IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

WILLIAM GILMAN,

Plaintiff/Counterclaim Defendant,

No. 11 Civ 5843 (JPO)
ECF Case

v.

ELIOT SPITZER and THE SLATE GROUP, LLC,

ORAL ARGUMENT REQUESTED

Defendants/Counterclaimants.

MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIM

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INTRODUCTION

This defamation action arises from a publication authored by defendant Eliot Spitzer, formerly the Attorney General of the State of New York, and published by defendant The Slate Group, LLC, on the website www.slate.com ("*Slate.com*"). The publication addresses actions taken by Mr. Spitzer when he served as Attorney General—specifically, civil and criminal proceedings his office initiated against insurance-related companies and their executives, including plaintiff William Gilman. In response to Mr. Gilman's Complaint, Defendants have answered and moved for judgment on the pleadings.

Pursuant to the requirements of N.Y. Civ. Rts. Law § 70-a(1)—New York's anti-SLAPP ("Strategic Lawsuit Against Public Participation") statute—Defendants also have filed a Counterclaim against Mr. Gilman. The anti-SLAPP statute is intended to prevent an applicant for or holder of a public permit or license from using the threat of expensive litigation to silence and/or punish advocacy on matters related to the permit or license. Where it applies, the anti-SLAPP statute can alter the substantive standard of care governing the speaker's conduct, and it potentially entitles a defendant to recover its attorney's fees and costs. Mr. Gilman has now moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the Counterclaim, arguing that the anti-SLAPP statute does not apply in this instance. As Defendants demonstrate below, however, all three issues he raises are properly resolved against him.

RELEVANT FACTS

The facts pertinent to Mr. Gilman's motion to dismiss the Counterclaim generally are simply stated. *See* Pl.'s Mem. of Law in Supp. of Mot. to Dismiss Defs.' Counterclaim ("Pl.'s

Mem.") at 1 n.1.[1] Mr. Gilman was for many years a senior executive at the international insurance brokerage commonly known as "Marsh." *See* Counterclaim ¶ 7. Beginning in 1976 and through today, Mr. Gilman has repeatedly applied for and continuously been licensed as an insurance broker by the New York State Department of Insurance (which two months ago was renamed the Department of Financial Services). *Id.* ¶ 8, *see also* Pl.'s Mem. at 1 & n.3.

Mr. Spitzer, during his tenure as Attorney General, initiated an investigation of the insurance industry that resulted in numerous criminal prosecutions and civil proceedings, including against Marsh. Counterclaim ¶¶ 5, 22-27. The civil complaint filed against Marsh by Mr. Spitzer's office identified Mr. Gilman, among others, as an "enforcer" of illegal schemes in which the company had engaged. *Id.* ¶ 23 & Ex. 5 at ¶ 50. Mr. Gilman was terminated by Marsh in the course of its own investigation of the government's allegations and he ultimately was indicted by a Grand Jury for, among other crimes, bid-rigging and price-fixing carried out in his role as an insurance broker. *Id.* ¶¶ 31-33. The specific details of Mr. Gilman's actions are recounted in the Counterclaim at paragraphs 9 through 33, and Defendants respectfully refer the Court to that document, rather than repeat them here. Suffice to say, Mr. Gilman was convicted of felony bid-rigging/price-fixing under the Donnelly Act, but that conviction was later vacated because of prosecutorial error at trial. *Id.* ¶¶ 34-39.

[1] The parties agree that, in adjudicating this motion to dismiss, the Court may take judicial notice of documents referred to in or integral to the Counterclaim and official records from other proceedings related to the subject of the Counterclaim. *See* Pl.'s Mem. at 1 n.1, 3 n.5; *see also, e.g.*, *Kesselman v. The Rawlings Co., LLC*, 668 F. Supp. 2d 604, 607 (S.D.N.Y. 2009) (in adjudicating Rule 12(b)(6) motion, court may consider "'documents that are attached to, incorporated by reference in, or integral to the [challenged pleading]; and it may also consider matters that are subject to judicial notice'" (quoting *Byrd v. City of New York*, No. 04 Civ 1396, 2005 WL 1349876, *1 (2d Cir. June 8, 2005))); *accord Staehr v. Hartford Fin. Servs. Grp., Inc.*, 547 F.3d 406, 424-26 (2d Cir. 2008); *Rothman v. Gregor*, 220 F.3d 81, 91-92 (2d Cir. 2000) (taking judicial notice of complaint in separate lawsuit as public record); *Piazza v. Fla. Union Free Sch. Dist.*, 777 F. Supp. 2d 669, 677-78 (S.D.N.Y. 2011) (taking judicial notice of state administrative record).

While the State's appeal from the order vacating Mr. Gilman's conviction was pending, the *Wall Street Journal* published an editorial criticizing the efficacy and purpose of the insurance industry investigation and legal proceedings that had been initiated by Mr. Spitzer and continued by then-Attorney General Cuomo. *Id.* ¶¶ 40, 45. In response, nine days later, Mr. Spitzer authored a piece rebutting the *Journal*'s contentions that was published on *Slate.com*. *Id.* ¶¶ 46-48. A complete copy of the piece is attached to the Complaint as Exhibit A. Insofar as relevant to the present motion, Mr. Spitzer observed:

> The *Journal*'s editorial also seeks to disparage the cases my office brought against Marsh & McLennan for a range of financial and business crimes. The editorial notes that two of the cases against employees of the company were dismissed after the defendants had been convicted. The judge found that certain evidence that should have been turned over to the defense was not. (The cases were tried after my tenure as attorney general.) Unfortunately for the credibility of the *Journal*, the editorial fails to note the many employees of Marsh who have been convicted and sentenced to jail terms, or that Marsh's behavior was a blatant abuse of law and market power: price-fixing, bid-rigging, and kickbacks all designed to harm their customers and the market while Marsh and its employees pocketed the increased fees and kickbacks. Marsh as a company paid an $850 million fine to resolve the claims and brought in new leadership. At the time of the criminal conduct, Jeff Greenberg, Hank Greenberg's son, was the CEO of Marsh. He was forced to resign.

