To be Argued by:
PAUL ALAN LEVY
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Second Department

VIP PET GROOMING STUDIO, INC.,

Docket No.: 2021-04228

Plaintiff-Respondent,

– against –

ROBERT SPROULE and SARAH SPROULE,

Defendants-Appellants.

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

PAUL ALAN LEVY
PUBLIC CITIZEN LITIGATION GROUP
3056 Riverside Drive
Wantagh, New York 11793
(202) 588-7725
plevy@citizen.org

Appellate Counsel to:

THE LAW OFFICE OF CLARE M. SPROULE
3056 Riverside Drive
Wantagh, New York 11793
(516) 804-5598
csproule@sproulelaw.com

Attorneys for Defendants-Appellants

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CONSTITUTION AND STATUTES

In their opening brief, defendants-appellants Robert Sproule and Sarah Sproule (the "Sproules") showed that this defamation action is a SLAPP suit under the anti-SLAPP law as amended in 2020 because Robert Sproule's consumer review of plaintiff-respondent VIP Pet Grooming Studio, Inc. ("VIP") addressed a matter of public concern. The Sproules also explained that the courts have unanimously and properly held that the 2020 amendments should be applied to lawsuits pending on the amendments' effective date. And the Sproules demonstrated that given the evidence adduced below as well as VIP's failure to allege a tenable claim for defamation against either Robert or Sarah Sproule, the trial court erred by refusing to dismiss the defamation action and award the Sproules their attorney fees for being forced to defend this meritless lawsuit. The amicus briefs submitted by the Reporters Committee for Freedom of the Press and several New York and national media companies, and by the consumer review sites Yelp and Trip Advisor, further support application of the 2020 anti-SLAPP amendments to this case.

VIP's short responses to appellants' arguments about why the lawsuit against Robert Sproule was a meritless SLAPP suit are, as shown below, unpersuasive. Moreover, VIP offers no justification for having sued Sarah Sproule for defamation given that she never posted any statements about VIP. Consequently, the denial of the Sproules' anti-SLAPP motion to dismiss should be reversed, and the case should be remanded with instructions to dismiss the action and to award attorney fees to the

defendants.

I. Robert Sproule's Review Addressed a Matter of Public Concern.

The Sproules' opening brief, at 26-42, showed that Robert Sproule's reviews are "communication[s] . . . in connection with an issue of public interest" for several reasons: (1) The statute defines that term to including all statements except those regarding "purely private matters"; (2) The statute's legislative history shows that it was intended to cover consumer advocacy as well as #MeToo complaints, which begin in private but become a matter of public concern when raised publicly; (3) Other states similarly construe their anti-SLAPP statutes containing that term, and similarly apply First Amendment protections for the equivalent concept of "matters of public concern"; (4) Under the well-accepted *Chapadeau* standard, New York courts defer to a publisher's judgment about whether issues are of public concern; and (5) The language and context of the reviews themselves show that they were addressed to a matter of public interest, in that they expressly warned other pet owners about a possible danger to their pets, and were posted to a forum that VIP had itself chosen as a place to be found by other consumers, and to which a large segment of the consuming public routinely turn for information to help guide their choices among competing businesses. VIP never responds to some of these reasons, and its responses to those that it addresses are not persuasive.

First, VIP acknowledges that the statute defines issues of public concern to include everything that is not a purely private matter. Although its brief repeatedly asserts that Robert Sproule's warning to other consumers was a "purely private matter," it never explains **how** that statement's subject can be deemed purely private. VIP notes that, at the beginning of the controversy, there was a private dispute between a customer and a business, VIP Br. at 6, and cites language from *Albert v. Loksen*, 239 F.3d 256, 270 (2d Cir. 2001), in an effort to show that this case is comparable. VIP Br. at 7. But that case actually supports the Sproules' position.

