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.

BRIEF FOR DEFENDANTS-APPELLANTS

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INTRODUCTION

Defendants Robert Sproule and Sarah Sproule ("the Sproules") appeal from the May 20, 2021 order of the Supreme Court of the State of New York, Nassau County (Steinman, J.S.C.), R.4-11, whose Notice of Entry was given on May 24, 2021, R. 11, and which was the subject of appellants' Notice of Appeal dated June 3, 2012, R.3.

Since 1992, New York law has incorporated a strong public policy against lawsuits—and meritless defamation actions in particular—that target members of the public who exercise their free speech rights. Such lawsuits, referred to as "Strategic Lawsuits Against Public Participation," or SLAPPs, are the subject of New York's "anti-SLAPP law," N.Y. Civ. Rights L. §§ 70-a & 76-a. As strengthened by amendments enacted in 2020, the anti-SLAPP law applies whenever a defendant is sued for engaging in "public petition and participation," including any exercise of the right to free speech "in connection with an issue of public interest." *Id.,* § 76-a. The law "broadly" defines "public interest" as including "any subject other than a purely private matter." *Id.* The law further provides that when the defendant moves for dismissal of such an action, the plaintiff must show a "substantial" basis for its lawsuit, not just a reasonable basis. *Id*. § 70-a. And, when the plaintiff has sued for defamation by speech covered by the law, it must meet the standard set by *New York Times v. Sullivan*, 376 U.S. 254 (1964), which demands a showing of "actual malice"—that is, it must prove by clear and convincing evidence that the defendant

spoke with actual knowledge or reckless disregard that the speech was false. *Id*. § 76-a. . Additionally (and regardless of whether the claim was for defamation), if the plaintiff fails to show that it had a substantial factual and legal basis for its claims, the anti-SLAPP law requires that attorney fees be awarded if the plaintiff has either "commenced or continued such an action" without a substantial basis in fact and law. *Id*. § 70-a.

In this case, the Supreme Court refused to dismiss a defamation lawsuit that a pet-grooming company, VIP Pet Grooming Studio, Inc. ("VIP") filed against both Sproules based on reviews of the company that Robert Sproule had posted on Google and Yelp. Mr. Sproule posted the reviews after the Sproule's puppy had to be euthanized following a medical emergency that began in the course of VIP's grooming services. Robert Sproule's reviews were expressly directed as a warning to other consumers—a "caution . . . against using this business" considering what had happened to his family's dog, and concluding, "[Y]ou would be best finding another groomer." The Sproules had sought compensation from VIP in a complaint for negligence brought in the District Court for Nassau County. This action for defamation was filed in response to that tort suit, and as a basis for removing that case from District Court. Despite the fact that Robert Sproule's comments had been posted to review sites where other consumers would likely look in choosing groomers

for their own pets, in an appeal to the common interest of all pet owners in securing safe as well as effective treatment for their animals, the trial court ruled that there was no public interest in learning about his review and hence denied the anti-SLAPP motion.

That ruling was erroneous. Speech posted to web sites that offer consumer reviews of businesses serve an obvious public interest, not purely private interest. The 2020 amendments extending the anti-SLAPP law to all speech on matters of public interest, moreover, apply to this action, which had been pending for little more than a week when the amendments went into effect. As a result, trial court's erroneous view that the speech did not involve a matter of public interest requires reversal and remand for dismissal of the claims and an award of attorney fees to the Sproules under the anti-SLAPP statute. Because the plaintiff failed completely to demonstrate that there was a substantial basis for its claims and that Robert Sproule's speech was made with actual malice, in the face of an anti-SLAPP motion supported by affidavits and documentary evidence, its claims could proceed only if the anti-SLAPP statute were inapplicable. Indeed, even if the district court were correct that the anti-SLAPP law did not apply, the defamation claims would still have to be dismissed because the complaint failed to identify any factual statements made by Robert Sproule that it alleged were false, and failed to plead special damages as

required by New York law despite admitting that the allegedly libelous statements involved only a single instance of professional error by the plaintiff.

QUESTIONS PRESENTED

1. Was plaintiffs' defamation complaint a SLAPP suit?

The Supreme Court ruled that Robert Sproule's reviews were addressed to "a private beef," and hence not a matter of public interest,

2. Do the 2020 amendments to New York's anti-SLAPP law apply to actions that were pending on November 10, 2020, the amendments' effective date?

The Supreme Court noted cases finding the law retroactive, but expressly declined to resolve this issue.

3. Did the complaint in this case, and plaintiff's showing in response to the motion to dismiss, meet the standards for an action involving public petition and participation?

The Supreme Court did not address this issue.

4. Did the complaint, which failed to plead special damages even though plaintiff admitted that the criticisms pertained only to a "single instance of alleged negligence" rather than any claimed "pattern of misconduct," properly allege a claim for defamation?

The Supreme Court did not address the special damages issue.

5. Did the complaint, which alleged only in conclusory fashion that a long paragraph containing both opinions and facts was "false," but failed to identify any factual statements as being false, fail to state a claim for defamation because the opinions expressed in the review are protected by the First Amendment as "pure opinion"?

The Supreme Court did not address these issues expressly but held that there were isolated fragments of the reviews that could be proved true or false.

STATEMENT OF THE CASE

A. Statutory Background: The New York Anti-SLAPP Law.

The New York anti-SLAPP law was adopted in 1992 in response to a demonstrated history of lawsuits being filed against members of the public who had participated in proceedings in opposition to the activities of companies and individuals who were seeking or using government permits in ways which, according to the speakers, were unfairly or illegally prejudicing their interests. "SLAPP suits—strategic lawsuits against public participation— . . . 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.2d 130, 137 n.1 (1992). The legislature's key concern, as stated in the legislative findings, was

"that the threat of personal damages and litigation costs can be and has been used as a means of harassing, intimidating or punishing individuals, unincorporated associations, not-for-profit corporations and others who have involved themselves in public affairs." 1992 Sess. Law News of N.Y. Ch. 767 (A. 4299) (McKinney's), § 1. The Governor's signing statement similarly explained: "The aim of SLAPP suits is simple and brutal: the individual is to regret ever having entered the public arena to tell government what she thinks about something directly affecting her." Quoted in *Ent. Partners Group v. Davis*, 155 Misc.2d 894, 903 (N.Y. Sup. Ct. 1992), *aff'd*, 198 A.D.2d 63 (1st Dep't 1993).

The First Department said much the same in one of its decisions applying the statute: "The primary objective of SLAPP suits is not to win. Instead of achieving victory in court, SLAPP suits are designed to intimidate [speakers] into dropping their [positions] due to the expense and fear of extended litigation. . . . The primary motivation behind filing SLAPP suits is to retaliate against successful opposition and prevent future opposition." *Hariri v. Amper*, 51 A.D.3d 146, 149 (1st Dep't 2008) (internal punctuation omitted).

Over the next three decades, however, the Legislature's remedies for SLAPP suits were rarely applied. The law's protections were accorded only to members of the public who communicated about the activities of public applicants or permittees,

and who were sued for speech that was "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." 1992 Sess. Law News of N.Y. Ch. 767 (A. 4299), Section 3. Moreover, the law only allowed awards of attorney fees without requiring them. In 2020, the Legislature amended the statute to extend anti-SLAPP protections to any member of the public who was sued over speech on a matter of public interest, and to provide that, when a plaintiff was found to have filed a SLAPP suit that was subject to dismissal under the statute, an award of attorney fees in favor of the successful anti-SLAPP movants would be mandatory rather than permissive.

The bill's sponsors were very clear about the problems that it addressed, and what they expected it to accomplish. The legislation was aimed at "frivolous lawsuit[s] intended to silence free speech and public participation in our democratic process, . . . [which] have abused our legal system by attempting to harass, intimidate and impoverish their critics with strategic lawsuits against public participation." New York State Legislature, *Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech* (July 22, 2020), https://nyassembly.gov/Press/?sec=story&story=93436. "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." *Id.* "These lawsuits are

started not because they have any chance of ultimate success—they don't— but to make sure that others don't speak out publicly, for fear of being sued. It is clear that the best remedy for this problem is to require those who bring these lawsuits to pay the legal fees and costs of those who they have wrongfully sued, along with an expedited means for the courts to toss these cases into the dustbin of history." *Id.*

To address these concerns, the legislature took a multi-pronged approach. It adopted special new procedures for handling any suit that is filed over speech on a "matter of public interest," Civil Rights Law Section 76-a. Under the express terms of the statute, the term "public interest" is to be "construed broadly, and shall mean any subject other than a purely private matter." *Id.* Section 76-a(d). Once a matter is determined to be within the scope of the statute, a defendant is permitted to seek dismissal either on the face of the complaint or by submitting supporting affidavits and other evidence, and the trial court is required to consider both supporting and opposing affidavits in deciding whether the plaintiff has a substantial basis for proceeding with its claim. CPLR Section 3211(g)(1) and (2). Moreover, the motion to dismiss is to be given preference on the calendar, and all discovery is stayed until the motion to dismiss has been addressed by the Court. *Id.* Section 3211(g)(3). No damages can be sought on any claim over a statement on a matter of public interest that depends on a showing about whether the statement is true or false (for example,

a defamation claim), unless the plaintiff is able to show by clear and convincing evidence that the statement was made with knowledge of falsity or reckless disregard of falsity. Civil Rights Law section 76-a(2). Finally, if the Court grants the motion to dismiss invoking the anti-SLAPP law because the plaintiff could not show that it had a substantial basis in both law and fact for bringing the claim, an award of attorney fees is mandatory. Civil Rights Law Section § 70-a(1).