In January 2011, some five months after publication, the State announced it would withdraw its appeal from the order vacating Mr. Gilman's conviction and dismiss its case against him, rather than retry it. Counterclaim ¶ 40. In dismissing the case, the State indicated that, given the substantial resources already expended on the prosecution, a re-trial would not be an efficient use of prosecutorial resources. *Id.* ¶ 40 & Ex. 11 (transcript of Jan. 12, 2011 proceedings) at 2:16-25. Thereafter, Mr. Gilman's pending appeal from his conviction was dismissed as moot. *Id.* ¶ 40 (citing *People v. Gilman*, 914 N.Y.S.2d 899 (2011)).

Mr. Gilman then initiated a civil lawsuit in this Court against his former employer, in which he seeks damages on various theories. *Id.* ¶ 41 & Ex. 12. Not long after, on August 19, 2011, almost a year to the day after the piece was published, Mr. Gilman filed the present defamation action against Mr. Spitzer, alleging that readers would have understood passages in it to be an allegation that he was guilty of criminal wrongdoing. *Id.* ¶ 49; *see also* Compl. ¶¶ 24-35. Because (1) Mr. Gilman is a public licensee, (2) the publication at issue represents an exercise by Defendants of their right to comment upon then-ongoing criminal proceedings that directly affected Mr. Gilman's license, and (3) the defamation Complaint is meritless and brought for ulterior purposes, Defendants filed their Counterclaim under the anti-SLAPP statute.

In support of his motion to dismiss the Counterclaim, Mr. Gilman's main contention is that the publication in question is not materially related to his insurance license and that the anti-SLAPP statute therefore does not apply. Pl.'s Mem. at 8-10. In support of this contention, Mr. Gilman states as fact that "the New York State Department of Insurance [never] took any formal action against Gilman" with respect to his license, *id.* at 2, and that "[t]here has never been any proceeding by the New York Department of Insurance to take away Gilman's license," *id.* at 8. Simply put, these statements are false.

After it was notified in 2004 that Marsh had suspended Mr. Gilman pending its further internal investigation of the State's allegations, the Department of Insurance opened its own investigation, file no. CSB-370346, to determine whether Mr. Gilman's license should be suspended or revoked. Declaration of Jay Ward Brown ("Brown Decl.") ¶ 2 & Ex. 1 (Letter from Dep't of Ins. to K. Padgett, Marsh & McLennan Cos. (Oct. 20, 2004) [NYDOI/Gilman-

00200]).[2] Moreover, promptly after it was notified of the criminal charges against Mr. Gilman, the Department of Insurance opened a second investigation, file no. CSB-489222, concerning whether he should continue to be licensed. *Id.* ¶¶ 3-4 & Exs. 2 & 3 (2006 License Renewal Questionnaire [NYDOI/Gilman-00126]; Letter from Dep't of Ins. to W. Gilman (Oct. 19, 2006) [NYDOI/Gilman-00001-03]). In connection with both investigations, the Department formally requested and received information and materials from Marsh and from Mr. Gilman's defense counsel. *Id.* ¶ 4 & Ex. 3 (Letter from Dep't of Ins. to W. Gilman (Oct. 19, 2006) [NYDOI/Gilman-00001-03] (requesting further information in response to Gilman's disclosures to Dep't of Ins. in Questionnaire regarding criminal charges); *id.* ¶ 5 & Ex. 4 (Letters from Dep't of Ins. to counsel to W. Gilman, R. Spinogatti (June 4, 2007; Sept. 24, 2007; Feb. 1, 2008; Feb. 26, 2008; May 12, 2008; Jan. 18, 2011) [NYDOI/Gilman-00026, 30, 35, 40, 125, 129] (requesting information regarding trial, conviction, sentencing, and appeal)).

At Mr. Gilman's sentencing, the trial judge expressly considered whether to order him to surrender his license, but ultimately decided to defer to the Department of Insurance, which the trial judge was informed was pursuing the matter. *Id.* ¶ 6 & Ex. 5 (Hr'g Tr. 87-88, Apr. 17, 2008 [NYDOI/Gilman-00115] ("The real issue for me is do I take it [the revocation of Gilman's insurance license] out of the hands of the superintendent or do I leave it in the hands of the superintendent"); *see also id.* ¶ 7 & Ex. 6 (Hr'g Tr. 8-9, Apr. 23, 2008 [NYDOI/Gilman-00123] (deciding that "whatever the superintendent does is what the superintendent does, and I stay out

[2] The cited records from the Department of Insurance were delivered to Defendants' counsel on November 28, 2011, in response to a request submitted on September 8, 2011 to the Department under the Freedom of Information Law. (In responding to the FOIL request, the Department advised counsel that is has withheld "boxes" of responsive documents on the ground they are subject to various confidentiality agreements or regulations.) As noted, the parties agree that the Court may take judicial notice of such official administrative records. *See supra* n.1.

of it"); *cf. id.* ¶ 8 & Ex. 7 (Hr'g Tr. 36-37, Apr. 17, 2008) [NYDOI/Gilman-00102-03] (People explaining that "[a]ll of the cooperating defendants in this case had to surrender their licenses")).

Thereafter, the Department formally demanded that Mr. Gilman surrender his license. *Id.* ¶ 9 & Ex. 8 (Letter from Dep't of Ins. to counsel to W. Gilman, R. Spinogatti (June 18, 2008) [NYDOI/Gilman-00373] ("Please ask Mr. Gilman to return his current BROKER License No. BF-715665")). Through counsel, Mr. Gilman declined voluntarily to do so. *Id.* ¶ 10 & Ex. 9 (Letter from R. Spinogatti to Dep't of Ins. (June 26, 2008) [NYDOI/Gilman-00128]). It was not until after the State announced it would not retry him—some five months *after* publication of Mr. Spitzer's piece—that the Department of Insurance notified Mr. Gilman that, as a result, it would "close [its] file with no disciplinary action being taken." *Id.* ¶ 11 & Ex. 10 (Letter from Dep't of Ins. to counsel to W. Gilman, R. Spinogatti (Jan. 28, 2011) [NYDOI/Gilman-00135]); *see also id.* ¶ 12 & Ex. 11 (Letter from Dep't of Ins. to counsel to W. Gilman, R. Spinogatti (Feb. 8, 2011) [NYDOI/Gilman-00199] (noting that both files had been closed as to Gilman)).