In *Albert v. Loksen*, a hospital employee claimed that the hospital had violated its contract by firing him, and that his supervisor had defamed him in certain statements she made to other staff in the course of his discharge. The court held that the statements were about a matter of only private concern because they had been addressed only to a limited audience. Here, if VIP had sued the Sproules over statements contained in their demand letter (on a theory of compelled self-publication), or over their statements to the veterinarians about what had happened to their pet at the hands of VIP's staff, *Albert*'s reasoning would suggest that the suit concerned a purely private controversy, not subject to the anti-SLAPP statute. But VIP sued the Sproules over Robert's warning to other consumers to be careful about committing their pets to VIP's care, lest their pets suffer a fate similar to the Sproules'

dog Ranger. Such statements involve the kind of public controversy distinguished by the court in *Albert*, in the very language that VIP quotes: "a dispute that in fact has received public attention because its ramifications will be felt by persons who are not direct participants." VIP Br. at 7. Robert Sproule's warning to other consumers was delivered in the very forum where pet owners—who are, as noted in the opening brief, at 41-42, a substantial segment of the consuming public—look for information about businesses they might hire for their pets.[1] Given that many pet owners consider their dogs to be members of their families, on whom they are ready to spend large sums for medical care (as the Sproules had to do after Ranger's brief time in VIP's hands), one would expect the pet-owning public to be deeply concerned about how a simple grooming visit could turn into a major family disaster if they choose the wrong groomer. Such concerns are not a "purely private matter." [2]

From there, VIP proceeds to discuss a few California cases in which courts

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[1] No data are available about how many people view VIP's Yelp page, but the Yelp amicus brief, at 2, shows that more than 224 million reviews are posted on Yelp.

[2] The only other New York decision VIP cites in this part of its argument is *Asbeka Industries v. Travelers Indemnity Co.*, 831 F. Supp. 74 (E.D.N.Y. 1993), but that case was not about whether speech is protected by the First Amendment and does not address the "issue of public concern" standard. The case was an insurance coverage dispute, and in the section of the opinion that VIP cites, the court rejected the proposition that an insurance company's refusal to provide coverage was a deceptive act subject to section 349 of the General Business Law.

noted that a statements's relationship to broader public issues could make it subject to the California anti-SLAPP law, as in *Wong v. Jing*, 117 Cal. Rptr.3d 747 (Cal. App. 2010), or conversely said that commercial advertisements that induced customers to click on links taking them to the defendants' web site, instead of seeking services from the plaintiffs, did not relate to issues of public interest, as in *Los Angeles Taxi Coop. v. Independent Taxi Owners Ass'n of Los Angeles*, 191 Cal. Rptr.3d 579 (Cal. App. 2015). VIP Br. at 7-9. But what VIP never does is cite a single case, from California or any other state, holding that a consumer review of a business, placed on a consumer review site where other consumers commonly look in assessing the qualities of local businesses whose goods or services they might want to purchase, does not address a matter of public interest.

VIP quotes dictum from the Nevada Supreme Court in *Stark v. Lackey*, 458 P.3d 342, 346 (Nev. 2020), characterizing five factors that the Nevada court believed represented California law, including the proposition that a "person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people." VIP Br. at 15, quoting R.115. But the many California cases cited in the Sproules' opening brief at 34-36 and n. 4, and attached to the Yelp amicus brief, show that consumer reviews are consistently treated as being addressed to a matter of public interest and hence subject to the

California anti-SLAPP law. Such reviews are not a matter of public interest only because they are communicated to a large number of people; they are a matter of public interest because consumers come to sites such as Yelp to look for information about how businesses treat their customers so that they can make judgments about where to spend their own hard-earned dollars on goods and services. Further, the dictum in *Stark v. Lackey* should not affect the interpretation of New York's anti-SLAPP law because Nevada's law does not contain the same definition as the New York law, which extends the protection of the law to all communications that do not pertain to a "purely private matter."

Moreover, VIP's brief fails to address the legislative history cited in the Sproules' opening brief, showing that the sponsors of the 2020 amendments intended the anti-SLAPP law's protection to extend to "consumer advocates and survivors of sexual abuse." Sproules Br. at 7. It is hard to imagine a matter that is more private, at the time it takes place, than the sexual abuse of a victim; yet the sponsors intended that when a survivor of such abuse goes public with this dispute, the anti-SLAPP law would protect her against a bogus defamation suit. The same statutory language protects a consumer who goes public with a dispute with a business, warning other consumers to be careful.

