New York Supreme Court

APPELLATE DIVISION—SECOND DEPARTMENT

VIP PET GROOMING STUDIO, INC.,

Plaintiff-Respondent,

—against—

ROBERT SPROULE and SARAH SPROULE,

Defendants-Appellants.

DOCKET NO. 2021-04228

AMICUS BRIEF ON BEHALF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, GANNETT CO., INC., THE MEDIA INSTITUTE, MPA – THE ASSOCIATION OF MAGAZINE MEDIA, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION, NEW YORK PUBLIC RADIO, THE NEW YORK TIMES COMPANY, PENGUIN RANDOM HOUSE LLC, RADIO TELEVISION DIGITAL NEWS ASSOCIATION, THE SOCIETY OF ENVIRONMENTAL JOURNALISTS, AND VOX MEDIA, LLC IN SUPPORT OF DEFENDANTS-APPELLANTS

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amici curiae ("Media Amici") are the Reporters Committee for Freedom of the Press (the "Reporters Committee"), Gannett Co., Inc., The Media Institute, MPA - The Association of Magazine Media, National Press Photographers Association, New York Public Radio, The New York Times Company, Penguin Random House LLC, Radio Television Digital News Association, The Society of Environmental Journalists, and Vox Media, LLC. Lead amicus is the Reporters Committee, 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 and professional and trade groups. A supplemental statement of the identity and interest of the other amici is included as Appendix A.[1]

Amici curiae are dedicated to defending the rights of journalists and news organizations to gather and report news throughout the United States, including in New York. Amici include organizations that frequently publish and host reviews of

[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.

products and services—content that provides vital information to consumers seeking to make smart, safe decisions. And, as members and representatives of the news media, amici are the frequent targets of strategic lawsuits against public participation ("SLAPPs") designed to punish and deter constitutionally protected newsgathering and reporting activities. Media Amici therefore have a strong interest in ensuring that New York courts properly interpret and apply the recently amended anti-SLAPP law, including as to its scope and its retroactivity.

STATEMENT OF FACTS AND PROCEEDINGS

On March 4, 2020, the Sproules brought their 4-month-old Cocker Spaniel, Ranger, to VIP Pet Grooming Studio, Inc. ("VIP") for a groom. R. 68 ¶¶ 1, 4; R. 81 ¶ 3.[2] The Complaint alleges that during the groom, VIP called the Sproules, explaining that "Ranger was acting strangely and needed to be picked up immediately." R. 68 ¶ 5. The Sproules took their puppy to the veterinarian, where he was put on a ventilator. R. 69 ¶¶ 5-7. Two days later, the puppy had to be put down. R. 70 ¶ 10. In March 2020, the parties exchanged letters disputing the events that transpired, with each threatening litigation. R. 23; R. 41-42. VIP's letter stated that "[a]ny defamation of VIP or attempt to 'destroy' its business [would] be met by [VIP taking] appropriate legal action." R. 23, 61-62; R. 41-42.

[2] All citations are to the Appellate Record ("R") or Docket ("Dkt.").

On May 4, 2020, Robert Sproule posted reviews on Yelp and Google, cautioning prospective customers against using VIP based on the Sproules' experience. Both reviews stated:

> I would strongly caution you against using this business. A grooming visit on March 4, 2020 ultimately ended with us having to put our 4-month old puppy to sleep two days later as a result of their negligence or incompetence. When we brought our happy healthy puppy in for a bath and cut, we specifically discussed our concerns regarding our puppy's hesitance to being bathed and the use of the clippers. We told the groomer that if there was any issue to stop and we would come get our puppy. Instead the groomer pushed our puppy through the process and only stopped and called us when it became very apparent that there was something physically wrong with our puppy. When we picked him up, he was clearly in distress, and we rushed him to the emergency vet. He had water in his lungs that the vet said could only have come from a dramatic physical accident at the groomer. Despite two days at the vet on a ventilator he continued to decline and we had to make the hard decision to let him go. We tried to discuss the situation with the groomer. They have taken no responsibility and in fact were abusive. They have threatened us financially and legally regarding telling our story. We will be pursuing legal recourse against this business when the courts reopen. You would be best finding another groomer.

Yelp review, R. 15, *available at* https://www.yelp.com/ biz/vip-pet-grooming-studio-wantagh; Google review, R. 64, *available at* vip pet grooming studio - Google Search.

VIP did not respond to either review for nearly six months. On August 17, 2020, the Sproules sued VIP for negligence. On November 1, 2020, VIP responded to the Google review. R. 64. The next day, it answered the Sproules' Complaint, and filed this defamation action. R. 12-19.

Significantly, on November 10, 2020—just eight days after VIP sued the Sproules for defamation—New York amended its anti-SLAPP law to, *inter alia*, expand 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 of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition." N.Y. Civ. Rights Law § 76-a(1)(a)(1)–(2).

On January 11, 2021, the Sproules moved to dismiss the defamation case on grounds that the amended anti-SLAPP law barred it. R. 88-107. On May 20, 2021, the court denied the motion, expressly declining to address whether the amended anti-SLAPP law applied retroactively because it concluded that the Sproules' reviews failed to address an issue of public interest. R. 4-11. The Sproules appealed. Media Amici write to address Defendants-Appellants' Questions Presented 2 and 3 concerning the retroactive application of the amended anti-SLAPP law and the definition of an "issue of public interest."

ARGUMENT

For the reasons that follow, the amendments to New York's anti-SLAPP law should be given retroactive effect to achieve the Legislature's remedial, speech-

protective goals. Media Amici also urge this Court to interpret "issue of public interest" broadly, just as the Legislature intended.

I. THE AMENDMENTS TO NEW YORK'S ANTI-SLAPP LAW APPLY RETROACTIVELY.

A. New York Enacted One of the First Anti-SLAPP Laws to Protect Free Speech.

In 1992, New York enacted one of the nation's first "anti-strategic lawsuits against public participation" ("anti-SLAPP") laws. 1992 N.Y. Sess. Laws ch. 767 (A299) (McKinney). SLAPPs are meritless, costly, time-consuming lawsuits "brought primarily to chill the valid exercise of a defendant's right to free speech," and often include defamation claims. *Ernst v. Carrigan*, 814 F.3d 116, 117 (2d Cir. 2016). As the Supreme Court recognized in *New York Times Co. v. Sullivan*, SLAPP plaintiffs need not prevail in court to achieve that goal; the threat of litigation alone can result in "self-censorship" by defendants. 376 U.S. 254, 279 (1964). For media entities, SLAPPs hinder their ability to deliver news by chilling speech and draining resources. "Short of a gun to the head, a greater threat to First Amendment expression" than SLAPPs "can scarcely be imagined." *Gordon v. Marrone*, 155 Misc. 2d 726, 736 (Sup. Ct. Westchester Cty. 1992), *aff'd*, 202 A.D.2d 104 (2d Dep't 1994).

Recognizing this threat, 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. New York's law, though trendsetting, was narrow, confining "public participation" to applications for public permits or similar government entitlements. *See* L.1992, ch. 767, § 3. 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 its laudable aims, few defendants received its protections.

B. The Amended Anti-SLAPP Law Broadly Protects Free Speech.

The Legislature recently recognized the need to amend the anti-SLAPP law to achieve its speech-protective goals and address its dangerous shortcomings. *See* S52A Sponsor Mem; L.2020, ch. 250, Bill Jacket at 5–6 (Letter of Assemblywoman Helene E. Weinstein) (hereinafter "Weinstein Sponsor Letter"). In November 2020, the Legislature enacted amendments that 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). In addition, to recover damages in a case involving public participation, plaintiffs must now meet the actual malice standard "by clear and convincing evidence," showing that defendants made the statement knowing it was false or "with reckless disregard" for its falsity. *Id*. § 76-a(2). The amendments also benefit defendants by requiring courts to consider their affidavits

on motions to dismiss, to prioritize hearing such motions, and to award prevailing defendants attorney fees. N.Y. C.P.L.R. 3211(g)(2); N.Y. Civ. Rights Law § 70-a. Because these amendments took effect on November 10, 2020, before VIP filed this case against the Sproules, the amended law only applies if it has retroactive effect. *See* R. 12-19.

