At a Term of the Supreme Court of the State of New York, held in and for the County of Franklin, at Tupper Lake, New York on June 21, 2024.

STATE OF NEW YORK
SUPREME COURT COUNTY OF FRANKLIN

USL MARINA, LLC,

Plaintiff,

-against-

ADIRONDACK WILD: FRIENDS OF THE FOREST PRESERVE and **ADIRONDACK EXPLORER, INC.,**

Defendants.

DECISION & ORDER
(Motion # 1, 2 & 3)
Index No: E2024-53
RJI No.:16-1-2024-0097

APPEARANCES: *Norfolk Beier PLLC (Matthew D. Norfolk, Esq.*, of counsel) for Plaintiff USL Marina, LLC;

Whiteman Osterman & Hannah LLP, Albany (*Philip H. Gitlen, Esq.*, and *Anna Seitelman, Esq.*, of counsel) and *Pace Environmental Litigation Clinic, Inc.*, White Plains (*Todd D. Ommen, Esq.*, of counsel) for Defendant Adirondack Wild: Friends of the Forest;

Schoeman Updike & Kaufman LLP, New York (*Charles B. Updike, Esq.*, and *Christopher M. McFadden Esq.*, of counsel) for Defendant Adirondack Explorer, Inc.;

HON. JOHN T. ELLIS, Supreme Court Justice:

This action was commenced on January 18, 2024 by the filing of summons and complaint. Thereafter an Amended Complaint was filed on March 12, 2024. The Amended Complaint alleges that the Defendants Adirondack Wild: Friends of the Forest Preserve (hereinafter "Adk. Wild") and Adirondack Explorer, Inc. (hereinafter "Adk. Explorer") (collectively, "Defendants") libeled Plaintiff USL Marina, LLC (hereinafter "Plaintiff") and seeks monetary damages and injunctive relief. Presently before the Court are the following motions: (1) Adk. Wild's Motion #1 of April 1, 2024 (NYSCEF Doc No. 19) to dismiss the

Amended Complaint pursuant to CPLR 3211(a)(1), (7) and (g), and for an award of costs, attorney's fees, compensatory and punitive damages in accordance with Civil Rights Law ("CRL") § 70-a and/or 22 NYCRR §130-1.1, together with such other and further relief as the Court deems just and proper; (2) Adk. Explorer's Motion #2 of even date (NYSCEF Doc No. 29) which seeks the exact same relief as Adk. Wild's Motion # 1; and (3) Plaintiff's Cross-Motion, Motion # 3 of May 20, 2024 (NYSCEF Doc No. 36) for discovery pursuant to CPLR 3211(g) and for such other and further relief as the Court deems just and proper. In resolving the instant application, the Court read and considered NYSCEF Doc Nos. 8, 19-31 and 36-49. Upon reading and considering same, the Court grants Defendants' applications in part, and denies Plaintiff's cross-motion in its entirety.

FACTS

The relevant facts of this matter are largely agreed upon and the Court notes at the outset that this matter turns mostly upon documentary evidence, the authenticity and accuracy of which — with the obvious exception of the allegedly libelous statement — no party disputes. Plaintiff is a limited liability company which owns and operates a commercial marina located in the Town of Santa Clara in Franklin County, New York. Adk. Wild is a not-for-profit organization, the stated mission of which is to ensure the legal protection of New York's Forest Lands in the Adirondack and Catskills Parks and to advocate for good stewardship of the lands within the Parks. Adk. Explorer is a not-for-profit publication which publishes news and information on environmental issues and other issues within the Adirondack Park. Though Adk. Explorer's principal place of business is within the park, no party disputes that through its written and online publications, Adk. Explorer reaches an audience that numbers in the millions, both within and without the Adirondack Park.

At the heart of this case is, of course, the allegedly libelous statement authored by Adk. Wild and published by Adk. Explorer. Prior to the statement being published, Plaintiff purchased the marina at issue in 2020 and undertook plans to expand same. The marina is situated on Lower Fish Creek Pond.[1] The advertisement or announcement upon which this action is based appeared in the November/December 2023 issue of Adk. Explorer's print and digital magazine, on its website, and on social media platforms. Since the appropriate resolution of this action turns upon the nature of statement made by Adk. Wild and published by Adk. Explorer, the Court reproduces it in full, as recited in the Amended Complaint (NYSCEF Doc No. 38 at 5):

1. Off the Scale: Big Development on Small Pond

2. **The Issue:** A developer wants to replace 8,600 square feet of dock at former Hickok's boat livery on Lower Fish Creek Pond with 34,000 feet of commercial marina for 93 motorized boat slips. That's a four-fold increase.

3. The proposed new docks, buoys and lights would extend 200 or more feet into the small pond's channel, more than twice the length of what exists today. The channel width would be reduced by 120 feet. Public safety is at risk.

4. **What's at stake:** Marina applications have been submitted this summer to the Adirondack Park Agency without studying impacts to boater and swimmer safety, congestion, residents, wild shorelines, and wildlife. An entire chain of interconnected ponds, lakes and channels within the public's Saranac Lakes Wild Forest will be affected. The cumulative impacts on top of existing trailered boat launches at Fish Creek and Upper Saranac Lake are unstudied and unknown.

5. The USL Marina as proposed is completely out of scale with its environment.

[1] Oddly enough, although the parties can agree on many things, the seemingly simple issue of where the marina is located is a matter of contention as is evident from the papers submitted. Though the issue will be discussed in further detail, the location of the marina cannot be disputed and is misstated by Plaintiff. Based upon all of the evidence before the Court, the marina is situated upon Lower Fish Creek Pond (*see* NYSCEF Doc No. 26 at 49-51, 56). Though seemingly a minor issue, the location of the marina is relevant since its location forms a part of the allegedly libelous statement.

The Amended Complaint alleges that Adk. Wild submitted the foregoing statement to Adk. Explorer with the intent that it be published for public consumption. Defendants, for their part, do not deny any of this. Indeed, Adk. Wild admits authoring the statement and viewed same as consistent with its stated mission (*see* NYSCEF Doc No. 20, ¶ 8). Adk. Explorer, for its part, notes that the proposed expansion of the marina was viewed by the publication as newsworthy since residents had been following the application process and Adk. Explorer, as well as other news outlets, had previously published items or information concerning the proposed expansion of the marina (NYSCEF Doc No. 30 at 2). Adk. Explorer did not edit or contribute to the statement and understood that Adk. Wild relied upon publicly available information in authoring same (*id.*). Adk. Wild confirms that Adk. Wild submitted the statement at issue as a paid advertisement (*id.*).

As is required pursuant to CPLR 3016(a), the Amended Complaint sets forth those aspects of the foregoing statement which are allegedly defamatory (denoted in bold and italicized type below) and the Court does likewise, since the "particular words complained of" (CPLR 3016[a]) will form the basis for much of the analysis to follow.

1. Off the Scale: Big Development on Small Pond
   The Marina is not located on a small body of water, such as a pond. It is located on Upper Saranac Lake, a large lake for the Adirondack State Park, 8.2 square miles in size.

2. **The Issue:** A developer wants to replace 8,600 square feet of dock at former Hickok's boat livery on Lower Fish Creek Pond with 34,000 feet of commercial marina for 93 motorized boat slips. That's a four-fold increase. ***Plaintiff proposes to replace 8,600 square feet of docks with 10,989 square feet of docks. This is a mere 27% increase. Plaintiff proposes to add 20 boat slips. Seventy-two (72) boat slips already exist.***

3. The proposed new docks, buoys and lights would extend 200 or more feet into the small pond's channel, more than twice the length of what exists today. The channel width would be reduced by 120 feet. Public safety is at risk.

