New York Supreme Court

Appellate Division – First Department

JIDE ZEITLIN,

Plaintiff-Appellant,

Docket No. 2022-04173

– against –

WILLIAM COHAN,

Defendant-Respondent.

NOTICE OF MOTION ON BEHALF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 26 MEDIA ORGANIZATIONS FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT-RESPONDENT

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New York County Clerk's Index No. 156829/2021

PLEASE TAKE NOTICE that upon the annexed affirmation of Katherine M. Bolger dated April 21, 2023, and all exhibits attached thereto, including a copy of the proposed brief of amici curiae, the Reporters Committee for Freedom of the Press and 26 media organizations (collectively, "amici") will move this Court, located at 27 Madison Avenue, New York, New York 10010, on May 1, 2023 at 10:00 a.m. or as soon thereafter as counsel may be heard, for an order granting amici leave to file the brief attached hereto as amici curiae in support of Defendant-Respondent in the above-captioned action pursuant to 22 NYCRR § 1250.4(f), and for such other and further relief as the Court may deem just and proper under the circumstances.

PLEASE TAKE FURTHER NOTICE that pursuant to N.Y. C.P.L.R. 2214(b), any answering papers or cross-motions are required to be served upon the undersigned at least two days before the date set forth above for the submission of this motion.

Dated: April 21, 2023
New York, NY

by: */s/Katherine M. Bolger*

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New York Supreme Court

Appellate Division – First Department

JIDE ZEITLIN,

Plaintiff-Appellant,

Docket No. 2022-04173

– against –

WILLIAM COHAN,

Defendant-Respondent.

AFFIRMATION OF KATHERINE M. BOLGER IN SUPPORT OF MOTION OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 26 MEDIA ORGANIZATIONS FOR LEAVE TO FILE AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT-RESPONDENT

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Katherine M. Bolger, an attorney duly admitted to practice before the courts of the State of New York, and not a party to this action, hereby affirms the following to be true under penalty of perjury pursuant to N.Y. C.P.L.R. § 2106:

1. I am a partner with Davis Wright Tremaine, located at 1251 Avenue of the Americas, 21st Floor, New York, NY 10020, and am counsel of record for the Reporters Committee for Freedom of the Press (the "Reporters Committee"), Association of American Publishers, Inc., The Daily Beast Company LLC, Daily News, LP, The E.W. Scripps Company, Fox Television Stations, LLC, Freedom of the Press Foundation, Gannett Co., Inc., Inter American Press Association, The Media Institute, MediaNews Group Inc., National Freedom of Information Coalition, National Newspaper Association, National Press Club Journalism Institute, The National Press Club, National Press Photographers Association, New York News Publishers Association, New York Public Radio, The New York Times Company, News/Media Alliance, Newsday LLC, Nexstar Media Inc., Online News Association, Society of Environmental Journalists, Society of Professional Journalists, Tully Center for Free Speech, and Vox Media, LLC (collectively, "amici") in the above-captioned action. I submit this affirmation in support of

amici's motion for leave to file a brief as amici curiae in support of Defendant-Respondent in the above-captioned action.

2. Attached hereto as **Exhibit A** is a true and correct copy of the brief that amici seek leave to file as amici curiae.

3. Attached hereto as **Exhibit B** is a true and correct copy of the Decision and Order from the Supreme Court, County of New York, dated August 24, 2022, from which Plaintiff-Appellant appeals.

4. Attached hereto as **Exhibit C** is a true and correct copy of the notice of appeal invoking this Court's jurisdiction.

5. Lead amicus, the Reporters Committee for Freedom of the Press (the "Reporters Committee"), is an unincorporated nonprofit association. Founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas seeking to reveal the identities of confidential news sources, the Reporters Committee works to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee frequently serves as amicus curiae in cases that concern issues of importance to journalists and news media, including litigation involving defamation claims and anti-SLAPP laws. *See, e.g.*, Amici Curiae Brief of the

Reporters Committee for Freedom of the Press, et al., in Support of Defendants-Appellants-Respondents, *Kurland & Associates, P.C. v. Glassdoor, Inc.*, No. 2021-2776 (1st Dep't filed Apr. 1, 2022), https://perma.cc/QSE6-U2HU; Amicus Brief on Behalf of the Reporters Committee for Freedom of the Press, et al., in Support of Defendants-Appellants, *VIP Pet Grooming Studio, Inc. v. Sproule*, No. 2021-4228 (2d Dep't filed Oct. 25, 2021), https://perma.cc/XY4Q-S7MW. Additional proposed amici curiae are prominent news publishers and professional and trade groups.[1]

6. Amici are well-suited to provide a unique industry-wide perspective not currently represented by Defendant-Respondent on the interpretation of the scope and motion-to-dismiss standard of New York's recently amended anti-SLAPP law. Amici or their members have a strong interest in ensuring they are able to report on issues of public interest without fear of unjustified defamation liability, and that they are able to quickly dismiss meritless litigation arising out of such speech.

[1] A comprehensive list of amici is annexed hereto as Appendix A.

7. Defendant-Respondent and Plaintiff-Appellant have been notified of this motion. Defendant-Respondent consents to amici's motion; Plaintiff-Appellant does not oppose.

WHEREFORE, I respectfully request that this Court grant amici's motion for leave to file a brief as amici curiae in support of Defendant-Respondent, a copy of which is attached hereto as **Exhibit A**.

Dated: April 21, 2023
New York, NY

by:*/s/Katherine M. Bolger*
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APPENDIX A: DESCRIPTION OF ADDITIONAL AMICI CURIAE

The Association of American Publishers (AAP) represents the leading book, journal, and education publishers in the United States on matters of law and policy, advocating for a free and sustainable environment for publishers, authors, booksellers and readers around the world to incentivize the publication of creative expression, professional content, and learning solutions. As essential participants in local markets and the global economy, our members invest in and inspire the exchange of ideas, transforming the world we live in one word at a time.

The Daily Beast delivers award-winning original reporting and sharp opinion from big personalities in the arenas of politics, pop-culture, world news and more.

Daily News, LP publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is one of the oldest media companies in the country, with its first issue dating back to 1919.

The E.W. Scripps Company is the nation's fourth-largest local TV broadcaster, operating a portfolio of 61 stations in 41 markets. Scripps also owns Scripps Networks, which reaches nearly every American through the national news outlets Court TV and Newsy and popular entertainment brands ION, Bounce, Grit,

Laff and Court TV Mystery. The company also runs an award-winning investigative reporting newsroom in Washington, D.C., and is the longtime steward of the Scripps National Spelling Bee.

Directly and through affiliated companies, **Fox Television Stations, LLC,** owns and operates 28 local television stations throughout the United States. The 28 stations have a collective market reach of 37 percent of U.S. households. Each of the 28 stations also operates Internet websites offering news and information for its local market.

Freedom of the Press Foundation (FPF) is a non-profit organization that supports and defends public-interest journalism in the 21st century. FPF works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including building privacy-preserving technology, promoting the use of digital security tools, and engaging in public and legal advocacy.

Gannett is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

The Inter American Press Association (IAPA) is a not-for-profit organization dedicated to the defense and promotion of freedom of the press and of expression in the Americas. It is made up of more than 1,300 publications from throughout the Western Hemisphere and is based in Miami, Florida.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

MediaNews Group is a leader in local, multi-platform news and information, distinguished by its award-winning original content and high quality local media. It is one of the largest news organizations in the United States, with print and online publications across the country.

The National Freedom of Information Coalition is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member network, NFOIC promotes press freedom, litigation and legislative and

administrative reforms that ensure open, transparent and accessible state and local governments and public institutions.

National Newspaper Association is a 2,000-member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Pensacola, FL.

The National Press Club Journalism Institute is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

The National Press Club is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its

creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The New York News Publishers Association is a trade association which represents daily, weekly and online newspapers throughout New York State. It was formed in 1927 to advance the freedom of the press and to represent the interests of the newspaper industry.

With an urban vibrancy and a global perspective, **New York Public Radio** produces innovative public radio programs, podcasts, and live events that touch a passionate community of 23.4 million people monthly on air, online and in person. From its state-of-the-art studios in New York City, NYPR is reshaping radio for a new generation of listeners with groundbreaking, award-winning programs including Radiolab, On the Media, The Takeaway, and Carnegie Hall Live, among many others. New York Public Radio includes WNYC, WQXR, WNYC Studios, Gothamist, The Jerome L. Greene Performance Space, and New Jersey Public

Radio. Further information about programs, podcasts, and stations may be found at www.nypublicradio.org.

The New York Times Company is the publisher of The New York Times and The International Times, and operates the news website nytimes.com.

The News/Media Alliance represents news and media publishers, including nearly 2,000 diverse news and magazine publishers in the United States—from the largest news publishers and international outlets to hyperlocal news sources, from digital-only and digital-first to print news. Alliance members account for nearly 90% of the daily newspaper's circulation in the United States. Since 2022, the Alliance is also the industry association for magazine media. It represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands, on topics that include news, culture, sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The Alliance diligently advocates for news organizations and magazine publishers on issues that affect them today.

Newsday LLC ("Newsday") is the publisher of the daily newspaper, Newsday, and related news websites. Newsday is one of the nation's largest daily newspapers, serving Long Island through its portfolio of print and digital products.

Newsday has received 19 Pulitzer Prizes and other esteemed awards for outstanding journalism.

Nexstar Media Group, Inc. ("Nexstar") is a leading diversified media company that leverages localism to bring new services and value to consumers and advertisers through its traditional media, digital and mobile media platforms. Nexstar owns, operates, programs or provides sales and other services to 199 television stations and related digital multicast signals reaching 116 markets or approximately 62% of all U.S. television households.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

The Society of Environmental Journalists is the only North American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall 2006, at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

Vox Media, LLC owns New York Magazine and several web sites, including Vox, The Verge, The Cut, Vulture, SB Nation, and Eater, with 170 million unique monthly visitors.