C. New York's Amended Anti-SLAPP Law Applies Retroactively.

New York laws generally apply prospectively unless the Legislature has indicated a preference for retroactive application. *See In re Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117, 122-23 (2001). At the same time, "remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose." *Id.* A remedial law "correct[s] imperfections in prior law . . . giving relief to the aggrieved party." *Nelson v. HSBC Bank USA*, 87 A.D.3d 995, 998 (2d Dep't 2011) (citation and internal quotation marks omitted). In determining whether a law should be given retroactive effect, courts also consider whether the Legislature "conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be." *In re Gleason*, 96 N.Y.2d at 122. These considerations justify "the 'potentially harsh' impacts of retroactivity." *Regina Metro. Co. v. New York State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 375 (2020).

Applying these principles, all New York courts to consider the issue have ***uniformly*** agreed that the anti-SLAPP amendments apply retroactively. *See Palin v. N.Y. Times Co.*, 510 F. Supp. 3d 21, 27 (S.D.N.Y. 2020); *Ctr. for Med. Progress v. Planned Parenthood Fed'n of Am.,* No. 20-CV-7670 (CM), 2021 WL 3173804, at *8 n.3 (S.D.N.Y. July 27, 2021); *Sweigert v. Goodman*, No. 18-CV-8653 (VEC) (SDA), 2021 WL 1578097, at *2 (S.D.N.Y. Apr. 22, 2021); *Coleman v. Grand*, 523 F. Supp. 3d 244, 258-59 (E.D.N.Y. 2021), *appeal docketed*, No. 21-800 (2d Cir. Mar. 26, 2021); Tr. of Proceedings, Dkt. 2345, *Gottwald v. Sebert*, No. 653118/2014 (Sup. Ct. N.Y. Cty. July 7, 2021); *Reus v. ETC Hous. Corp*., 72 Misc. 3d 479, 485 n.* (Sup. Ct. Clinton Cty. 2021); *Project Veritas v. N.Y. Times Co.*, No. 63921/2020, 2021 WL 2395290, at *7 (Sup. Ct. N.Y. Cty. Mar. 18, 2021); *Sackler v. Am. Broad. Cos.*, 71 Misc. 3d 693, 698 (Sup. Ct. N.Y. Cty. 2021). These decisions are correct, and Media Amici urge this Court to reach the same conclusion.

1. The Legislature Clearly Indicated Its Preference for Retroactive Application.

First, by eliminating prospective language from the 1992 law, the Legislature clearly indicated its preference for courts to apply the 2020 amendments retroactively. *Compare* A5991, § 3 (2019–20) (as introduced) *with* A5991, § 4 (2019–20) (as enacted). The 1992 anti-SLAPP law had applied only prospectively. *See* L.1992, ch. 767, § 6. As introduced, the 2020 amendments also contained forward-looking language, stating, "[t]his act shall take effect immediately and shall

apply to actions commenced on or after such date." *See* A5991, § 3 (2019–20) (as introduced). The Legislature then amended the bill to state, "[t]his act shall take effect immediately." A5991, § 4 (2019–20) (as enacted).[3] *Cf. CFCU Cmty. Credit Union v. Hayward*, 552 F.3d 253, 264 (2d Cir. 2009) (finding legislators' decision to exclude anti-retroactivity language "suggests an intent to apply the law" retroactively).

Further, the law requires plaintiffs to pay defendants' attorneys' fees in SLAPPs "commenced ***or continued***" without a substantial basis in law. N.Y. Civ. Rights Law § 70-a(1) (emphasis added); *see Reus*, 72 Misc. 3d at 485 n.* (applying amendments retroactively because "Plaintiffs have continued this action to date").

2. The Anti-SLAPP Amendments Are Remedial, Aimed at Fixing Flaws in the Original Law and Broadening a Narrow Judicial Interpretation.

The legislative history of the anti-SLAPP amendments makes clear they are remedial—intended "to correct the narrow scope of New York's prior anti-SLAPP law." *Palin*, 510 F. Supp. 3d at 27; *see also In re OnBank & Tr. Co.*, 90 N.Y.2d 725, 731 (1997) (finding legislation remedial based partially on sponsor memorandum and bill jacket). The amendments' sponsors recognized that the 1992

[3] Further indicating the Legislature's intent in making this change, the only critical letter in the bill jacket asks the Legislature to avoid retroactivity by reinstating the language on prospective application. *See* L.2020, ch. 250, Bill Jacket at 41–42 (Letter of Rent Stabilization Ass'n). Notably, the legislature did not reinsert that language.

law "failed to accomplish" its objective to "provide the utmost [speech] protection." S52A Sponsor Mem.; *see also* Weinstein Sponsor Letter (calling original legislation "inadequate"). In response, the sponsors aimed to "better advance the purposes" of the 1992 law, S52A Sponsor Mem., by "expanding the breadth of the law and also putting teeth into it so as to deter" SLAPPs. Weinstein Sponsor Letter.

The law also "was designed to rewrite an unintended judicial interpretation" of the 1992 anti-SLAPP law. *In re Gleason*, 96 N.Y.2d at 122. Legislators complained that the definition of public participation had been too "narrowly interpreted by the courts" and that "courts have failed to use their discretionary power to award costs and attorney's fees to a defendant found to have been victimized by actions intended only to chill free speech." S52A Sponsor Mem.; *see also Harfenes v. Sea Gate Ass'n*, 167 Misc. 2d 647, 653 (Sup. Ct. N.Y. Cty. 1995) (calling for narrow construction of the law). To remedy this and better deter SLAPPs, the drafters broadened the definition of public participation and made fee-shifting mandatory. *See* S52A Sponsor Mem.; N.Y. Civ. Rights Law §§ 70-a(1) (requiring fees), 76-a(1)(a)(1)–(2) (defining public participation).

3. The Legislature Conveyed Its Urgency When Enacting the Anti-SLAPP Amendments, Which Took Effect Immediately.

Media entities and other groups, including Media Amici, supported the amendments as an important means to protect against a growing wave of frivolous, speech-chilling litigation targeting members of the news media. L.2020, ch. 250,

Bill Jacket. The bill's sponsors likewise feared "the rising tide" of SLAPPs. Weinstein Sponsor Letter. Against this backdrop, the Legislature showed its urgency by providing the amendments would take immediate effect. L.2020, ch. 250, § 4; *see also In re Gleason*, 96 N.Y.2d at 122; *Brothers v. Florence*, 95 N.Y.2d 290, 299 (2000) (finding immediate effective date supports retroactive application); *Nelson*, 87 A.D.3d at 997-98 (same).

4. Applying the Anti-SLAPP Amendments Retroactively Does Not Prejudice the Appellee.

VIP faces no "potentially harsh impacts" from retroactive application of the anti-SLAPP amendments. *See Regina Metro. Co.*, 35 N.Y.3d at 375 (citation and internal quotation marks omitted); *see also Palin*, 510 F. Supp. 3d at 28 (finding no harsh impact in retroactively applying anti-SLAPP amendments). The anti-SLAPP amendments require plaintiffs meet an actual malice standard to recover damages where the speech at issue meets the broadened definition of "public participation." N.Y. Civ. Rights Law § 76-a(1)(a)(1)–(2). But VIP has been prepared since before it filed its Complaint to argue that the Sproules published their statements with actual malice. R. 16. Despite receiving written warning that the Sproules would seek dismissal under the newly amended anti-SLAPP law, VIP pressed on with its defamation claim. R. 65-66. And, in opposing the motion to dismiss, VIP briefed both retroactivity and actual malice. *See* R. 117-29. Plaintiffs are not prejudiced where they have already made their case that defendants' speech meets the anti-

SLAPP amendments' requirements. *See Coleman*, 523 F. Supp. 3d at 259; *Sackler*, 71 Misc. 3d at 698. This is true even if the defendant is a private figure whose status would not previously have triggered the actual malice standard. *See*, *e.g.*, *Coleman*, 523 F. Supp. 3d at 255-57, 259-60; *Sackler*, 71 Misc. 3d at 698; Tr. of Proceedings, Dkt. 2345, at 14, 52-53, *Gottwald*, No. 653118/2014.[4] By applying the anti-SLAPP amendments here, the Court gives effect to the Legislature's remedial intent without prejudicing VIP.

5. Applying the Anti-SLAPP Amendments Retroactively Protects the Press and Public from Meritless, Speech-Chilling Litigation.