Again, the Marina is not on a pond. Moreover, Plaintiff's proposal will extend one dock ("Dock 1") 196 feet into the lake; one dock ("Dock 2") 188 feet into the lake; one dock ("Dock 3") 172 feet into the lake; and one dock ("Dock 4") 160 feet into the lake. The proposed docks' lengths are all in compliance with the Town of Santa Clara Planning Board's approval of Plaintiff's site plan for the project at the Marina and Town of Santa Clara regulations governing commercial marinas. Plaintiff's proposal will not reduce the lake channel by 120 feet. Plaintiff's proposed project includes the installation and utilization of "no wake" or speed limiting buoys designed to reduce motorboat speed. There is no reasonable basis or rationale to state public safety is at risk.

4. **What's at stake:** Marina applications have been submitted this summer to the Adirondack Park Agency without studying impacts to boater and swimmer safety, congestion, residents, wild shorelines, and wildlife. An entire chain of interconnected ponds, lakes and channels within the public's Saranac Lakes Wild Forest will be affected. The cumulative impacts on top of existing trailered boat launches at Fish Creek and Upper Saranac Lake are unstudied and unknown.
Plaintiff submitted a comprehensive application to New York State Adirondack Park Agency (hereinafter referred to as the "APA") containing studies and impacts analyses of the proposed marina project. Additionally, there is no scientific basis or rationale to state an "entire chain of interconnected ponds, lakes and channels within the public's Saranac Lakes Wild Forest will be affected." Lastly, Defendants' statement suggests that the application process before the APA is corrupt, unusual and not in harmony with normal permit review processes thereby unlawfully or unfairly favoring Plaintiff.

5. The USL Marina as proposed is completely out of scale with its environment.
There is no reasonable basis or rationale to state this. The proposed project has been approved by the Town of Santa Clara Planning Board and is in compliance with Town of Santa Clara commercial marina regulations, both of which Defendants had an opportunity to challenge in a court of competent jurisdiction but failed to do.

Following publication of the statement, by letters dated December 29, 2023, Plaintiff notified the Defendants that the statements contained therein were false and defamatory, and that they were to cease and desist further publication of such statements without first permitting Plaintiff to review same (*see* NYSCEF Doc No. 21). The letter also required the Defendants to publicly retract and then correct, via a full-page announcement in the magazine's next issue, the

already published statement (*id.*). Aside from these demands, the letter also threatened legal action if Plaintiff's demands were not satisfactorily meant, which determination would be in Plaintiff's sole discretion, and further indicated that the "foregoing demands do not involve the publishing of statements or other conduct of Adk. Wild that constitutes privileged public petitioning or participation pursuant to [New York's CRL]" (*id.*). When Defendants failed to act in accordance with the letters of December 29, 2023, the instant action commenced shortly thereafter.

For its part, Adk. Wild sets forth an array of arguments in opposition to the Amended Complaint and in support of its application, as follows: (1) the statements made are either true or substantially true, and/or that the statements are statements of opinion upon which no defamation action can be maintained; (2) the complaint must be dismissed because the instant action constitutes a SLAPP ("Strategic Lawsuit Against Public Participation") suit and has no substantial basis in law (or a substantial argument in favor of extending, modifying, or reversing existing law)[2] in accordance with CPLR 3211(g); (3) the amended complaint fails to plead the elements of defamation, failing to plead facts which would demonstrate that Adk. Wild acted with actual malice; and (4) that Adk. Wild is entitled to costs, fees, and compensatory/punitive damages owing to the filing of a frivolous SLAPP suit (*see* NYSCEF Doc No. 28 at 2).

Adk. Explorer, in turn, marshals the following arguments in support of its motion: (1) that because Adk. Wild's statement is part of a paid advertisement which do not purport to represent Adk. Explorer's views, Adk. Explorer cannot be liable for defamation; (2) the Complaint must be dismissed pursuant to the CPLR and CRL because Plaintiff's have failed to

[2] None of the papers submitted on the instant applications argued in favor of extending, modifying, or reversing existing law, and thus the Court's focus in analyzing this matter under the rubric provided for in CPLR 3211(g) will be on the "no substantial basis in law" standard.

allege actual malice, as is required in cases such as this involving public participation and petition, and have further failed to state a *prima facie* claim for defamation; and (3) that it too is entitled to costs, attorney's fees and damages owing to New York's Anti-SLAPP Law (*see* NYSCEF Doc No. 31 at 2).

The Court notes that both Defendants, and Adk. Wild in particular, place emphasis upon the truth of the statements asserted in the announcement/advertisement (or that same is non-actionable opinion) as a defense. Indeed, the Defendants take pains to note that the statements made in the advertisement/announcement were based upon, or culled directly from, Plaintiff's own permit application to the Adirondack Park Agency ("APA") and Adk. Wild appends such materials to its application (*see* NYSCEF Doc Nos. 22-26).[3] Plaintiff also places heavy reliance on the documents submitted in support of its permit application in opposition to the motions to dismiss, but for an entirely different reason. Plaintiff asserts that Adk. Wild's purportedly false statements were based upon *outdated* information that had first been submitted to the APA in June of 2022 (*see* NYSCEF Doc No. 37, ¶ 5). Plaintiff asserts that following June of 2022, the project's scope changed in such a way that, at the time of the statement's publication, the statements contained therein were rendered false and that Defendants' reliance upon the permit application documents set forth as NYSCEF Doc Nos. 22-26 was thus in error, an error which resulted in the publication of a defamatory statement when accurate, up-to-date project plans were available to Defendants (*see* NYSCEF Doc Nos. 39-45). As will be discussed in further detail below, the Court is not similarly convinced that the two sets of documents are so radically different as to render Adk. Wild's statement, and Adk. Explorer's publication, defamatory

[3] For its part, Adk. Explorer adopts the factual and legal support set forth by Adk. Wild in support of its truth-as-a-defense claim, since Adk. Wild was the author of the statement (*see* NYSCEF Doc No. 31, n1).

conduct. Indeed, in the Court's view, both sets of permitting documents provide an ample foundation upon which Adk. Wild can reasonably claim that its statements were based either in truth or an expression of opinion.

Aside from asserting the falsity of the statement in opposition to Defendants' application, or in support of its own cross-motion, Plaintiff's other arguments are as follows: (1) that the affirmation of Adk. Explorer Publisher Tracy Ormsbee (NYSCEF Doc No. 30) should be disregarded as infirm;[4] (2) that this action is not a SLAPP suit such that it should be examined under the appropriate sections of CPLR 3211 and provisions of the CRL; (3) that Adk. Explorer cannot avail itself of the Anti-SLAPP statutory protections since it is not participating in any way with Plaintiff's application; (4) that the Adk. Explorer's assertion that it cannot be held liable for defamation for the content of an advertisement is misplaced; (5) that the complaint sufficiently pleads a claim for libel, to include allegations of actual malice in the event that the Court finds that the action is subject to New York's Anti-SLAPP provisions; and (6) that should the Court not deny outright Defendants' applications, it should order discovery per CPLR 3211(g)(3).