The New York State Assembly and Senate passed legislation amending the anti-SLAPP law to extend protection against lawsuits over speech on issues of public interest on July 22, 2020, and the Governor signed it on November 10, 2020. By its terms, it took effect "immediately." 2020 Sess. Law News of N.Y. Ch. 250 (A-5991-A), Section 4.

B. Facts of This Case.

The affidavits and documentary evidence introduced in support of the motion to dismiss show the following. The Sproules live in Lombard, Illinois, a Chicago suburb, with their seven-year old daughter. In early March, 2020, they traveled to Wantagh, New York for the funeral of Sarah's father. They brought along the four-month old puppy, "Ranger," that they had given their daughter for Christmas. R.81 ¶ 2; R. 74 ¶ 2.

On Wednesday, March 4, 2020 at 10:00 am, Sarah Sproule brought the puppy

to VIP Pet Grooming Studio in Wantagh, New York for a bath and haircut. When they arrived, there were no other pets and only one employee at the location. Sarah introduced herself and told the groomer that the puppy needed a bath and a haircut. She also told the groomer that Ranger had only had one grooming appointment before, and that the previous groomer had said Ranger was anxious about the process, especially the clippers. R.81-82 ¶¶ 3-4. Sarah told the groomer that if the puppy started acting anxious at any point, she should stop the grooming and call Sarah, who would pick him up even if that meant that his haircut was not finished. The groomer said that she was very experienced in dealing with anxious dogs and appeared to understand what Sarah wanted. Sarah then filled out a form with her contact information and the information for Ranger's veterinarian in Illinois. Before she left, Sarah reiterated that, if Ranger acted anxious, the groomer should call Sarah to pick him up even if the grooming was incomplete. R.82.

Less than two hours later, Sarah received a call from the groomer, who sounded agitated and upset. The groomer told Sarah that she needed to come immediately and pick up Ranger as he was acting strange. Sarah quickly drove to VIP Pet Grooming. When she arrived, the groomer was standing right by the front door of the salon holding Ranger who was visibly upset, shaking and panting. His grooming was not finished. The groomer did not say that anything out of the ordinary had happened. *Id.*

¶ 7.

The groomer appeared upset and seemed anxious for Sarah to take Ranger and leave. She told Sarah that Sarah did not have to pay because she (the groomer) had not finished grooming Ranger, but Sarah insisted on paying for some of the services anyway. Although the complaint alleges that the puppy "was calm, happy and healthy when Sarah Sproule picked him up," R.14 ¶ 8, it also alleges that the dog was "extremely agitated" during the grooming. R.13 ¶ 6. In fact, the dog was "visibly upset and shaking," and continued "shaking and panting" even after Sarah Sproule picked him up. R.82 ¶ 7. The groomer plainly knew that something was amiss, in that she was anxious for Sarah to take the dog and leave and said that Sarah needn't pay. R.83 ¶ 8.

Sarah put Ranger in the passenger seat beside her so she could pet him and try to calm him down. She let her husband Robert know that their dog was "freaking out." R.25, 83 ¶ 9. As Sarah drove home, the dog continued to shake and pant as Sarah petted him to try to calm him down. *Id.* ¶ 10. Upon getting home, the dog began to vomit, throwing up blood-tinged mucus. *Id.*¶ 11. Because the puppy's breathing was shallow and labored, and he was groaning and drooling, the Sproules contacted a veterinarian, who directed them to the Veterinary Referral & Emergency Center of Westbury ("the hospital"), where the dog was checked in. R.75, ¶¶ 5-6;

R.84 ¶¶ 13-14.

After the veterinarian examined Ranger and gave him a chest x-ray, Ranger was admitted and put into an oxygenated kennel. The veterinarian told the Sproules that Ranger's breathing difficulties were caused by fluid in his lungs, most likely because of a traumatic event at the groomer. The veterinarian enumerated three possible causes for Ranger's condition and urged them to call the groomer to try to get more details about any traumatic events that may have occurred while Ranger was at the grooming facility. R.84 ¶ 1; R.75 ¶ 7.

Robert Sproule called the groomer and explained his concerns to the woman who answered the phone. The grooomer specifically denied one of the possible causes that the veterinarian had identified (electrocution from chewing wires), and more generally denied that anything unusual happened during the appointment. She stated that, as soon as Ranger started acting oddly, she stopped grooming him and called Sarah to pick him up. R.76 ¶ 8.

By the time Robert reached the hospital after this call, a critical care veterinarian, Dr. Brittany Sylvane, was also examining Ranger. Robert told the veterinarians that the groomer had said that nothing unusual had happened during the grooming. At this point, the veterinarians had ruled out electrocution as a possible cause, but they said that the amount of fluid in his lungs was more consistent with

drowning. They explained that drowning can be caused not only by submersion but also by inhalation or aspiration of water during a dog's bath. R.76 ¶ 9; R. 85 ¶ 16. Dr. Sylvane recommended that Ranger be sedated and remain in an oxygenated kennel at least overnight, hoping that medication would dry out his lungs; the Sproules returned home while Ranger remained sedated. R.76 ¶10; R.85 ¶ 17.

Over the next two days, Ranger's condition deteriorated. The veterinarians tried a number of treatments, including intubating Ranger and placing him on a mechanical ventilator for 24-48 hours in order to give his lungs a break and time to heal; the Sproules accepted these recommendations, which cost them more than $10,000. R.77 ¶ 11 12; R.85 ¶¶ 17-19.

In the meantime, Robert visited VIP Pet Grooming in Wantagh with his mother, Clare Sproule (who is an attorney, and who has represented the Sproules in this litigation), to try to get more details regarding the circumstances of Ranger's visit. Robert spoke to "Michelle," the same person with whom he had spoken on the telephone the day before, and who was the only person in the shop at the time of their visit. Michelle said that she was the manager and that it was she who had groomed Ranger. Michelle was visibly anxious and nervous. Robert let her know what Ranger's condition was at that point. He asked her to walk him through what had happened with Ranger and whether he could see where Ranger had been groomed.

R.77 ¶ 13.

Michelle told Robert that Ranger was agitated during the whole appointment and had difficulty with both the bathing and the cutting. Michelle stated that she could tell he was upset, based both on his demeanor and on how fast his heart was beating throughout the grooming. She said that she held him close to her during the grooming process to try to calm him down, but that at one point he was so upset during the clipping that he defecated on the table and had to be bathed a second time as a result. After the second bath, she contacted Sarah to pick him up because at that point his disposition and temperament had changed, and he started acting strange. R.77-78 ¶¶ 13-14.

Robert's conversation with Michelle was civil the entire time. Robert's mother/attorney then gave Michelle her business card and asked that VIP Pet Grooming's attorney call her to discuss what had happened. R.78 ¶ 15.

By Friday morning, Ranger's condition had not improved; the veterinarians told the Sproules that because he could not breathe on his own, they had to intubate him again and put him back on the ventilator. They suggested that the Sproules come to the hospital as soon as possible so that they could further discuss his treatment. The Sproules brought their daughter with them, recognizing that there was a possibility that this would be the last time she would see Ranger. While their daughter spent a

few minutes petting the sedated puppy, the veterinarian told the Sproules that Ranger's prognosis was not good. She said that it did not appear that his lungs were drying out and that all she could recommend was another 48 hours of intubation. For the first time, she told them that if Ranger were her puppy, she would probably let him go. Later that afternoon, the veterinarian called and told Robert that the chest x-ray showed that the fluid in Ranger's lungs was increasing. The Sproules made the difficult decision at that time to put Ranger to sleep. They went to the hospital to spend a last few minutes with Ranger, and were there when he was put to sleep. R.78-79 ¶¶ 16-18; R.86-87 ¶¶ 21-23.