Media Amici urge this Court to apply the anti-SLAPP amendments retroactively given their remedial intent. New York's media organizations are facing ever-more SLAPPs, including suits targeting consumer reviews. *See*, *e.g.*, *Mirza v. Amar*, 513 F. Supp. 3d 292, 300 (E.D.N.Y. 2021) (dismissing defamation suit based on negative Yelp review); *Torati v. Hodak*, 147 A.D.3d 502, 503 (1st Dep't 2017) (same); *Themed Rests., Inc. v. Zagat Survey, LLC*, 21 A.D.3d 826, 827 (1st Dep't 2005) (dismissing restaurant's libel suit against reviewer). And, while media defendants have benefitted from the retroactive application of New York's anti-

[4] VIP would have faced a heightened fault standard regardless of the law's retroactivity. As discussed below, the Sproules spoke on a matter of public concern, requiring that VIP prove gross irresponsibility. *See infra* Part II; *see also Coleman*, 523 F. Supp. 3d at 264 n.4 (noting plaintiff would also fail to meet gross irresponsibility standard).

SLAPP amendments by trial courts, the Appellate Division has yet to weigh in and solidify these protections. *See Palin*, 510 F. Supp. 3d at 27; *Project Veritas*, 2021 WL 2395290, at *7; *Sackler*, 71 Misc. 3d at 698. Here, Media Amici urge this Court to apply the anti-SLAPP amendments retroactively, protecting consumers and media from meritless yet dangerous litigation.

II. THE AMENDED ANTI-SLAPP LAW DEFINES "ISSUE OF PUBLIC INTEREST" IN A BROAD, SPEECH-PROTECTIVE MANNER, COVERING THE SPROULES' REVIEWS.

The amended anti-SLAPP law applies 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). The consumer reviews at issue unquestionably meet this standard.

A. The Sproules' Reviews Were Published in a "Public Forum."

As a threshold matter, and while the trial court did not reach the issue, it is undisputed that the Sproules' speech occurred in a public forum. Publicly accessible websites, including consumer review websites such as Google and Yelp, provide an open platform for free discourse. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (describing social media as "the modern public square"). The Eastern District of New York recently confirmed that statements made on social media are "communication[s] . . . in a public forum" within the meaning of the amended anti-SLAPP law. *See*, *e.g.*, *Goldman v. Reddington*, No. 18-CV-3662 (RPK) (ARL),

2021 WL 4099462, at *4 (E.D.N.Y. Sept. 9, 2021) (internal quotation marks omitted). Similarly, other states have held that consumer review websites are public forums within the meaning of their respective anti-SLAPP laws. *See*, *e.g.*, *GOLO, LLC v. Higher Health Network, LLC*, No. 18-CV-2434 (GPC) (MSB), 2019 WL 446251, at *15 (S.D. Cal. Feb. 5, 2019) ("Product reviews on a website constitute 'public forums.'"); *Wong v. Jing*, 189 Cal. App. 4th 1354, 1366 (2010) (holding publicly accessible websites, including Yelp, are public forums under anti-SLAPP law); *Demetriades v. Yelp, Inc.*, 228 Cal. App. 4th 294, 310 (2014) ("Yelp's [w]eb site is a public forum and contains matters of public concern in its reviews of restaurants and other businesses."); *Stile v. Korb*, No. A-19-807131-C, 2020 Nev. Dist. LEXIS, at *9 (Nev. 8th Jud. Dist. Nov. 3, 2020) ("[W]eb sites such as Yelp are the type of public forum that is protected under the First Amendment."). Indeed, websites that collect and feature user-generated content, like social media and consumer reviews, are quintessential public forums—their very function is to create communities and allow members to converse. Thus, the Sproules' reviews posted to Yelp and Google are communications within a "public forum" under New York's amended anti-SLAPP law.

B. The New York Legislature Defined "Issue of Public Interest" Broadly, Covering the Sproules' Consumer Reviews.

The Legislature amended the anti-SLAPP law to protect a wide range of speech "in connection with an issue of public interest," including ***"any subject other***

than a purely private matter." N.Y. Civ. Rights Law § 76-a(1)(a), (d) (emphasis added). There is little case law interpreting "public interest" within New York's newly amended anti-SLAPP law. *See Lindberg v. Dow Jones & Co.*, No. 20-CV-8231 (LAK), 2021 WL 3605621, at *7 (S.D.N.Y. Aug. 11, 2021). Fortunately, New York courts have developed robust case law addressing a nearly identical issue in the defamation context—whether speech involves a matter of "public concern," and thus receives heightened protections, or is instead of "purely private concern." *Albert v. Loksen*, 239 F.3d 256, 270 (2d Cir. 2001); *see also Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 199 (1975) (setting heightened "gross irresponsibility" standard when allegedly defamatory statements address matters of public concern).

Courts interpreting New York's amended anti-SLAPP law have applied this common law precedent to determine whether speech addresses an issue of public interest.[5] *See Lindberg*, 2021 WL 3605621, at *7; *Coleman*, 523 F. Supp. 3d at 257-58; *Reus*, 72 Misc. 3d at 485-86. This approach is logical given that the drafters of the amended anti-SLAPP law used the same language as common law precedent: protecting speech on a broad range of "public matters" and excluding only "purely private matters." *See Chapadeau*, 38 N.Y.2d at 199; N.Y. Civ. Rights Law § 76-

[5] The trial court correctly noted that New York's anti-SLAPP law, as amended, is in its infancy; however, it did not need to look to Nevada and California law to define "public interest." New York's common law has already defined the term in its defamation jurisprudence.

a(1)(d). The New York Legislature, in using "materially the same language" as the jurisdiction's defamation precedent, 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); 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 amended anti-SLAPP law transplants the well-established "public" and "private" language from New York's defamation law, those cases are directly applicable.

In the defamation context, "public concern" is subject to an "extremely broad interpretation." *Albert*, 239 F.3d at 269. It is "extremely rare" for New York courts to find speech is of purely private concern. *Id.*; *cf. Huggins v. Moore*, 94 N.Y.2d 296, 302-03 (1999) (speech is of purely private concern when it "falls into the realm of mere gossip and prurient interest" or is "directed only to a limited, private audience") (citations and internal quotation marks omitted). Any speech "reasonably related to matters warranting public exposition" is of public concern. *Chapadeau*, 38 N.Y.2d at 199. In undertaking this analysis, courts broadly construe the public interest by looking to the statement's "content, form, and context." *Huggins*, 94 N.Y.2d at 302 (citing *Dun & Bradstreet v. Greenmoss Builders*, 472

U.S. 749, 761 (1985)) (citations and internal quotation marks omitted). A matter may be of "public concern" even if it involves individuals' experiences "so long as some theme of legitimate public concern can reasonably be drawn from their experience." *Id.* at 303.

Here, the content, form, and context of the Sproules' reviews demonstrate that they addressed a matter of public concern. Specifically, the reviews were posted on consumer review sites, Yelp and Google, where thousands of pet owners seek out reviews for pet-related services and anyone with an internet connection can access them. There were more than 30 reviews of VIP on Google and Yelp at the time Robert Sproule wrote his review (and many more now), showing there is public interest in writing and reading consumer reviews about grooming services. *See* Dkts. 16, 23; R. 64 Google; R. 15 Yelp. This is key, because the trial court erroneously concluded that the Sproules' experience was a mere "single act of alleged negligence concerning one pet by a small, privately-owned pet grooming business." R. 9. Half of the reviews posted on Yelp were one-star experiences cautioning others against using this business. On Google, Nancy Hoffman described an "extremely painful & traumatic" experience for her puppy, where she cautioned others and explained she "[w]as told [her] 10-month-old poodle puppy had an ear infection," and drove him to the veterinarian, during which he "bl[ed] all over his car crate" because his nails were cut too short. *See* R. 64 Google. Clearly, the Sproules were not the only

consumers to have had a negative experience with VIP nor were they the only consumers to have needed to see a veterinarian afterwards. But even if the Sproules were the first to speak out about their negative experience, their reviews would still address a matter of public concern. The Sproules' reviews begin by "strongly caution[ing] [pet owners] against using this business" and end by suggesting that prospective customers "would be best finding another groomer." *See* R. 64 Google; R. 15 Yelp. The reviews also include detailed discussions of their visit, including the date, the experience, and the negative outcome. *Id.* When taking into consideration the broad content, form, and context of these reviews, including Yelp and Google as forums, a potential consumer would understand the reviews were framed in cautionary terms directed to pet owners generally.

That VIP has expended considerable resources to sue the Sproules over the content of their business reviews, underscores just how valuable good consumer reviews are and is an implicit acknowledgment that future clientele may rely on the Sproules' reviews when choosing a groomer. Yelp and Google are public forums, meaning VIP can respond directly to consumer speech it disagrees with and even adjust its business in response. Therefore, because these reviews are addressed to the public, on publicly accessible platforms, and advise future consumers that a similar problem may arise if they use VIP, the reviews should be protected as speech

"in connection with the public interest" under New York's amended anti-SLAPP law.