DISCUSSION

The Court's analysis of the issues raised herein must begin with the threshold question: is the instant action a SLAPP suit such that New York's anti-SLAPP provisions — CPLR 3211[g]; CRL § 70-a; CRL § 76-a (*see Reeves v Associated Newspapers, Ltd.*, 228 AD3d 81, 88-89 [1st Dept 2024]) — become applicable to the instant applications to dismiss (*see e.g. Trump v Trump*, 79 Misc 3d 866, 872 [Sup Ct, New York County 2023] [beginning its analysis of a CPLR 3211[a][1], [7], and [g] motion to dismiss by determining whether the action was a SLAPP

[4] Plaintiff concedes that with the recent amendment of CPLR 2106, the affirmation is not improperly attested to, and accordingly abandons this argument (*see* NYSCEF Doc No. 49).

suit])? If so, the Court's usual analysis of a motion to dismiss pursuant to CPLR 3211(a) shifts radically and "plaintiffs can avoid dismissal only if they establish that they have a 'substantial basis in law' for their claims" (*Trump*, 79 Misc 3d at 873, citing CPLR 3211[g][1]; *see also* Hon. Mark C. Dillon 2022 Supp Prac Commentaries, McKinney's Cons Laws of NY, C3211:69 ["A primary significance of CPLR 3211[g] is that the statute, in effect, flips the burden of proof from the moving party to demonstrate a dispositive legal defense to an action, to the opposing party to demonstrate that the action has merit"]).

As is relevant to the instant application, CRL § 76-a provides that:

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

The foregoing statutory provision, together with its companion anti-SLAPP provisions, were amended in 2020 specifically to "broaden the scope of the law and afford greater protections to citizens facing litigation arising from public petition and participation" (*Mable Assets, LLC v Rachmanov*, 192 AD3d 998, 1000 [1st Dept 2021]). Indeed, this view of the Anti-SLAPP statute is supported by the amended version of CRL § 70-a, which explicitly provides to the prevailing party on an anti-SLAPP application that:

> 1. A defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of this article, may maintain . . . [a] claim . . . to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that:

> (a) costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven . . . of the [CPLR], that the action involving public petition and participation was commenced or continued ***without a substantial basis in fact and law*** . . . ;
> (b) other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights; and
> (c) punitive damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the ***sole*** purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights [*emphasis added*].

As has been referenced numerous times already by way of the authorities cited, assuming an action is a SLAPP suit, CPLR 3211(g)(1) becomes the governing standard on a motion to dismiss and provides, in pertinent part:

> A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, ***shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law*** [*emphasis added*].

Thus, while Plaintiff is correct that Defendants bear the burden on the instant dismissal applications of showing that the instant action is a SLAPP suit (NYSCEF Doc No. 46 at 5), if Defendants meet their burden, the protections afforded by the provisions cited above are then properly invoked and the burden shifts to Plaintiff to demonstrate that the cause has a substantial basis in law. Moreover, pursuant to CRL §76-a(2), Plaintiff may only recover damages if they can prove, by clear and convincing evidence, that the allegedly libelous statement at issue "was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue."

Having set forth the foregoing, the Court finds and determines that the instant action is a SLAPP action within the meaning of CRL § 76-a, such that CPLR 3211(g) and CRL § 70-a apply to the instant applications. A plain reading of the statute makes this clear. The instant

action stems directly from a *communication* in a *public forum* in connection with an issue of *public interest* or lawful conduct in furtherance of the exercise of the *constitutional right of free speech* in connection with an issue of *public interest* (*see* CRL § 76-a[1], [2]). "Public interest" is to be construed broadly as anything other than a purely private matter (CRL § 76-a[2][d]). The Court, as above, finds the commentaries on the law of particular use in shedding further light on this subject:

> SLAPP suits, as the reader knows, involve litigation commenced by [among others] property owners, real estate developers, and others seeking public approvals for projects. The suits are brought against members of the public who, through public participation, oppose the project. Causes of action are asserted under various theories such as defamation, prima facie tort, and tortious interference with contractual relations. The concern behind the law is that the suits are motivated to intimate [*sic*] the public from speaking out against proposed projects. CPLR 3211(g), and parallel provisions of CPLR 3212(h), were enacted to provide protections to members of the public from such suits.

(Hon. Mark C. Dillon 2022 Supp Prac Commentaries, McKinney's Cons Laws of NY, C3211:69).[5] Further, caselaw is in accordance with the Court's determination in this regard. For instance, in *Mable Assets, LLC v Rachmanov*, discussed *supra*, the Second Department was presented with a case in which the plaintiff brought a cause of action for, among other things, slander, where it was alleged that defendant had made defamatory remarks to the City of New York and other third parties regarding the plaintiff's acquisition of a property for the purpose of constructing a daycare thereon (*Mable Assets, LLC v Rachmanov*, 192 AD3d at 999). The Court found that *regardless of whether the action was analyzed under the more restrictive pre-2020 anti-SLAPP legislation* or the broader legislation effective as of 2020, the matter was "an action involving public petition and participation" since the defendant established that the "plaintiff was a public applicant . . . with regard to the development of the subject property . . . and that the

[5] The Court notes that this commentary acknowledges the fact that under the anti-SLAPP laws in effect prior to the 2020 amendments, the statute was limited in its application to instances where speech was directed to "a public applicant or permittee" (*see Aristocrat Plastic Surgery P.C. v Silva*, 206 AD3d 26, 28 [1st Dept 2022]).

action was materially related to defendant's efforts to . . . challenge or oppose the plaintiff's application" (*id.* at 1000). The *Mable Assets* Court might as well have been describing the instant action in the above-quoted language since the facts are indistinguishable from one another.

The Court's conclusion that this action is a SLAPP suit is further buttressed by the Third Department's holding in *Harris v Town of Fort Ann*, 35 AD3d 928 (3d Dept 2006). In that case, the defendants in the underlying action attempted to stop construction of a cellular tower on private land by the landowner, the Town of Fort Ann, and Cellular One (*id.*). Following the permit application for construction of the tower, the defendants made allegedly defamatory statements regarding the application process and the application was withdrawn with the result that the landowner brought suit alleging defamation and tortious interference with contract (*id.*). The Third Department, in analyzing the motion to dismiss under the anti-SLAPP law, stated as follows:

> Urging a governmental entity to take a particular action on a pending permit application is manifestly a lawful purpose (*see* U.S. Const. 1st Amend.; Civil Rights Law § 76–a; *Villanova Estates v. Fieldston Prop. Owners Assn.*, 23 A.D.3d 160, 161, 803 N.Y.S.2d 521 [2005]; *see generally* Governor's Mem. approving L. 1992, ch. 767, 1992 McKinney's Session Laws of N.Y., at 2911). Even if such urging is undertaken in an unneighborly fashion and the position urged results in the loss of a potentially lucrative lease, this clearly does not give the disappointed permit applicants a viable cause of action for tortious interference of contract. Plaintiffs had a high burden of proof to avoid dismissal (*see* CPLR 3211[g]), and they failed to meet that burden.

(*id.* at 929). Again, the relevant facts of *Harris v Town of Fort Ann* are strikingly analogous to the relevant facts of the instant action. Thus, on the facts before it, there can be no doubt that the instant action is one involving public petition and participation. The action involves the exercise of free speech or communication in a public forum an application/project pending before a governing body on a matter that cannot be described as "purely private." This action thus appears to be exactly the type of litigation which New York's anti-SLAPP law was designed to address.

The Court notes that Plaintiff cites little to no precedent which stands for the specific proposition that the instant action is not a SLAPP suit. Rather, Plaintiff makes various arguments on this subject, to include that that the SLAPP provisions of CRL § 70-a only apply if Plaintiff's *sole* purpose was to hinder defendant's exercise of free speech (NYSCEF Doc No. 46 at 4). This argument — besides being irrelevant on the question of whether the action is or is not a SLAPP suit since CRL § 70-a applies to remedies as opposed to the criteria set forth in CRL § 76-a — is undercut by the statute which makes a reference to "sole purpose" with respect to the Court's consideration of an award of punitive damages. In short, this argument is simply in error.