In other words, at the time Mr. Spitzer authored the publication at issue, the question whether Mr. Gilman would be required to forfeit his insurance license was the subject of ongoing administrative proceedings arising directly from the criminal prosecution that Mr. Spitzer's office initiated and about which he wrote.

ARGUMENT

Under Fed. R. Civ. P. 12(b)(6), the Court is obliged to accept the factual allegations of the Counterclaim as true, and may grant Mr. Gilman's motion to dismiss only if it is clear that the Defendants cannot prove any set of facts that would entitle them to relief. *Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs*, 850 F.2d 904, 909 n.2 (2d Cir. 1988); *Rolon v. Henneman*, 443 F. Supp. 2d 532, 535 (S.D.N.Y. 2006), *aff'd*, 517 F.3d 140 (2d Cir. 2008). Thus, the single

question presented by the current motion is the threshold one of whether the Defendants have pleaded sufficient facts to afford a basis on which a fact-finder could conclude that the anti-SLAPP statute applies to Mr. Gilman's defamation action. As Defendants demonstrate below, the Counterclaim more than satisfies this standard.[3]

I. THE TERMS OF THE ANTI-SLAPP STATUTE ARE PLAIN AND UNAMBIGUOUS, AND DEFENDANTS' PLEADING OBLIGATION IS STRAIGHTFORWARD

As have many other jurisdictions, New York adopted legislation to combat so-called SLAPP suits in 1992. As the Legislature declared when it enacted the statute:

> [It is] the policy of the state that the rights of citizens to participate freely in the public process must be safeguarded with great diligence. The laws of the state must provide the utmost protection for the free exercise of speech, petition and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern.

Laws of 1992 (ch. 767, § 1); *see also, e.g., 600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 137 n.1 (1992) (describing growing general concern with "strategic lawsuits against public participation," which 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" and observing that New York had just enacted law specifically aimed at broadening protection of citizens facing such litigation).

Although its operative provisions are spread across three sections, New York's anti-SLAPP law is simple. First, the Legislature provided that damages may only be awarded against

[3] No substantive questions regarding the effect of the anti-SLAPP statue are currently presented. Assuming the Court sustains the Counterclaim, such questions, including the impact of the statute on the standard of care applicable to Defendants' conduct, as well as whether Defendants are entitled to recover their attorney's fees, would properly be raised at later stages of these proceedings.

a defendant in a SLAPP suit alleging defamation if the plaintiff can prove a heightened degree of culpability:

> 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.

N.Y. Civ. Rts. Law § 76-a(2) (emphasis added). Second, the Legislature provided for recovery by a "SLAPPed" speaker of his or her attorney's fees and other damages:

> 1. A defendant in an *action involving public petition and participation* . . . may maintain a[] . . . counterclaim 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 may be recovered upon a demonstration that the *action involving public petition and participation* was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law;
>
> (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.

N.Y. Civ. Rts. Law § 70-a (emphasis added).

As is evident, the key question in determining whether the substantive provisions of the anti-SLAPP statute apply to a claim in the first instance is whether the action is one "involving

public petition and participation." The Legislature defined that term in the third statutory section:

> An "action involving public petition and participation" is an action, claim, cross claim or counterclaim for damages that is brought by a *public applicant or permittee*, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission.

N.Y. Civ. Rts. Law § 76-a(1)(a) (emphasis added). The Legislature also defined the term "public applicant or permittee," which means:

> any person who has applied for or obtained a permit, zoning change, lease, *license*, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission.

N.Y. Civ. Rts. Law § 76-a(1)(b) (emphasis added). In addition to these expansive definitions, the Legislature also chose to define broadly the *types* of public participation protected from SLAPP suits, describing the class of protected "communications" to include not just testimony at public hearings, but suits arising out of *any* form of public communication, including "*any* statement, claim, allegation in a proceeding, decision, protest, *writing*, argument, contention *or other expression*." N.Y. Civ. Rts. Law § 76-a(1)(a) (emphasis added).

In short, as the plain language of the statute makes clear, in order to recover damages and attorney's fees under the anti-SLAPP statute, Defendants here must prove that (1) Mr. Gilman held a license from the government, (2) Mr. Gilman's defamation claim is materially related to efforts by Defendants to comment on or to challenge or oppose Mr. Gilman's continued licensure, and (3) Mr. Gilman's defamation claim is at least lacking a substantial basis in fact and law. N.Y. Civ. Rts. Law § 76-a(1)-(2); *see also, e.g.*, *Duane Reade, Inc. v. Clark*, 2 Misc.3d 1007(A), at *4, 784 N.Y.S.2d 920 (N.Y. Sup. Ct. N.Y. Cty. 2004) (whether anti-SLAPP statute

applies to lawsuit "requires a twofold inquiry" pursuant to which "court must determine whether the plaintiff is a 'public applicant or permittee,'" and then "whether the lawsuit is an 'action involving public petition and participation'").

II. THE COUNTERCLAIM ADEQUATELY ALLEGES THAT MR. GILMAN IS A "PUBLIC PERMITTEE"

Mr. Gilman first seeks to evade the anti-SLAPP statute by arguing that he is not a "public permittee." Both the plain language of the statute and the cases applying it, however, demonstrate that this contention is meritless.

It is both alleged specifically in the Counterclaim and conceded by Mr. Gilman that he was and is the holder of a license issued by the Department of Insurance. Counterclaim ¶¶ 8, 22, 51; Pl.'s Mem. at 1. By its plain terms, the anti-SLAPP statute applies to legal proceedings instituted by any "public applicant or permittee" and the Legislature has defined that term, in relevant part, to mean "any person who has applied for or obtained a . . . license . . . from any government body." N.Y. Civ. Rts. Law § 76-a(1)(a)-(b). There can, therefore, be no question that Defendants have adequately alleged this element of their claim. Indeed, because the statutory language itself is plain and unambiguous and the relevant facts are undisputed, the Court need look no further in order to hold as a matter of law that Mr. Gilman is a "public permittee" within the meaning of the anti-SLAPP statute.