EXHIBIT A

New York Supreme Court

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AMICI CURIAE BRIEF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 26 MEDIA ORGANIZATIONS IN SUPPORT OF DEFENDANT-RESPONDENT

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STATEMENT OF INTEREST OF AMICI CURIAE

Lead amicus the Reporters Committee for Freedom of the Press is an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. Other amici are prominent news publishers, professional organizations, and trade groups. A supplemental statement of the identity and interest of the amici is included as Appendix A to amici's motion for leave to file this amici curiae brief.[1]

Amici are dedicated to defending the First Amendment rights of journalists, news organizations, and publishers. As members and representatives of the news media and publishing industry, amici are the frequent targets of strategic lawsuits against public participation ("SLAPPs") designed to punish and deter constitutionally protected newsgathering, reporting, and publishing activities. Amici therefore have a strong interest in ensuring that New York's amended anti-

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than amici or their counsel, contribute money toward preparing or submitting this brief.

SLAPP law is correctly interpreted and applied. Further, drawing on their collective experience with SLAPPs, amici seek to provide the Court with a broader perspective on the importance of state anti-SLAPP laws to the protection of speech about matters of public interest.

INTRODUCTION AND SUMMARY OF ARGUMENT

SLAPPs are meritless legal claims that threaten to chill the exercise of First Amendment rights. While SLAPPs lack legal foundation, the mere prospect of costly, protracted litigation alone can discourage speech. Indeed, since *New York Times Co. v. Sullivan*, courts have recognized that the threat of a lawsuit—even an ultimately unsuccessful one—can lead to self-censorship and diminish participation in the marketplace of ideas. 376 U.S. 254, 279 (1964). Would-be speakers are forced into a perverse cost-benefit analysis, weighing the value of participating in the public square against the burden of defending against a lawsuit.

To combat this troubling trend, New York, along with thirty-two other states and the District of Columbia, has adopted anti-SLAPP laws that provide mechanisms to lower the costs and other burdens associated with defending against meritless lawsuits aimed at chilling speech in connection with a public issue. *See Anti-SLAPP Legal Guide*, Reporters Comm. for Freedom of the Press, https://perma.cc/7RSF-4GMB (last accessed Apr. 21, 2023).

In 2020, the New York Legislature (the "Legislature") amended the state's anti-SLAPP law to expand its protections for defendants facing meritless lawsuits arising out of constitutionally protected speech about matters of interest and concern to the public. Under the amended law, if an action arises out of a defendant's speech about an "issue of public interest," a motion to dismiss "shall be granted" unless the plaintiff "demonstrates that the cause of action has a substantial basis in law," N.Y. C.P.L.R. 3211(g), including by pleading facts that, taken as true, constitute "clear and convincing evidence that" the speech "was made with knowledge of its falsity or with reckless disregard of whether it was false," that is, with actual malice, N.Y. Civ. Rights Law § 76-a(2). These provisions ensure that journalists and other speakers facing meritless legal claims arising out of their statements about public issues receive broad protection under the anti-SLAPP law and can quickly secure the dismissal of such claims.

The importance of strong anti-SLAPP protection is evident in the instant case: a multi-year legal battle against a freelance reporter for a nonprofit news organization arising out of the exercise of constitutionally protected speech about a matter of public interest. William Cohan's ProPublica article, *The Bizarre Fall of the CEO of Coach and Kate Spade's Parent Company* (hereinafter, the "Article"), describes the rise and fall of the plaintiff, one of only five Black Fortune 500 CEOs. Compl. at Ex. A. The Article describes how Zeitlin, whose mother was a

domestic worker in Nigeria, became one of the few Black partners at Goldman Sachs. *Id.* As the Article reports, he was considered for multiple positions in the Obama Administration, nominated for an ambassadorship, and became CEO of Tapestry, the parent company of Coach, Kate Spade, and Stuart Weitzman. *Id.* The Article also recounts Zeitlin's 2007 extramarital affair with a woman named Gretchen Raymond, and Raymond's allegation to a different reporter in 2009 that Zeitlin had "used deception to lure [her] into an unwanted romantic relationship." *Id.* Cohan quotes Zeitlin in the Article as saying this is "not true." *Id.* Nevertheless, Raymond's allegations contributed to Zeitlin's withdrawal of his ambassadorship nomination in 2009 and his resignation from Tapestry—whose workforce was nearly 80 percent female—in 2020. *Id.* Published in summer 2020, when the #MeToo and Black Lives Matter movements were driving a national discussion, the Article raised important questions regarding when corporate leaders should face professional consequences due to personal relationships, and the lack of racial diversity at the top of major U.S. corporations.

Availing himself of the protections of New York's amended anti-SLAPP law, Cohan moved to dismiss Zeitlin's defamation claims. The trial court granted the motion to dismiss pursuant to the amended anti-SLAPP law, finding that the Article concerned an issue of public interest and that Zeitlin was therefore

required—but failed—to clearly and convincingly plead that Cohan published the Article with actual malice.

Amici urge this Court to affirm. The Article concerns an issue of public interest and is therefore subject to the amended anti-SLAPP law. As discussed below, the law requires courts to broadly interpret what speech constitutes an issue of public interest. The trial court correctly held that the Article falls squarely within the range of speech protected by the law.

Further, the trial court correctly held that the anti-SLAPP law requires a plaintiff to clearly and convincingly plead actual malice to survive a motion to dismiss. Robust application of the actual malice standard is an essential part of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Sullivan*, 376 U.S. at 270. Its application pursuant to the anti-SLAPP law deters plaintiffs from bringing meritless speech-chilling lawsuits in the first instance, and protects speakers from the costs of litigation arising out of the exercise of their right to free speech. Together, the amended law's broad scope and actual malice standard are essential to protecting the news media's ability to inform the public about matters of public concern.

ARGUMENT

I. The amended anti-SLAPP law defines "issue of public interest" in a broad, speech-protective manner that encompasses the Article.

New York's amended anti-SLAPP law applies "broadly" to cases involving "any communication in a place open to the public or a public forum in connection with an issue of public interest." N.Y. Civ. Rights Law § 76-a(1)(a)(1), (1)(d). The Article unquestionably meets this standard.

A. New York's amended anti-SLAPP law broadly protects free speech about issues of public interest.

SLAPPs are "characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future." *Mable Assets, LLC v. Rachmanov*, 192 A.D.3d 998, 999–1000 (2d Dep't 2021) (quoting *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 137 n.1 (1992)). "Short of a gun to the head, a greater threat to First Amendment expression" than a SLAPP "can scarcely be imagined." *Gordon v. Marrone*, 155 Misc. 2d 726, 736 (Sup. Ct. Westchester Cnty. 1992), *aff'd*, 202 A.D.2d 104 (2d Dep't 1994); *see also Ernst v. Carrigan*, 814 F.3d 116, 117 (2d Cir. 2016) (describing SLAPPs as "brought primarily to chill the valid exercise of a defendant's right to free speech").

In response to the threat posed by SLAPPs, in 1992, New York enacted one of the nation's first anti-SLAPP laws. 1992 N.Y. Sess. Laws ch. 767 (A4299) (McKinney). New York's original anti-SLAPP law aimed to "provide the utmost

protection for the free exercise of speech, petition and association rights" by protecting citizens from lawsuits arising out of their public participation. L. 1992, ch. 767, § 1. Though trendsetting, the law's scope was narrow; it limited the definition of "public participation" to applications for public permits or similar government entitlements. L. 1992, ch. 767, § 3. Many courts interpreted the law even more narrowly. *See, e.g.*, *Hariri v. Amper*, 51 A.D.3d 146, 151 (1st Dep't 2008). Thus, despite the law's laudable aims, few defendants received the benefit of its protections.

Recognizing the need to strengthen the anti-SLAPP law to achieve its speech-protective goals, in 2020, the Legislature expanded the definition of public participation to include "any communication in a place open to the public or a public forum in connection with an issue of public interest" and "any other lawful conduct in furtherance of the exercise of the constitutional right[s]" of free speech or petition. N.Y. Civ. Rights Law § 76-a(1)(a)(1)–(2); *see also* S52A Sponsor Mem. (July 22, 2020); L. 2020, ch. 250, Bill Jacket at 5–6 (Letter of Assemblywoman Helene E. Weinstein) (hereinafter "Weinstein Sponsor Letter") (calling this the "most important[]" change in the new law). The Legislature instructed that "'[p]ublic interest' shall be construed broadly, and shall mean any subject other than a purely private matter." N.Y. Civ. Rights Law § 76-a(1)(d).

Courts have duly followed the Legislature's directive to apply the amended anti-SLAPP law "broadly." N.Y. Civ. Rights Law § 76-a(1)(d). In doing so, they have drawn from an extensive body of New York case law addressing a nearly identical issue in the defamation context: whether speech involves a matter of "public concern" or is of "purely private concern." *Albert v. Loksen*, 239 F.3d 256, 270 (2d Cir. 2001) (citation omitted); *see, e.g.*, *Lindberg v. Dow Jones & Co.*, No. 20-CV-8231 (LAK), 2021 WL 3605621, at *7 (S.D.N.Y. Aug. 11, 2021); *Coleman v. Grand*, 523 F. Supp. 3d 244, 257–58 (E.D.N.Y. 2021); *Aristocrat Plastic Surgery P.C. v. Silva*, 206 A.D.3d 26, 30–31 (1st Dep't 2022); *Carey v. Carey*, Index No. 152192/2021, 2022 WL 571412 (Sup. Ct. N.Y. Cnty. Feb. 15, 2022). Rightly so. The Legislature, in using "materially [the] same language" as New York defamation case law, was presumptively "aware of the longstanding judicial interpretation of the phrase and intended for it to retain its established meaning." *Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1762 (2018); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) ("If a statute uses words or phrases that have already received authoritative construction by the jurisdiction's court of last resort . . . they are to be understood according to that construction."). Because the anti-SLAPP amendments imported the well-settled "public" and "purely private" language from New York defamation law, that case law is instructive here.