Plaintiff also asserts that Adk. Explorer cannot make use of the anti-SLAPP provisions since it was not the author of the statement, distanced itself from same, and did not publicly participate or petition with respect to the marina project (NYSCEF Doc No. 46 at 8). This argument is again undercut by the plain language of the statute and moreover, smacks against common sense. The statute does not distinguish in the least between authors and publishers of statements for purposes of CRL § 76-a. The statute thus appears to contemplate the fact that in cases where defamation is alleged, there will often be two distinct entities at work; the author of the statement and the publisher of same. That the statute speaks simply in terms of "[a]n action involving public petition and participation" without distinguishing between authors and publishers of statements, leads to the logical conclusion that the protections of the statute were meant to cover both authors and publishers. Had the legislature intended differently, it presumably would not have enacted the law which it did as it was written (*see State of New York v Alfa Laval Inc.*, 213 AD3d 1171, 1173 [3d Dept 2023] [noting that "statutory text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to the Legislature's intention"] [internal citations omitted]). Plaintiff's reading of the statute would

lead to the absurd result that many publishers in defamation actions would be deprived of New York's anti-SLAPP protections.

Plaintiff relies in large part upon certain actions taken prior to litigation in support of its argument that the instant action is not a SLAPP suit, but the Court finds these arguments similarly unavailing. More specifically, Plaintiff relies upon the fact that it gave Defendants written notice that their statement was defamatory and requested a retraction of same prior to commencing the instant action (NYSCEF Doc No. 46 at 7). First and foremost, as Adk. Wild notes in its Reply papers, the applicable statutes and caselaw do not indicate that prior notice of potential litigation — such as the cease-and-desist letter of December 29, 2023 sent to Defendants by Plaintiff (NYSCEF Doc No. 21) — is a factor to be considered by the Court in determining whether an action is a SLAPP suit. Indeed, as noted by Adk. Wild, matters such as the one presently before the Court will often involve "the threat of liability" (*Aristocrat Plastic Surgery P.C. v Silva*, 206 AD3d at 28). The Court takes it as axiomatic that in many actions which are later determined to be SLAPP suits, as in any other type of action, there will often be pre-commencement activity in the form of cease-and-desist letters, informal negotiations, and demands. To argue that giving a party advanced notice of a potential lawsuit somehow completely insulates the party providing notice from a determination that the action is a SLAPP suit again strikes the Court as against common sense.

To this point, Plaintiff relies on the language in its demand letter of December 29, 2023 which states that "[t]he intention of this letter is to address and correct the misstatements of fact identified above." The Court notes that the preceding sentence of the letter also makes an unmistakable reference to the anti-SLAPP law insofar as it states that "[t]he foregoing demands do not involve the publishing of statements or other conduct by Adk. Wild that constitutes

privileged public petitioning or participation pursuant to New York State Civil Rights Law. Plaintiff stresses that this letter "is proof" that this action is not a SLAPP suit (NYSCEF Doc No. 46 at 7-8). On the contrary, the foregoing language is of little to no value and strikes the Court as a dubious disclaimer at best rather than any sort of "proof" or defense which would weigh against a determination that this action is not a SLAPP suit. Owing to CRL § 76-a, a party cannot demand that protected speech in a public forum on an issue of public interest cease and then, once it commences litigation, argue that it is insulated from anti-SLAPP legislation by virtue of the disclaimer. To draw an analogy, however strained, this seems to the Court akin to an individual committing battery, disclaiming responsibility for same during commission of the tort, and then attempting to rely on the disclaimer as a defense. To say the least, such would plainly be ineffectual.

Having determined that the instant applications are governed by New York's anti-SLAPP law, the burden shifts to Plaintiff to demonstrate that their claims have a "substantial basis in law" in accordance with CPLR 3211(g)(1). Thus, the Court turns to the grounds for dismissal raised by each of the Defendants. As will be seen, Plaintiff has not carried its burden, and therefore, dismissal is warranted.

MOTION # 1: ADK. WILD'S MOTION TO DISMISS

Foremost amongst Adk. Wild's asserted grounds for dismissal is that the statement which it authored is true or substantially true. The law regarding defamation actions, at least insofar as it pertains to the instant application, has been succinctly stated by the Third Department on multiple occasions as follows:

> [I]t is for the court to decide whether the statements complained of are reasonably susceptible of a defamatory connotation, thus warranting submission of the issue to the trier of fact" (*Silsdorf v Levine*, 59 NY2d 8, 12-13 [1983] [internal quotation marks and citation omitted]; *see Wilcox v Newark Val. Cent. School Dist.*, 74 AD3d 1558, 1560

> [2010]). This determination is made by looking at the context and circumstances surrounding the entire communication (*see James v Gannett Co.*, 40 NY2d 415, 419 [1976]). "A defamation action is subject to an absolute defense that the alleged defamatory statements are substantially true" (*Proskin v Hearst Corp.*, 14 AD3d 782, 783 [2005] [citations omitted]; *see Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379-380 [1977]; *Nekos v Kraus*, 62 AD3d 1144, 1145-1146 [2009]). In this regard, "truth need not be established to an extreme literal degree . . . [and] minor inaccuracies are acceptable" (*Ingber v Lagarenne*, 299 AD2d 608, 609-610 [2002] [internal quotation marks and citation omitted], *lv denied* 99 NY2d 507 [2003]; *see Cusimano v United Health Servs. Hosps., Inc.*, 91 AD3d 1149, 1151 [2012], *lv denied* 19 NY3d 801 [2012]). Finally, defamation actions must be based upon assertions of fact. Statements consisting of solely opinion are not actionable (*see Immuno AG. v Moor-Jankowski*, 77 NY2d 235, 243-245 [1991]; *Gentile v Grand St. Med. Assoc.*, 79 AD3d 1351, 1352 [2010]; *Brown v Albany Citizens Council on Alcoholism*, 199 AD2d 904, 905 [1993]).

(*Hope v Hadley-Luzerne Pub. Lib.*, 169 AD3d 1276, 1277 [3d Dept 2019]; *see also Reus v ETC Housing Corp.*, 203 AD3d 1281, 1284-1285 [3d Dept 2022] [internal citations omitted]). Thus, in accordance with the foregoing, the Court shall examine the statement complained of, as well as the surrounding circumstances, to determine whether the statement is defamatory, while keeping in mind that truth is an absolute defense, and that "truth" in this setting means "substantially true," with *minor* inaccuracies being acceptable.

Further, statements of pure opinion are not actionable, while statements of mixed opinion are (*see Stega v New York Downtown Hospital*, 31 NY3d 661, 674 [2018]). A statement of "pure opinion" is a statement of opinion accompanied by a recitation of facts upon which it is based or one which does not imply that it is based upon undisclosed facts which justify the opinion but are unknown to those reading or hearing it (*Steinhilber v Alphonse*, 68 NY2d 283, 289-290 [1986]). Similar to how truth operates as an absolute defense to claims of defamation, pure opinions receive constitutional protections accorded to the free expression of ideas, "no matter how vituperative or unreasonable it may be" (*id.* [internal citation omitted]).

As alluded to above, the Court's task in examining a defamation claim is to carefully examine the allegedly defamatory words themselves, as well as surrounding context and

circumstances, to determine whether the words are susceptible to a defamatory meaning. With regards to the asserted truth of the statement as a defense, Defendants largely rely upon the fact that the statement at issue was based upon Plaintiff's own application to the APA (*see* NYSCEF Doc Nos. 22-26) while Plaintiff asserts that this reliance was misplaced since a more recent set of marina project plans (*see* NYSCEF Doc Nos. 39-45) were extant at the time of the publication of the statement. By way of their Reply papers, while acknowledging the existence of Plaintiff's updated documents, Defendants maintain that the submission of same does not change the instant analysis, since nothing in Plaintiff's submissions demonstrates the falsity of the statement at issue. The Court now turns to the exact words complained of, as recited *supra*.