Clare Sproule, acting as counsel for Robert and Sarah Sproule, sent a March 9, 2020 demand letter to VIP Pet Grooming's attorney John Ciampoli with the veterinarian bills and other bills attached, asking that VIP Pet Grooming pay the costs of Ranger's medical care and other costs. R.41-42. The letter, which was forwarded by email the following day, R.23 ¶4(h), 43, briefly set out what had happened to Ranger during and after he was groomed at their facility. The letter also stated that the Sproules would take appropriate legal action against VIP Pet Grooming if it did not promptly respond. The letter concluded by noting that litigation against a small business can result in "negative publicity" that can have a "devastating" impact in a small community. R.42.

A few days later, Attorney Sproule received a letter from Mr. Ciampoli. R.23 ¶ 4(i), 63. Mr. Ciampoli did not address the facts or demand made in the letter. Instead, his letter was replete with contentions about what had happened to Ranger and about what he claimed Ms. Sproules had said to him personally and to the staff at VIP Pet Grooming. In that letter Mr. Ciampoli threatened to sue the Sproules for defamation if they spoke to press about the controversy or otherwise tried to "destroy" his clients' business. R.61-62. None of Mr. Ciampoli's assertions about what Attorney Sproule allegedly said orally are supported by any evidence in the record.

VIP maintains a page on Yelp's consumer review site, including many photographs and other advertising for the company's services. R. 22 ¶ 4(c), 26-27; https://www.yelp.com/biz/vip-pet-grooming-studio-wantagh. On May 4, 2020 Robert Sproule posted two virtually identical reviews, one to VIP's page on Yelp, and the other to the Google review site about VIP. His reviews described what happened to Ranger during and after his grooming at VIP on March 4, 2020 and stating his opinion about VIP Pet Grooming's services. Those reviews, which are the subject of this lawsuit, 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?hrid=WgX2e6oIJSMsmKUU6ctlig.

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.
> Google review, R. 64,
> https://www.google.com/search?q=vip+pet+grooming+studio#lrd=0x89c27f409a3d0169:0x87d018b87114a959,1,,,

Sarah Sproule did not post anything to either Google or Yelp about the controversy. However, on August 17, 2020, both Sproules filed an action in negligence against VIP in the District Court for Nassau County, New York. R.67-70.

On November 1, 2020, the owner of VIP posted a response on Google to Robert Sproule's review, contending that the review was both false and defamatory; much of the response was directed to statements that Clare Sproule allegedly made to VIP's staff and to its lawyer, and to the tone and manner in which she allegedly conducted herself. The response appears directly under Robert Sproule's criticisms. So far as the record reflects, VIP did not post any response on Yelp although, when a business owner has taken command of its Yelp page (as VIP has done), the owner

is able to post responses to all reviews.

On November 2, 2020, VIP answered the Sproules' District Court complaint and also filed this action for defamation against both Robert Sproule and Sarah Sproule. The summons and complaint were served on November 6, 2020.

C. Proceedings Below.

The complaint alleges a claim for defamation based on statements made in the Yelp and Google reviews, which are set forth in full above and in paragraphs 16 and 17 of the complaint. Those paragraphs are preceded by a brief set of alleged facts, largely directed to criticizing the Sproules' atttorney, Clare Sproule, for things she (and to some extent Robert) had allegedly said to VIP staff and VIP's original counsel, Mr. Ciampoli, but which did not appear in the Yelp and Google reviews that are the ostensible subject of the litigation. The factual allegations, paragraphs 3 to 15, R. 13-14, admitted that, while VIP staff had been grooming the Sproules' pet, he became "extremely agitated," R.13 ¶ 6, and that consequently the groomer had stopped the process and called Sarah Sproule to pick up the dog. R.14 ¶ 7. Yet the complaint then alleged that the dog was "calm, healthy and happy" when Sarah Sproule arrived to collect him. The rest of the specific allegations in the complaint allege that on March 5 and 6, Robert Sproule and Clare Sproule had made statements to VIP and its counsel about the chewing of wire and possible electrocution, and

accused VIP staff of forcing water into the dog's lungs. *Id.* ¶¶ 10, 11, 12. Paragraph 13 alleged that Clare Sproule—who is not a defendant in this case—had told VIP's attorney that VIP "had better pay up" and suggested that the small business could be "destroyed" if the Sproules "went to the Wantagh local papers and told them that VIP was killing dogs. The complaint does not allege that the two defendants ever made such a statement, publicly or privately, and the statements alleged in paragraphs 10 through 13 have nothing to do with the two public reviews, the only things that either of the Sproules is accused of having published to third parties. The Yelp and Google reviews are the only publications allegedly made to third parties.[1]

Paragraphs 16 and 17 of the Complaint quote the entire thirteen-sentence reviews, as they appeared on Yelp and Google, and assert very generally that the entire paragraphs are "false and defamatory," R.14; *see also id.* ¶ 18, without specifying any thirteen sentences that contain allegedly false statements of fact. The complaint also alleges that "Defendants" [sic] had published their reviews "maliciously, with intent to injure the plaintiff," R.15 ¶ 19, and that the reviews were published "maliciously, intentionally and willfully." R.16 ¶ 25, 17 ¶ 32. But the

[1] Publication to a third party is an element of a claim for defamation. *Brady v. Gaudelli*, 137 A.D.2d 951, 951 (N.Y. App. Div. 2d Dept. 2016). Statements to a plaintiff's own representatives, such as in a phone call to the plaintiff's lawyer, do not meet this test. *Ginarte Gallardo Gonzalez & Winograd v. Schwitzer*, 193 A.D.3d 614, 614 (N.Y. App. Div. 1st Dept. 2021).

complaint does not allege that the statements were made with knowledge of falsity or reckless disregard of probable falsity. And, although the complaint alleges very generally that VIP had suffered "injury to its business reputation," R.16 ¶ 26, 17 ¶ 31, it makes no allegation of special damages.

Moreover, Sarah Sproule was named as a defendant in the defamation action even though she made no public statements about VIP and the complaint did not allege that she had said anything defamatory. The only even implicit reference to any claimed wrongful conduct by Sarah is that, in some allegations, the complaint uses the plural "defendants" instead of the singular "defendant." *E.g.,* R. 15 ¶ 19*,* R.17 ¶ 32. Plaintiff has never explained why Sarah Sproule is a defendant in the absence of any allegation that she published any statements to third parties. Because paragraph 23 of the Complaint urges that the District Court action be removed to the Supreme Court and consolidated with the defamation action, it appears that Sarah Sproule was named as a defendant to ensure that there was an identity of parties with the case that VIP wanted to remove from District Court.

On November 19, 2020, after the 2020 anti-SLAPP amendments were signed into law, Attorney Sproule sent a letter to Thomas Mullaney, one of VIP's lawyers, calling his attention to the anti-SLAPP amendments and urging him to dismiss the defamation action. R.65-66. When VIP did not dismiss its lawsuit, the Sproules

moved to dismiss under the anti-SLAPP law. R.20-21.

In support of that motion, defendants argued that Robert Sproule's reviews addressed a matter of public interest—whether consumers should avoid entrusting their pets to VIP for grooming in light of what had happened to their own puppy. They also supplied detailed affidavits from both Sproules, as well as copious documentation authenticated by their counsel, showing the course of events that had led directly from their decision to send Ranger to VIP for grooming to their anguished decision to euthanize their suffering pet only two days later. This undisputed course of events provides the factual basis for the opinions that Robert Sproule expressed in his reviews. Because they had submitted affidavits, the Sproules explained, the 2020 anti-SLAPP amendments put the burden on VIP to show that it has a substantial basis in fact as well as law for pursuing defamation claims. Moreover, even apart from dismissal under the anti-SLAPP law, the Sproules' motion argued that the complaint should be dismissed because its allegation of falsity was far too conclusory and failed to identify specific assertions of fact in Robert Sproule's reviews that were allegedly false.

VIP responded by contending that the anti-SLAPP law should not be applied to the case because the case concerns only "a single allegation of negligence by a small, local dog grooming company," R.122, R125, whose private character was

shown by the fact that the Sproules' attorney had demanded a payment of $20,000 to avoid litigation. According to VIP's opposition, "The purpose of Mr. Sproule's posting was not to warn the public against danger. Rather, the statement was posted to harm VIP by driving away business and extort a payment." R.128. Moreover, VIP sought to distinguish the holding in *Palin v. New York Times*, 510 F. Supp. 3d 21, 26–27 (S.D.N.Y. 2020), where Judge Rakoff applied the 2020 anti-SLAPP amendment to a defamation case that was pending on the effective date of the statute. Judge Rakoff had noted that retroactive application would have no "harsh impact" in part because the plaintiff, Sarah Palin, is a public figure who knew when she filed her libel suit that she would have to satisfy the actual malice standard regardless of anti-SLAPP legislation. VIP contended that it would be a "harsh result" to subject it to anti-SLAPP standards interfering with its ability to seek relief from criticisms that it deems defamatory.