Both the statute's legislative history and the case law construing it squarely support this conclusion. Indeed, earlier this year, the Second Circuit observed that, "[u]niformly, the New York courts have found that the persons properly alleged to be public applicants within the meaning of the anti-SLAPP statute were persons whose proposed actions required government permission." *Chandok v. Klessig*, 632 F.3d 803, 819 (2d Cir. 2011) (holding that anti-SLAPP statute did not apply to academic who had applied for government grant because she was free to

proceed with her proposed research without any government approval and was merely seeking financial support for it); *see also, e.g., Street Beat Sportswear, Inc. v. Nat'l Mobilization Against Sweatshops*, 698 N.Y.S.2d 820, 824 (N.Y. Sup. Ct. N.Y. Cty. 1999) (regardless of specific term—registrant, applicant, permittee—used to denote plaintiff's status, where "plaintiff can only operate its business with the permission of [a state government body]," plaintiff "is a public permittee because it 'continues to be subject to state oversight'"); Brown Decl. ¶ 13 & Ex. 12 (Letter from Assemblyman William Bianchi to then-Governor Mario M. Cuomo (July 14, 1992) ("The definition of 'public applicant or permittee' is intended to include anybody who has begun the process of seeking governmental approval for a proposed action, anybody who has obtained such an approval, or anybody who is acting in the absence of a required approval. It is not intended that a formal application be the prerequisite for inclusion as a 'public applicant or permittee'[.]")). Needless to say, Mr. Gilman could not have engaged in his profession as an insurance broker without the license in question.

In support of his contention that the Court should ignore both the plain language of the statute as well as its legislative history and the cases applying it, Mr. Gilman first points to the phenomenon that originally led to enactment of anti-SLAPP statutes in scores of jurisdictions: the frequent practice by large real estate developers of squelching environmental opposition to their projects by bringing meritless claims for defamation against those who had the temerity to speak against them. *See* Pl.'s Mem. at 7-8. That this particular phenomenon was the initial impetus for development of anti-SLAPP legislation, however, is irrelevant to the reach of the

statute as enacted by the New York Legislature, which by its plain terms applies to *any* person who seeks or obtains a government-issued license, not merely to real estate developers.[4]

The answer to Mr. Gilman's other contention—that the Court must limit the reach of the term "license" lest "anyone with a driver's license issued by the Department of Motor Vehicles [] be subject to the anti-SLAPP counterclaim," Pl.'s Mem. at 8—is equally straightforward. If the Legislature had wanted to exempt holders of driver's licenses from the reach of the anti-SLAPP statute, it could have done so, but it did not. The paucity of cases applying the statute to disputes involving driver's licenses doubtless is explained by the infrequency with which defamation claims are filed in disputes over the quality of someone's driving skills. But to the extent a citizen one day is sued over an objection voiced to another's entitlement to drive—perhaps for urging revocation of the license of a habitually intoxicated driver—the holder of the driver's license would be a public permittee under the anti-SLAPP act just as surely as Mr. Gilman is, and rightfully so. And, in any event, Defendants here do not allege that Mr. Gilman is subject to suit under the anti-SLAPP statute because he holds a driver's license.

[4] New York is hardly alone in addressing a wide range of plaintiffs who use the litigation process to try to silence critical speech: The vast majority of anti-SLAPP statutes apply broadly to speech addressing matters of public concern, not merely to speech concerning development-related controversies. *See, e.g.*, Ark. Code Ann. §§ 16--63-501 to 508 (West 2011) (covering, *inter alia*, "an act in furtherance of the right of free speech . . . in connection with an issue of public interest or concern"); Cal. Civ. Proc. Code §§ 425.16 to 425.18 (West 2011) (covering "any act . . . in furtherance of the person's right of petition or free speech . . . in connection with a public issue"); D.C. Code § 18-5501 to 5505 (2011) (covering, *inter alia*, any "expression or expressive conduct that involves . . . communicating views to members of the public in connection with an issue of public interest"); 735 Ill. Comp. Stat. 110/1 to 110/99 (West 2011) (covering "acts in furtherance of [one's] rights of petition, speech, association, or to otherwise participate in government"); La. Code Civ. Proc. Ann. art. 971 (2011) (covering, *inter alia*, "[a]ny written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest"); Or. Rev. Stat. § 31.150 (West 2011) (covering, *inter alia*, any verbal or written statement "in a place open to the public or a public forum in connection with an issue of public interest").

III. THE COUNTERCLAIM ADEQUATELY ALLEGES THAT MR. GILMAN'S DEFAMATION CLAIM IS MATERIALLY RELATED TO DEFENDANTS' EFFORTS TO COMMENT ON OR TO CHALLENGE OR OPPOSE HIS CONTINUED LICENSURE

In all candor, the lower New York State courts are all over the map when it comes to articulating the standard for determining whether a lawsuit, such as Mr. Gilman's here, is "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose [the plaintiff's government] application or permission." N.Y. Civ. Rts. Law § 76-a(1)(a). While Defendants discuss the most relevant cases in more detail below, at bottom, for every case that Mr. Gilman can cite suggesting that, to trigger the anti-SLAPP statute, the challenged publication must expressly reference the permit or license being commented upon, Defendants can point to an equal number holding that the nexus requirement is not nearly so strict. The simple fact is that neither the New York Court of Appeals nor the Second Circuit has yet to address the question and, as a result, this Court is obliged to predict how the New York Court of Appeals would rule, based on its own analysis of the statutory text and legislative intent. *E.g.*, *Cowen & Co. v. Tecnoconsult Holdings*, No. 96 CIV. 3748 (BSJ), 1996 WL 391884, at *4 n.3 (S.D.N.Y. July 11, 1996) ("Although this Court may look to lower court decisions for guidance on questions of state law, this Court is bound only by decisions by the New York Court of Appeals and the Court of Appeals for the Second Circuit."); *Plummer v. Lederle Labs.*, 819 F.2d 349, 355 (2d Cir. 1987) ("A federal court sitting in diversity must follow the law directed by the [New York Court of Appeals], and if there is no direct decision . . . should determine what it believes [the Court] would find if the issue were before it.").