1. Off the Scale: Big Development on Small Pond
The Marina is not located on a small body of water, such as a pond. It is located on Upper Saranac Lake, a large lake for the Adirondack State Park, 8.2 square miles in size.

This is perhaps the most straightforward of the allegedly defamatory material to analyze. The statement at issue is, in fact, true, as evidenced by both Plaintiff's and Adk. Wild's submissions (maps, surveys, and site plans, among others) on the subject. The marina is unquestionably located upon the Lower Fish Creek Pond which *connects* to the Upper Saranac Lake. Thus, this particular "small pond" aspect of the statement complained of is true and protected absolutely on this basis.

2. **The Issue:** A developer wants to replace 8,600 square feet of dock at former Hickok's boat livery on Lower Fish Creek Pond with 34,000 feet of commercial marina for 93 motorized boat slips. That's a four-fold increase.
Plaintiff proposes to replace 8,600 square feet of docks with 10,989 square feet of docks. This is a mere 27% increase. Plaintiff proposes to add 20 boat slips. Seventy-two (72) boat slips already exist.

The foregoing aspect of the alleged defamatory statement is also true or substantially true. With respect to the claimed increase in square footage, the dispute appears to stem

primarily from the manner in which the parties arrived at their respective calculations more than anything else. Adk. Wild correctly notes that Plaintiff may be correct that the total square footage of the expanded *docks* will be 10,989 square feet. This hardly matters, since Adk. Wild's advertisement or announcement indicates that an old boat livery will be replaced by a commercial marina with 34,000 square feet of *commercial marina* space. Thus, the two parties are speaking in terms of apples and oranges, with Plaintiff using the square footage of docks as its measure, and Adk. Wild using the total square footage of the expanded marina as its reference point. Adk. Wild explains how it arrived at its final square footage (which Plaintiff does not take issue with, *see* NYSCEF Doc Nos. 20, ¶ 20; 47 at 13) and there does not appear to be anything unreasonable in the calculation. That Defendant uses the larger of the two square footages is understandable given its purpose in opposition to the marina's expansion, while Plaintiff's desire that actual dock square footage be the measure is equally understandable given its business interests.

With respect to the stated number of expanded boat slips, Adk. Wild's advertisement placed the number at 92, while the final number, based upon Plaintiff's submissions, is 93. This slight difference appears to fall squarely into the category of a "minor" inconsistency and the number stated is substantially true (*see Hope v Hadley-Luzerne Pub. Lib.*, 169 AD3d at 1277 quoting *Ingber v Lagarenne*, 299 AD2d 608, 609-610 [2002]). The "four-fold increase" reference is based upon the existing dock space (approximately 8,600 sq. ft.) relative to the total size of the planned marina (stated to be 34,000 sq. ft.) and is substantially accurate. Thus, the foregoing portions of the statement at issue are true or substantially true and protected absolutely.

3. The proposed new docks, buoys and lights would extend 200 or more feet into the small pond's channel, more than twice the length of what exists

today. The channel width would be reduced by 120 feet. Public safety is at risk.

Again, the Marina is not on a pond. Moreover, Plaintiff's proposal will extend one dock ("Dock 1") 196 feet into the lake; one dock ("Dock 2") 188 feet into the lake; one dock ("Dock 3") 172 feet into the lake; and one dock ("Dock 4") 160 feet into the lake. The proposed docks' lengths are all in compliance with the Town of Santa Clara Planning Board's approval of Plaintiff's site plan for the project at the Marina and Town of Santa Clara regulations governing commercial marinas. Plaintiff's proposal will not reduce the lake channel by 120 feet. Plaintiff's proposed project includes the installation and utilization of "no wake" or speed limiting buoys designed to reduce motorboat speed. There is no reasonable basis or rationale to state public safety is at risk.

Again, whether one reviews the old permit application papers which Adk. Wild relied upon to formulate the statement at the time of publication or the new materials submitted by Plaintiff, the foregoing statement is true, substantially true, or pure opinion. A glance at the surveys/site plans presented reveals that the docks at issue are going to be (though estimates vary slightly) the following lengths: 200 feet; 192 feet; 176 feet; 166 feet; and 167 feet (*see* NYSCEF Doc No. 43 at 4). The documents submitted also reveal that "no wake" buoys will be installed approximately fifty (50) feet from the end of the docks (*id.* at 6). Thus, to say that the proposed new docks, *together with buoys*, would extend more than 200 feet into the channel, is accurate. It does not matter, as Plaintiff indicates, that the dock lengths are in compliance with the law. The two statements are not mutually exclusive. Further, Plaintiff does not indicate how, if at all, the stated reduction by "120 feet" in channel width is inaccurate. Finally, that aspect of the statement which indicates that "[p]ublic safety is at risk" is a statement of pure opinion insofar as it expresses the belief of Adk. Wild and is accompanied by the facts upon which the opinion is based. Plaintiff is, of course, free to disagree with Adk. Wild's opinion in this regard since this is the nature of opinions. What Plaintiff cannot do is bring suit against Adk. Wild and/or Adk. Explorer because it disagrees with this particular opinion.

4. **What's at stake:** Marina applications have been submitted this summer to the Adirondack Park Agency without studying impacts to boater and swimmer safety, congestion, residents, wild shorelines, and wildlife. An entire chain of interconnected ponds, lakes and channels within the public's Saranac Lakes Wild Forest will be affected. The cumulative impacts on top of existing trailered boat launches at Fish Creek and Upper Saranac Lake are unstudied and unknown.
Plaintiff submitted a comprehensive application to New York State Adirondack Park Agency (hereinafter referred to as the "APA") containing studies and impacts analyses of the proposed marina project. Additionally, there is no scientific basis or rationale to state an "entire chain of interconnected ponds, lakes and channels within the public's Saranac Lakes Wild Forest will be affected." Lastly, Defendants' statement suggests that the application process before the APA is corrupt, unusual and not in harmony with normal permit review processes thereby unlawfully or unfairly favoring Plaintiff.

With respect to the first sentence quoted above, it is accurate insofar as the initial permit documents submitted to the APA were rejected because of an inadequate assessment of boat traffic and recreational water uses (*see* NYSCEF Doc No. 23). Thereafter, a boat traffic assessment was submitted as responsive to the Department of Environmental Conservation's "Notice of Incomplete Application" (*see* NYSCEF Doc No. 24). Upon the evidence before the Court, it is also accurate to state that there are no studies regarding swimmer safety, residents, wild shorelines, and/or wildlife either, as none of the documents before the Court appear to indicate that such studies were undertaken. Further, with respect to the second sentence quoted above, which claims that an "entire chain" of bodies of water will be affected, again, simply resorting to the documents submitted by Plaintiff (*see e.g.* NYSCEF Doc No. 45 at 6-10) would permit even a casual observer to note the interconnected nature of the bodies of water at issue here. Aside from their conclusory statement that "there is no scientific basis or rationale" to state that the bodies of water at issue will be affected, Plaintiff offers no indication of how the statement is false. Under CPLR 3211(g), Plaintiff bears a "high burden" (*see Harris v Town of Fort Ann*, 35 AD3d at 929) and it failed to carry its burden on this point. It is not enough to

simply assert that the statement is false and offer an unsupported conclusion as proof for why this is the case. Plaintiff must demonstrate the falsity of the statement in order to show that this aspect of their claims has a "substantial basis in law." Indeed, absent more, owing to the *fact* that the bodies of water are interconnected, it would not be unreasonable to surmise that they will be affected in some way, but how and to what degree Adk. Wild left unsaid. The final sentence in the above-quoted language is also accurate or a statement of opinion. Finally, to the extent that Plaintiff argues that the above-quoted language implies corruption on the part of permitting authorities, the Court finds no such defamatory connotation to be gleaned from the statement as a whole.