C. The Trial Court Erred in Concluding That the Sproules' Reviews Were Not "in the Public Interest."

Because these reviews fit squarely within New York's extremely broad definition of "public interest," the trial court erred in holding to the contrary, that (1) the reviews involved "a single act of alleged negligence concerning one pet by a small, privately-owned pet grooming business," and (2) the conduct of VIP was not related to or aimed at the public at large nor was it shared by others. This holding, which relied almost entirely on California law, starkly limits what content can be considered in the "public interest."[6] R. 8-9. For the reasons that follow, Media Amici explain that (1) the Sproules' reviews were of interest to the pet-owning community, and (2) consumer reviews are "in the public interest," and protecting them is one of the many rationales the Legislature enacted anti-SLAPP reform.

[6] The trial court correctly noted that "[t]he ability of an individual to write a review concerning a single experience with a private merchant is not a license to defame with impunity that merchant—as alleged by VIP—and potentially destroy its reputation." R. 9. And the trial court is correct that a defamed business can sue for defamation; no one has a "license to defame." But SLAPPs are now subject to the new law, which increases protection for defendants whose speech broadly connects to an issue of public concern. This is a legislative decision, and the trial court lacks authority to change the standard.

1. The Sproules' Reviews Were of Interest to the Pet-Owning Community.

To be of public concern, a statement need not be "of interest to the population as a whole"; rather, it may be of interest to a specific community, even a "highly specialized" one. *McNally v. Yarnall*, 764 F. Supp. 838, 847 (S.D.N.Y. 1991); *Abbott v. Harris Publ'ns, Inc*., No. 97-CV-7648 (JSM), 2000 WL 913953, at *7 (S.D.N.Y. July 7, 2000) (statements about dog show judge's dishonesty of legitimate public concern to dog show community). The trial court's reasoning here is contrary to the *Abbott* case, in which the Southern District of New York held that allegedly false statements and misrepresentations in plaintiff's application to judge a dog show were a matter of public concern because of their implications for the dog show community. *Abbott*, 2000 WL 913953, at *7. The same has been held true of other controversies of interest to particular audiences. *See*, *e.g.*, *Don King Prods., Inc. v. Douglas*, 742 F. Supp. 778, 782-83 (S.D.N.Y. 1990) (holding that boxing fan community was sufficiently large such that boxing promoter's comments were in the "public interest"); *Campo Lindo for Dogs v. N.Y. Post Corp.*, 65 A.D.2d 650, 650 (3d Dep't 1978) (holding safety of dog vacation home was "within the public concern").

Here, pet-owners are the relevant community, and they are a substantial one: according to a survey conducted by the American Pet Products Association, seventy percent of U.S. households own a pet, with pet owners spending an estimated $109.6

billion on pet supplies and services (including grooming). *See* "Pet Industry Market Size, Trends & Ownership Statistics," AM. PET PRODS. ASS'N (Mar. 24, 2021), https://www.americanpetproducts.org/press_industrytrends.asp. A majority of the pet grooming industry has been described as "a haven for small businesses." Jennifer Cheeseman Day & Joe Weinstein, "Pet Owners Spending More on Time-Saving, Specialty Pet Care Services," U.S. CENSUS BUREAU (Feb. 18, 2020), https://www.census.gov/library/stories/2020/02/spending-on-pet-care-services-doubled-in-last-decade.html (explaining that "[a]mong the 211,000 pet care service workers, just under half (47%) are self-employed . . . and about half (49%) work for companies with fewer than 50 employees"). Affirming the trial court's holding would essentially immunize any critical consumer statements about pet grooming businesses, since small businesses are the default in this industry. R. 9.

The Sproules' reviews, directed to pet owners seeking a safe groomer, constitute a matter of public interest to that community, or at least those pet owners in or near Wantaugh, New York. *See* R. 64 Google; R. 15 Yelp. The reviews are addressed to local and visiting pet owners, and anyone else who may be seeking a pet groomer. *Id.* Like in *Abbott*, where the court held statements relevant to the dog show community were a matter of public concern, this Court should conclude that information concerning pet harm at a pet grooming business is of public interest to those deciding whether to bring their dog there. The reviews concern more than just

a "private beef"; they detail a greater problem with entrusting pets to third-party caregivers, a matter of great importance to the pet-owning community. *See*, *e.g.*, *Abbott*, 2000 WL 913953, at *7; *Campo Lindo for Dogs*, 65 A.D.2d at 650 (article discussing poor conditions at dog vacation home is of "public concern"); *see also Traditional Cat Ass'n v. Gilbreath*, 118 Cal. App. 4th 392, 397 (2004) (statements on website regarding a dispute between two cat breeding groups were a matter of public interest in that community). Just as courts have held that dog shows, dog vacation homes, and cat breeding are matters of public interest, the Sproules' reviews discussing a negative pet grooming experience certainly meet that standard.

2. Consumer Reviews Are of Public Concern and Protecting "Consumer Advocates" Was One of Many Rationales for Anti-SLAPP Reform.

Reviews of products and services are of public concern to others who may use the product or service. *See*, *e.g.*, *McNally*, 764 F. Supp. at 847 (art historian's negative assessment of artworks' value and authenticity was of public concern); *Park v. Capital Cities Commc'ns, Inc*., 181 A.D.2d 192, 194 (4th Dep't 1992) (letter complaining doctor performed unnecessary eye surgery was of public concern). For instance, in *Wong v. Jing*, a Yelp review about a first-hand experience at the dentist constituted an issue of public interest because "consumer information that goes beyond a particular interaction between the parties and implicates matters of public concern that can affect many people is generally deemed to involve an issue of public

interest for purposes of the anti-SLAPP statute." 189 Cal. App. 4th at 1366. Despite the clear similarities between *Wong* and this case, the trial court distinguished it, claiming that the Yelp review "went beyond the scope of a private experience and concerned the broader issue of nitrous oxide and mercury dental fillings in treating children." R. 9. However, the trial court's analysis only underscores the similarity between these two cases. Just as *Wong* involved a single, first-hand negative business experience with broader implications, so too do the Sproules' reviews. While the reviews describe the Sproules' visit, they also caution future consumers on the broader issue of mistreatment of pets in third-party care. Reviews like the Sproules' provide "consumer protection information" of public concern by "warning [others] not to use plaintiffs' services" and "aid[ing] consumers choosing among" alternatives—a function as essential in New York as it is in California. *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 899-900 (2004).

Indeed, New York's amended anti-SLAPP law expressly aims to protect the rights of "consumer advocates" to speak publicly on issues impacting other consumers. Specifically, one of the bill's sponsors explained:

> This broken system has led to journalists, ***consumer advocates***, survivors of sexual abuse and others ***being dragged through the courts on retaliatory legal challenges solely intended to silence them***. Today, New York's Democratic Majority 'SLAPPs back' with our new legislation (S.52A/A.5991A) that expands anti-SLAPP protections, thereby strengthening First Amendment rights in New York State, the media capital of the world.

"Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech," N.Y. STATE LEGISLATURE, https://nyassembly.gov/Press/files/20200722a.php (July 22, 2020) (emphasis added). There is no question that "consumer advocates" were intended to receive protection from the very problem that the amended anti-SLAPP law was designed to remedy. To hold that the Sproules' reviews were not "in connection with an issue of public interest" would frustrate the purpose of the anti-SLAPP law and hamper public discourse. *Id.*; N.Y. Civ. Rights Law § 76-a(1)(a)(1)–(2).

The Legislature sought to protect consumer reviews for good reason. Although publications like Consumer Reports and Consumer Affairs have long been helpful guides to shoppers, consumer reviews have become more accessible, prominent, and useful resources in the Internet age, as consumers spend more time shopping online. Websites like Amazon, Google, Yelp, TripAdvisor, CNET and Wirecutter provide invaluable consumer information. For example, with more than 184 million reviews worldwide, Yelp helps millions of consumers make informed decisions and compare ratings between competing businesses. Iva Marinova, "25+ Groundbreaking Yelp Statistics to Make 2021 Count," REVIEW42 (last updated Oct. 14, 2021), https://review42.com/resources/yelp-statistics.[7]

[7] Congress also recognizes that candid reviews heighten consumer awareness and create accountability. It passed the Consumer Review Fairness Act in 2016, 15 U.S.C. § 45b, 130 Stat. 1355, to "protect consumers' ability to share their honest opinions about a business's products,

Reviews also help businesses, allowing them to identify areas of consumer dissatisfaction and improve their products and services. *See*, *e.g.*, Ryan Fan, "How Domino's Revitalized Its Failing Brand," BETTERMARKETING (June 19, 2020), https://bettermarketing.pub/how-dominos-revitalized-its-failing-brand-77e9dec19ac3 (explaining that Domino's "listened to their consumers and then improved their product").