The starting point for this analysis is, of necessity, the allegations of Mr. Gilman's Complaint, which specifically claims that Mr. Spitzer's piece defamed him by falsely asserting

that he had engaged in unlawful bid-rigging and price-fixing during his tenure at Marsh.[5] The question that follows is whether, having so construed Mr. Spitzer's words, the Complaint is "materially related to" Defendants' efforts to oppose or comment on Mr. Gilman's license.

Simply put, both Mr. Gilman and certain of the lower court decisions on which he relies have misread the statute's plain language. Mr. Gilman argues that the anti-SLAPP law requires that Defendants' *publication* be "materially related to" their efforts to attack Mr. Gilman's insurance license, Pl.'s Mem. at 8 (point heading II), and then bootstraps from that contention a requirement that the publication expressly mention the insurance license and proceedings regarding it. But the statute says no such thing. Rather, it expressly requires that the *plaintiff's lawsuit* (*not* the publication it places at issue) be "materially related to" the defendant's efforts to oppose or comment on the plaintiff's permit or license. *See* N.Y. Civ. Rts. Law § 76-a(1)(a) (defining "action involving public petition and participation" as "an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission"). This is consistent with the purpose of the anti-SLAPP statute, which is to discourage the use of the courts to intimidate critics of public applicants or permittees. 8 Weinstein Korn Miller, N.Y. Civ. Pract. § 3211.51 (statute "focuses on retaliatory litigation commenced or maintained for the purpose of intimidating persons who have voiced opinions in public meetings or discussions inimical to those of the person controlling the litigation" and is designed to deter such abuses).

[5] It bears emphasis at this point that one of the grounds for Defendants' motion for judgment on the pleadings is that the piece cannot reasonably be construed in this manner and, more specifically, that the particular allegedly defamatory statements at issue cannot reasonably be understood as "of and concerning" Mr. Gilman.

The Counterclaim alleges, in appropriate factual detail, precisely what the plain language of the anti-SLAPP statute requires: that Mr. Gilman filed his defamation claim in retaliation for Mr. Spitzer's conduct in initiating and comments in support of proceedings that jeopardized Mr. Gilman's status as a licensed insurance broker. Specifically, the Counterclaim alleges that Mr. Spitzer, in his capacity as Attorney General, commenced proceedings that resulted in felony criminal charges against Mr. Gilman—proceedings that were by any definition an effort to "challenge or oppose" Mr. Gilman's continued status as a licensed insurance broker. The *Wall Street Journal* publicly criticized the insurance-related proceedings initiated by Mr. Spitzer's office and, in the publication challenged here, Mr. Spitzer both corrected misstatements by the *Journal* and defended the public purpose served by and propriety of those prosecutions and civil proceedings generally. Mr. Spitzer's public rebuttal of the *Journal*'s criticism of the legal proceedings was published during the pendency of the criminal charges against Mr. Gilman and while the Department of Insurance was actively considering whether he should be required to surrender his license. Counterclaim ¶¶ 22-40, 45-48; Brown Decl. 3-4 & Exs. 2 & 3.

The Counterclaim further alleges that Mr. Gilman is using this defamation action both to punish Mr. Spitzer in his capacity as a private citizen, since he could not name Mr. Spitzer a co-defendant in his companion case against Marsh because of Mr. Spitzer's immunity from civil liability for his acts as Attorney General, Counterclaim ¶¶ 41-44, and improperly to secure discovery from Mr. Spitzer, as if he were a party to that action, through this one.[6] In that

[6] Indeed, at the December 2 conference held in this case, Mr. Gilman's counsel made his intentions in this regard clear. *See* Tr. at 3-4 (after Court ruled that discovery would be stayed pending further briefing on Defendants' motion for judgment on the pleadings, Mr. Gilman's counsel asserted that "the only issue that I wanted to raise . . . I might as well say it, is that we do feel fairly strongly that it would be appropriate to have at the earliest possible time the – and this may not entail any documentary discovery – the deposition of the defendant Spitzer") (Brown Decl. Ex. 15).

companion action, Mr. Gilman hurls the wild accusation that Mr. Spitzer abused his office to obtain an indictment against Mr. Gilman under false pretenses—*i.e.*, that Mr. Spitzer's efforts as Attorney General to challenge or oppose Mr. Gilman's continued employment as an insurance broker were themselves unlawful. *Id.* ¶¶ 42-43. In short, the Counterclaim alleges both the nature of Mr. Spitzer's conduct opposing Mr. Gilman's continued status as a licensee (by way of felony criminal charges against him), and the nature of the piece as public commentary, authored in his capacity as a private citizen, defending that conduct. This is all that the anti-SLAPP act requires a defendant in Mr. Spitzer's position to plead.

The decision in *Duane Reade, Inc. v. Clark*, 2 Misc. 3d 1007(A), 784 N.Y.S.2d 920 (N.Y. Sup. Ct. N.Y. Cty. 2004), is virtually on all fours with the present case. There, a local citizen authored a display advertisement urging a boycott of Duane Reade drugstores because, the author argued, it was a bad corporate neighbor. *Id.* at *10. Among other things, the author objected to a lighted sign that the drugstore was constructing atop its building, claiming that the lights would adversely affect the neighborhood. *Id.* at *2. The call for a boycott was published in a Rockaway newspaper, *The Wave*. Duane Reade sued both the author and the newspaper for defamation, and the defendants moved to dismiss the Complaint and for recovery of damages under the anti-SLAPP statute. *Id.* at *1. The company argued that the anti-SLAPP statute did not apply because its lawsuit was not "an 'action involving public petition and participation' under the act since its lawsuit [wa]s not materially related to any effort by [the author] to report on, comment on or oppose Duane Reade's application" for a permit. *Id.* at *6.