5. The USL Marina as proposed is completely out of scale with its environment.

There is no reasonable basis or rationale to state this. The proposed project has been approved by the Town of Santa Clara Planning Board and is in compliance with Town of Santa Clara commercial marina regulations, both of which Defendants had an opportunity to challenge in a court of competent jurisdiction but failed to do.

Finally, with respect to this aspect of the alleged defamatory statement, the Court concludes that the speech at issue is pure opinion. The proposed expansion may or may not be completely out of scale with its environment or it may fall anywhere on the spectrum between those two extremes. Viewed in its proper context, the foregoing statement cannot be read as anything other than Adk. Wild's pure opinion and an exercise of its right to a free expression of its ideas on the particular subject of the marina expansion.

Thus, regardless of which set of documents the Court uses as a reference — the documents initially relied upon by Adk. Wild at the time of the statement's publication or the updated permitting documents submitted by Plaintiff — the Court concludes that words complained of are either true, substantially true, or statements of pure opinion. Accordingly, the

statement at issue is protected absolutely, and the Court finds that the statement is thus not subject to a defamatory meaning. Accordingly, Plaintiff has not demonstrated, in accordance with CPLR 3211(g), that the Amended Complaint has a "substantial basis in law" insofar as no claim for libel can stand against Adk. Wild. Moreover, given that truth is an absolute defense to a libel cause of action and that statements of pure opinions are not actionable, it necessarily follows that no valid claim for libel can be stated against the publisher of the material, Adk. Explorer. Thus, based upon the foregoing reasoning, those aspects of both Motions # 1 and 2 which seek dismissal are granted in accordance with CPLR 3211(g).

Next, Defendants each assert that the Amended Complaint is deficient insofar as it fails to adequately plead that the allegedly defamatory statement was made with "actual malice." While rendered largely academic based upon the Court's findings and determinations set forth above, the Court shall nonetheless examine the arguments advanced by the parties on this particular point. As is relevant here, "defamation requires proof that defendant made [1] 'a false statement, [2] published that statement to a third party without privilege, [3] with fault measured by at least a negligence standard, and [4] the statement caused special damages or constituted defamation per se'" (*Hope v Hadley-Luzerne Public Library*, 169 AD3d at 1277, citing *Dickson v Slezak*, 73 AD3d 1249, 1250 [3d Dept 2010], quoting *Roche v Claverack Coop. Ins. Co.*, 59 AD3d 915, 916 3d Dept 2009]; *see also Gottwald v Sebert,* 40 NY3d 240, 270 [2023] [internal citation omitted]; *Jule v Kiamesha Shores Property Owners Association Inc.*, 210 AD3d 1330, 1334 [3d Dept 2022] [internal citations omitted]). In the instant case, Plaintiff was required to plead that the alleged defamatory statement was made with "actual malice" (knowledge that the statement was false or reckless disregard for the truth) (*see Gottwald v Sebert*, 40 NY3d at 251).

The Court concludes that the cause of action for libel is, at the very least, adequately plead. Plaintiff alleged that a false statement was made; that same was published to a third party without privilege; by at least a negligence standard (Plaintiff alleges actual malice); and that the statement caused Plaintiff damages. Moreover, though the Defendants point to a lack of factual allegations in the Amended Complaint which would support the theory that Defendants were motivated by "actual malice" and note that the phrase is mentioned in the Amended Complaint only once in passing, this does not matter for the purposes of evaluating the adequacy of the complaint since Plaintiff bears "no obligation to show evidentiary facts to support [his or her] allegations of malice on a motion to dismiss pursuant to CPLR 3211(a)(7)" (*Sokol v Leader*, 74 AD3d at 1182; *see also Kotowski v Hadley*, 38 AD3d 499, 501-502 [2d Dept 2007]). Thus, the Amended Complaint, while perhaps not a model of pleading a defamation claim, adequately sets forth a cause of action for libel and dismissal is not warranted on this basis.

MOTION # 2: ADK. EXPLORER'S MOTION TO DISMISS

The Court now considers the only aspect of Adk. Explorer's motion to dismiss which is distinct and non-duplicative of the grounds upon which Adk. Wild sought dismissal, to wit: that Adk. Wild's statement is part of a paid advertisement which does not purport to represent Adk. Explorer's views, thereby insulating Adk. Wild from a claim of defamation. Having already arrived at the conclusion that dismissal of the Amended Complaint is warranted on the basis that the statement is absolutely protected by virtue of its being true or non-actionable opinion, the Court again stresses that consideration of the instant argument is largely academic.

Adk. Explorer's Publisher, Tracy Ormsbee, confirms that Adk. Wild paid for the announcement or advertisement to appear in the Adk. Explorer publications and that Adk. Explorer did not edit or contribute to same. Aside from taking issue with the precedents which

Adk. Explorer cites, Plaintiff raises a threshold issue of whether or not the statement is even an "advertisement" which could act to exempt Adk. Explorer from liability for its publication of the statement in accordance with the authorities cited. Plaintiff points out that nothing is being advertised for sale and that the statement is denominated an "announcement" by Adk. Wild (NYSCEF Doc No. 46 at 9). Plaintiff describes the statement as a "call-to-action" (*id.*).

First, it is incorrect that there is no proof before the Court that Adk. Wild paid for the statement to run. Tracy Ormsbee explicitly indicates that Adk. Wild paid for the statement to appear in Adk. Explorer's publications. There is no proof to the contrary by any individual with personal knowledge before the Court and the Memorandum of Law, signed by counsel, is obviously inadequate to the task of controverting Tracy Ormsbee's claim in this regard. Second, what Adk. Wild called the statement is not dispositive on the issue. Moreover, while the Court agrees with the Plaintiff's characterization of the statement as a "call-to-action" this is not necessarily outcome determinative with respect to Adk. Explorer's defense.

"The First Amendment protects speech though it be in the form of a paid advertisement, in a form that is sold for profit, or in the form of a solicitation to pay or contribute money" (20 NY Jur 2d, Constitutional Law § 274). In the seminal case of *New York Times Co. v Sullivan*, at issue was an allegedly libelous "full-page *advertisement* [*emphasis added*]" carried by the New York Times in March of 1960 entitled "Heed Their Rising Voices" (*New York Times v Sullivan*, 376 US 254, 256 [1964]). The announcement, advertisement, or statement — however one chooses to characterize it — concerned student demonstrations in connection with the civil rights movement and after describing their efforts to advance this cause, attempted to illustrate a southern "wave of terror" that was spreading in response to their demonstrations (*id.*). The announcement concluded with an appeal for, among other things, funds to support causes which

the authors of the advertisement supported (*id.* at 257). While this case is perhaps best known for its reasoning requiring a demonstration of "actual malice" by public figures in defamation cases (*see id.* at 281), as is relevant here, the Court was not persuaded by arguments that the constitutional guarantees regarding freedom of the press should not extend to paid advertisements and in rejecting same, noted as follows:

> The publication here was not a 'commercial' advertisement in the sense in which the word was used in Chrestensen. *It communicated information, expressed opinion, recited grievances, protested claimed abuses, and sought financial support on behalf of a movement whose existence and objectives are matters of the highest public interest and concern.* See N.A.A.C.P. v. Button, 371 U.S. 415, 435, 83 S.Ct. 328, 9 L.Ed.2d 405. That the Times was paid for publishing the advertisement is as immaterial in this connection as is the fact that newspapers and books are sold. Smith v. California, 361 U.S. 147, 150, 80 S.Ct. 215, 4 L.Ed.2d 205; cf. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 64, n. 6, 83 S.Ct. 631, 9 L.Ed.2d 584. *Any other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.* Cf. Lovell v. City of Griffin, 303 U.S. 444, 452, 58 S.Ct. 666, 82 L.Ed. 949; Schneider v. State, 308 U.S. 147, 164, 60 S.Ct. 146, 84 L.Ed. 155. The effect would be to shackle the First Amendment in its attempt to secure 'the widest possible dissemination of information from diverse and antagonistic sources.' Associated Press v. United States, 326 U.S. 1, 20, 65 S.Ct. 1416, 1424, 89 L.Ed. 2013. To avoid placing such a handicap upon the freedoms of expression, *we hold that if the allegedly libelous statements would otherwise be constitutionally protected from the present judgment, they do not forfeit that protection because they were published in the form of a paid advertisement* [*emphasis added*].