With respect to the sufficiency of its allegations of falsity, VIP chose not to amend its complaint to set forth specific allegations of falsity; instead, it simply identified in its opposition brief two sentences in the Robert Sproule reviews that it said represented statements of fact— Robert Sproule's assertion that Ranger had died as a result of VIP's "negligence or incompetence," and his statement that the dog "had water in his lungs that the vet said could only have come from a dramatic

physical accident at the groomer." R.12. VIP did not introduce any affidavits to create a prima facie case on the issues of falsity or actual malice; instead, it rested on its contention that there were contradictions in the evidence that the Sproules had filed in support of their anti-SLAPP motion to dismiss.

In reply, the Sproules argued that, given the absence of specific allegations of falsity in the complaint, the trial court should not be in the position of sifting through Robert Sproule's published statements to isolate and identify assertions of fact. R.131. They also pointed out that VIP's main argument against treating their review as pertaining to an issue of public interest—the fact that it related only to a single incident of negligence—was alone sufficient to warrant dismissal of the complaint on its face because New York follows the "single instance rule" under which a false statement about a mistake made in the course of the plaintiff's business or profession is not actionable as defamation unless the plaintiff both pleads and proves special damages which VIP failed to do. R.134-135.

The Supreme Court denied the motion to dismiss. It expressly declined to address whether the 2020 antiSLAPP amendments apply to cases pending on the effective date of the law because it decided that, in any event, the Sproule reviews did not address an issue of public interest. In deciding the meaning of the statutory term "public interest," the court cited cases decided under the California and Nevada anti-

SLAPP laws, some of which had articulated multi-part tests to determine whether speech is of interest to "substantial number of people, and not only to a "relatively small specific audience." R.8. The court concluded that the reviews here did not involve a matter of public interest because they addressed only "a single act of alleged negligence concerning one pet by a small, privately-owned pet grooming business"; otherwise, consumers who write reviews "concerning a single experience with a private merchant [would get] a license to defame with impunity that merchant . . . and potentially destroy its reputation." *Id.*

Turning to the motion to dismiss on the face of the complaint, the court concluded that the statements in the review were not opinion. The court held that (1) whether the death of the Sproules' dog resulted from "negligence of incompetence" and (2) what the veterinarian told them—"that the water in the dog's lungs could only have resulted from a dramatic physical accident"—were matters of fact that could be established, or disproved, through admissible evidence. R.10. The Court did not address VIP's failure to allege special damages caused by statements about "a single act of alleged negligence."

ARGUMENT

I. THE COMPLAINT SHOULD HAVE BEEN DISMISSED UNDER THE ANTI-SLAPP LAW.

A. Robert Sproule's Consumer Reviews Addressed an "Issue of Public Interest" Within the Meaning of the Anti-SLAPP Law as Amended in 2020.

The Yelp and Google reviews were posted to warn other consumers to beware of using VIP's services in light of what happened to the Sproules' pet. These reviews fit easily within the statutory definition of "public interest" in section 76-a(1)(d) of the Civil Rights Law. Notwithstanding cases cited by the court below, reviews posted to consumer review sites such as Yelp and Google are typically treated as falling within the statutory coverage of issues of public interest under the anti-SLAPP laws of other states. Indeed, even under the multi-factor tests cited by the trial court, and under the similar analysis of whether speech is on a "matter of public concern" (a standard that courts in New York and elsewhere treat as interchangeable with "issue of public interest"), the reviews easily qualify as addressing an issue of public interest.

1. The Statute Expressly Defines "Public Interest" as Including All Speech That Is Not a "Purely Private Matter."

The anti-SLAPP law explicitly provides that "'[p]ublic interest' shall be

construed broadly, and shall mean any subject other than a purely private matter." § 76-a(1)(d). Although the court below mentioned the term "purely private matter" in passing, it never analyzed the meaning of that phrase. Nor did the court explained how a statement could qualify as a "purely private matter" when, by its very terms, the statement is phrased as a warning to other consumers, and where it was posted on public review sites, directed to and used by members of the public interested in pet care services and in reviews from consumers of such businesses,

The "purely private matter" exception ensures that entirely private communications, which contain speech protected under the First Amendment, do not come within the scope of anti-SLAPP protection. The First Amendment can protect private speech, and the "purely private matter" exception prevents the application of anti-SLAPP standards to speech contained, for example, in a personal letter to a third party. Arguably, it might also exclude from anti-SLAPP coverage cases such as *Dun & Bradstreet v. Greenmoss Builders*, 472 U.S. 749, 761–63 (1985), where the Supreme Court held that a credit report that was furnished to only five paying subscribers did not address an issue of public concern. Similarly, the California Supreme Court held in *FilmOn.com Inc. v. DoubleVerify Inc.*, 439 P.3d 1156, 1167 (Cal. 2019), that reports circulated only "privately, to a coterie of paying clients [who] in turn, use the information . . . for their business purposes alone," did not qualify

as statements on an issue of public interest *See also* *Albert v. Loksen*, 239 F.3d 256, 269–70 (2d Cir. 2001) (statements "directed only to a limited, private audience are 'matters of purely private concern.'"). By contrast, reviews posted on sites such as Yelp and Google are expressly addressed to the public on a matter likely of interest to those who read them. They are not addressed to a "purely private matter."

2. Consumer Reviews of Local Businesses Presumptively Qualify for Anti-SLAPP Coverage Because They Address Issues of Interest to Members of the Public Trying to Identify Businesses That They Should Patronize.

Sites such as Yelp and Google reviews play a major role in informing the public about the both the good and bad features of doing business with various local companies. Yelp and other consumer review sites thrive because they fill a need felt by consumers and small businesses alike:

> "word-of-mouth [can be] a powerful purveyor of new customers, but with the classic local community structure breaking apart in an online era, how could individuals know which businesses to trust? Yelp was the answer – an online review site in which customers shared their experiences, helping others make informed decisions about restaurants, auto-repair shops, and more.
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> Marrs, *The Complete Guide to Yelp Reviews: Getting, Removing & More* (July 17, 2020), available at https://www.wordstream.com/blog/ws/2013/07/22/yelp-reviews.

And surveys show that consumers often turn to sites such as Yelp to find useful information to guide them in deciding what private businesses they ought to patronize. Belt, *Study shows 97% of people buy from local businesses they discover on Yelp*, (Oct. 19, 2019), available at https://blog.yelp.com/businesses/study-shows-97-of-people-buy-from-local-businesses-they-discover-on-yelp/; Smith & Anderson, *Online Reviews*, https://www.pewresearch.org/internet/2016/12/19/online-reviews/ (Dec. 19, 2016).

Of course, no business is ever going to sue, or threaten suit, over a positive review, no matter how ill-advised or even phony. The threat of being sued for a negative review unfairly puts a legal thumb on the scale and distorts the marketplace of ideas about the quality of local businesses. But a legal regime that enables consumers to post their experience freely, without having to worry about the legal bills they would incur if a business takes offense at something they said and brings suit without having a substantial factual and legal basis for pursuing a libel claim, facilitates the free flow of information about local businesses. Construing the 2020 anti-SLAPP amendments as presuming that consumer reviews posted to review sites are addressed to an issue of public interest enables the marketplace of ideas to function the most smoothly.

Indeed, the Court can look to VIP's own behavior in assessing the likelihood

of public interest in the information that consumers can find in both Google and Yelp reviews. VIP uses its Yelp page to post advertising for its services, including providing its own laudatory descriptions of its services, and posting many photographs of happy animals which, presumably, have received VIP's grooming services. *See* https://www.yelp.com/biz/vip-pet-grooming-studio-wantagh.[2] And although VIP has apparently not taken advantage of its option as a "claimed business" on Yelp to post direct responses to consumer reviews on that web site, the VIP Pet Grooming page of Google reviews reveals that VIP's owner consistently responds to Google reviews. Moreover, the very fact that VIP has spent its own money on filing this lawsuit over Robert Sproule's reviews, and has alleged that the reviews will cost it business, shows that VIP is acutely aware of the likelihood that many members of the public will be interested in, and may be influenced by, reviews of its services from consumers such as Robert Sproule.