Reviews are also important vehicles for public expression. *See Mr. Chow of N.Y. v. Ste. Jour Azur S.A.*, 759 F.2d 219, 228 (2d Cir. 1985) ("[R]eviews, although they may be unkind, are not normally a breeding ground for successful libel actions."). Denying anti-SLAPP protection to consumer reviews punishes critical and diverging viewpoints, distorts the accuracy of resources providing consumer information, and denies businesses the opportunity to benefit from candid criticism.

III. THE TRIAL COURT'S APPROACH THREATENS TO DENY ANTI-SLAPP PROTECTION TO CONSUMER REVIEWS AND OTHER SOURCES OF INFORMATION.

A single experience or anecdote can draw attention to topics of public interest, whether the context is consumer reviews, investigative journalism, or social justice movements. Journalists, filmmakers, and other storytellers often rely on the

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services, or conduct in any forum – and that includes social media." *Consumer Review Fairness Act: What Businesses Need to Know*, U.S. FEDERAL TRADE COMM'N (Feb. 2017), https://www.ftc.gov/tips-advice/business-center/guidance/consumer-review-fairness-act-what-businesses-need-know. The Act bars companies from including non-disparagement clauses "that threaten or penalize people for posting negative reviews," because the "wisest policy" is to "[l]et people speak honestly about products and their experience with [the] company." *Id.*

narrative of a single person, a hidden problem, or marginalized position to shed light on underreported but compelling issues. The trial court's approach could pose grave danger to those who rely on the amended anti-SLAPP law to deter and dispose of meritless legal claims arising from such narratives. Media Amici are particularly concerned with the broader effects of the trial court's ruling, which saw a consumer review expressing a single family's first-hand experience with a business as a "private beef" instead of addressing a matter of public interest. This reductive view of anecdotes or examples threatens to deny anti-SLAPP protection in other areas where it is warranted and chill future speech of this kind.

The chilling effect would be especially pronounced for local publications and reporters, whose mission it is to report on stories of individual whistleblowers and community issues, which may impact smaller groups. These outlets often lack the resources to defend against legal claims, making them much likelier to avoid controversial topics entirely. Individuals in small communities have spoken out against a variety of public interest concerns, including unsafe meat plant conditions or prison conditions during COVID-19.[8] Local publications also routinely cover

[8] FIC Staff, "Press Advisory: Meat Inspector Speaks Out Against Unsafe COVID-19 Plant Conditions" (Nov. 19, 2020), https://foodwhistleblower.org/press-advisory-meat-inspector-speaks-out-against-unsafe-covid-19-plant-conditions/; Brian Didlake II, "Days after inmate dies due to COVID-19, family speaks out about prison conditions inside" (Dec. 9, 2020), https://www.fox61.com/article/news/health/coronavirus/family-of-inmate-speaks-out-about-prison-conditions-after-other-inmate-dies-due-to-covid-19/520-b01c2aa6-1d0e-49bb-92df-cd407b088e1e.

stories like the Sproules' as part of their work uncovering systemic issues within their communities. To list a few examples of news reporting in the pet grooming context:

1. Abbott Koloff & Liam Quinn, "Mahwah family wants answers after dog's death following grooming appointment," NORTHJERSEY.COM (Aug. 17, 2021), https://www.northjersey.com/story/news/local/2021/08/17/mahwah-nj-dog-death-grooming-appointment-samson/8145670002 (detailing the story of a healthy 5-year-old dog suffering heatstroke and organ failure after a grooming appointment in Mahwah, New Jersey).
2. Maria L. La Ganga, "Charlie went to the groomer for a bath and trim. Within hours, he was dead," L.A. TIMES (July 12, 2021), https://www.latimes.com/california/story/2021-07-12/charlie-went-to-the-groomer-for-a-bath-and-a-trim-within-hours-he-was-dead (detailing the story of a 4-year-old maltipoo strangled to death by a dog restraint at a groomer in Los Angeles).
3. Jennifer Borrasso, "4 PetSmart Employees Facing Charges After Dog Strangled to Death During Grooming Visit," KDKA-TV (May 12, 2021), https://pittsburgh.cbslocal.com/2021/05/12/petsmart-employees-facing-charges-after-dog-dies (detailing the story of a 12-year-old dog strangled to death while getting a nail trim at a groomer in Pittsburgh).

In the above reports, each pet owner experienced a single, devasting instance of negligence at the hands of the groomer, yet the community as a whole learned about the experience, transforming each individual incident into a matter of great public interest to pet owners. Although not all pet-related stories spell out the connection to broader issues of groomer misconduct, they all shed light on the problem. But first-hand stories like these could be at risk under the trial court's approach.

Indeed, it is often the voice or experience of one that sparks needed change for many, as has been evident in recent years with social movements like the #MeToo movement, ignited by individual complaints of harassment and abuse, and social protests prompted by incidents of police brutality. The notion that the amended anti-SLAPP law can only protect debates that are already in the public eye, or that have impacted a large number of people, has no basis in law and would chill speech on many topics that would otherwise be brought to light by journalists, advocates, or other members of the public.

The notion that the amended anti-SLAPP law does not apply to speech describing a single act of potential negligence in a small community is contrary to the Legislature's purpose in amending the law to avoid self-censorship. If the trial court's position were adopted, any defendant who speaks out about a negative business experience but does not expressly link it to a broader problem, even if their speech is of public interest or undeniably sparks a wider debate, could be denied

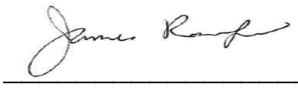
anti-SLAPP protection. The speech-chilling ramifications of such an approach would not be limited to consumer reviews, but would also hamper local reporting, public advocacy, and other speech, and would frustrate the remedial intentions behind amending the anti-SLAPP law.

CONCLUSION

For the foregoing reasons, Media Amici urge this Court to reverse and remand with instructions to find for the Defendants-Appellants under New York's amended anti-SLAPP law.

Dated: October 25, 2021
New York, New York

Respectfully submitted,

By: 

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APPELLATE DIVISION – SECOND DEPARTMENT

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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 6,819 words.

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EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

VIP PET GROOMING STUDIO, INC.,

Plaintiff,

-against-

ROBERT SPROULE and SARAH SPROULE,

Defendants.

----------X

IAS Part 8
Index No. 612337/2020
Mot. Seq. No. 002

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

Defendants' Notice of Motion, Affirmation & Exhibits.....1
Plaintiff's Affirmation in Opposition & Exhibits.....2
Defendants' Reply.....3

In March 2020, defendants brought their dog to plaintiff, VIP Pet Grooming Studio, Inc. ("VIP"), for grooming. The dog fell ill and subsequently died. Thereafter, defendant Robert Sproule posted statements on popular review sites on the internet stating that VIP caused the dog's death. VIP brought this action for injunctive relief and compensatory and punitive damages related to defendants' allegedly defamatory statements. Defendants now move to dismiss the action pursuant to CPLR 3211 (a)(7) and (g). For the reasons set forth below, the motion is denied.[1]

[1] Because VIP's claim survive dismissal, defendants' application to dismiss VIP's third cause of action for compensatory and punitive damages on the basis that it is not a cognizable independent cause of action is moot.

BACKGROUND

On March 4, 2020, defendants left their dog with VIP to be bathed and groomed. Defendants admit that they told VIP's groomer that their dog suffered from anxiety. According to VIP, the dog behaved normally while being bathed, but became agitated while being groomed. As a result, VIP contacted defendants to retrieve the dog before grooming was complete. Defendants claim that when they arrived home, the dog was shaking, panting heavily and vomiting, requiring defendants to bring the dog to the veterinary hospital.