(*id.* at 266-267 [internal footnote omitted]).

Returning to the present controversy, the Court notes that while the statement at issue is not an advertisement in the sense that something was being advertised for sale, it is an advertisement in the sense described by the *New York Times v Sullivan* Court. Significantly, though not an aspect of the statement which the parties focus their attention on, the statement does solicit funds and suggests what individuals can do to aid the cause being advanced in the statement. The statement published by Adk. Explorer explicitly invites readers to make donations to Adk. Wild and urgers readers to contact government officials in connection with the marina (*see* NYSCEF Doc No. 8). While it is a call-to-action, it is thus also an advertisement, though not of the "commercial" type, and should be analyzed as such.

Having stated as much, the Court now turns to the precedents cited by Adk. Explorer and Plaintiff. The Court notes that much of Plaintiff's arguments with respect to this defense rest upon whether the publisher knew that the information contained in the advertisement was false. As it has already been established that the statement at issue here was true, substantially true, or protected opinion, these arguments are no longer relevant. Adk. Explorer relies upon *Humane League of Philadelphia v Berman and Co.*, 2013 NY Slip Op 30408[U] (Sup Ct, New York County 2013) for the proposition that "[a]bsent a special relationship between a newspaper and an advertiser, a newspaper is not liable for misstatements in advertisements" (*id.*, citing *Coakley v. VV Publ. Corp.,* 254 A.D.2d 135, 136 [1st Dept 1998]; *Stoianoff v. Gahona,* 248 A.D.2d 525, 526 [2d Dept 1998]). The Court notes that this case was overturned on other grounds (*see Humane League of Philadelphia, Inc. v Berman and Co.,* 108 AD3d 417 [1st Dept 2013]) and in doing so, the First Department did not address the defense at issue here. Plaintiff asserts that the *Humane League of Philadelphia* trial court simply misapplied the precedents (*see Coakley* and *Stoianoff, supra*) it relied upon (NYSCEF Doc No. 46 at 10). There is merit in Plaintiff's contention insofar as it appears that the rule from *Humane League of Philadelphia v Berman and Co.* is more appropriately applied to causes of action of negligence where it is asserted that a publisher acted negligently in publishing the material at issue rather than in causes of action asserting defamation (*see Rosenthal v MDX Medical, Inc.*, 152 AD3d 811, 812 [2d Dept 2017] [dismissing cause of action sounding in negligence since there was no basis for recovery for a negligent misstatement where no special relationship existed between the parties], citing *Pressler v Dow Jones & Co., Inc.* 88, AD2d 928, 928 [2d Dept 1982]; *see also Stoianoff v Gahona*, 248 AD2d 525, 526 [2d Dept 1998] [internal citations omitted]).

While the foregoing may be true and Adk. Explorer may not avail itself of the rule set forth by the trial court in *Humane League of Philadelphia, Inc. v Berman and Co.,* as discussed above, this is only a smaller struggle in a wider conflict wherein the ultimate truth and/or non-actionable nature of the statement carries the day. Thus, other precedent relied upon by Adk. Explorer is more directly on point insofar as it was held that "no civil action can be maintained to attack the publication . . . [where] there is no indication that the advertised and reported statements with which plaintiffs took issue were false [or anything other than pure opinion] (*Woon Pang Ng. v Chee Kong Tong Supreme Lodge Chinese Freemason of the World*, 8 AD3d 214, 215 [1st Dept 2004]). Accordingly, while dismissal is not warranted owing to the rule cited by the trial court in *Humane League of Philadelphia v Berman and Co.*, dismissal is nonetheless appropriate. The Amended Complaint has no substantial basis in law as it pertains to Adk. Explorer and dismissal is thereby warranted pursuant to CPLR 3211(g). Having established that there is no substantial basis in law for the Amended Complaint pursuant to CPLR 3211(g), the Court now turns to the other aspects Defendants' motions, those which seeks costs, attorney's fees, compensatory and punitive damages pursuant to CRL § 70-a.

APPLICATION OF ANTI-SLAPP RECOVERY PROVISION

Notwithstanding that it has already been set forth above, for ease of discussion, it is worth repeating the pertinent text of CRL § 70-a.

> 1. A defendant in an action involving public petition and participation, as defined in paragraph (a) of subdivision one of section seventy-six-a of this article, may maintain . . . [a] claim . . . to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that:
> (a) costs and attorney's fees shall be recovered upon a demonstration, including an adjudication pursuant to subdivision (g) of rule thirty-two hundred eleven . . . of the [CPLR], that the action involving public petition and participation was commenced or continued ***without a substantial basis in fact and law*** . . . ;
> (b) other compensatory damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for

> the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights; and
> (c) punitive damages may only be recovered upon an additional demonstration that the action involving public petition and participation was commenced or continued for the ***sole*** purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights [*emphasis added*].

Thus, per the plain language of CRL § 70-a(1)(a), costs and attorney's fees *shall* be recovered upon a demonstration that an action to which CRL § 76-a applies was commenced or continued without a substantial basis in law, as per CPLR 3211(g). Such is the case here and thus, at minimum, Defendants are entitled to recover the costs and attorney's fees associated with this action (*see Mora v Koch*, 79 Misc 3d 434, 442 [Sup Ct, Dutchess County 2023]). The more pressing issue presented to the Court with respect to the application of CRL § 70-a is whether or not Defendants are entitled to recover either compensatory damages or punitive damages pursuant to CRL § 70-a(1)(b) and (c). As a corollary to this question, it is not apparent from the statute whether the Court is first required to hold a hearing in either granting or denying a request for compensatory damages or punitive damages.

With respect to the latter of the two questions posed in the preceding paragraph, the Court concludes that as with any motion where the record is clear, it is within its discretion in disposing of the motion upon the papers presented (*see* CPLR 2218; *see also Entertainment Partners Group, Inc. v Davis*, 155 Misc 2d 894, 901 [Sup Ct, New York County 1992]). Indeed, the First Department, in affirming a trial court's dismissal of a SLAPP suit but modifying judgment to award costs and fees, explicitly held that "[d]efandants, however, are not entitled to punitive damages because the record does not show that plaintiff commenced the action solely with malicious intent" (*215 West 84th St Owner LLC v Bailey*, 217 AD3d 488, 489 [1st Dept 2023]). The First Department made such determination upon the papers alone since no hearing on damages was held before the trial court (*id.*; *see also Southampton Day Camp Realty, LLC v*

Gormon, 118 AD3d 976, 978 [2d Dept 2014] [noting that the trial court properly dismissed that aspect of the motion seeking punitive damages as the defendants failed to demonstrate that the lawsuit was commenced solely to harass, intimidate, or maliciously inhibit defendants]).

With respect to the issue of punitive damages, this issue can be promptly disposed of in Plaintiff's favor. For an award of punitive damages, CRL § 70-a(1)(c) requires a showing that the action was commenced or continued for the "*sole* purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech [*emphasis added*]." On the papers before the Court, there has been no such showing. Indeed, whatever else can be said with respect to Plaintiff's motivations for commencing this action, it cannot be said that Plaintiff was *solely* motivated by an intent to harass, intimidate, or inhibit Defendants in the exercise of their speech. Indeed, the record before the Court makes clear that at least one of the factors motivating Plaintiff was the protection of its business interests. Thus, an award of punitive damages would be inappropriate.