In deciding that Robert Sproule's reviews were not addressed to an issue of public interest, the court below referred to a "principle" that it attributed to some

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[2] The Yelp page reflects that the page has been "claimed," which means that the business owner has taken steps to be "verified" by Yelp so that it can take advantage of "a suite of free tools to showcase their businesses on Yelp," including uploading photographs, providing specific opening and closing times and other information that the business believes would be of interest to potential customers, and obtaining the ability to reply directly to consumer reviews. Yelp, *What is a claimed business?*, https://www.yelp-support.com/article/What-is-a-claimed-business?

decisions under the California and Nevada anti-SLAPP laws that "otherwise private information" cannot be turned into a matter of public interest simply by communicating it to a large number of people. There are several reasons to reject this line of analysis. First, the Court should be cautious about borrowing unduly from other state anti-SLAPP laws without paying close attention to differences of statutory language. Although the California anti-SLAPP law, section 425.16(e) of the California Code of Civil Procedure gives protection to speech on issues of public interest, and Nevada's anti-SLAPP law, Nev. Rev. St. § 41.660(1), protects speech "in direct connection with an issue of public concern," neither statute has a definition of "public interest" or "public concern" that extends that phrase to everything except purely private matters.

The trial court nevertheless concluded that a statement directed to the public and in which the public is predicably interested cannot be deemed a statement on a matter of public interest unless there was already a public debate about that particular incident. But that view would exclude from coverage the very sorts of statements that the 2020 amendments' sponsors said they hoped to protect, such as statements by "consumer advocates [and] survivors of sexual abuse." *Senate and Assembly Majorities Advance Anti-SLAPP Legislation*, *supra*. Until she goes public with her complaints, a victim of sexual abuse has a private dispute, and indeed a highly private

dispute, about what may have been a single instance of impropriety. But when the first woman spoke publicly about Bill Cosby or Jeffrey Weinstein or Larry Nassar, in the hope of protecting other women from possible abuse, she was speaking about a matter of public interest. It is apparent that the legislature thought that its amendments would protect such survivors. So, too, an individual consumer who goes public about his experience with a small business, in the hope of informing other potential customers, is speaking about a matter of public interest even though, before the consumer went public, it was not yet a matter of public debate, and even though the consumer did not know of other misconduct by the business.

Moreover, various decisions in the New York courts addressed the existence of speech on a matter of public concern when they invoke the *Chapadeau* principle, under which media speech on a matter of public concern is actionable in defamation only if the publisher violated a standard of gross responsibility. *Chapadeau v. Utica Observer Dispatch*, 38 N.Y.2d 196 (1975). In deciding whether to apply *Chapadeaux*, courts generally defer to the judgment of publishers in deciding whether a something is a matter of public concern that warrants dissemination to the public. *Weiner v. Doubleday & Co.*, 74 N.Y.2d 586, 595 (1989). Moreover, this Court has held that a nonmedia defendant who uses a public medium for the publication of matter deemed defamatory should be accorded the same privileges as would be

accorded to the medium itself. *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).

Here, review of the VIP Pet Grooming page on Yelp reveals that Yelp has, by the operation of its algorithm, determined that Robert Sproule's review is one of the consumer comments about VIP that should be openly displayed on that page for all visiting consumers to see, as opposed to the "17 other reviews that are not currently recommended." https://www.yelp.com/biz/vip-pet- grooming-studio-wantagh.[3] Just as Yelp's decisions about which review merit public attention are entitled to *Chapadeau* deference, the Court should also accept Robert Sproule's judgment that other pet owners would be interested in learning about how VIP Pet Grooming treated their family pet. For this reason as well, the Court should consider the defamation claim in this case under the assumption that the review was addressed to an issue of public interest.

Likewise, even under California case law applying its longstanding anti-SLAPP statute, a consumer review like Robert Sproule's concerns a matter of public interest. Although some California courts consider multiple factors in deciding whether speech is addressed to an issue of public interest for purpose of applying

[3] The manner in which Yelp's algorithm works to make these judgments is discussed at https://www.yelp.com/not_recommended_reviews/vip-pet-grooming-studio-wantagh.

California's anti-SLAPP law, those courts consistently hold that the type of speech at issue here—a review published on a consumer review site—is within the protection of the statute because it is "provided to aid consumers." *Makaeff v. Trump U.*, 715 F.3d 254, 262–63 (9th Cir. 2013); *Piping Rock Partners v. David Lerner Associates*, 946 F. Supp. 2d 957, 969 (N.D. Cal. 2013), *aff'd*, 609 Fed. Appx. 497 (9th Cir. 2015); *Grenier v. Taylor*, 183 Cal. Rptr. 3d 867, 876 (Cal. Ct. App. 2015). Similarly, *Demetriades v. Yelp, Inc.*, 175 Cal. Rptr. 3d 131, 143 (Cal. Ct. App. 2014), recognized that Yelp's web site is a public forum and "contains matters of public concern in its reviews of restaurants and other businesses," but held that Yelp's own promotional statements about its web site constituted commercial expression that is expressly excluded from protection by the California anti-SLAPP law.

Following these principles, the California Court of Appeal ruled, in *Chaker v. Mateo*, 147 Cal. Rptr. 3d 496, 502 (Cal. Ct. App. 2012), that statements posted on two review web sites, RipoffReport.com and Topix, addressed issues of public interest because they "plainly fall within in the rubric of consumer information about [plaintiff's] business and were intended to serve as a warning to consumers about his trustworthiness." The court also considered that the plaintiff had

> posted a profile on the Web site and it generated responses from other members of the community . . .. Having elected to join the topix Web site, Chaker clearly must have

> recognized that other participants in the Web site would have a legitimate interest in knowing about his character before engaging him on the Web site. Thus, here Chaker himself made his character a matter of public interest as the term has been interpreted.
>
> *Id.* at 1146-1147.

Similarly, in *Piping Rock Partners* — one of the California cases that the Supreme Court cited to support its narrow construction of "issue of public interest"— the court upheld the defendants' invocation of California's anti-SLAPP law because

> as in *Chaker* and *Wilbanks [v. Wolk*, 17 Cal. Rptr.3d 497 (2004)], Dobbs's statement is a warning to consumers not to do business with plaintiffs because of their allegedly faulty business practices. It makes no difference, for purposes of the public interest requirement, that the warning was not sincere, accurate, or truthful. Accordingly, the Court finds that defendants have made a threshold showing that plaintiffs' suit arises from an act in furtherance of the defendants' rights of petition or free speech.
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> 946 F. Supp. 2d at 969.[4]

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[4] Several unreported California appellate decisions similarly hold, citing cases such as *Chaker* and *Wilbanks*, that because "negative reviews are effectively 'warning[s] not to use' or patronize the business, and '[are i]n the context of information ostensibly provided to aid consumers,' such reviews become 'directly connected to an issue of public concern.'" *Olson v. Kelly*, 2020 WL 1225994, at *1 (Cal. Ct. App. Mar. 13, 2020); *Olson v. Sardi*, 2020 WL 2079150, at *2–3 (Cal. Ct. App. Apr. 30, 2020) (fact that plaintiff is a private therapist who "works with a relatively small group of clients" does not prevent Yelp review from being an issue of public interest); *Simoni v. Swan*, 2019 WL 5485209, at *6–7 (Cal. Ct. App. Oct. 25, 2019); *Sacks v. Haslet*, 2018 WL 4659509, at *8 (Cal. Ct. App. Sept. 28, 2018)

Similarly, both Washington and Texas courts have held that consumer reviews of businesses come, by definition, within the protection of those states' anti-SLAPP laws. *AR Pillow Inc. Maxwell Payton*, 2012 WL 6024765, at *5 (W.D. Wash. Dec. 4, 2012); *Morrison v. Profanchik*, 578 S.W.3d 676, 682 (Tex. Ct. App. 2019); *Floyd v. Aalaei*, 2016 WL 11472821, at *5 (E.D. Tex. Apr. 28, 2016), report and recommendation adopted, 2016 WL 4472777 (E.D. Tex. Aug. 25, 2016) (citing several Texas state court decisions).

