suit" bill
Date: 6/17/92

Senator Marchi's bill #5441, the so-called "SLAPP suit' bill, has recently been passed through the Codes Committee and is now in the Rules Committee.

Re introduced this year by Assemblyman Bianchi, it passed the Assembly without a single dissenting vote.

The Sierra Club, both at the national and at the chapter levels, has long stood in opposition to SLAPP suits. In this we are not alone. Increasingly, citizens from all over the U.S. are opposing these suits that are none other than ill-disguised assaults on a citizen's First Amendment rights.

We ask you to stand by us in supporting S.5441, and in hastening its passage through Rules so that it can be voted on before the end of this session.

On behalf of the 40,000 members of the Atlantic Chapter of the Sierra Club, I wish to thank you for your help in this matter.

Sincerely yours
Marian Rose
Marian H. Rose, Conservation Co-Chair
Sierra Club - Atlantic Chapter

JUN 1 9 1992

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S. 5441

C.A.M.L.
P.O. Box 751
Valley Stream, New York 11582

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6/26/92

D-DAY
+ counting

Senator,

What are You going to Do Today to get the Anti-SLAPP Bill - 5441 to the Senate floor for a Vote Before Adjournment? Why is Marino + the Senate sitting on their hands?!

JUN 27 1992

WHY ARE YOU?!!!

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A4299 S5411

July 2, 1992

The Honorable Elizabeth Moore
Counsel to the Governor
State Capitol, Room 225
Albany, NY 12224

Memo in Support
A.4299 / S.5441

Dear Ms. Moore:

I write to urge that Governor Cuomo approve and sign into law Assembly bill A.4299, passed earlier this week by both houses of the Legislature, which would provide sanctions against individuals who initiate SLAPP suits.

SLAPP is an acronym for Strategic Lawsuits Against Public Participation, meaning civil suits, and the attendant threat of personal damages and litigation costs, brought with the sole purpose of harassing, intimidating, or punishing individuals or organizations that have involved themselves in public issues.

Over the past several years, The Nature Conservancy has been the target of several SLAPP suits in New York State. These suits arose from statements and positions advanced by The Nature Conservancy relating to land use decisions on properties adjacent to nature preserves owned and maintained by our organization. Although we successfully defended ourselves in these suits, we have incurred hundreds of thousands of dollars in legal costs in the process.

The SLAPP suit issue goes to the very heart of the ability of individuals and organizations to freely participate in public decision-making processes, including public decisions affecting the protection of the environment. By allowing courts to apply sanctions against litigants who bring civil actions solely for the purpose of intimidating public participation efforts, this legislation would provide a clear and meaningful deterrent to the use of SLAPP suits in New York State.

Once again, I urge Governor Cuomo to approve A.4299.

Respectfully,

Andy

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Andy Beers
Director of Government Relations

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Town of
Brookhaven

Office of the Town Clerk

Stanley Allan - Town Clerk & Registrar

July 5, 1991

Governor Mario Cuomo
State Capitol
Albany, New York 12224

Re: Sense of Town Board Resolution in Support of Assembly Bill No. A-4299
and Senate Bill No. S-6441 - "SLAPP" Legislation

Dear Governor Cuomo:

Annexed hereto please find copy of the resolution that was adopted at a regular meeting of the Brookhaven Town Board on July 2, 1991 relative to the above captioned matter.

Sincerely,

STANLEY ALLAN
TOWN CLERK

SA:dg/enc
cc: Peter Scully, Deputy Supervisor
Town Attorney
All those named in resolution

Town Hall • Patchogue, Long Island, New York 11772 • (516) 654-7823

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RESOLUTION NO. 11
MEETING OF: JULY 2, 1991

SENSE OF TOWN BOARD RESOLUTION IN SUPPORT OF ASSEMBLY BILL NO. A-4299 AND SENATE BILL NO. S-5441 - "SLAPP" LEGISLATION

WHEREAS, Assembly Bill No. A-4299 has been adopted in the New York State Assembly and Senate Bill No. S-5441 has been introduced in the New York State Senate; and

WHEREAS, said legislation if adopted will have the effect of protecting an individual's right to oppose another individual's application or permit from any governmental body without fear or threat of legal reprisal, and

WHEREAS, said legislation has been introduced in order to mitigate and protect against Strategic Lawsuits Against Public Participation, also known as "SLAPP" lawsuits, and

WHEREAS, SLAPP lawsuits have a chilling effect upon an individual's right of free speech, which includes opposition to a particular application or permit,

NOW, THEREFORE, BE IT RESOLVED, by the Town Board of the Town of Brookhaven that it supports Assembly Bill No. A-4299 and Senate Bill No. S-5441, and be it further

RESOLVED that the Town Clerk is directed to remit copies of this resolution to the following State officials:

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MARIO M. CUOMO, Governor
State Capitol
Albany, New York 12224

MELVIN MILLER, State Assembly Speaker
Legislative Office Building
Room 932
Albany, New York 12248

RALPH MARINO, Senate Majority Leader
The Capitol Bldg. Room 330
Albany, New York 12247

OWEN H. JOHNSON, State Senator
23-24 Argyle Square
Babylon, NY 11702

JAMES J. LACK, State Senator
38-42 New York State Office Building
Hauppauge, New York 11788

KENNETH P. LaVALLE, State Senator
325 Middle Country Road
Selden, New York 11784

CAESAR TRUNZO, State Senator
New York State Office Building
Hauppauge, New York 11788

THOMAS F. BARRAGA, State Assemblyman
4 Udall Road
West Islip, New York 11795

JOHN L. BEHAN, State Assemblyman
P.O. Drawer 9001
Wainscott, New York 11975-9001

I. WILLIAM BIANCHI, State Assemblyman
228 Waverly Place
Patchogue, New York 11772

JOHN C. COCHRANE, State Assemblyman
665 Deer Park Avenue
North Babylon, New York 11703

JAMES CONTE, State Assemblyman
1783 New York Avenue
Huntington Station, New York 11743

JOHN J. FLANAGAN, Jr., State Assemblyman
24 Woodbine Avenue
Northport, New York 11768

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ROBERT GAFFNEY, State Assemblyman
1227 Main Street
Suite 301
Port Jefferson, New York 11777

PAUL E. HARENBERG, State Assemblyman
85 Middle Country Road
Sayville, New York 11782

JOSEPH SAWICKI, State Assemblyman
107 Roanoke Avenue - Room 301
Riverhead, New York 11901

ROBERT SWEENEY, State Assemblyman
270-B North Wellwood Avenue
Lindenhurst, New York 11757

ROBERT C. WERTZ, State Assemblyman
50 Route 111
Suite 200
Smithtown, NY 11787

000051

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