For similar reasons, the Court declines to make an award of compensatory damages pursuant to CRL § 70-a(1)(b). While Defendants assert throughout their papers that this action was commenced to harass, intimidate, or maliciously inhibit the exercise of free speech, the assertions are made in a conclusory manner and without much in the way of evidentiary support. The December 29, 2023 letter, contrary to Defendants' assertions, does not necessarily evidence an intent to harass (*see e.g.* NYSCEF Doc No. 28 at 22). In any event, the proofs before the Court on this subject are not such that the Court can state with any level of certainty that the action was brought for the purpose of "harassing, intimidating, punishing or otherwise maliciously inhibiting" Defendants in the exercise of what has only now been determined to be protected speech. Again, if anything, the proof before the Court demonstrates that Plaintiff's

primary purpose was to protect its legitimate business interests and that problems only arose due to the manner in which Plaintiff elected to protect its interest, a consequence of which was the impermissible trampling of Defendants' First Amendment rights.

With respect to the mandatory award of costs and attorney's fees, this issue may be determined upon the papers alone as well, and only in certain circumstances, such as disputed facts, must the Court hold a hearing (*see Brinson v Brinson*, 178 AD3d 1367, 1369 [4th Dept 2019]; *see also Lamb v Amigone*, 12 AD3d 1165, 1165 [4th Dept 2004]). While an award of costs and fees is certain pursuant to CRL § 70-a(1)(a), the extent of such award is yet to be determined and the Court shall order the parties to submit further papers with the proper evidentiary support so that the Court can assess the *reasonableness* of the requested costs and fees (*see Hinman v Jay's Village Chevrolet Inc.*, 239 AD2d 748, 748 [3d Dept 1997]). Should it be necessary, the Court shall hold a hearing with respect to same (*see Lehman Commercial Paper, Inc. v Point Property Co., LLC*, 146 AD3d 1192, 1195-1196 [3d Dept 2017] [noting that while the determination to award attorney's fees can be based upon papers alone, a hearing is required where the required evidence — such as counsel's experience, ability, reputation, hourly rates, the prevailing hourly rate for similar work, itemized bills, the difficulty of the questions presented, and a multitude of other relevant factors — is lacking]).

With respect to Defendants' request for costs and/or sanctions pursuant to the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1, the Court denies said request. The demonstration required for relief pursuant to Part 130 is that a party engaged in "frivolous conduct" which is defined as, among other things, conduct which is "completely without merit in law" (*see* 22 NYCRR § 130-1.1[c][1]). While the Court has found and determined that this action was commenced without a "substantial basis in law" in accordance with CPLR 3211(g),

this standard is not nearly as onerous as the "completely without merit in law" criterion upon which the Court must base an award of costs and/or sanctions for frivolous conduct (*see Reeves v Associated Newspapers, Ltd.*, 228 AD3d at 85 [noting that while many complaints are dismissed for failing to state a claim, very few are found to be frivolous, and that simply because an action lacks merit does not necessarily render it frivolous]). In the final analysis, this Court enjoys considerable discretion in determining whether to invoke Part 130 for frivolous conduct. While the Court has found that this action lacks a substantial basis in law, it does not similarly reach the conclusion that the action was utterly without merit such that it is frivolous and worthy of sanction. Finally, given that an award of costs and attorney's fees is made mandatory by CRL § 70-a, sanctions pursuant to Part 130, even if warranted, appear duplicative.

CROSS-MOTION # 3

The cross-motion must be denied for obvious reasons. The Court having determined that the statement at issue is either protected opinion or subject to the absolute defense of truth, it goes without saying that further discovery pursuant to CPLR 3211(g)(3) is not warranted. Such discovery is only called for where a party cannot present facts to justify its opposition to a dismissal motion. Here, there are no facts which can justify opposition to the motion to dismiss since it has been determined that the statement is true or based in opinion, and that, accordingly, there is no substantial basis in law for a libel claim. The purpose of New York's anti-SLAPP law is to provide "the utmost protection for the free exercise of speech . . . particularly where such rights are exercised in a public forum with respect to issues of public concern" (*Aristocrat Plastic Surgery, P.C. v Silva,* 206 AD3d at 29, quoting Sponsor's Mem, Bill Jacket, L 2020, ch 250, quoting L 1992, ch 767). That purpose is served by dismissal, not further litigation.

CONCLUSION

Based upon the dismissal of the libel claim, any claim for injunctive relief necessarily fails as well. To the extent that the Court has not expressly addressed an issue or argument raised, they have been examined and found to be without merit or rendered academic based upon the findings and determinations made herein. To the extent the Court has not addressed any requested relief, same is denied.

ACCORDINGLY, IT IS HEREBY

ORDERED, that Defendant Adirondack Wild: Friends of the Forest Preserve's Motion # 1, dated April 1, 2024, is **GRANTED IN PART** and **DENIED IN PART** as is set forth more fully herein, and the Amended Complaint is **DISMISSED** as to Defendant Adirondack Wild; and it is further

ORDERED, that Defendant Adirondack Explorer Inc.'s Motion # 2, dated April 1, 2024, is **GRANTED IN PART** and **DENIED IN PART** as is set forth more fully herein, and the Amended Complaint is **DISMISSED** as to Defendant Adirondack Explorer; and it is further

ORDERED, that pursuant to CRL § 70-a(1)(a), Defendants Adirondack Wild and Adirondack Explorer are awarded their actual costs and reasonable attorney's fees, to be determined upon further proceedings; and it is further

ORDERED, that within thirty (30) days of entry of this Decision and Order, counsel for Defendants Adirondack Wild and Adirondack Explore shall file via NYSCEF supplemental papers consisting of an affirmation of counsel fully familiar with the facts and circumstances of this matter, together with detailed supporting exhibits documenting attorney's fees expended in this litigation (itemized billing statements, statements/bills of costs, and any other documents

which tend to demonstrate the actual costs expended and reasonableness of the requested fees); and it is further

ORDERED, that within fourteen (14) days from the service of Defendants' supplemental papers, as directed in the preceding paragraph, Plaintiff's counsel shall serve objections, if any, to the amount of fees requested by each of the Defendants via NYSCEF; and it is further

ORDERED, that within seven (7) days of Plaintiff's objections, if any, Defendants Adirondack Wild and Adirondack Explorer shall file and serve reply papers, if any, via NYSCEF; and it is further

ORDERED, that Defendants Adirondack Wild's and Adirondack Explorer's requested relief in the form of sanctions and/or costs pursuant to the Rules of the Chief Administrator of the Courts (22 NYCRR) § 130-1.1, and for compensatory and/or punitive damages pursuant to CRL § 70-a(1)(b) and (c) is **DENIED**; and it is further

ORDERED, that the cross-motion (Motion # 3) dated May 20, 2024, is **DENIED** in its entirety; and it is further

ORDERED, that this original Decision and Order shall be filed with the County Clerk by the Court via NYSCEF, and pursuant to CPLR 2220, Defendant Adirondack Wild: Friends of the Forest Preserve's counsel shall serve a copy of this Decision and Order, together with Notice of Entry, on all persons and entities entitled to notice under the law, and thereafter file proof of service with the County Clerk's Office.

THE FOLLOWING CONSTITUTES THE DECISION AND ORDER OF THE COURT

Signed and Dated: August 22, 2024
Tupper Lake, New York

ENTER

Hon. John T. Ellis, J.S.C.