The court, however, rejected this contention and held that Duane Reade's defamation lawsuit *was* materially related to the author's efforts to oppose construction of the sign (which required a building permit) because the advertisement was published to the public while that

permit was under review by government authorities. *Id.* at *6; *see also id.* at *7 (government's final decision about sign was not made until two months after advertisement at issue was published). That the advertisement made no specific reference to the permit review proceedings was no bar to the statute's application. Rather, despite his failure to make "reference to any governmental process," the author was objecting to activities that Duane Reade could only carry out with government approval, and this alone, the court held, was a sufficient nexus to warrant application of the anti-SLAPP statute. *Id.* at *7.[7]

At bottom, the court held, under any "reasonable interpretation of the facts" alleged, one would have to conclude that the advertisement "constitute[d the author's] effort to 'report on, comment on, . . . challenge or oppose'" issuance of a building permit to Duane Reade. *Id.* The newspaper, which served as the vehicle for distribution of the author's commentary, likewise was entitled to avail itself of the protections of the anti-SLAPP act. *Id.* at *11 (granting motions of both defendants to dismiss complaint and awarding to both defendants attorney's fees and compensatory and punitive damages under anti-SLAPP statute in amounts to be determined). There is no principled basis on which Mr. Gilman can distinguish his own lawsuit against these defendants from the one Duane Reade initiated against the advertiser and *The Wave*.

Indeed, Mr. Gilman relies here largely on the same arguments the court in *Duane Reade* considered and rejected. For example, Mr. Gilman, like Duane Reade, cites *Harfenes v. Sea Gate Assoc., Inc.*, 647 N.Y.S.2d 329, 333 (N.Y. Sup. Ct. N.Y. Cty. 1995), for the proposition

[7] *See also Street Beat Sportswear, Inc. v. Nat'l Mobilization Against Sweatshops*, 698 N.Y.S.2d 820, 824 (N.Y. Sup. Ct. N.Y. Cty. 1999) (although challenged commentary by defendants at rallies and press conferences did not specifically reference pending legal proceedings regarding plaintiff's alleged violation of labor laws, it nevertheless generally addressed plaintiff's labor practices and there thus was sufficient nexus between suit against defendants and their commentary regarding lawfulness of public permittee's actions to trigger anti-SLAPP statute).

that, to invoke the anti-SLAPP statute, the defendant must have "directly" challenged a permit or license application. Pl.'s Mem. at 9. But, as the court in *Duane Reade* expressly recognized, *Harfenes* does not support this proposition. In *Harfenes*, several individual homeowners asserted a claim under the anti-SLAPP statute against a civic association. The homeowners contended that they had been named by the association as defendants in a lawsuit in retaliation for opposing an environmental permit. The court declined to apply the anti-SLAPP statute because (1) the homeowners admitted that they had been entirely unaware of the association's status as an applicant for a permit until years afterward and (2) accordingly, the homeowners never participated in the permit process in any manner. *Id.*, 647 N.Y.S.2d at 330-31 & n.2; *see also id.* at 332. Moreover, the homeowners did not claim to have taken part in any public protest or participation, whether by placing an editorial advertisement or otherwise. Rather, the only "petitioning" activity in which the homeowners claimed to have engaged was their filing of a lawsuit in which they sought to discover the identity of certain trash hauling companies that allegedly had aided and abetted the association in unlawful dumping in an effort to hold *those* companies liable for the costs of environmental remediation. *Id.* In short, the holding in *Harfenes* is wholly inapposite to the circumstances presented here.[8]

[8] Although it is undisputed that proceedings regarding Mr. Gilman's license remained very much ongoing when the piece was published, his suggestion that the anti-SLAPP statute applies only to communications challenging a permit or license while there are official proceedings pending is irreconcilably at odds with the plain language of the statute as well as its legislative history. Indeed, a principal sponsor of The Citizens Participation Act of 1992, as the anti-SLAPP legislation was known, emphasized that it was intended to safeguard a wide range of civic activism including, for example, publicly displaying a protest slogan written on a bedsheet. *See* Brown Decl. ¶ 14 & Ex. 13 (New York Senate Debate Transcripts, 1992 Chapter 767, Statement of Senator Marchi, at 8709-10); *see also* Edward W. McBride Jr., Note, *The Empire State SLAPPS Back: New York's Legislative Response to SLAPP Suits*, 17 Vt. L. Rev. 925, 952-53 (Spring 1993) (statute protects "signing a petition or circulating a flier," and "the communication that is the basis of the libel suit is not limited to reporting a violation of law to the government"); Marnie Stetson, Note, *Reforming SLAPP Reform: New York's Anti SLAPP*

To the extent that Mr. Gilman may be suggesting that *Harfenes* stands for the additional proposition that the anti-SLAPP statute requires that a communication be directed to the permitting authorities, this, too, is inaccurate. As the court in *Harfenes* expressly observed, the statute was "designed to protect those citizens who, *usually* before a government agency, publicly challenge" permits or approvals, 647 N.Y.S.2d at 331 (emphasis added). Nowhere does the court purport to hold that covered communications are *exclusively* those directed to permitting authorities. The court in *Duane Reade* made exactly this point when it rejected the same argument advanced by the drugstore chain there, observing that the court in *Harfenes* itself had acknowledged

> that the statute was "designed to protect those citizens who, *usually* before a government agency, publicly challenge" permits or approvals. *Harfenes*, 167 Misc. 2d at 650 (emphasis added). The word "usually" counters plaintiff's argument that *Harfenes* holds that the legislation somehow excludes all communication except that which occurs before a government agency. An interpretation that a critic[']s statements are unprivileged because they appeared in the newspaper and were not spoken directly to the public agency would be completely anti-thetical to the fundamental free speech rights protected under the anti-SLAPP statute.

Duane Reade at *7.[9]

Statute, 70 N.Y.U. L. Rev. 1324, 1355 (Dec. 1995) (statute "protects any petitioning activity" challenged by public permittees including, *inter alia*, "if a citizen writes a letter to the local newspaper"). In particular, that a "public permittee" expressly includes an entity that has already been granted a permit logically presupposes that commentary regarding the actions of such an entity need not occur in the limited context of an ongoing government proceeding regarding revocation to afford a sufficient nexus between the permittee's suit and the defendant's commentary about the permittee. The statute plainly protects, and is intended to protect, speech encouraging the commencement of revocation proceedings.