The dog remained hospitalized until March 6 when defendants decided to euthanize him. According to defendants, prior to their decision to euthanize, the veterinarian advised them that a chest x-ray showed "increasing" fluid in the dog's lungs and opined that the prognosis was not good. Defendants allege that the veterinarian attributed the dog's symptoms to a "traumatic event at the groomer," likely from either: (a) electrocution from chewing on a wire, (b) strangulation from the groomer's restraints or (c) drowning during the bathing process. The veterinarian's notes, however, indicate that the fluid in the dog's lungs could also have been the result of "generalized seizure activity."

Shortly after the dog's death, by letter dated March 9, defendants' counsel (who is also Robert's mother) informed VIP that "there was no question" VIP caused the dog's death. Defendants demanded reimbursement from VIP in the amount of $20,000. The letter concluded: "If we do not hear from you within seven business days, we will commence a legal action....[A]s you are well aware, the negative publicity that comes along with a law suit against a business in a small community such as Wantagh, can be devastating."

In early May 2020, Robert Sproule posted a statement on both Yelp and Google, that read:

> I would strongly caution you against using this business. A grooming visit on March 4, 2020 ultimately **ended with us having to put our 4-month old puppy to sleep** two days later **as a result of their negligence or incompetence.** When we brought our happy healthy puppy in for a bath and cut, we specifically discussed our concerns regarding our puppy's hesitance to being bathed and the use of the clippers. We told the groomer that if there was any issue to stop and we would come get our puppy. Instead the groomer pushed our puppy through the process and only stopped and called us when it

> became very apparent that there was something physically wrong with our puppy. When we picked him up, he was clearly in distress, and we rushed him to the emergency vet. He had water in his lungs that **the vet said could only have come from a dramatic physical accident at the groomer**. Despite two days at the vet on a ventilator he continued to decline and we had to make the hard decision to let him go. We tried to discuss the situation with the groomer. They have taken no responsibility and in fact were abusive. They have threatened us financially and legally regarding telling our story. We will be pursuing legal recourse against this business when the courts reopen. You would be best finding another groomer. (Emphasis added).

After VIP refused to pay any damages, defendants commenced an action against VIP in Nassau County District Court in August 2020 for "actual damages" and "loss of companionship," totaling $14,921.32.

VIP claims that Robert Sproule's statements on Yelp and Google are false and were published "maliciously, intentionally, willfully and in gross disregard" of VIP's rights, with the intent to injure VIP's business and reputation.

LEGAL ANALYSIS

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept as true the facts "alleged in the complaint and submissions in opposition to the motion, and accord ... the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 414 (2001); *see People ex rel. Cuomo v. Conventry First LLC*, 13 N.Y.3d 108 (2009); *Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 54 (2001).

Notably, on a motion to dismiss, a party is not obligated to demonstrate evidentiary facts to support the allegations contained in the complaint (*see, Stuart Realty Co. v. Rye Country Store, Inc.*, 296 A.D.2d 455 (2d Dept. 2002); *Paulsen v. Paulsen*, 148 A.D.2d 685, 686 (2d Dept. 1989) and "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005); *International Oil Field Supply Services Corp. v. Fadeyi*, 35 A.D.3d 372 (2d Dept. 2006). "In assessing a motion under CPLR 3211(a)(7), a Court may freely consider affidavits submitted by a party to remedy any defects in the complaint," and

if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v. Martinez*, 84 N.Y.2d 83 (1994); *see also Uzzle v. Nunzie Court Homeowners Ass'n, Inc.*, 70 A.D.3d 928 (2d Dept. 2010).

In moving to dismiss VIP's complaint, defendants argue, among other things, that this action is barred by the recently amended New York Civil Rights Law ("NYCRL") §76-a, commonly referred to as the anti-SLAPP (strategic lawsuits against public participation) statute. SLAPP actions are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future. *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d130 (1992). To provide safeguard for the exercise of free speech, New York State enacted a law specifically aimed at broadening the protection of citizens facing litigation arising from their public petition and participation. *See* NYCRL §76-a (L.1992, c. 767).

At the time the statements at issue were made and when this action was commenced, the anti-SLAPP statute only applied to a plaintiff that was a "public applicant or permittee" with claims that concerned a communication that was "materially related" to the defendants' efforts to report on, comment on or oppose the plaintiff's application. In November 2020, the anti-SLAPP law was expanded to cover an "action involving public petition and participation" based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest" and imposed the requirement that a plaintiff establish by clear and convincing evidence that the communication was made with "actual malice." The legislative intent of the amendment was to protect citizens' exercise of the rights of free speech and petition about *matters of public interest*. *See* Sponsor Memo. NYCRL §76-a(1)(d) instructs that the term "public interest" should be construed broadly, but does not encompass a purely private matter.

Defendants argue that Robert Sproule's on-line statements: (a) constitute protected communication that falls within the newly amended anti-SLAPP law and (b) the anti-SLAPP

amendment should be applied retroactively in this case.[2] It is unnecessary for this court to determine whether the amendment should be given retroactive effect since Sproule's online statements are not protected communications made in connection with an issue of public interest since they involve a purely private matter.

The private nature of Sproule's statements is facially apparent from their subject matter: VIP's treatment of the defendants' anxious dog. Neither the statements nor the context in which they were made reflect that the Sproules' experience was shared by others or that the conduct discussed related to or was aimed at the public at large. *Cf. Wilner v. Allstate Insurance Co.*, 71 A.D.3d 155 (2d Dept. 2010)(alleged conduct that impacts consumers at large not a private dispute under the Deceptive Trade Practices Act, General Business Law §349).

Since the New York anti-SLAPP amendments are in their infancy, this court shall look to decisions in other jurisdictions with similar anti-SLAPP laws for guidance on the issue of what constitute matters of "public interest."[3] To determine whether statements were made in connection with an issue of "public interest," the courts in Nevada and California consider the following principles: (1) "public interest" does not equate with mere curiosity; (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest; (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient; (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people. *See Piping Rock Partners, Inc., v. David Lerner Associates, Inc.*, 946 F.Supp 2d 957 (N.D. Cal. 2013), *citing*

[2] The court in *Palin v. New York Times*, 2020 WL 711593 (S.D.N.Y 2020), found that §76-a is a "remedial statute" that should be given retroactive effect. *See also Sackler v. American Broadcasting Companies, Inc.*, 2021 WL 969809 (Sup. Ct., New York County).

[3] Both VIP and defendants cite to out-of-state case law in support of their respective positions for the same reason.

Weinberg v. Feisel, 110 Cal App. 4th 1122 (2003); *see also Stark v. Lackey*, 136 Nev. 38 (Sup. Ct. 2020).

In *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal.5th 133, 145 (2019), California's Supreme Court recently cautioned that courts should engage in a relatively careful analysis of whether a particular statement constitutes speech made in connection with an issue of "public interest." Specific considerations identified by the court include whether the subject of the speech (1) was a person or entity in the public eye, (2) could affect large numbers of people beyond the direct participants, (3) occurred in the context of an ongoing controversy, dispute or discussion or (4) affected a community in a manner similar to that of a governmental entity.

Here, it cannot be concluded that allegations of a single act of alleged negligence concerning one pet by a small, privately-owned pet grooming business is a matter of public interest affecting a substantial number of people. *See Consumer Justice Center v. Trimedica International, Inc.*, 107 Cal. App. 4th 595 (2003)(speech about a specific product was not a matter of public concern). The ability of an individual to write a review concerning a single experience with a private merchant is not a license to defame with impunity that merchant—as alleged by VIP—and potentially destroy its reputation. That the defamation may be accessed by a large number of people does not transform this private beef into a matter of public interest. Any other conclusion would immunize every defamatory on-line review unless made with malice.

Despite defendants' contention, the facts here are easily distinguishable from *Wong v. Jing*, 189 Cal. App.4th 1354 (2010), where the defendant's alleged defamatory statement consisted of a Yelp review of a dentist following treatment of her son. In *Wong v. Jing*, the Yelp review by Jing went beyond the scope of a private experience and concerned the broader issue of the use of nitrous oxide and mercury dental fillings in treating children.

Applying the above stated principles, it cannot be said that this matter is one of "public interest."

Defendants also contend that VIP's claims must be dismissed because the statements at issue constituted "pure opinion" rather than fact. "The elements of a cause of action [to recover damages] for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." *Martino v. HV News, LLC*, 114 A.D.3d 913 (2d Dept. 2014), *quoting Epifani v. Johnson*, 65 A.D.3d 224 (2d Dept. 2009). A "libel action cannot be maintained unless it is premised on published assertions of fact." *Brian v. Richardson*, 87 N.Y.2d 46 (1995).