In the court below, a prominent feature of VIP's argument about whether Robert Sproule's reviews were addressed to an issue of public interest was its assertions that his statements were false, intended to harm VIP's business, and made to extort a payment from VIP. But as the court said in *Piping Rock*, "It makes no difference, for purposes of the public interest requirement, that the warning was not sincere, accurate, or truthful." 946 F. Supp.2d at 969. And, as the California Supreme Court has held, "claimed illegitimacy of the defendant's acts is an issue

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Amato v. Bermudez, 2018 WL 3689494, at *5–6 (Cal. Ct. App. Aug. 3, 2018) ("Under the broadly construed anti-SLAPP statute, consumer reviews of businesses open to the public are routinely viewed as matters of public interest."); *Hays v. Gagliardi*, 2017 WL 5591470, at *4 (Cal. Ct. App. Nov. 21, 2017); *Hooshmand v. Griffin*, 2017 WL 1376370, at *1 (Cal. Ct. App. Apr. 17, 2017); ("There is now a well-established body of law recognizing that consumer Internet postings are protected speech activities under the anti-SLAPP law."); *Kagewerks, Inc. v. Bessmon Kalasho*, 2014 WL 6066112, at *4–5 (Cal. Ct. App. Nov. 14, 2014).

which the plaintiff must raise and support in the context of the discharge of the plaintiff's [secondary] burden to provide a prima facie showing of the merits of the plaintiff's case." *Navellier v. Sletten*, 52 P.3d 703, 712 (Cal. 2002). Attempting to smuggle such considerations into the public-interest determination "confuses the threshold question of whether the SLAPP statute potentially applies with the question of whether an opposing plaintiff has established a probability of success on the merits." *Id.* at 712. The Texas courts similarly hold that contentions that speech is wrongful do not bear on the question whether the speech comes within the scope of the Texas anti-SLAPP law (the "TCPA"). *See In re Lipsky*, 411 S.W.3d 530, 543 (Tex. Ct. App. 2013). "[At] the first step of our TCPA analysis, asking whether the TCPA applies in the first place, we do not consider whether the communications were defamatory, harassing, or otherwise actionable." *Amini v. Spicewood Springs Animal Hosp.*, 2019 WL 5793115, at *6 (Tex. Ct. App. Nov. 7, 2019) (citing cases).

VIP's contention that Robert Sproule's reviews were false goes to the merits of the defamation action, and its contention that the reviews posted were in furtherance of an alleged effort to extort a payment could, if proved, bear on the theory of common law malice. They are not, however, relevant to whether the anti-SLAPP law applies in the first place.

3. Robert Sproule's Consumer Reviews Addressed an "Issue of Public Interest" Because They Met the Well-Established Test for Being a Matter of Public Concern.

Moreover, even apart from cases specifically addressing the meaning of "issue of public interest" under state anti-SLAPP laws, courts in many states have held that consumer expressions of their views about the businesses that they have patronized raise "matters of public concern," and hence warrants extra protection under the First Amendment. Because New York courts broadly equate "matter of public concern" and "issues of public interest,"[5] precedents applying the former phrase bear on the meaning of the anti-SLAPP law.

Treatment of consumer reviews as a matter of public concern was addressed, for example, in a pair of Oregon cases involving reviews of business products and

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[5] For example, in *Ortiz v. Valdescastilla*, 102 A.D.2d 513, 518 (N.Y. App. Div. 1st Dept. 1984), the court's discussion cited *Chapadeau*'s discussion of the standards for deciding whether speech addressed a matter of public concern, and in the very next sentence said that the newspaper's decision to [publish the article "represents a responsible editorial judgment as to what constitutes a matter of genuine public interest." Similarly, in *Gaeta v. New York News*, 62 N.Y.2d 340, 348-349 (N.Y. 1984), the Court of Appeals repeatedly switched back and forth between discussing whether a story addressed a matter of public concern and whether it was a matter of public interest, effectively equating these two phrases. And in *Nolan v. State*, 158 A.D.3d 186, 192 (N.Y. App. Div. 1st Dept. 2018), the Appellate Division discussed the meaning of *Dun & Bradstreet*, in which the United States Supreme court addressed whether credit reports addressed a matter of public concern, saying that it showed that the matter in that case "is unquestionably of public interest."

services: *Neumann v. Liles*, 369 P.3d 1117, 1125 (Or. 2016); *Lowell v. Wright*, 473 P.3d 1094, 1102 (Or. App. 2020), *review allowed*, 480 P.3d 934 (Or. 2021). Those cases held that reviews posted on a consumer review site about a wedding venue and a piano store, respectively, addressed matters of public concern. The Oregon Supreme Court said in *Newman* that it found a matter of public concern because "Liles's review was posted on a publicly accessible website, and the content of his review related to matters of general interest to the public, particularly those members of the public who are in the market for a wedding venue," 473 P.3d at 1102. And in *Lowell*, a review was a matter of public concern because "Wright posted . . . on a publicly accessible website (Google), and the review's content related to matters of general interest to the public, particularly those members of the public in the market for a piano." 369 P.3d at 1125. As *Lowell* explained, "consumer speech regarding goods, services, and the businesses that provide them to the public has typically been recognized as speech on a matter of public concern." *Id.* Likewise, courts in several states have adopted the general proposition that "a place of public accommodation has voluntarily injected itself into the public concern for the limited purpose of reporting on its goods and services." *Pegasus v. Reno Newspapers*, 57 P.3d 82, 92 (Nev. 2002). The Nevada Supreme Court said, "We agree with [that] rationale." *Id.*

New York courts, too, have accepted that proposition. For example, in

addressing a defamation case over a restaurant review, the First Department said, "The review of the restaurant was of interest to the public who might patronize it and was privileged under the First Amendment." *Twenty-Five East 40th St. Rest. Corp. v. Forbes*, 37 A.D.2d 546, 546 (N.Y. App. Div. 1st Dept. 1971), *aff'd*, 30 N.Y.2d 595 (1972). The same approach protected a news report about a small business that operated a vacation home for dogs; the Appellate Division was satisfied that the article addressed an issue of public concern, *Campo Lindo for Dogs v. New York Post Corp.*, 65 A.D.2d 650, 650 (N.Y. App. Div. 3d Dept. 1978). This concept was applied specifically to consumer reviews in *Penn Warranty Corp. v. DiGiovanni*, 10 Misc.3d 998, 1004 (N.Y. Sup. Ct. 2005), and *Intellect Art Multimedia v. Milewski*, 24 Misc.3d 1248(A) (N.Y. Sup. Ct. 2009), both saying "The courts have recognized that personal opinion about goods and services are a matter of legitimate public concern and protected speech."

Under this line of cases, Robert Sproule's reviews addressed a matter of public interest and hence were plainly within the protection of the anti-SLAPP law. But even if the Court applies a general multi-factor test without regard to the statutory definition, as the court below purported to do, R. 8, 9, the Court should draw on the test, frequently used by courts across the country, including in New York, to assess whether speech is addressed to a matter of public concern based on its "content, form

and context." *Santer v. Bd. of Educ. of E. Meadow Union Free Sch. Dist.*, 23 N.Y.3d 251, 264 (2014). *Accord TMJ Implants v. Aetna*, 498 F.3d 1175, 1185 (10th Cir. 2007); *Levinsky's v. Wal-Mart Stores*, 127 F.3d 122, 132-133 (1st Cir. 1997), *quoting Dun & Bradstreet*, 472 U.S. at 761.

Here, the content, form and context of Robert Sproule's reviews show them to have been addressed to a matter of public concern. They were specifically phrased as being addressed to consumers generally, suggesting that they take his family's experiences in dealing with VIP and its staff into account in deciding which pet grooming business they should use for their own pets. He posted them to public locations where other consumers would likely be looking for information to guide their decisions as consumers or pet-related services. And it was predictable that the pet-owning community in the area, itself a large swath of the community as a whole, would find this information useful.

Data from the United States Bureau of the Census indicate that fully half of all American households own pets, and pet care services represent a significant segment of the American economy, with more than a hundred thousand service providers selling nearly six billion dollars worth of services— numbers that do not even include veterinary services, pet supplies and food. Day and Weinstein, *Pet Owners Spending More on Time-Saving, Specialty Pet Care Services* (Feb. 18. 2020)

https://www.census.gov/library/stories/2020/02/spending-on-pet-care-services-doubled-in-last-decade.html. In those circumstances, pet owners who are choosing among many service providers have a natural interest in learning about the experiences of other pet owners with any given company. Moreover, the public has shown widespread interest in the alleged mistreatment of animals, whether by political figures (such as when Mitt Romney put a dog on his car's roof, or Lyndon Johnson lifted his beagle by its ears), or by small businesses.[6] The likely public interest in learning about this dispute is apparent.

In short, Robert Sproule's reviews addressed an issue of public interest, and the Court below erred in ruling otherwise.

B. The 2020 Anti-SLAPP Amendments Apply to This Case.

Although the court below did not reach the question, VIP argued below that applying the 2020 anti-SLAPP amendments would be unfair because of the "harsh impact of retroactivity here" would have on "a small, privately-owned business." R.135-136. That argument should be rejected.