VIP focuses on a different aspect of the legislative history, pointing to Senator

Hoylman's statement that the statutory amendments were needed because too few courts had been willing to award attorney fees in favor of defendants "found to have been victimized by actions intended only to chill free speech." VIP then proclaims that it does not intend to chill speech, only to vindicate its reputation. But good or bad faith on the part of the plaintiffs is irrelevant to the remedy of early dismissal or the award of attorney fees. To the contrary, under section 70-a of the Civil Rights Law, an intent to harass or chill is relevant only to a SLAPP'd defendant's ability to recover damages through a SLAPP counterclaim. Considering that the statute expressly makes bad intentions relevant to damages awards, but not to awards of attorney fees or to the dismissal of SLAPP suits that lack the requisite substantial basis, the legislature's intention not to require a showing of bad intent as a condition of early dismissal is clear. Moreover, courts elsewhere have rejected the proposition that intent to chill speech is required before a SLAPP can be dismissed. *Bosley Medical Institute v. Kremer*, 403 F.3d 672, 682 (9th Cir. 2005); *Equilon Enterprises v. Consumer Cause*, 52 P.3d 685, 693-694 (Cal. 2002). As the D.C. Court of Appeals said in construing the D.C. anti-SLAPP law,

> the statutory text does not call for inquiry into the plaintiff's motives; it focuses on the claim, not the claimant. Nor does anything in the legislative history suggest the Council envisioned an examination of the plaintiff's motives in connection with special motions to dismiss. This contrasts with some state anti-SLAPP laws that do call for examination

of the plaintiff's subjective motivation.

Am. Stud. Assn. v. Bronner, 259 A.3d 728, 748 (D.C. 2021).[3]

Rather, a plaintiff whose lawsuit falls within the scope of an anti-SLAPP law must produce both legal argument and admissible evidence showing that it can present a prima facie case on the elements of its claim that the speech was actionable. Here, plaintiff VIP produced no evidence in support of its claims for the trial court to consider, and so its defense of this appeal rides on its argument that the speech was not on an issue of public interest (or that the SLAPP law does not apply to cases pending on the law's effective date).

The Sproules' opening brief also pointed to decisions applying *Chapadeau*, which created a special standard of fault for defamation claims about issues of public concern and deferred to publishers' judgments about what controversies are sufficiently of public concern to merit publication. Sproules Br. at 32-33, citing *Chapadeau v. Utica Observer Dispatch*, 38 N.Y.2d 196 (1975). This deference extends, according to this Court's ruling in *Pollnow v. Poughkeepsie Newspapers*, 107 A.D.2d 10, 16 (N.Y. App. Div. 2d Dept. 1985), *aff'd*, 67 N.Y.2d 778 (1986), to

[3] The circumstances of this case provide reason to doubt VIP's avowed benign intentions, given the timing of the suit for the apparent purpose of forum shopping (taking the Sproules' negligence action out of the District Court), and the fact that Sarah Sproule was sued for defamation even though she did not post either of the reviews.

publishers' decisions to run statements submitted to them for publication. VIP's response points out that this action is not brought against a media entity but against an individual who has published his review on the media entity's platform. VIP Br. 11. Further, VIP seeks to turn *Pollnow* in its favor because, in that case, the Court decided that the plaintiff had met his burden of alleging sufficiently that the speech was actionable, even though it was addressed to a matter of public concern; VIP says that it has alleged actual malice.

But VIP ignores the fact that, as the opening brief showed, Yelp has concluded through its recommendation software that Robert Sproule's review is sufficiently reliable to warrant publication on the main VIP Studios page of its site; under *Pollnow*, this Court should defer to Yelp's judgment in this regard. Accordingly, the "nonmedia individual defendant who utilizes a public medium for the publication of matter deemed defamatory should be accorded the same constitutional privilege as the medium itself." *Id.* at 16.[4] And although mere allegations of actual malice were sufficient to avoid dismissal when *Pollnow* was decided thirty-six years ago, under the 2020 anti-SLAPP amendments that apply to this case, when a statement addresses a matter of public concern, mere allegations are not enough to protect the plaintiff

[4] Yelp's amicus brief addresses at pages 9-12 its recommendation software and other efforts to erect barriers against the publication of reviews on its site that are less worthy of public viewing.

against dismissal. Rather, as amended, C.P.L.R. 3211(g)(2) requires the Court to consider supporting and opposing affidavits stating the facts upon which the action or defense is based, and not just the pleadings. But VIP made a deliberate choice not to present affidavits or other evidence in support of its defamation claim.