Under the amended anti-SLAPP law, as in older common-law defamation cases, it is "extremely rare" for courts to label speech a matter of "purely private" concern. *Albert*, 239 F.3d at 269. Instead, courts endorse an "extremely broad interpretation" of what constitutes speech of "public concern." *Id.* Moreover, "offending statements can only be viewed in the context of the writing as a whole, and not as disembodied words, phrases or sentences." *Gaeta v. N.Y. News, Inc*., 62 N.Y.2d 340, 349 (1984). Personal narratives and "'human-interest items' may be matters of public concern if 'reasonably related to matters warranting public exposition,'" including "business and romantic pursuits." *Lindberg*, 2021 WL 3605621, at *1, *8 (quoting *Lewis v. Newsday, Inc.*, 246 A.D.2d 434, 435 (1st Dep't 1998)). Courts recognize "the familiar journalistic technique of featuring the experiences of a single individual" to shed light on broader issues, *id.* at *9 (quoting *Gaeta*, 62 N.Y.2d at 349–50), or on the individual's "public career, even though details about [their] personal life are included," *Carey*, 2022 WL 571412, at *6. "Additionally, courts have regularly found that accounts or allegations of sexual assault, harassment or other impropriety constitute matters of public interest." *Travis v. Daily Mail*, Index No. CV-010973-22NY, 2023 WL 2748858, at *3 (Civ. Ct. N.Y. Cnty. Mar. 31, 2023). Courts further recognize that the determination of newsworthiness is "best left to the judgment of journalists and editors, which [courts] will not second-guess absent clear abuse." *Lindberg*, 2021

WL 3605621, at *9 (quoting *Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 595 (1989)).

B. The Article concerns an issue of public interest and warrants anti-SLAPP protection.

Far from being one of the "extremely rare" cases involving only "purely private" matters, *Albert*, 239 F.3d at 269–70, the Article concerns issues of obvious public interest, as the trial court correctly held. It reports on the rise of one of only five Black Fortune 500 CEOs, his nomination for an ambassadorship, and his downfall due in part to allegations of sexual impropriety related to an extramarital affair. That the Article was published at a time when the #MeToo and Black Lives Matter movements were driving national conversations about race and about sexual misconduct only underscores that the Article addressed issues of paramount public interest and concern.

In recognizing that the Article fell within the scope of the amended anti-SLAPP law, the trial court joined other courts that have held that similar speech is of public interest. For example, in *Coleman v. Grand*, the court held that a musician's statements about her relationship with an older, more prominent musician—which, while "rocky," was "legal and consensual"—were of public interest. 523 F. Supp. 3d at 254. Noting the rise of the #MeToo movement, the court found that "'widespread and difficult conversations about what constitutes inappropriate behavior in professional settings'" were "indisputably an issue of

public interest." *Id.* at 259 (quoting *Elliott v. Donegan*, 469 F. Supp. 3d 40, 52 (E.D.N.Y. 2020)). The plaintiff's "prominen[ce]" in his industry "[f]urther add[ed] to the public interest," even though he lacked "household-name status." *Id.* at 260.

In *Lindberg v. Dow Jones*, the court held that Wall Street Journal articles about the "business and romantic pursuits" of an investment firm's founder were of public interest. *Lindberg*, 2021 WL 3605621, at *1, *10. "The fact that the *Journal* highlighted Lindberg's surveillance of romantic interests—a matter that may seem 'unnecessarily sordid' to some—d[id] not change this conclusion." *Id.* at *10 (quoting *Naantaanbuu v. Abernathy*, 816 F. Supp. 218, 226 (S.D.N.Y. 1993)). The court added that it "may not second guess the *Journal*'s judgments as to news content" or its "editorial judgement in employing the journalistic technique of highlighting human-interest items when reporting on a matter of public concern." *Id.* (citations and internal quotation marks omitted).

And, in *Gaeta v. New York News*, the Court of Appeals addressed defamation claims arising from a Daily News article stating that a patient transferred from a mental hospital to a nursing home "suffered a nervous breakdown that psychiatrists said was precipitated by a messy divorce and the fact that his son killed himself because his mother dated other men." 62 N.Y.2d at 346. The mother sued for defamation and argued this statement was not of public concern, but the court disagreed. The court concluded that the statement was tied

into the broader issue of the state's controversial transfer of patients to the nursing home. *Id.* at 350; *see also, e.g.*, *Goldman v. Reddington*, No. 18-CV-3662 (RPK) (ARL), 2021 WL 4755293, at *4 (E.D.N.Y. Apr. 21, 2021), *report and recommendation adopted*, 2021 WL 4099462 (Sept. 9, 2021) (woman's allegation that plaintiff sexually assaulted her was of public interest "especially given the public's recent engagement in widespread conversations about sexual misconduct and what constitutes inappropriate behavior on college campuses"); *Huggins v. Moore*, 94 N.Y.2d 296, 299, 304–05 (1999) (actress's statements about plaintiff's "betrayal of trust in their personal and financial relationships" were of public interest given "the greater significance of [her] personal story, a tragic downfall from a position of stardom and wealth"); *Weiner*, 74 N.Y.2d at 594–95 (statement in book that woman "always slept with her shrinks" was of public interest because it related to "an inquiry into the failure of family and professional figures to halt the progression of [her] illness before it resulted in murder"); *Shuman v. N.Y. Mag.*, 149 N.Y.S.3d 874 (Sup. Ct. N.Y. Cnty. 2021), *aff'd*, 211 A.D.3d 558 (1st Dep't 2022) ("To the extent the articles discuss their sexual relationships and other private conduct, they do so in connection with the matters of significant public concern," that is, "underlying themes of evolving gender power dynamics in sexual relationships").

The Article similarly is of public interest. Zeitlin's "improbable . . . rise" and "calamitous fall" are themselves issues of public interest—"a tale worth telling," as the Article says. *See* Compl. at Ex. A. "Born in Nigeria, the son of a maid, Zeitlin was largely brought up by an American family . . . and rose to become . . . one of only five Black CEOs among Fortune 500 companies"—at Tapestry, the "parent company of luxury brands such as Coach, Kate Spade and Stuart Weitzman," staffed by "'79% women.'" *Id.* The Article also discusses President Obama's nomination of Zeitlin to the post of U.S. ambassador for U.N. management and reform and his interest in securing a position at the Treasury Department. Yet Raymond's allegations that Zeitlin "used deception to lure [her] into an unwanted romantic relationship," as she told a Senate staffer and a reporter in 2009, led to the withdrawal of Zeitlin's nomination and, a decade later, his resignation from Tapestry. *Id.* This profile of Zeitlin's "pathway to [his] public career, even though details about [his] personal life are included," is hardly "'a purely private matter.'" *Carey*, 2022 WL 571412, at *5–6 (quoting N.Y. Civ. Rights Law § 76-a(1)(d)).

Further, the Article—published at a time when the #MeToo and Black Lives Matter movements were at the forefront of public discourse—undeniably relates to these broader issues. As the trial court correctly noted, "New York courts broadly interpret what constitutes matters of public concern and have found that statements

about a relationship that touch on topics of sexual impropriety and power dynamics . . . during the advent of the #MeToo movement [are] indisputably an issue of public interest," such that "Plaintiff's claims are subject to the anti-SLAPP law." *Zeitlin v. Cohan*, No. 156829/2021, 2022 WL 3647126, at *4 (Sup. Ct. N.Y. Cnty. Aug. 24, 2022) (citation and internal quotation marks omitted). Moreover, the trial court properly declined to "second-guess" Cohan's and ProPublica's "editorial determination that [Zeitlin's] 'personal saga' was reasonably related to this matter of social concern to the community." *Huggins*, 94 N.Y.2d at 305.

C. A ruling that the Article does not concern an issue of public interest would threaten reporting that benefits the public.

Providing anti-SLAPP protection for speech like the Article is essential to ensuring that journalists—including, especially, freelancers like Cohan and those at nonprofit and local news outlets—are not deterred from publishing reporting that drives public discourse, social movements, and reforms.

On the topic of sexual relationships and the workplace, while some reporting focuses on allegations of harassment and assault, *see, e.g.*, Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, New Yorker (Oct. 10, 2017), https://perma.cc/KPA3-MS2Q, other reporting focuses on consensual relationships, sparking important conversations about the extent to which such relationships can (or should) have professional repercussions. *See, e.g.*, Vanessa Bohns, *CNN President Jeff Zucker's Resignation*

Shows Why Even Consensual Office Romances Can Cause Problems, Conversation (Feb. 2, 2022), https://perma.cc/AE9C-9GBJ ("Whether policies overseeing consensual relationships at work are really necessary has been debated many times. And it seems reasonable to ask: Shouldn't mutually consenting adults be allowed to make these decisions for themselves?"); Andrew Soergel, *#MeToo Contributes to 2019's 'Staggering' CEO Departures*, U.S. News (Jan. 8, 2020), https://www.usnews.com/news/economy/articles/2020-01-08/metoo-contributes-to-2019s-staggering-ceo-departures ("Even outside of specific harassment allegations, executives at Intel, REI, McDonald's and Lululemon are among those who in the past two years have resigned or been ousted as a result of consensual relationships they had with subordinates, coworkers or business partners."); David Yaffe-Bellany, *McDonald's C.E.O. Fired Over a Relationship That's Becoming Taboo*, N.Y. Times (Nov. 4, 2019), https://perma.cc/S3HK-C7NT ("The mere fact that a successful executive was fired because of what McDonald's described as a 'recent consensual relationship' reflects changing attitudes about romance in the workplace, employment lawyers and other experts said."); Jessica Bennett, *The Complicated Case of Katie Hill*, N.Y. Times (Nov. 1, 2019), https://perma.cc/ZR7B-XTMR (Hill's "case is not clear-cut . . . . [S]he did admit to having a separate sexual relationship with a staffer on her election campaign, which is not barred by House rules."); Barbara Ortutay, *Intel CEO Out After*

Consensual Relationship with Employee, Associated Press (June 21, 2018), https://perma.cc/C2CV-LA3N ("Workplace impropriety that has cost executives their jobs runs a broad range from consensual dalliances to accusations of assault.").