In deciding whether a newly enacted law applies to litigation pending at the

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[6] See Volokh. *Texas court throws out Prestigious Pets' 'nondisparagement' lawsuit* (Washington Post. Aug. 31, 2019), https://www.washingtonpost.com/ news/ volokh-conspiracy/wp/2016/08/31/texas-court-throws-out-prestigious-pets-nondisparagement-lawsuit-against-customer/.

time of enactment, New York courts follow the principle that "remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose." *In re Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117, 123 (2001) "Other factors in the retroactivity analysis include whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency," such as by "direct[ing] that the amendment was to take effect immediately." *Id.* Because these factors all support retroactive application of the 2020 amendments, every one of the four courts to address that issue has ruled in favor of retroactive application. *Sweigert v. Goodman*, 2021 WL 1578097, at *2 (S.D.N.Y. Apr. 22, 2021); *Coleman v. Grand*, 2021 WL 768167, at *7–8 (E.D.N.Y. Feb. 26, 2021); *Palin v. New York Times Co.*, 510 F. Supp. 3d 21, 26–27 (S.D.N.Y. 2020); *Sackler v. Am. Broad. Companies*, 71 Misc.3d 693, 698-699 (N.Y. Sup. Ct. 2021).

Those rulings were correct for several reasons. First, the 2020 amendments were remedial legislation, intended to address perceived shortcomings in the protection provided to free speech by the anti-SLAPP law as originally enacted. As the sponsor's memo stated, "The purpose of this bill is to extend the protection of New York's current law regarding Strategic Lawsuits Against Public Participation ('SLAPP suits'). The amendment will protect citizens' exercise of the rights of free speech and petition about matters of public interest." R.114. Moreover, Section 4

of the bill specified that the act would take effect immediately, id., which was one of the considerations that animated retroactive application in *Gleason*, 96 N.Y.2d at 122. "Under New York law, these clear legislative expressions of remedial purpose and urgency give the amendments retroactive effect." *Coleman v. Grand*, 2021 WL 768167 at *8, And, in addition, the statute provides for awards of attorney fees as well as damages to cases against plaintiffs who have "commenced or continued" a SLAPP suit. Civil Rights Law section 70-a(1). Each of these aspects of the statute and legislative history impel the conclusion that the amended statute should be applied here. Although the opinion in the *Palin* case did note, as VIP argued below, that Sarah Palin was in any event a public figure, the Court's construction of the statute as having application to previously-filed cases still pending on the law's effective date did not turn on that fact.

Moreover, there are three equitable considerations that support application of the amended statute on the facts of this case. First, VIP did not file this case until November 2, 2020, eight days before the statute became effective, and did not serve the complaint until November 6, 2020, four days before the effective date. By November, it had been several months since July 22, 2020, when the legislature passed the bill; only the governor's signature remained. Plaintiff should at least have been aware of the significant possibility that its suit would be subject to tougher

standards. Second, although defendants had no obligation to provide advance notice so that VIP could avoid facing an anti-SLAPP motion, they did not spring their motion on plaintiff unawares; rather, the Sproules' counsel gave plaintiff's counsel fair notice that an anti-SLAPP motion was contemplated and urged him to withdraw the action to avoid any need to invoke the new law.

Third, and finally, this case presents more than a whiff of untoward procedural maneuvering on VIP's part to punish the Sproules for bringing a suit for negligence. VIP did not bring suit for defamation until the very day it had to respond to the District Court negligence action, and it did so for the apparent purpose of stalling the progress of the negligence suit, upping the ante and at the same time creating a counterpressure on the Sproules to give up their negligence claim. And even worse, the libel action was filed against Sarah Sproule even though she had not posted the reviews. It is hard to avoid the inference that the only reason why Sarah Sproule was named as a defendant was to punish her for bringing a negligence action over the death of a family pet and to give her a personal incentive to drop that suit.

VIP asks for special equitable consideration because it is a small business, but it has not done equity vis-a-vis the victims of its baseless litigation. Its plea to be released from application of the 2020 anti-SLAPP amendments should be rejected.

C. The Complaint Should Have Been Dismissed as a SLAPP Suit.

Once the Court determines that Robert Sproule spoke on an issue of public interest and that the 2020 amendments apply here, it follows that the trial court's refusal to dismiss this action should be reversed, for several reasons.

First, although the motion to dismiss was based on the personal-knowledge affidavits of Robert and Sarah Sproule, as well as extensive documentary evidence, VIP rested on its complaint. Consequently, VIP has made no showing that the reviews contained any false statements of fact and thus failed to demonstrate a substantial basis for its lawsuit, as the anti-SLAPP law requires. CPLR Rule 3211(g). Moreover, VIP has neither pleaded that the Sproules made statements with knowledge or reckless disregard of their falsity, nor adduced any evidence of such knowledge or reckless disregard, which is now required when plaintiff seeks either compensatory or punitive damages in a defamation claim that is covered by the amended anti-SLAPP law. Civil Rights Law § 76-a. Paragraph 25 of the complaint alleges that defendant or defendants published "maliciously, intentionally and willfully and in gross disregard of the rights of VIP"; similar phrasings appear in paragraphs 19 and 32. But these are allegations of common-law malice, which is "quite different from" the standard of actual malice, meaning publication with knowledge of falsity or reckless disregard of falsity. *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 251–52 (1974); *Chandok v. Klessig*, 632 F.3d 803, 815 (2d Cir. 2011);

Prozeralik v. Capital Cities Commun., 82 N.Y.2d 466, 479-480 (1993). Nor has plaintiff presented any evidence of special damages, which, as explained below (at 48-49) is needed to maintain a defamation action based on a "single instance" of alleged negligence.

Moreover, as explained below in Part II, even apart from VIP's failure to present any evidence in support of its claims, the complaint is insufficient even on its face to allege that specific statements of fact are false or that plaintiff has suffered any special damages. Plaintiffs' failure to allege a proper claim for defamation also warrants dismissal under the anti-SLAPP law, and remand to the Supreme Court for award of defendants' attorney fees.

D. Defendants are Entitled to Attorneys' Fees and Costs.

The 2020 amendments to Civil Rights Law § 70-a require an award of costs and attorneys' fees when a lawsuit over public petition and participation "was commenced or continued without a substantial basis in fact and law . . ..." Because, as shown above, VIP's defamation claim has no substantial basis in fact and in law, the trial court should be directed to award fees and costs on remand.

II. THE COMPLAINT SHOULD HAVE BEEN DISMISSED ON ITS FACE BECAUSE IT DID NOT ALLEGE EITHER SPECIAL DAMAGES OR SPECIFIC FALSE STATEMENTS, AND ROBERT SPROULE'S REVIEWS EXPRESSED PROTECTED OPINION.

The trial court also erred by failing to dismiss the complaint on its face, even after declining to apply the anti-SLAPP statute, for two main reasons, as explained below. First, even though VIP conceded (and the trial court agreed), that the Robert Sproule reviews were addressed to a single instance of professional error, VIP never alleged special damages as New York law requires. Second, the Robert Sproule reviews were replete with opinion, which is not actionable under New York law (and the First Amendment), yet the complaint never alleged with specificity which, if any, factual assertions on the reviews were false.

A. The Complaint Should Have Been Dismissed Under the Single Instance Rule.

One of VIP's main arguments against application of the anti-SLAPP law was that, because Robert Sproule was objecting to at most a single instance of business misconduct, which had affected only one pet, the public could not possibly be interested enough in his criticisms to make his speech a matter of public interest. R.122, R.125. VIP's acknowledgment that the reviews addressed a single instance of misconduct was unquestionably accurate, and the trial court's agreement with that

characterization formed the central basis of its ruling on the anti-SLAPP issue. R.6. But that concession runs headlong into New York's "single-instance" rule: when the defendant is sued for "charging a party with a single dereliction in connection with his or her trade, occupation or profession, [that] statement does not accuse a party of general ignorance or lack of skill [and hence] is not deemed actionable unless special damages are pleaded and proven." *D'Agrosa v. Newsday*, 158 A.D.2d 229, 237 (N.Y. App. Div. 2d Dept. 1990). *Accord* *Duci v. Daily Gaz. Co.*, 102 A.D.2d 940, 940 (N.Y. App. Div. 3d Dept. 1984); *Bowes v. Magna Concepts*, 166 A.D.2d 347, 349 (N.Y. App. Div. 1st Dept. 1990). Special damages "must be fully and accurately identified 'with sufficient particularity to identify actual losses . . ..' When loss of business is claimed, the persons who ceased to be customers must be named and the losses itemized." *Matherson v. Marchello*, 100 A.D.2d 233, 235 (N.Y. App. Div. 2d Dept. 1984), *abrogated on other grounds by* *Laguerre v. Maurice*, 192 A.D.3d 44 (N.Y. App. Div. 2d Dept. 2020). "Even the false description of a single instance of a plaintiff's misconduct is not actionable if the plaintiff merely contends in a conclusory fashion, as herein, that his reputation was injured by the publicity." *Duci*, 102 A.D.2d at 940.