[9] Mr. Gilman cites *Guerrero v. Carva*, 779 N.Y.S.2d 12 (N.Y. App. Div. 1st Dep't 2004), for the contrary proposition—*i.e.*, that the defendant, and therefore the defendant's communication in issue, must have expressly been petitioning a particular government body. Pl.'s Mem. at 8-9. But as the court in *Guerrero* candidly admitted, in suggesting that the communication must identify the permit or application in question, it was (1) following *Harfenes* and (2) engrafting onto the statute a limitation not present in its plain language. 779 N.Y.S.2d at

Similarly, in *Adelphi University v. Committee to Save Adelphi*, N.Y.L.J., Feb. 6, 1997, at 33 (N.Y. Sup. Ct. Nassau Cty. 1997) (Brown Decl., Ex. 14), the court held that the anti-SLAPP statute is "not limited to covering lawsuits brought by a public permittee concerning statements made directly to government agencies. . . . Defendant's communications to the press were calculated to elicit public interest in [plaintiff's allegedly wrongful] activities and pressure state regulators to act; they thus satisfy the 'materially related' element of the SLAPP [s]tatute." As that court emphasized, limiting application of the anti-SLAPP statute to only those statements specifically challenging permits directly before an agency "would render it virtually useless since almost every hotly contested public debate receives press coverage, and the ability to participate in the debate to influence *that coverage* often determines the outcome." *Id.* (emphasis added).[10]

21-22. For the reasons noted *supra*, *Harfenes* is inapposite and, in any event, courts are not entitled to read into the statute terms the Legislature did not adopt. *E.g., Sprint Spectrum LP v. Conn. Sitting Council*, 274 F.3d 674, 677 (2d Cir. 2001) ("When interpreting a statute, courts should accord a statutory enactment its plain meaning. [Courts] may not by construction, read a provision into legislation that is not clearly stated therein." (internal quotation marks omitted)); *In re Erie County Agric. Soc'y v. Cluchey*, 40 N.Y.2d 194, 200 (1976) ("Courts should not . . .add restrictions or limitations where none exist. . . .'We are not privileged, by judicial construction, to legislate.' . . . [Courts] have no authority to read a requirement into a statute under the guise of construction[.]" (citation omitted)). In addition, it cannot be disputed that both the civil proceedings Mr. Spitzer commenced against Marsh, and the criminal prosecution he initiated against Mr. Gilman, necessarily challenged Mr. Gilman's ongoing entitlement to an insurance license. *See* pp. 4-6, *supra*. Even the language Mr. Gilman quotes from *Guerrero* purports to require only that the litigant invoking the anti-SLAPP statute have been engaged in efforts to challenge the defamation plaintiff's license; it does not purport to require that the publication he claims defamed him itself constitute that challenge (so long as it otherwise is materially related to his fitness to hold such a license). In short, even if the court in *Guerrero* can properly be said to have reached the broad conclusion Mr. Gilman attributes to it, that conclusion is not only of no relevance to this case, it is wrong and should not be perpetuated by this Court.

[10] The other cases cited by Mr. Gilman are easily distinguishable. For example, in *OSJ, Inc. v. Work*, 691 N.Y.S.2d 302, 307 (N.Y. Sup. Ct. Madison Cty. 1999), *aff'd*, 710 N.Y.S.2d 666 (N.Y. App. Div. 3d Dep't 2000), the "communication" in issue was the defendant's trial testimony, given in exchange for immunity from prosecution arising out of the events about which he was compelled to testify. The court there concluded that such testimony is not public petition or participation in the sense contemplated by the anti-SLAPP statute. Similarly, in

In the end, the referenced language from non-binding cases such as *Harfenes* and *Guerrero* notwithstanding, under the plain language of the anti-SLAPP statute, Defendants have alleged facts establishing the requisite nexus between this lawsuit and their efforts to challenge, oppose and/or comment on Mr. Gilman's fitness to serve as a licensed insurance broker.

IV. THE COUNTERCLAIM ADEQUATELY ALLEGES THAT MR. GILMAN'S DEFAMATION CLAIM LACKS MERIT

Finally, Mr. Gilman contends that Defendants have failed adequately to allege that his defamation claim is meritless and that it was filed for improper purposes. Pl.'s Mem. at 10-11. As noted, to recover attorney's fees and costs, a party invoking the anti-SLAPP statute must demonstrate that the plaintiff's action "was commenced or continued without a substantial basis in fact and law." N.Y. Civ. Rts. Law § 70-a(1)(a). Similarly, to recover other compensatory damages, a party invoking the anti-SLAPP statute must demonstrate that the plaintiff's action "was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights." *Id.* § 70-a(1)(b).

Mr. Gilman argues that the allegations of the Counterclaim are merely conclusory assertions of law and that "Defendants do not, and cannot, allege facts from which a factfinder could conclude that Plaintiff's claim for defamation per se by libel is without merit." Pl.'s Mem. at 10-11 (citing *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007)). Mr. Gilman certainly is correct

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Bridge Capital v. Ernst, 877 N.Y.S.2d 51, 53 (N.Y. App. Div. 1st Dep't 2009), the "communication" was a private inquiry to the Attorney's General's office regarding the status of approval of the defamation plaintiff's condominium plan for use by the defendant in a contract suit over damages regarding purchase of a condominium. That court, too, concluded that the communication in question was not the type of public advocacy or participation contemplated by the anti-SLAPP statute. It cannot reasonably be argued that the piece authored by Mr. Spitzer and published on *Slate.com* was anything other than an effort to influence public debate about a series of then-ongoing civil, criminal and administrative proceedings and, hence, "public participation" in a classic sense.

that the Supreme Court has held that a counterclaimant, like any plaintiff, is required to allege in good faith facts that support its contentions. *Twombly*, 550 U.S. at 555 ("a formulaic recitation of a cause of action's elements will not do" to avoid dismissal for failure to state claim). As the Court later elaborated, an affirmative pleading "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" while a pleading that offers mere "'labels and conclusions,'" or that "tenders 'naked assertion[s]' devoid of further factual enhancement'" is defective. *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949 (2009) (quoting *Twombly*, 550 U.S. at 570); *see also, e.g., Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt., LLC*, 595 F.3d 86, 91 (2d Cir. 2010) (test is whether affirmative pleading alleges "a plausible set of facts sufficient 'to raise a right to relief above the speculative level'" (quoting *Twombly*, 550 U.S. at 555)).