These themes echoed throughout the widespread reporting on Zeitlin's departure from Tapestry. *See, e.g.*, Melissa Repko, *CVS Fires Several Employees and Executives After Internal Sexual Harassment Investigation*, CNBC (Mar. 11, 2022), https://perma.cc/QZB8-X3ZV ("The #MeToo movement, which began in Hollywood, has ricocheted across the corporate world from fast-food chains to apparel companies. It has led to the downfall of prominent business leaders, including . . . . Jide Zeitlin[.]"); Lauren Sherman, *In Public Relations, Brands and Executives Can No Longer 'Control the Narrative'*, Bus. of Fashion (July 24, 2020), https://perma.cc/WQ4Y-938C ("This week, two top-level executives[,]" including Zeitlin, "were accused of misconduct within the pages of reputable media outlets. . . . [C]ompanies — and their executives — are being held accountable like never before."); Suzanne Kapner & Telis Demos, *Tapestry Board Had Opened Probe Into CEO Jide Zeitlin Before He Resigned*, Wall St. J. (July 21, 2020), https://perma.cc/GF7S-PVKM; Kellie Ell, *Tapestry CEO Resigns Because of #MeToo Allegations*, Yahoo (July 21, 2020), https://perma.cc/2EEA-NREQ; Kim Bhasin & Jordyn Holman, *Tapestry CEO Resigns Amid Probe of*

Inappropriate Behavior, Bloomberg (July 21, 2020), https://perma.cc/KZL8-TN7Q ("The abrupt change comes at a time when executive behavior is under a microscope. In the #MeToo era, transgressions that may once have been considered minor are no longer swept aside.").

The Article and other reporting on Zeitlin's resignation also implicate important issues involving the small number of Black executives at U.S. companies. *See, e.g.*, Sherman, *supra* ("As the only black CEO at a major fashion company, [Zeitlin's] leadership was also seen as progression in an industry bogged down by racism and antiquated infrastructure. But he still resigned, without severance, as Tapestry investigated his conduct."); Phil Wahba, *There Are Now Just 4 Black CEOs in the Fortune 500 as Tapestry Boss Resigns*, Fortune (July 21, 2020), https://perma.cc/N49E-EZLG ("The list of Black CEOs heading a Fortune 500 company got shorter on Tuesday when the chief executive of Coach and Kate Spade parent Tapestry left the fashion company after less than a year on the job."); Bhasin & Holman, *supra* ("The surprise departure . . . marks a setback for Black representation in Corporate America, which has been trying to increase diversity at the highest ranks.").

Without anti-SLAPP protections for such coverage and the statements that form the backbone of it, sources will fear speaking out, members of the news media—particularly freelancers and smaller, nonprofit, or local news outlets—will

be chilled from reporting on important issues, and the public will lose access to valuable information. Holding otherwise would not only endanger consequential journalism, but also would invite the exact kind of arbitrary line-drawing and second-guessing of editorial judgment that the Court of Appeals has held is an improper role for courts to undertake. *See Gaeta*, 62 N.Y.2d at 349. The trial court correctly recognized that the Article was of public interest under the amended anti-SLAPP law, and amici urge this Court to affirm.

II. New York's anti-SLAPP law requires the dismissal of a SLAPP unless the plaintiff clearly and convincingly pleads actual malice.

In addition to protecting a broad range of speech, New York's anti-SLAPP law provides journalists and other speakers with another vital protection: it enables them to quickly obtain the dismissal of a SLAPP against them unless the plaintiff can establish that the suit has a "substantial basis in law." N.Y. C.P.L.R. 3211(g). To meet that standard and fend off dismissal, a plaintiff must "establish[] by clear and convincing evidence that" the defendant made the challenged speech with actual malice—that is, with "knowledge of its falsity or with reckless disregard of whether it was false." N.Y. Civ. Rights Law § 76-a(2). This is, intentionally, a high bar. Requiring substantial, convincing allegations of actual malice at the pleading stage is key to the anti-SLAPP law's ability to quash frivolous yet expensive litigation aimed at silencing journalists and other speakers. The trial court correctly applied this legal standard and dismissed Zeitlin's claims.

A. The plain text of the anti-SLAPP law requires a plaintiff to plead clear and convincing evidence of actual malice to survive a motion to dismiss.

Zeitlin contends that the trial court applied the amended anti-SLAPP law incorrectly by requiring him to "present clear and convincing evidence of actual malice at the pleading stage," and argues that the clear-and-convincing requirement applies only at summary judgment. *See* Appellant's Br. at 31. This argument misreads the trial court's holding and ignores the plain text of the law. The trial court was correct in finding that because Zeitlin's claims arose out of speech about issues of public interest, he was "required to meet the higher pleading standard of establishing by clear and convincing evidence that his causes of action have a substantial basis in law, i.e., that the article was published with actual malice[,]" to avoid dismissal. *Zeitlin*, 2022 WL 3647126, at *4 (citations and internal quotation marks omitted).

The law expressly requires "the plaintiff, in addition to all other necessary elements" of their claim, to "establish[] by clear and convincing evidence that" the speech at issue was made with actual malice. N.Y. Civ. Rights Law § 76-a(2). This requirement applies throughout the proceedings. The law makes no distinction based on whether the plaintiff is facing a motion to dismiss or a motion for summary judgment. *Id*. Additionally, when facing either a motion to dismiss or for summary judgment, the plaintiff must demonstrate a "substantial basis" for

the claim. N.Y. C.P.L.R. 3211(g); N.Y. C.P.L.R. 3212(h). "The Legislature viewed 'substantial' as a more stringent standard than the 'reasonable' standard that would otherwise apply." *Sackler v. Am. Broad. Companies*, 144 N.Y.S.3d 529, 534 (Sup. Ct. N.Y. Cnty. 2021) (quoting *Duane Reade, Inc. v. Clark*, 2 Misc. 3d 1007(A) (Sup. Ct. N.Y. Cnty. 2004)).[2] Putting these provisions together, a SLAPP will be dismissed unless the plaintiff pleads facts that, if true, would clearly and convincingly demonstrate a substantial basis for concluding that the defendant spoke with actual malice.

What does change at different stages of the litigation is how the plaintiff meets that standard. A SLAPP "plaintiff must *plead*, and ultimately *prove*, that defendants acted with actual malice in order to recover." *Travis*, 2023 WL 2748858, at *4 (emphasis added). On a motion to dismiss, the court looks at the

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[2] Outside of the anti-SLAPP context, on a motion to dismiss pursuant to N.Y. C.P.L.R. 3211(a)(7), as the trial court correctly stated, a "'court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory.' However, 'factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration.'" *Zeitlin*, 2022 WL 3647126, at *3 (first quoting *Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118, 121 (1st Dep't 2002); then quoting *Skillgames, LLC v. Brody*, 1 A.D.3d 247, 250 (1st Dep't 2003)). As the trial court correctly held, and for the reasons stated in Cohan's brief, Zeitlin's "entirely conclusory" allegations of actual malice doom his defamation claims under any pleading standard. *Id.* at *4.

pleadings;[3] on a motion for summary judgment, the court looks at the proof, to determine whether there is a triable issue of fact. N.Y. C.P.L.R. 3211(g), N.Y. C.P.L.R. 3212(b), (h). That is, at the motion-to-dismiss stage, the court asks whether the plaintiff has pled facts that, if true, would clearly and convincingly demonstrate a substantial basis for finding the defendant spoke with actual malice. The court does not, however, ask whether the plaintiff has proven those facts to be true.

Consistent with the anti-SLAPP law's plain text, numerous courts applying it have correctly recognized that "[i]n order to avoid dismissal of its SLAPP suit complaint, [a] plaintiff must establish by clear and convincing evidence a 'substantial basis' in fact and law for its claim," which requires alleging facts that, if true, would constitute "clear and convincing evidence that the [speaker] published the [challenged speech] with actual malice." *Sackler*, 144 N.Y.S.3d at 534 (quoting *Duane Reade, Inc.*, 2 Misc. 3d 1007(A)); *see also, e.g.*, *Cheng v. Neumann*, No. 21-CV-00181 (LEW), 2022 WL 326785, at *6 (D. Me. Feb. 3, 2022), *aff'd*, 51 F.4th 438 (1st Cir. 2022); *Travis*, 2023 WL 2748858, at *4; *Goldman v. Abraham Heschel Sch.*, No. 158209/2021, 2023 WL 2366830, at *3,

[3] The anti-SLAPP law also permits courts to consider supporting and opposing affidavits at the motion-to-dismiss stage. N.Y. Civ. Rights Law § 76-a(2).