Here, VIP's complaint did not even mention special damages, still less allege them with the requisite detail. The complaint should have been dismissed for that

reason alone.

B. The Complaint Should Have Been Dismissed Because Opinion Is Not Actionable.

The complaint should also have been dismissed because the review, taken as a whole, was an expression of one consumer's opinion about how a pet grooming business failed him and his family through its treatment of their dog, coupled with its refusal to accept any responsibility for the problem, as well as its having threatened its customers if they dared to tell their story publicly.

"A 'pure opinion' is a statement of opinion which is accompanied by a recitation of the facts upon which it is based." *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289 (1986). Courts consistently hold that pure opinion is not actionable because "[e]xpressions 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." *Mann v. Abel*, 10 N.Y.3d 271, 276 (2008) (citation omitted).

Whether a particular statement constitutes an opinion, or an objective fact is a question of law and subject to de novo review. *Id.* The Court of Appeals has set out the following factors to be considered in distinguishing opinion from facts:

> (1) whether the specific language in issue has a precise meaning which is readily understood; (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 or listeners that what is being read or heard is likely to be opinion, not fact (citations omitted).
>
> *Id.*

"The question is not whether there is an isolated assertion of fact; rather, 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." *Stolatis v. Hernandez*, 161 A.D.3d 1207, 1210 (2d Dep't 2018) (citing *Mann v. Abel*, 10 N.Y.3d at 276; *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995); *Crescendo Designs, Ltd. v. Reses*, 151 A.D.3d 1015, 1016 (N.Y. App. Div. 2d Dep't 2017); *Sandals Resorts Intl. v Google*, 86 A.D.3d at 42.

Courts have recognized that when critical statements about local businesses appear on reviews sites like Yelp, consumers recognize that what are reading is being read or heard is likely to be opinion, not fact. *Spencer v. Glover*, 397 P.3d 780, 786 (Utah App. 2017). That is, "a reasonable reader would have believed that the writer of the review was a dissatisfied customer who utilized the Yelp website to express an opinion." *Crescendo Designs v. Reses*, 151 A.D.3d 1015, 1016 (N.Y. App. Div. 2d Dept. 2017); *Sandals Resorts Intl. Ltd. v. Google*, 86 A.D.3d 32, 44 (N.Y. App. Div.

1st Dept.2011]) ([R]eaders give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts"). Indeed, "New York courts have consistently protected statements made in online forums as statements of opinion rather than fact. *Mirza v. Amar*, 513 F. Supp. 3d 292, 298 (E.D.N.Y. 2021), citing *Ganske v. Mensch*, 480 F. Supp.3d 542, 552 (S.D.N.Y. 2020)] (collecting cases). *Mirza* continued, "That defendant's allegedly defamatory statements appeared on Yelp—an Internet forum specifically designed for the publication of crowd-sourced opinionated reviews about businesses—'conveys a strong signal to a reasonable reader' that the statements are defendant's opinion." *Id.*

The Court can read these reviews for itself and should conclude, after reading them, that viewed as a whole, they represent consumer opinion rather than a statement of fact.

There are, to be sure, several isolated statements of fact in the thirteen-sentence reviews. For example, the reviews say that the Sproules specifically cautioned VIP's staff about the dog's tendency to object to being bathed and clipped, that they specifically urged the staff to stop if such issues arose, and that the groomer did encounter such issues, and had to call the Sproules in the middle of the grooming to get them to come and pick up the dog early—these are facts. The reviews also say that after the unsuccessful grooming services, the dog spent two days on a ventilator,

that in the end the Sproules had to decide on euthanasia given the dog's condition, that the Sproules tried to discuss the problem with VIP, but that VIP would not take any responsibility and, in fact, "threatened us financially and legally regarding telling our story." These, too, are facts. And these facts provide the basis for the negative review; they do not undermine that characterization of the reviews as opinion. *See* *Steinhilber*, 68 N.Y.2d at 289. Furthermore, the complaint does not single out any of these statements as allegedly false; indeed, these facts are largely undisputed and were supported by the documentary evidence submitted in support of the motion to dismiss.

Indeed, the complaint does not identify any factual statement in the reviews, and allege that it is false. Rather, the complaint simply quotes both reviews in their entirety,, R.15 ¶¶ 16-17, and sandwiches those twenty-six sentences between the entirely conclusory allegations that the "following" and "above" statements are "false and defamatory." R.14-15, ¶¶ 16, 17, 18.

This will not do. The complaint must "identif[y] specific assertions of fact as false," *Sandals Resorts Intern. Ltd.*, 86 A.D.3d at 39; conclusory averments of wrongdoing are insufficient to sustain a complaint unless supported by allegations of ultimate facts. *Vanscoy v. Namic USA Corp.*, 234 A.D.2d 680, 681-682 (N.Y. App. Div. 3d Dept. 1996). Plaintiff cannot leave it to the court to "sift . . . through a

communication for the purpose of isolating and identifying assertions of fact." *Brian v. Richardson*, 87 N.Y. at 51. VIP's failure to allege the falsity of specific statements whose factual character the Court can assess is fatal to the Complaint.

VIP's brief in opposition to the motion to dismiss did identify two sentences as being statements of fact, R.128:

> "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."
>
> and
>
> "He had water in his lungs that the vet said could only have come from a dramatic physical accident at the groomer."
>
> R. 50.

But identifying the allegedly false statements in the brief does not save the complaint. A plaintiff is entitled to have nonconclusory allegations in the complaint taken as true for the purpose of a motion to dismiss. Assertions in counsel's brief do not benefit fro the same presumption.

Moreover, apart from the statements that there was a grooming visit on March 4, 2020, and that the Sproules decided to have their dog euthanized two days later — two facts whose truth is undisputed — the trial court erred by agreeing (R.10) that the statements singled out in VIP's briefs represented actionable statements of fact.

Referring to a business person as "incompetent" is too vague and imprecise to support a defamation action; this word simply represents Robert Sproule's nonactionable opinion. *Torati v. Hodak*, 147 A.D.3d 502, 503 (N.Y. App. Div. 1st Dept. 2017); *Parks v. Steinbrenner*, 131 A.D.2d 60, 62 (N.Y. App. Div. 1st Dept. 1987); *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 381 (1977). And, to be sure, in the Sproules' tort action VIP's "negligence" will be a mixed question of fact and law triable to a jury. But when that same word, "negligence," is written by a consumer criticizing a business, the reasonable reader will understand that the consumer is not making a factual statement, but rather is expressing an opinion about how the family dog ended up dead.

Similarly with respect to the second sentence quoted above, there was no dispute below that the dog had water in his lungs, and whether the reason must necessarily have been that there was a "dramatic physical accident" at the groomers is an expression of the veterinarian's professional opinion. Perhaps, as the trial judge suggested, evidence will ultimately be presented about whether there was or was not a physical accident at VIP during the grooming process, but the oral statement by the veterinarian about how the water in the dog's lungs could have come about was simply a statement of professional opinion.

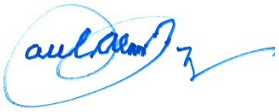
Consequently, the Court should reverse the decision below and remand with

instructions to dismiss the complaint.

CONCLUSION

The decision below should be reversed, and remanded with instructions to award reasonable costs and attorney fees to defendants under the New York anti-SLAPP law and/or to dismiss the complaint on its face.

Respectfully submitted,



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APPELLATE DIVISION - SECOND DEPARTMENT
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It is hereby certified, pursuant to 22 NYCRR 1250.8(j), that the foregoing brief was prepared on a computer using Word Perfect 8.

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Paul Alan Levy

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—Second Department

VIP PET GROOMING STUDIO, INC.,

Plaintiff-Respondent,

– against –

ROBERT SPROULE and SARAH SPROULE,

Defendants-Appellants.

1. The index number of the case in the court below is 612337/20.

2. The full names of the original parties are as set forth above. There have been no changes.

3. The action was commenced in Supreme Court, Nassau County.

4. The action was commenced on or about November 2, 2020 by the filing of a Summons and Verified Complaint. In lieu of an Answer Defendants filed a Motion to Dismiss the Complaint, on or about January 11, 2021.

5. The object of this action is for injunctive relief and compensatory and punitive damages related to Defendants' alleged defamatory statements.

6. This appeal is from the Decision and Order of the Honorable Leonard D. Steinman, dated May 20, 2021, which denied Defendants' Motion to Dismiss the Complaint.

7. This appeal is on the full reproduced record.