Defendants have set forth sufficient facts in support of each element of their counterclaim. With respect to their obligation to plead facts supporting their claim that the Complaint is without a substantial basis in fact or law, N.Y. Civ. Rts. Law § 70-a(1)(a), the Counterclaim is replete with specific factual allegations. While Defendants respectfully refer the Court to the Counterclaim itself rather than repeating its contents here, by way of summary example:

- Defendants specifically refer to and incorporate by reference into their Counterclaim the publication alleged by Mr. Gilman to be defamatory and quote relevant language from it, Counterclaim ¶¶ 46-48, and Defendants specifically allege that the piece does not identify Mr. Gilman, *id.* ¶ 48. The content of the piece itself is the only "fact" relevant to the question of whether it can reasonably be understood as "of and concerning" Mr. Gilman in the first instance, which it cannot. *See* Fifth Defense. Without more, these allegations regarding the content of the piece demonstrate that Mr. Gilman's Complaint is without a substantial basis in law or fact.

- Defendants allege in specific detail—the text alone comprises eight pages of the Counterclaim—the facts regarding Mr. Gilman's conduct at Marsh Global Broking, including specifically his role in rigging bids and fixing prices while employed there.

Counterclaim ¶¶ 7-40 & Exs. 2-11 (reviewing facts set forth in and incorporating as exhibits judicial records and other official documents from underlying litigations and investigations involving Gilman). Summarized briefly, these allegations set forth the specific substance of solicitations to participate in criminal activity that Mr. Gilman made to representatives of insurance companies, instructions he gave to his subordinates to punish insurance companies who refused to take part in the illegal conduct, and false statements that he made to customers of Marsh regarding the competitiveness of bids obtained for their business. *Id.* Defendants also allege in detail the specific nature, outcomes and timing of the criminal proceedings against Mr. Gilman. *Id.* ¶¶ 31-40 & Exs. 10-11. These factual allegations directly support the propositions that, assuming the challenged piece can be understood to be of and concerning Mr. Gilman in the first instance, (1) he is unable to meet his burden of proving that the challenged statements to the effect that he engaged in the referenced misconduct are materially false; (2) the piece is in any event a fair and accurate report of official proceedings; and (3) Mr. Gilman is unable to carry his burden of proving that Mr. Spitzer and The Slate Group violated the applicable standard of care in writing and publishing it. *See* Sixth, Seventh and Tenth Defenses. Any one of these propositions is sufficient to demonstrate that Defendants have stated a claim that the Complaint is without substantial basis in law or fact.

- Defendants allege that Mr. Spitzer, the former Attorney General, authored the piece, and that it was published on a website managed by The Slate Group. Counterclaim ¶¶ 4-5. These pleaded facts adequately support the affirmative defenses asserted by The Slate Group that (1) it is entitled to immunity from this suit pursuant to 47 U.S.C. § 230, and (2) that Mr. Gilman as a matter of law cannot meet his burden of proving that The Slate Group violated the applicable standard of care. *See* Eighth and Tenth Defenses.[11]

As for the requirement that Defendants allege facts sufficient to support their contention that Mr. Gilman's action was instituted for an improper purpose, such as to harass or punish them, N.Y. Civ. Rts. Law § 70-a(1)(b), he once again ignores express and detailed allegations in the Counterclaim. As the Counterclaim explains, Mr. Gilman also has sued his former employer, Marsh, in an action also pending before this Court. Counterclaim ¶¶ 41-43. In that action, Mr. Gilman falsely alleges that Mr. Spitzer abused his office as Attorney General for personal gain, specifically, that Mr. Spitzer conspired with various people to make Mr. Gilman a scapegoat in

[11] *See, e.g.*, Tr. at 4 (plaintiff's counsel stating his "semi-educated opinion that there was no fact-checker" employed by defendant The Slate Group to review the piece because "due to the status of the author as a former governor and attorney general himself, there was more latitude given to the facts as he would present them as opposed to what would happen if, say, I wrote a piece") (Brown Decl., Ex. 15).

return for lenient treatment of Marsh, and that Mr. Spitzer purportedly did so to benefit a "friend" and campaign contributor, Michael Cherkasky (a defendant in the other action), and to bolster his own "crime-fighting credentials" in advance of his planned run for governor. *Id.* ¶¶ 42-43 (citing and attaching as exhibit copy of complaint in other action). Furthermore, Defendants allege, because Mr. Spitzer is immune from civil liability for acts undertaken in his official capacity as Attorney General, Mr. Gilman could not name him a defendant in the other action. *Id.* ¶ 44. Rather, Mr. Gilman used publication by Mr. Spitzer of the piece in question, after his term in office had concluded, as an excuse to haul him into court and thereby secure discovery from him in his case against Marsh as if Mr. Spitzer were a party to it. *See id.* ¶ 44. Significantly, as Defendants also plead in their Counterclaim, Mr. Gilman did *not* object to the accuracy of the piece at the time of its publication or for a year thereafter: neither he nor any of his representatives *ever* complained to Mr. Spitzer or *Slate.com* about the piece, they never asked for a retraction, never requested a correction, and never sent a letter to the editor to correct what they now claim are falsehoods contained in it about Mr. Gilman. *Id.* ¶ 49.

Simply put, the factual allegations set forth in the Counterclaim are, at the very least, plausible and sufficient to raise above a speculative level Defendants' ability to prove that the Complaint is without a substantial basis in fact and law, and that it was filed for a purpose other than to secure compensation for injury to reputation. Consequently, this third prong of Mr. Gilman's motion to dismiss must also be rejected.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiff's Motion to Dismiss Defendants' Counterclaim.

Dated: December 13, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition to Plaintiff's Motion to Dismiss Defendants' Counterclaim was served via the Court's CM/ECF system this 13th day of December 2011 upon the following:

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