*6 (Sup. Ct. N.Y. Cnty. Mar. 3, 2023) (rejecting plaintiff's argument that "the clear and convincing evidence standard . . . 'is irrelevant' in determining whether the action can withstand a motion to dismiss"); *Carey*, 2022 WL 571412, at *12; *Gillespie v. Kling*, No. 158959/2021, 2022 WL 16699233, at *3 (Sup. Ct. N.Y. Cnty. Nov. 2, 2022); *Omansky v. Tribeca Citizen LLC*, No. 160658/2021, 2022 WL 3647133, at *7 (Sup. Ct. N.Y. Cnty. Aug. 24, 2022); *Vaughn v. Xu*, No. 160322/2020, 2022 WL 3446931, at *4 (Sup. Ct. N.Y. Cnty. Aug. 17, 2022); *Torres v. Marrero*, No. 154253/2020, 2022 WL 3043398, at *5 (Sup. Ct. N.Y. Cnty. Aug. 2, 2022); *Great Wall Med. P.C. v. Levine*, 163 N.Y.S.3d 783 (Sup. Ct. N.Y. Cnty. 2022); *Epoch Grp. Inc. v. Politico, LLC*, No. 652753/2021, 2021 WL 5850036, at *3 (Sup. Ct. N.Y. Cnty. Dec. 9, 2021); *Massa Constr., Inc. v. Meaney*, No. 126837/2020, 2021 WL 4321438, at *2 (Sup. Ct. N.Y. Cnty. May 10, 2021). The trial court below likewise correctly required Zeitlin to plead facts that, if true, would clearly and convincingly establish a substantial legal basis for finding Cohan spoke with actual malice. *Zeitlin*, 2022 WL 3647126, at *4. It did not require him to prove that those facts were true. *Id.*

B. The actual malice standard protects uninhibited, robust, and wide-open debate on public issues.

Zeitlin's arguments to the contrary would, if adopted, directly undermine the amended anti-SLAPP law's speech-protective goals. For an anti-SLAPP law to be capable of "provid[ing] the utmost protection for" free speech and public

participation, L. 1992, ch. 767, § 1, defendants must be able to quickly obtain the dismissal of suits that fail to adequately plead actual malice.

The actual malice standard provides crucial protection for speech, including news reporting, about public figures and issues of public interest. It has its roots in *New York Times v. Sullivan*, where the U.S. Supreme Court held that under the First Amendment, public officials cannot recover damages for defamatory falsehoods relating to official conduct unless they demonstrate actual malice, *i.e.*, that the defamatory statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279–80. The actual malice standard "was fashioned to assure [the First Amendment's guarantee of] unfettered interchange of ideas for the bringing about of political and social changes desired by the people," even when those ideas are "vehement, caustic, and sometimes unpleasantly sharp." *Id.* at 269–70 (citation omitted). The Court recognized that "erroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the breathing space that they need . . . to survive." *Id.* at 271–72 (citation and internal quotation marks omitted). Absent this speech-protective standard, "would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true" due to the fear of facing expensive libel litigation, which "dampens the vigor and limits the variety of public debate." *Id.* at 279.

Accordingly, a plaintiff's effort to "show actual malice" must demonstrate "the convincing clarity which the constitutional standard demands." *Id.* at 285–86.

The actual malice requirement stood in contrast to the English common law tradition of libel suits as a tool of social control intended to protect the church, crown, and wealthy landed gentry. *See Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 151 (1967); *McKee v. Cosby*, 139 S. Ct. 675, 679 (2019) (Thomas, J., concurring in denial of certiorari). To the extent that objective survived in the American courts, it had curtailed important social discourse, such as abolitionist literature. *See, e.g.*, Michael Kent Curtis, *The Curious History of Attempts to Suppress Antislavery Speech, Press, and Petition in 1835-37*, 89 Nw. U. L. Rev. 785 (1995). Indeed, *Sullivan* itself was part of a campaign of libel suits against the press aimed at suppressing criticism of Jim Crow laws. *See Sullivan*, 376 U.S. at 294–95 (Black, J., concurring); Samantha Barbas, *Actual Malice: Civil Rights and Freedom of the Press in New York Times v. Sullivan* 38 (2023) ("Segregationists devised another means to attack the . . . press—high-value libel suits."). But, beginning with *Sullivan*, the Supreme Court recognized that the First Amendment imposes limits on state libel laws, and has extended those limits to cases brought by public figures, reinforcing the actual malice standard as "an important safeguard for the rights of the press and public to inform and be informed on matters of legitimate interest." *Curtis Publ'g Co.*, 388 U.S. at 164–65 (Warren, C.J.,

concurring). New York courts, too, have recognized the importance of being "vigilant about the potential 'chilling effect' the threat of defamation actions can have on public debate" and in applying the requirement "to show actual malice on the part of the defendant." *600 W. 115th St. Corp.*, 80 N.Y.2d at 137–38 (citing *Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 248 (1991)).

With the amended anti-SLAPP law, the Legislature extended this vital protection by requiring plaintiffs challenging speech about public issues to clearly and convincingly establish that the defendant spoke with actual malice, "thereby strengthening First Amendment rights in New York State, the media capital of the world." Press Release, *Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech*, N.Y. State Legislature (July 22, 2020), https://nyassembly.gov/Press/files/20200722a.php; *see* N.Y. Civ. Rights Law § 76-a(1)(a)(1), (2). A robust application of the actual malice standard is essential to allowing members of the news media, like Cohan, to report on issues of interest and concern to the public without fear of being subjected to the expense, harassment, and disruption of meritless, retaliatory litigation. This requirement also benefits the judicial system. By clogging the courts with meritless defamation claims, SLAPP plaintiffs waste judicial resources and co-opt the courts into their harmful efforts to chill speech.

C. Requiring plaintiffs to make clear and convincing allegations of actual malice at the pleading stage is necessary to protect journalists and other speakers faced with SLAPPs.

It is particularly important for journalists and other speakers to be able to swiftly obtain the dismissal of claims against them that fail to clearly and convincingly satisfy the actual malice standard. Zeitlin's arguments to the contrary would strip speakers of this important protection and force SLAPP defendants to spend time and resources defending against claims that, while meritless, are costly to resolve. For many, the most viable option may be to settle, retract the allegedly defamatory statement, and remain silent in the future. Bystanders, afraid of facing protracted, expensive litigation of their own, may self-censor too. The public is then deprived of these contributions to the marketplace of ideas.

As the anti-SLAPP amendments' sponsors noted, news media organizations are facing a growing number of SLAPPs from politicians and others who dislike their reporting, regardless of its accuracy. For example, in its letter to the Legislature in support of the amendments, New York-based WarnerMedia described three meritless defamation suits faced by its businesses: one against CNN filed by Donald Trump's campaign over a CNN.com op-ed; another against CNN from Representative Devin Nunes related to its coverage of the Trump impeachment proceedings; and one against HBO's "Last Week Tonight with John

Oliver," which was filed by the subject of a feature on coal industry safety issues. L. 2020, ch. 250, Bill Jacket at 14 (Letter of WarnerMedia).

But the targets of these baseless suits are not limited to large national media organizations. One local TV station in Wisconsin faced a lawsuit from the Trump campaign after it aired an ad criticizing his COVID-19 policies. *See* Ted Johnson, *Donald Trump's Campaign Sues Wisconsin TV Station for Continuing to Air Super PAC Ad Attacking His Coronavirus Response*, Deadline (Apr. 13, 2020), https://perma.cc/GU5V-VRMM. The suit sparked concerns that the campaign was targeting smaller stations less able to afford to fight back and hoping to intimidate other stations into not airing critical ads. *Id.* Similarly, in Iowa, a small-town newspaper faced a defamation suit from a local police officer after it truthfully reported on his sexual relationships with teenage girls. *See* Meagan Flynn, *A Small-Town Iowa Newspaper Brought Down a Cop. His Failed Lawsuit Has Now Put the Paper in Financial Peril.*, Wash. Post (Oct. 10, 2019), https://perma.cc/W7US-DPQ6. These actions were eventually dismissed on the merits, but not before the defendants incurred significant litigation costs. The Iowa newspaper, family-owned for nearly a century, sought $140,000 in crowdfunding to avoid having to sell the paper to pay its legal costs. *Id.* Nonprofit newsrooms and individual reporters, too, "are especially vulnerable, as plaintiffs often attack individuals or defendants with fewer resources." Victoria Baranetsky & Robert

Rosenthal, *Op-Ed: Scorched Earth Litigation: The Call for Anti-SLAPP May Save You*, Columbia Journalism Rev. (Nov. 16, 2022), https://perma.cc/BPR6-PDNV (describing media organization's effort to defeat SLAPP filed by charity it reported on "which took six years to conclude [and] could have easily bankrupted us").

Other organizations, fearing similarly expensive and protracted legal battles, have refrained from publishing critical commentary. *See, e.g.*, Adam Liptak, *Fearing Trump, Bar Association Stifles Report Calling Him a 'Libel Bully'*, N.Y. Times (Oct. 24, 2016), https://perma.cc/378G-GZYC; D. Victoria Baranetsky & Alexandra Gutierrez, *OP-ED: What a Costly Lawsuit Against Investigative Reporting Looks Like*, Columbia Journalism Rev. (Mar. 30, 2021), https://perma.cc/NB92-ZXTW (describing organization's "exceptionally costly" effort to defeat SLAPP and commenting that "other news organizations might look at this lawsuit and decide that reporting on powerful or deep-pocketed organizations isn't worth the risk").

When journalists and media organizations are forced to spend time and money defending against SLAPPs instead of being able to quickly obtain their dismissal, reporting and newsgathering suffers, scarce financial resources are diverted from newsrooms to legal fees, and readers lose access to valuable content. Plaintiffs may learn the worrisome lesson that they can effectively silence, intimidate, and bankrupt critics on a minimal showing. Where, however,

defendants can avail themselves of strong anti-SLAPP protections, including the dismissal of suits that fail to clearly and convincingly plead actual malice, these threats are minimized. Time and money spared on lengthy litigation can be reinvested in mission-critical newsgathering and reporting work, published without fear of being made to bear the costs of subjects' dissatisfaction.