Whether a particular statement constitutes an opinion, or an objective fact is a question of law. *Mann v. Abel*, 10 N.Y.3d 271 (2008). Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation. *Id.* In distinguishing between statements of opinion and fact, the factors to be considered are: (1) whether the specific language at issue has a precise, readily understood meaning; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers that what is stated is likely to be opinion, not fact. *Gross v. New York Times Co.*, 82 N.Y.2d 146 (1993). It is necessary to consider the writing as a whole, including its tone and apparent purpose, as well as the overall context of the publication, to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the plaintiff. *Mann v. Abel*, 10 N.Y.3d 271 (2008).

Applying the aforementioned principles, it cannot be said, as a matter of law, that the statements posted online by Robert Sproule were pure opinion. Sproule stated that their dog was put to sleep as a result of VIP's "negligence or incompetence." Presumably, defendants can prove this fact. Further, defendant's claim that the veterinarian told them that the water in the dog's lungs could only have resulted from a "dramatic physical accident" at the groomer can also be established through admissible evidence.

Therefore, defendants' motion to dismiss is denied.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: May 20, 2021
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X Index No.: 612337/2020

VIP PET GROOMING STUDIO, INC.,

Plaintiff,

NOTICE OF APPEAL

v.

ROBERT SPROULE and SARAH SPROULE,

Defendants.

----------X

PLEASE TAKE NOTICE, that Defendants Robert Sproule and Sarah Sproule (collectively "Defendants") hereby appeal to the Appellate Division of the Supreme Court of the State of New York, Second Department, from the Decision and Order of the Hon. Leonard D. Steinman dated May 20, 2021 and duly entered in the office of the Clerk of the Court on May 24, 2021, and from each and every part thereof that denied Defendants' motion to dismiss plaintiff VIP Pet Grooming Studio, Inc.'s complaint seeking injunctive relief and compensatory and punitive damages for defendant Robert Sproule's allegedly defamatory statements made in an online review of plaintiff's services. A copy of the Decision and Order is annexed hereto.

DATED: June 3, 2021
Wantagh, New York

By: Clare M. Sproule

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Supreme Court of the State of New York
Appellate Division: Second 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.

VIP PET GROOMING STUDIO, INC.

- against -

ROBERT SPROULE and SARAH SPROULE

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ☒ Civil Action
- ☐ CPLR article 75 Arbitration
- ☐ Action Commenced under CPLR 214-g
- ☐ 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: Nassau
Dated: 06/03/2021	Entered: May 24, 2021
Judge (name in full): Leonard D. Steinman	Index No.:612337/2020
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:
This case is currently proceeding in Nassau Supreme Court and Justice Steinman has ordered that a related case, Robert Sproule and Sarah Sproule v. VIP Pet Grooming Studio, Inc., Index No. CV-008817-20, that was filed in Nassau County District Court prior to this one be consolidated with it.

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.
This is an appeal from the Decision and Order of the Hon. Leonard D. Steinman dated May 20, 2021 that denied Defendants' motion to dismiss plaintiff VIP Pet Grooming Studio, Inc.'s complaint seeking injunctive relief and compensatory and punitive damages for defendant Robert Sproule's allegedly defamatory statements made in an online review of plaintiff's services.

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.

Whether the Court erred in finding that plaintiff's complaint seeking injunctive relief and compensatory and punitive damages for defendant's allegedly defamatory on-line review was not subject to dismissal pursuant to the recent amendments to New York Civil Rights Law 76-a (" anti-SLAPP law") on the basis that the on-line review was not a matter of "public interest."

Whether the Court erred in finding that defendant's on-line review was not pure opinion, despite defendants citing dispositive case law on the issue and plaintiff failing to address the issue, and failing to dismiss plaintiff's complaint on this basis.

Whether the Court erred by failing to consider the other arguments defendants made in support of their motion to dismiss plaintiff's complaint for failing to state a claim for relief, including that the complaint fails to state any facts supporting the conclusory allegation that the review injured plaintiff's reputation and business and that the review was not defamatory because it referred to a single instance of negligence, which is not considered to be defamatory under the "single instance rule.".

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	Robert Sproule	Defendant	Appellant
2	Sarah Sproule	Defendant	Appellant
3	VIP Pet Grooming Studio, Inc.	Plaintiff	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 and 2			
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Party or Parties Represented (set forth party number(s) from table above): 3			
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:			
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City:	State:	Zip:	Telephone No:
E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
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Attorney/Firm Name:			
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Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X

VIP PET GROOMING STUDIO, INC.,

Plaintiff,

-against-

ROBERT SPROULE and SARAH SPROULE,

Defendants.

----------X

IAS Part 8
Index No. 612337/2020
Mot. Seq. No. 002

DECISION AND ORDER

LEONARD D. STEINMAN, J.

The following submissions, in addition to any memoranda of law, were reviewed in preparing this Decision and Order:

Defendants' Notice of Motion, Affirmation & Exhibits.....1
Plaintiff's Affirmation in Opposition & Exhibits.....2
Defendants' Reply.....3

In March 2020, defendants brought their dog to plaintiff, VIP Pet Grooming Studio, Inc. ("VIP"), for grooming. The dog fell ill and subsequently died. Thereafter, defendant Robert Sproule posted statements on popular review sites on the internet stating that VIP caused the dog's death. VIP brought this action for injunctive relief and compensatory and punitive damages related to defendants' allegedly defamatory statements. Defendants now move to dismiss the action pursuant to CPLR 3211 (a)(7) and (g). For the reasons set forth below, the motion is denied.[1]

[1] Because VIP's claim survive dismissal, defendants' application to dismiss VIP's third cause of action for compensatory and punitive damages on the basis that it is not a cognizable independent cause of action is moot.

BACKGROUND

On March 4, 2020, defendants left their dog with VIP to be bathed and groomed. Defendants admit that they told VIP's groomer that their dog suffered from anxiety. According to VIP, the dog behaved normally while being bathed, but became agitated while being groomed. As a result, VIP contacted defendants to retrieve the dog before grooming was complete. Defendants claim that when they arrived home, the dog was shaking, panting heavily and vomiting, requiring defendants to bring the dog to the veterinary hospital.

The dog remained hospitalized until March 6 when defendants decided to euthanize him. According to defendants, prior to their decision to euthanize, the veterinarian advised them that a chest x-ray showed "increasing" fluid in the dog's lungs and opined that the prognosis was not good. Defendants allege that the veterinarian attributed the dog's symptoms to a "traumatic event at the groomer," likely from either: (a) electrocution from chewing on a wire, (b) strangulation from the groomer's restraints or (c) drowning during the bathing process. The veterinarian's notes, however, indicate that the fluid in the dog's lungs could also have been the result of "generalized seizure activity."

Shortly after the dog's death, by letter dated March 9, defendants' counsel (who is also Robert's mother) informed VIP that "there was no question" VIP caused the dog's death. Defendants demanded reimbursement from VIP in the amount of $20,000. The letter concluded: "If we do not hear from you within seven business days, we will commence a legal action....[A]s you are well aware, the negative publicity that comes along with a law suit against a business in a small community such as Wantagh, can be devastating."

In early May 2020, Robert Sproule posted a statement on both Yelp and Google, that read:

> I would strongly caution you against using this business. A grooming visit on March 4, 2020 ultimately **ended with us having to put our 4-month old puppy to sleep** two days later **as a result of their negligence or incompetence.** When we brought our happy healthy puppy in for a bath and cut, we specifically discussed our concerns regarding our puppy's hesitance to being bathed and the use of the clippers. We told the groomer that if there was any issue to stop and we would come get our puppy. Instead the groomer pushed our puppy through the process and only stopped and called us when it

> became very apparent that there was something physically wrong with our puppy. When we picked him up, he was clearly in distress, and we rushed him to the emergency vet. He had water in his lungs that **the vet said could only have come from a dramatic physical accident at the groomer**. Despite two days at the vet on a ventilator he continued to decline and we had to make the hard decision to let him go. We tried to discuss the situation with the groomer. They have taken no responsibility and in fact were abusive. They have threatened us financially and legally regarding telling our story. We will be pursuing legal recourse against this business when the courts reopen. You would be best finding another groomer. (Emphasis added).

After VIP refused to pay any damages, defendants commenced an action against VIP in Nassau County District Court in August 2020 for "actual damages" and "loss of companionship," totaling $14,921.32.

VIP claims that Robert Sproule's statements on Yelp and Google are false and were published "maliciously, intentionally, willfully and in gross disregard" of VIP's rights, with the intent to injure VIP's business and reputation.