Moreover, the complaint is facially deficient under the anti-SLAPP law because, contrary to VIP's assertions, VIP Br. at 12 & 16, the complaint never alleges either that Robert Sproule's reviews were published "with a reckless disregard for the truth" or that Robert Sproule's statements "were knowingly false."[5] VIP does not cite the paragraph of its complaint that supposedly alleged actual malice; in fact, VIP only alleged that the statements were published "maliciously, intentionally and willfully, and in gross disregard of the rights of VIP." R.16, Complaint ¶ 26; *see also* R. 17, Complaint ¶ 32. Appellants' opening brief (at 46-47) explained that, at most, this is an allegation of common law malice; VIP has not responded to that argument. Indeed, the complaint does not state claims on its face as required even if the case

[5] Although in some parts of its brief VIP properly refers only to statements by "Mr. Sproule," Br. 4, 5, 6, 7, 11, it also repeatedly uses the plural "Sproules" in an apparent effort to justify having sued Sarah Sproule. E.g., Br. 16 ("Sproules' defamatory statements," Br. 17 ("the Sproules' internet postings"), *see also* Br. 18. 19. However, neither in the complaint, nor in the record below, nor in VIP's appellate brief, is there any evidence that Sarah Sproule made any defamatory statements, much less made statements with actual malice. VIP offers no excuse for having sued Sarah Sproule.

were not subject to the anti-SLAPP law. *See infra* at 13-16. These are additional reasons to conclude that VIP's complaint lacks a substantial basis and hence is subject to dismissal under the 2020 anti-SLAPP amendments.

Finally, VIP apparently seeks affirmance on the alternate ground that record evidence somehow supports its allegation of falsity and would support the existence of actual malice if VIP had pleaded it. VIP Br. at 16-17. But the evidence that VIP cites does not support its argument. VIP points first to the notes that the veterinarians made when Ranger was first brought to the hospital, indicating that his symptoms "are consistent with severe noncardiogenic pulmonary edema secondary to transit airway obstruction or general seizure activity," (quoting R.33, 39) and then to Sarah Sproule's affidavit describing what the veterinarians said at that time: "that the dog's distress was 'likely caused by a traumatic event at the groomer'" (quoting R.84). Both statements, VIP contends, conflict with the statement in the review that Ranger "had water in his lungs that the vet said could only have come from a dramatic physical accident at the groomer." (quoting R. 15, 64). But these materials in the record do not contradict Robert Sproule's statements about what the veterinarians said over the course of their unsuccessful treatment. Water in the lungs is completely consistent with "pulmonary edema secondary to transit airway obstruction" as quoted above. Moreover, the affidavits from both Sproules indicated that the veterinarians

posed various possibilities when the dog first arrived, which they followed up by asking questions of VIP that the veterinarians suggested they explore. It was only after they got answers to such questions that, as Sarah Sproule's affidavit indicated, R. 85, 86 ¶¶ 16, 22, 23, the veterinarians' diagnosis narrowed to drowning as the cause of Ranger's distress. Robert Sproule's affidavit is likewise entirely consistent with that understanding of the veterinarians' evolving sense of what must have happened. R.78-79, ¶¶ 17, 18 (referring to fluid in the lungs). The evidence supports the veracity of Robert's reviews, and his genuine belief in the accuracy of his description of how the veterinarians were characterizing the circumstances and their origin,

II. The Anti-SLAPP Law as Amended in 2020 Applies to this Case Because It Was Still Pending, and VIP Refused to Withdraw It, After the Amendments' Effective Date.

The Sproules' opening brief (at 42-45) showed that both the language and the legislative history of the 2020 anti-SLAPP amendments supported their application to lawsuits pending on November 10, 2020, the effective date of the statute. Appellants cited four decisions, one from the Supreme Court and three from the United States District Courts for the Southern and Eastern Districts of New York. The media amicus brief provides further argument in support of applying the amendments here, and identifies another four state and federal decisions applying the

amendments to cases filed before the effective date but still being pursued after that date. Reporters Comm. Amicus Br. at 7-13. No court has held otherwise.

Moreover, the Sproules' brief, at 42-45, appellants anticipated each of VIP's arguments against retroactivity, such as its effort to distinguish *Palin v. New York Times Co.*, 510 F. Supp. 3d 21, 26–27 (S.D.N.Y. 2020), on the ground that Palin was a public figure and hence already obligated to show actual malice. In addition, several of the cases cited by the Sproules and the media amici, where the amended law was applied to pending cases, involve plaintiffs who were not public figures. *E.g.* *Coleman v. Grand*, 523 F. Supp.3d 244, 255-257 (E.D.N.Y. 2021); *Reus v. ETC Hous. Corp.*, 72 Misc.3d 481 (N.Y. Sup. Ct. 2021); *Sweigert v. Goodman*, 2021 WL 1578097, at *1 (S.D.N.Y. Apr. 22, 2021).