In sum, a robust application of New York's amended anti-SLAPP law, including its actual malice standard, at the pleading stage is both required by the plain text of the law and essential to ensuring that it achieves its speech-protective goals.

CONCLUSION

For the foregoing reasons, amici urge this Court to affirm. The Article concerned an issue of public interest within the scope of the anti-SLAPP law and Zeitlin was therefore required—and failed—to establish by clear and convincing evidence that his claims had a substantial basis in law, including that Cohan spoke with actual malice.

Dated: April 21, 2023
New York, NY

Respectfully submitted,

/s/Katherine M. Bolger

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APPELLATE DIVISION – FIRST DEPARTMENT

PRINTING SPECIFICATIONS STATEMENT

It is hereby certified, pursuant to 22 NYCRR 1250.8(j) that, according to the word count of the word-processing system used to prepare this brief, the total word count for all printed text in the body of the brief exclusive of the material omitted under 22 NYCRR 1250.8(f)(2) is 6,702 words.

This brief was prepared on a computer using:

- Microsoft Word (Version 16.53) for Microsoft 365
- Times New Roman, a proportionally spaced font
- 14-point size font

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

----------X

JIDE ZEITLIN,

Plaintiff,

- v -

WILLIAM COHAN,

Defendant.

----------X

INDEX NO. 156829/2021

MOTION DATE 12/14/2021

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

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were read on this motion to/for DISMISS.

Plaintiff Jide Zeitlin brings this defamation action against William Cohan, a journalist for ProPublica, for the publication of a July 22, 2020 article titled "The Bizarre Fall of the CEO of Coach and Kate Spade's Parent Company" ("the article"). In motion sequence 003, Cohan moves to dismiss the complaint on the grounds that Plaintiff is unable to meet the heightened pleading standard under New York's anti-SLAPP (strategic lawsuits against public participation) law, as the article addresses an issue of public concern which requires Plaintiff to establish by clear and convincing evidence that the article was published with actual malice. (NYSCEF Doc No. 22, Ms003 Memo, at 7.)

Background

Plaintiff is a businessman who served as the CEO of Tapestry, Inc., the parent company of certain fashion brands like Coach and Kate Spade, from 2019 to his resignation on July 21, 2020, the day before the article's publication. Many of the relevant facts underlying this case, however, pertain to Plaintiff's pastime as a photographer using the pseudonym "James Greene" and the

extra-marital relationship he had with a woman he photographed, Gretchen Raymond, from January to October 2007.

As set forth in the complaint, Plaintiff alleges that Cohan initially approached him for an interview in 2019, to write a "comprehensive piece about Mr. Zeitlin's life's journey from Nigeria, to Wall Street, and ultimately to Tapestry" which would be published in *Air Mail*. (NYSCEF Doc No. 2, Complaint, at ¶ 54.) Plaintiff alleges that Cohan, however, had sought the interview with the intention of focusing on Plaintiff's relationship with Ms. Raymond, and that, during the interview process, Cohan shared Ms. Raymond's false allegations with Tapestry, which then forced Plaintiff to resign. (*Id*. at ¶¶ 63-69.)

The Article

The article summarizes Plaintiff's early life and career, culminating in his September 24, 2009 nomination to the post of the US Ambassador for UN Management and Reform by President Obama. (NYSCEF Doc No. 3, Article, at 1-6.) On December 9, 2009, the day after the Senate Foreign Relations Committee recommended that the Senate approve his nomination, Gretchen Raymond emailed Max Gigle, a staff assistant to Connecticut Senator Chris Dodd, stating that Plaintiff "has put me and my family through hell." (*Id*. at 7.)

The article recounts the allegations contained in Raymond's 2009 email (the "email"); that in 2007, Raymond was working as a fitness model and responded to a Craigslist ad titled "Fit yes, experience not necessary" posted by photographer "James Greene". (*Id*.) The two began a correspondence, photoshoots were arranged, and the two eventually became lovers after Plaintiff "confessed to her that he had been living a double life." (*Id*. at 8.)

Although Plaintiff ended the relationship in October 2007, Raymond's husband discovered its existence and revealed his discovery to Plaintiff's wife. (*Id*. at 9.) The email states that Raymond had a brick thrown through her car window, seemingly in retaliation for the affair.

In further researching Plaintiff's photography career, Raymond and her husband learned that the "Sohophoto studio" used by Plaintiff was actually an apartment directly adjacent to his familial residence, where he resided with his wife and children. They also found seven models, described as "young women," photographed by Plaintiff in "demonstrably sexual poses, many lying on a bed in skimpy lingerie," including Tamara Williams, who "said she was over 18 when she was photographed topless on a bed in Zeitlin's SoHo studio around 2005, 'but that nothing bad transpired.'" (*Id*. at 9-10.)

The article states that Raymond "struck some pay dirt when Josh Rogin, a reporter at The Cable- a blog of Foreign Policy magazine- became interested in her claims[.]" (*Id*. at 10.) Rogin broke the news that Plaintiff's nomination to the UN had been withdrawn after "rumors swirled about his overall character and elements of identity fraud." (*Id*.)

The article concludes with Cohan alleging that Plaintiff was "alternately evasive or dismissive" of his questions regarding the withdrawal of his nomination and that he "denied everything." (*Id*. at 11.) Plaintiff allegedly stated that he was asked about his relationship with Raymond during the senate hearing (which Cohan notes is untrue), that he was "collateral damage in a GOP plot to wound Obama's foreign policy team," and, as proof of the falsity of Raymond's claims, that he had been offered the "bigger role" of undersecretary of the Treasury in 2015 (although Cohan notes that he was unable to confirm this after reaching out to multiple sources).

Plaintiff commenced this action on July 21, 2020, alleging that the article is "patently false, defamatory, highly damaging," and relies upon a single source, Ms. Raymond, "an incensed woman who was brokenhearted after [Plaintiff] ended a brief, wholly consensual relationship that began and ended nearly fourteen years ago." (Complaint at ¶ 1.)

Plaintiff sets forth three causes of action for defamation per se against Cohan, each based on different statements contained in the article: 1) that Plaintiff "used deception to lure a woman [Ms. Raymond] into an unwanted romantic relationship"; 2) that Plaintiff "stalked, harassed, and threatened Ms. Raymond," as evidenced by her 2009 email (which was included in the article via hyperlink); and 3) that Plaintiff "engaged in pedophilia and production of child pornography," also evidenced by the same email. (*Id*. at ¶¶ 86, 107, 127.)

In motion sequence 003, Cohan moves to dismiss the complaint on the grounds that Plaintiff is unable to meet the heightened pleading standard under New York's anti-SLAPP law, as the article addresses an issue of public concern, which requires Plaintiff to establish by clear and convincing evidence that the article was published with actual malice. (NYSCEF Doc No. 22, Ms003 Memo, at 7.) Cohan also argues that he cannot be found liable for the republication or summarization of Ms. Raymond's 2009 email, pursuant to New York Civil Rights Law § 74, because the email was part of Plaintiff's congressional nomination hearing. (*Id*. at 18-21.) Finally, Cohan argues that the statements underlying Plaintiff's first cause of action for defamation, that Plaintiff "used deception to lure a woman into an unwanted romantic relationship," are substantially true, and were first published in 2009 by another reporter, Josh Rogin, in *The Cable*, entitling Cohan to a qualified privilege of republication. (*Id*. at 21-24.)

In opposition, Plaintiff argues that the statements are not subject to the anti-SLAPP law because they do not relate to a matter of "public concern," but that, in any event, he does meet the

actual malice standard. (NYSCEF Doc No. 50, Opposition, at 5.) Plaintiff also argues that Cohan's republication defense pertaining to the 2009 email is meritless because the email was not an official part of the proceeding, but rather, was sent the day after the proceeding had concluded (*id*. at 5-6), and that Plaintiff's first cause of action is well pled (*id*. at 19-21).

Discussion

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], "the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121, [1st Dept 2002].) However, "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

Additionally, CPLR 3211 [g] provides that in cases involving the public interest, as defined by Civil Rights Law § 76-a, where a defendant moves to dismiss pursuant to CPLR 3211 [a] [7], "the burden is upon the plaintiff to establish that its claim has the requisite substantial basis." (*Duane Reade, Inc. v Clark*, 2 Misc. 3d 1007(A), at *4, 2004 WL 690191 [Sup Ct, NY County 2004].) "In order to avoid dismissal of its SLAPP suit complaint, plaintiff must establish by clear and convincing evidence a 'substantial basis' in fact and law for its claim. The Legislature viewed 'substantial' as a more stringent standard than the 'reasonable' standard that would otherwise apply." (*Id*., *quoting* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:73.)

Anti-SLAPP

The anti-SLAPP law, as amended on November 10, 2020[1] and codified at Civil Rights Law § 76-a[1] ["Actions involving public petition and participation; when actual malice to be proven"], provides, in pertinent part, that:

> (a) An "action involving public petition and participation" is a claim based upon:
> (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or
> (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.
> …
> (d) "Public interest" shall be construed broadly, and shall mean any subject other than a purely private matter.
>
> 2. In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

Civil Rights Law § 70-a[1][a] ["Actions involving public petition and participation; recovery of damages"] provides that a defendant "shall" recover costs and attorney's fees upon a demonstration "that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law[.]"