LEGAL ANALYSIS

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept as true the facts "alleged in the complaint and submissions in opposition to the motion, and accord ... the benefit of every possible favorable inference," determining only "whether the facts as alleged fit within any cognizable legal theory." *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y.2d 409, 414 (2001); *see People ex rel. Cuomo v. Conventry First LLC*, 13 N.Y.3d 108 (2009); *Polonetsky v. Better Homes Depot*, 97 N.Y.2d 46, 54 (2001).

Notably, on a motion to dismiss, a party is not obligated to demonstrate evidentiary facts to support the allegations contained in the complaint (*see, Stuart Realty Co. v. Rye Country Store, Inc.*, 296 A.D.2d 455 (2d Dept. 2002); *Paulsen v. Paulsen*, 148 A.D.2d 685, 686 (2d Dept. 1989) and "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 19 (2005); *International Oil Field Supply Services Corp. v. Fadeyi*, 35 A.D.3d 372 (2d Dept. 2006). "In assessing a motion under CPLR 3211(a)(7), a Court may freely consider affidavits submitted by a party to remedy any defects in the complaint," and

if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v. Martinez*, 84 N.Y.2d 83 (1994); *see also Uzzle v. Nunzie Court Homeowners Ass'n, Inc.*, 70 A.D.3d 928 (2d Dept. 2010).

In moving to dismiss VIP's complaint, defendants argue, among other things, that this action is barred by the recently amended New York Civil Rights Law ("NYCRL") §76-a, commonly referred to as the anti-SLAPP (strategic lawsuits against public participation) statute. SLAPP actions are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future. *600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d130 (1992). To provide safeguard for the exercise of free speech, New York State enacted a law specifically aimed at broadening the protection of citizens facing litigation arising from their public petition and participation. *See* NYCRL §76-a (L.1992, c. 767).

At the time the statements at issue were made and when this action was commenced, the anti-SLAPP statute only applied to a plaintiff that was a "public applicant or permittee" with claims that concerned a communication that was "materially related" to the defendants' efforts to report on, comment on or oppose the plaintiff's application. In November 2020, the anti-SLAPP law was expanded to cover an "action involving public petition and participation" based upon "any communication in a place open to the public or a public forum in connection with an issue of public interest" and imposed the requirement that a plaintiff establish by clear and convincing evidence that the communication was made with "actual malice." The legislative intent of the amendment was to protect citizens' exercise of the rights of free speech and petition about *matters of public interest*. *See* Sponsor Memo. NYCRL §76-a(1)(d) instructs that the term "public interest" should be construed broadly, but does not encompass a purely private matter.

Defendants argue that Robert Sproule's on-line statements: (a) constitute protected communication that falls within the newly amended anti-SLAPP law and (b) the anti-SLAPP

amendment should be applied retroactively in this case.[2] It is unnecessary for this court to determine whether the amendment should be given retroactive effect since Sproule's online statements are not protected communications made in connection with an issue of public interest since they involve a purely private matter.

The private nature of Sproule's statements is facially apparent from their subject matter: VIP's treatment of the defendants' anxious dog. Neither the statements nor the context in which they were made reflect that the Sproules' experience was shared by others or that the conduct discussed related to or was aimed at the public at large. *Cf. Wilner v. Allstate Insurance Co.*, 71 A.D.3d 155 (2d Dept. 2010)(alleged conduct that impacts consumers at large not a private dispute under the Deceptive Trade Practices Act, General Business Law §349).

Since the New York anti-SLAPP amendments are in their infancy, this court shall look to decisions in other jurisdictions with similar anti-SLAPP laws for guidance on the issue of what constitute matters of "public interest."[3] To determine whether statements were made in connection with an issue of "public interest," the courts in Nevada and California consider the following principles: (1) "public interest" does not equate with mere curiosity; (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest; (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient; (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people. *See Piping Rock Partners, Inc., v. David Lerner Associates, Inc.*, 946 F.Supp 2d 957 (N.D. Cal. 2013), *citing*

[2] The court in *Palin v. New York Times*, 2020 WL 711593 (S.D.N.Y 2020), found that §76-a is a "remedial statute" that should be given retroactive effect. *See also Sackler v. American Broadcasting Companies, Inc.*, 2021 WL 969809 (Sup. Ct., New York County).

[3] Both VIP and defendants cite to out-of-state case law in support of their respective positions for the same reason.

Weinberg v. Feisel, 110 Cal App. 4th 1122 (2003); *see also Stark v. Lackey*, 136 Nev. 38 (Sup. Ct. 2020).

In *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal.5th 133, 145 (2019), California's Supreme Court recently cautioned that courts should engage in a relatively careful analysis of whether a particular statement constitutes speech made in connection with an issue of "public interest." Specific considerations identified by the court include whether the subject of the speech (1) was a person or entity in the public eye, (2) could affect large numbers of people beyond the direct participants, (3) occurred in the context of an ongoing controversy, dispute or discussion or (4) affected a community in a manner similar to that of a governmental entity.

Here, it cannot be concluded that allegations of a single act of alleged negligence concerning one pet by a small, privately-owned pet grooming business is a matter of public interest affecting a substantial number of people. *See Consumer Justice Center v. Trimedica International, Inc.*, 107 Cal. App. 4th 595 (2003)(speech about a specific product was not a matter of public concern). The ability of an individual to write a review concerning a single experience with a private merchant is not a license to defame with impunity that merchant—as alleged by VIP—and potentially destroy its reputation. That the defamation may be accessed by a large number of people does not transform this private beef into a matter of public interest. Any other conclusion would immunize every defamatory on-line review unless made with malice.

Despite defendants' contention, the facts here are easily distinguishable from *Wong v. Jing*, 189 Cal. App.4th 1354 (2010), where the defendant's alleged defamatory statement consisted of a Yelp review of a dentist following treatment of her son. In *Wong v. Jing*, the Yelp review by Jing went beyond the scope of a private experience and concerned the broader issue of the use of nitrous oxide and mercury dental fillings in treating children.

Applying the above stated principles, it cannot be said that this matter is one of "public interest."

Defendants also contend that VIP's claims must be dismissed because the statements at issue constituted "pure opinion" rather than fact. "The elements of a cause of action [to recover damages] for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se." *Martino v. HV News, LLC*, 114 A.D.3d 913 (2d Dept. 2014), *quoting Epifani v. Johnson,* 65 A.D.3d 224 (2d Dept. 2009). A "libel action cannot be maintained unless it is premised on published assertions of fact." *Brian v. Richardson*, 87 N.Y.2d 46 (1995).

Whether a particular statement constitutes an opinion, or an objective fact is a question of law. *Mann v. Abel*, 10 N.Y.3d 271 (2008). Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation. *Id.* In distinguishing between statements of opinion and fact, the factors to be considered are: (1) whether the specific language at issue has a precise, readily understood meaning; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers that what is stated is likely to be opinion, not fact. *Gross v. New York Times Co.*, 82 N.Y.2d 146 (1993). It is necessary to consider the writing as a whole, including its tone and apparent purpose, as well as the overall context of the publication, to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the plaintiff. *Mann v. Abel,* 10 N.Y.3d 271 (2008).

Applying the aforementioned principles, it cannot be said, as a matter of law, that the statements posted online by Robert Sproule were pure opinion. Sproule stated that their dog was put to sleep as a result of VIP's "negligence or incompetence." Presumably, defendants can prove this fact. Further, defendant's claim that the veterinarian told them that the water in the dog's lungs could only have resulted from a "dramatic physical accident" at the groomer can also be established through admissible evidence.

Therefore, defendants' motion to dismiss is denied.

Any relief requested not specifically addressed herein is denied.

This constitutes the Decision and Order of this court.

Dated: May 20, 2021
Mineola, New York

ENTER:

LEONARD D. STEINMAN, J.S.C.

ENTERED
May 24 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

----------X Index No.: 612337/2020

VIP PET GROOMING STUDIO, INC.,

Plaintiff, **AFFIRMATION OF SERVICE**

v.

ROBERT SPROULE and SARAH SPROULE,

Defendants.

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Clare M. Sproule, an attorney admitted in New York state, affirms under penalties of perjury and pursuant to CPLR 2106 that on June 3, 2021 I served Defendants' Notice of Appeal, Informational Statement and the Decision and Order appealed from via NYSCEF on all counsel of record.

DATED: June 3, 2021
Wantagh, New York

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