III. The Complaint Is Subject to Dismissal on Its Face Even If the 2020 Anti-SLAPP Amendments Do Not Apply.

The Sproules' opening brief (at 48-55) showed that, the anti-SLAPP law aside, VIP's complaint was subject to dismissal because it did allege special damages as required by New York's single instance rule, and because it specifies no allegedly false statements of fact—as opposed to actionable opinion—within Robert Sproule's reviews that are alleged to be false. VIP's opposition brief does not respond to the latter point, and its response on the single-instance rule, VIP Br. at 21-22,

misrepresents the record and misstates the law.

VIP contends that the Sproules did not preserve their single instance rule argument because they failed to raise it in the court below, but that assertion is incorrect—the point was specifically argued at R.134-135. VIP says that the cases cited on the single instance rule "generally involve media defendants," VIP Br. at 22, but in fact the single instance rule is often applied in favor of non-media defendants. *E.g.,* *Cook v. Relin*, 280 A.D.2d 897, 899 (4th Dept. 2001); *Barra v. County of Tompkins,* 125 A.D.3d 665, 658 (3d Dept. 2015); *Amelkin v. Commercial Trading Co.*, 23 A.D.2d 830, 831 (1st Dept. 1965).

Finally, VIP contends that some of the statements in Robert Sproule's reviews went beyond a single instance of bad conduct, but rather accused VIP of "general incompetence." VIP Br. at 22. Not only is this characterization of the additional statements incorrect, but the complaint did not allege that any of these statements were false. Moreover, the first statement that VIP identifies in this argument is pure opinion and hence not actionable, *id.* ("I would strongly caution you against using this business... You would be best finding another groomer"), as is the passing use of the word "abusive." As for the statements that VIP took no responsibility for Ranger's death, and that VIP threatened the Sproules "financially" and "legally," *id.*, the warning letter from VIP's attorney Ciampioli shows that both of these statements

are indisputably true. R.62. When a defamation action is based on multiple statements, the claim over each one must be assessed separately, and the single instance rule may justify dismissal of claims against certain statements even though others are protected as opinion. *Muhlhahn v. Goldman*, 93 A.D.3d 418, 419 (1st Dept. 2012). Moreover, the fact that a single dereliction was serious, and merited serious consequences, does not save a defamation plaintiff from the single instance rule. *Bowes v. Magna Concepts*, 166 A.D.2d 347, 348-349 (N.Y. App. Div. 1st Dept. 1990) (fact that former editor got the "facts jumbled and failed to investigate those facts" required public apology); *D'Agrosa v. Newsday*, 158 A.D.2d 229, 238 (2d Dept. 1990) (erroneous report that doctor failed to administer oxygen properly, leading to large jury verdict); *Larson v. Albany Med. Ctr.*, 252 A.D.2d 936, 939 (3d Dept. 1998) (alleged misconduct warranted discharge).

In any event, VIP stated in the court below that Robert Sproule's review was limited to a "single instance of alleged negligence" (and hence, on VIP's argument, is not a matter of public interest). R. 123, 125. That is the basis on which VIP avoided dismissal below, and VIP repeats that argument on appeal. The doctrine of judicial estoppel, *Bihn v. Connelly*, 162 A.D.3d 626, 627-628 (2d Dept. 2018), bars it from denying that the allegedly defamatory aspect of Robert Sproule's reviews are directed to a single instance of negligence.

CONCLUSION

The decision below should be reversed, with instructions to dismiss the complaint and to consider defendants' motion for an award of attorney fees under the New York anti-SLAPP law.

Respectfully submitted,

Paul Alan Levy
Public Citizen Litigation Group
1600 20th Street, NW
Washington, D.C. 20009
(202) 588-7725
plevy@citizen.org

address for service:

Clare M. Sproule
The Law Office of Clare M. Sproule
3056 Riverside Drive
Wantagh, New York 11793
Office/Fax (516) 804-5598
csproule@sproulelaw.com

Attorneys for Defendants-Appellants

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Paul Alan Levy