The court finds that Plaintiff's claims are subject to the anti-SLAPP law, as they are "communication[s] in a place open to the public or a public forum in connection with an issue of

[1] Although neither party raises the question of the applicability of the November 10, 2020 amendment, the court notes that it does apply, based on this action's commencement date of July 21, 2021, despite the fact that the article was published on July 22, 2020. (*See Gottwald v Sebert*, 203 AD3d 488 [1st Dept, Mar. 10, 2022] [holding that the amendment does not apply retroactively to "pending claims"]; *Goldberg v Urbach*, 2022 WL 1285452, at *1 [Sup Ct, Richmond County, Mar. 14, 2022] [holding that the amendment does not apply to defamation action commenced August 26, 2020, before the amendment was enacted].)

public interest[.]" (Civil Rights Law § 76-a[1][a][1].) "New York courts broadly interpret what constitutes matters of public concern" and have found that statements about a relationship that touch on topics of "sexual impropriety and power dynamics in the music industry during the advent of the #MeToo movement" "[are] indisputably an issue of public interest." (*Aristocrat Plastic Surgery, P.C. v Silva*, 206 AD3d 26, 30-31 [1st Dept, May 19, 2022], *citing Coleman v Grand*, 523 F Supp 3d 244, 259 [ED NY 2021]; *see also Isaly v Garde*, 2022 WL 2669242, at *5 [Sup Ct, NY County, July 11, 2022] [finding that articles containing accusations of sexual harassment pertained to "issue of public interest"]; *Parker v Simmons*, 2021 WL 4891347 [Sup Ct, NY County 2021] [same].)

As such, Plaintiff is required to meet the higher pleading standard of establishing by "clear and convincing evidence" that his causes of action have "a substantial basis in law" (CPLR 3211[g]), i.e., that the article was published with "'actual malice'--- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (*Great Wall Med. P.C. v Levine*, 74 Misc 3d 1224[A], at *2 [Sup Ct, NY County, Mar. 8, 2022]; *Sackler v American Broadcasting Companies, Inc.*, 71 Misc 3d 693, 700 [Sup Ct, NY County 2021].) Here, Plaintiff's allegations of actual malice are entirely conclusory (Complaint at ¶¶ 90-94; 111-14; 131-34), unsupported by "clear and convincing evidence," and thus insufficient to meet his required burden.

Plaintiff incorrectly argues that he is not yet required to establish by "clear and convincing evidence" that the article was published with actual malice, as "that is the standard applicable to anti-SLAPP claims at ***summary judgment***, not the motion-to-dismiss stage." (NYSCEF Doc No. 50, Opposition, at 23 [emphasis in original]; *see* CPLR 3211[g]; *Great Wall Med. P.C.*, 74 Misc 3d 1224[A] at *2 [a motion to dismiss a SLAPP suit "must be granted … unless the party opposing the motion demonstrates … by clear and convincing evidence" that the publication at issue was

made with actual malice]; *Torres v Marrero*, 2022 WL 3043398, at *5 [Sup Ct, NY County, Aug. 2, 2022] ["A plaintiff is now required to establish by 'clear and convincing evidence' that there is a substantial basis in fact and law for its claim"].)

Finally, because the article falls "under the ambit of the amended anti-SLAPP law, defendant is entitled to seek damages and attorneys' fees under Civil Rights Law §§ 70-a and 76-a(1)(a)(1)." (*Aristocrat Plastic Surgery, P.C.*, 206 AD3d at 32.) Thus, it is hereby

ORDERED that Defendant William Cohan's motion sequence 003 for dismissal of the complaint is granted in its entirety, the complaint is dismissed against Defendant, with costs and disbursements, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that within ten (10) days from the entry of this order, Defendant William Cohan shall file and serve on all parties an itemized bill fully detailing his actual costs and attorneys' fees associated with this action; the truthfulness and accuracy of which shall be affirmed by an attorney of said firm who is fully familiar with the facts and circumstances of the instant matter; and it is further

ORDERED that if Plaintiff disputes the accuracy or reasonableness of the costs and attorneys' fees incurred by Defendant William Cohan, within ten (10) days from service of the itemized bill referenced above, Plaintiff must file and serve on all parties a sworn statement setting forth his basis for disputing the accuracy or reasonableness of said costs and fees.

8/24/2022					WILLIAM PERRY, J.S.C.		
DATE							
CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

EXHIBIT C

FILED: APPELLATE DIVISION - 1ST DEPT 09/21/2022 04:36 PM 2022-04173
NYSCEF DOC. NO. 1 RECEIVED NYSCEF: 09/21/2022

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

JIDE ZEITLIN, Plaintiff, – against – WILLIAM COHAN, Defendant.	Index No. 156829/2021 (Hon. William Perry) **NOTICE OF APPEAL**

PLEASE TAKE NOTICE that Plaintiff Jide Zeitlin hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, from the annexed Decision and Order of the Supreme Court of the State of New York, County of New York (Perry, J.S.C.), dated August 24, 2022 (the "Order"), and duly entered and filed on August 24, 2022, and each and every portion thereof.

A true and correct copy of the Notice of Entry of the Order is attached as Exhibit 1. A true and correct copy of Plaintiff's Informational Statement pursuant to 22 NYCRR § 1250.3(a) is annexed as Exhibit 2.

DATED: Brooklyn, New York
September 21, 2022

ABRAMS FENSTERMAN, LLP

/s/ Justin T. Kelton

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EXHIBIT 1

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

JIDE ZEITLIN Plaintiff, v. WILLIAM COHAN Defendant.	Index No. 156829/2021 **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the annexed decision and order was entered by the New York County Clerk on August 24, 2022.

Dated: August 24, 2022
New York, NY

/s/ Jay Ward Brown

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. WILLIAM PERRY** **PART** **23**

Justice

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JIDE ZEITLIN,

Plaintiff,

- v -

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As set forth in the complaint, Plaintiff alleges that Cohan initially approached him for an interview in 2019, to write a "comprehensive piece about Mr. Zeitlin's life's journey from Nigeria, to Wall Street, and ultimately to Tapestry" which would be published in *Air Mail*. (NYSCEF Doc No. 2, Complaint, at ¶ 54.) Plaintiff alleges that Cohan, however, had sought the interview with the intention of focusing on Plaintiff's relationship with Ms. Raymond, and that, during the interview process, Cohan shared Ms. Raymond's false allegations with Tapestry, which then forced Plaintiff to resign. (*Id*. at ¶¶ 63-69.)

The Article

The article summarizes Plaintiff's early life and career, culminating in his September 24, 2009 nomination to the post of the US Ambassador for UN Management and Reform by President Obama. (NYSCEF Doc No. 3, Article, at 1-6.) On December 9, 2009, the day after the Senate Foreign Relations Committee recommended that the Senate approve his nomination, Gretchen Raymond emailed Max Gigle, a staff assistant to Connecticut Senator Chris Dodd, stating that Plaintiff "has put me and my family through hell." (*Id*. at 7.)

The article recounts the allegations contained in Raymond's 2009 email (the "email"); that in 2007, Raymond was working as a fitness model and responded to a Craigslist ad titled "Fit yes, experience not necessary" posted by photographer "James Greene". (*Id*.) The two began a correspondence, photoshoots were arranged, and the two eventually became lovers after Plaintiff "confessed to her that he had been living a double life." (*Id*. at 8.)

Although Plaintiff ended the relationship in October 2007, Raymond's husband discovered its existence and revealed his discovery to Plaintiff's wife. (*Id*. at 9.) The email states that Raymond had a brick thrown through her car window, seemingly in retaliation for the affair.

In further researching Plaintiff's photography career, Raymond and her husband learned that the "Sohophoto studio" used by Plaintiff was actually an apartment directly adjacent to his familial residence, where he resided with his wife and children. They also found seven models, described as "young women," photographed by Plaintiff in "demonstrably sexual poses, many lying on a bed in skimpy lingerie," including Tamara Williams, who "said she was over 18 when she was photographed topless on a bed in Zeitlin's SoHo studio around 2005, 'but that nothing bad transpired.'" (*Id*. at 9-10.)

The article states that Raymond "struck some pay dirt when Josh Rogin, a reporter at The Cable- a blog of Foreign Policy magazine- became interested in her claims[.]" (*Id*. at 10.) Rogin broke the news that Plaintiff's nomination to the UN had been withdrawn after "rumors swirled about his overall character and elements of identity fraud." (*Id*.)

The article concludes with Cohan alleging that Plaintiff was "alternately evasive or dismissive" of his questions regarding the withdrawal of his nomination and that he "denied everything." (*Id*. at 11.) Plaintiff allegedly stated that he was asked about his relationship with Raymond during the senate hearing (which Cohan notes is untrue), that he was "collateral damage in a GOP plot to wound Obama's foreign policy team," and, as proof of the falsity of Raymond's claims, that he had been offered the "bigger role" of undersecretary of the Treasury in 2015 (although Cohan notes that he was unable to confirm this after reaching out to multiple sources).

Plaintiff commenced this action on July 21, 2020, alleging that the article is "patently false, defamatory, highly damaging," and relies upon a single source, Ms. Raymond, "an incensed woman who was brokenhearted after [Plaintiff] ended a brief, wholly consensual relationship that began and ended nearly fourteen years ago." (Complaint at ¶ 1.)

Plaintiff sets forth three causes of action for defamation per se against Cohan, each based on different statements contained in the article: 1) that Plaintiff "used deception to lure a woman [Ms. Raymond] into an unwanted romantic relationship"; 2) that Plaintiff "stalked, harassed, and threatened Ms. Raymond," as evidenced by her 2009 email (which was included in the article via hyperlink); and 3) that Plaintiff "engaged in pedophilia and production of child pornography," also evidenced by the same email. (*Id*. at ¶¶ 86, 107, 127.)

In motion sequence 003, Cohan moves to dismiss the complaint on the grounds that Plaintiff is unable to meet the heightened pleading standard under New York's anti-SLAPP law, as the article addresses an issue of public concern, which requires Plaintiff to establish by clear and convincing evidence that the article was published with actual malice. (NYSCEF Doc No. 22, Ms003 Memo, at 7.) Cohan also argues that he cannot be found liable for the republication or summarization of Ms. Raymond's 2009 email, pursuant to New York Civil Rights Law § 74, because the email was part of Plaintiff's congressional nomination hearing. (*Id*. at 18-21.) Finally, Cohan argues that the statements underlying Plaintiff's first cause of action for defamation, that Plaintiff "used deception to lure a woman into an unwanted romantic relationship," are substantially true, and were first published in 2009 by another reporter, Josh Rogin, in *The Cable*, entitling Cohan to a qualified privilege of republication. (*Id*. at 21-24.)

In opposition, Plaintiff argues that the statements are not subject to the anti-SLAPP law because they do not relate to a matter of "public concern," but that, in any event, he does meet the

actual malice standard. (NYSCEF Doc No. 50, Opposition, at 5.) Plaintiff also argues that Cohan's republication defense pertaining to the 2009 email is meritless because the email was not an official part of the proceeding, but rather, was sent the day after the proceeding had concluded (*id*. at 5-6), and that Plaintiff's first cause of action is well pled (*id*. at 19-21).

Discussion

On a pre-answer motion to dismiss a complaint for failure to state a cause of action, pursuant to CPLR 3211 [a] [7], "the court should accept as true the facts alleged in the complaint, accord plaintiff the benefit of every possible inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory." (*Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121, [1st Dept 2002].) However, "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003].)

Additionally, CPLR 3211 [g] provides that in cases involving the public interest, as defined by Civil Rights Law § 76-a, where a defendant moves to dismiss pursuant to CPLR 3211 [a] [7], "the burden is upon the plaintiff to establish that its claim has the requisite substantial basis." (*Duane Reade, Inc. v Clark*, 2 Misc. 3d 1007(A), at *4, 2004 WL 690191 [Sup Ct, NY County 2004].) "In order to avoid dismissal of its SLAPP suit complaint, plaintiff must establish by clear and convincing evidence a 'substantial basis' in fact and law for its claim. The Legislature viewed 'substantial' as a more stringent standard than the 'reasonable' standard that would otherwise apply." (*Id*., *quoting* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:73.)

Anti-SLAPP

The anti-SLAPP law, as amended on November 10, 2020[1] and codified at Civil Rights Law § 76-a[1] ["Actions involving public petition and participation; when actual malice to be proven"], provides, in pertinent part, that:

> (a) An "action involving public petition and participation" is a claim based upon:
> (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or
> (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.
> …
> (d) "Public interest" shall be construed broadly, and shall mean any subject other than a purely private matter.
>
> 2. In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

Civil Rights Law § 70-a[1][a] ["Actions involving public petition and participation; recovery of damages"] provides that a defendant "shall" recover costs and attorney's fees upon a demonstration "that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law[.]"

The court finds that Plaintiff's claims are subject to the anti-SLAPP law, as they are "communication[s] in a place open to the public or a public forum in connection with an issue of

[1] Although neither party raises the question of the applicability of the November 10, 2020 amendment, the court notes that it does apply, based on this action's commencement date of July 21, 2021, despite the fact that the article was published on July 22, 2020. (*See Gottwald v Sebert*, 203 AD3d 488 [1st Dept, Mar. 10, 2022] [holding that the amendment does not apply retroactively to "pending claims"]; *Goldberg v Urbach*, 2022 WL 1285452, at *1 [Sup Ct, Richmond County, Mar. 14, 2022] [holding that the amendment does not apply to defamation action commenced August 26, 2020, before the amendment was enacted].)

public interest[.]" (Civil Rights Law § 76-a[1][a][1].) "New York courts broadly interpret what constitutes matters of public concern" and have found that statements about a relationship that touch on topics of "sexual impropriety and power dynamics in the music industry during the advent of the #MeToo movement" "[are] indisputably an issue of public interest." (*Aristocrat Plastic Surgery, P.C. v Silva*, 206 AD3d 26, 30-31 [1st Dept, May 19, 2022], *citing Coleman v Grand*, 523 F Supp 3d 244, 259 [ED NY 2021]; *see also Isaly v Garde*, 2022 WL 2669242, at *5 [Sup Ct, NY County, July 11, 2022] [finding that articles containing accusations of sexual harassment pertained to "issue of public interest"]; *Parker v Simmons*, 2021 WL 4891347 [Sup Ct, NY County 2021] [same].)

As such, Plaintiff is required to meet the higher pleading standard of establishing by "clear and convincing evidence" that his causes of action have "a substantial basis in law" (CPLR 3211[g]), i.e., that the article was published with "'actual malice'--- that is, with knowledge that it was false or with reckless disregard of whether it was false or not." (*Great Wall Med. P.C. v Levine*, 74 Misc 3d 1224[A], at *2 [Sup Ct, NY County, Mar. 8, 2022]; *Sackler v American Broadcasting Companies, Inc.*, 71 Misc 3d 693, 700 [Sup Ct, NY County 2021].) Here, Plaintiff's allegations of actual malice are entirely conclusory (Complaint at ¶¶ 90-94; 111-14; 131-34), unsupported by "clear and convincing evidence," and thus insufficient to meet his required burden.

Plaintiff incorrectly argues that he is not yet required to establish by "clear and convincing evidence" that the article was published with actual malice, as "that is the standard applicable to anti-SLAPP claims at ***summary judgment***, not the motion-to-dismiss stage." (NYSCEF Doc No. 50, Opposition, at 23 [emphasis in original]; *see* CPLR 3211[g]; *Great Wall Med. P.C.*, 74 Misc 3d 1224[A] at *2 [a motion to dismiss a SLAPP suit "must be granted … unless the party opposing the motion demonstrates … by clear and convincing evidence" that the publication at issue was

made with actual malice]; *Torres v Marrero*, 2022 WL 3043398, at *5 [Sup Ct, NY County, Aug. 2, 2022] ["A plaintiff is now required to establish by 'clear and convincing evidence' that there is a substantial basis in fact and law for its claim"].)

Finally, because the article falls "under the ambit of the amended anti-SLAPP law, defendant is entitled to seek damages and attorneys' fees under Civil Rights Law §§ 70-a and 76-a(1)(a)(1)." (*Aristocrat Plastic Surgery, P.C.*, 206 AD3d at 32.) Thus, it is hereby

ORDERED that Defendant William Cohan's motion sequence 003 for dismissal of the complaint is granted in its entirety, the complaint is dismissed against Defendant, with costs and disbursements, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that within ten (10) days from the entry of this order, Defendant William Cohan shall file and serve on all parties an itemized bill fully detailing his actual costs and attorneys' fees associated with this action; the truthfulness and accuracy of which shall be affirmed by an attorney of said firm who is fully familiar with the facts and circumstances of the instant matter; and it is further

ORDERED that if Plaintiff disputes the accuracy or reasonableness of the costs and attorneys' fees incurred by Defendant William Cohan, within ten (10) days from service of the itemized bill referenced above, Plaintiff must file and serve on all parties a sworn statement setting forth his basis for disputing the accuracy or reasonableness of said costs and fees.

8/24/2022
DATE

WILLIAM PERRY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
	X	GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

EXHIBIT 2

Supreme Court of the State of New York
Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

JIDE ZEITLIN

- against -

WILLIAM COHAN

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ☒ Civil Action
- ☐ CPLR article 75 Arbitration
- ☐ CPLR article 78 Proceeding
- ☐ Special Proceeding Other
- ☐ Habeas Corpus Proceeding

Filing Type

- ☒ Appeal
- ☐ Original Proceedings
  - ☐ CPLR Article 78
  - ☐ Eminent Domain
  - ☐ Labor Law 220 or 220-b
  - ☐ Public Officers Law § 36
  - ☐ Real Property Tax Law § 1278
- ☐ Transferred Proceeding
  - ☐ CPLR Article 78
  - ☐ Executive Law § 298
- ☐ CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

☐ Administrative Review	☐ Business Relationships	☐ Commercial	☐ Contracts
☐ Declaratory Judgment	☐ Domestic Relations	☐ Election Law	☐ Estate Matters
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous	☐ Prisoner Discipline & Parole
☐ Real Property (other than foreclosure)	☐ Statutory	☐ Taxation	☒ Torts

Appeal

Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	■ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
■ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: New York
Dated: 08/24/2022	Entered: August 24, 2022
Judge (name in full): Williiam Perry, J.S.C	Index No.: 156829/2021
Stage: ☐ Interlocutory ■ Final ☐ Post-Final	Trial: ☐ Yes ■ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ☐ Yes ■ No

If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

N/A

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Appeal from Decision and Order on Motion dated and entered on August 24, 2022 by Honorable William Perry. Defendant moved to dismiss the complaint on the grounds that Plaintiff was unable to meet the heightened pleading standard under New York's anti-SLAPP law. The motion was granted. Plaintiff appeals from each and every portion of the decision and order.

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

The Supreme Court erred by holding that: (i) New York's anti-SLAPP law applies to a story about a private, years-old affair; (ii) Plaintiff did not sufficiently plead actual malice; (iii) Plaintiff was required to support his allegations by "clear and convincing evidence" at the pre-answer stage; and (iv) Plaintiff's allegations are unsupported by "clear and convincing evidence".

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Jide Zeitlin	Plaintiff	Appellant
2	William Cohan	Defendant	Respondent
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

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Party or Parties Represented (set forth party number(s) from table above): 1

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Party or Parties Represented (set forth party number(s) from table above): 2

Attorney/Firm Name:
Address:
City: | State: | Zip: | Telephone No:
E-mail Address:
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
Party or Parties Represented (set forth party number(s) from table above):

Attorney/Firm Name:
Address:
City: | State: | Zip: | Telephone No:
E-mail Address:
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice
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