SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF FRANKLIN

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USL MARINA, LLC,

Plaintiff,

- against -

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

Defendants.

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Index No. E2024-53

**ADIRONDACK WILD'S MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS THE COMPLAINT**

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## PRELIMINARY STATEMENT

Defendant Adirondack Wild: Friends of the Forest Preserve ("Adirondack Wild") respectfully submits this memorandum of law in support of its motion to dismiss the Amended Complaint pursuant to CPLR 3211 (a)(1), (7) and (g), and for an award of costs, attorney's fees, and compensatory and punitive damages, pursuant to Civil Rights Law § 70-a and 22 NYCRR 130-1.1.[1]

Adirondack Wild is a not-for-profit membership organization whose mission is to safeguard the legal protections governing New York's Forest Preserve lands in the Adirondack and Catskill Parks, and to promote public and private land stewardship in those parks that is consistent with wild land values through education, advocacy and research. The organization and its 900 members work hard to ensure that the Constitution, laws, and regulations protecting the Adirondack Park's wild lands, natural resources, and scenic beauty are not violated.

In accord with its mission, Adirondack Wild authored and published an announcement in the November/December 2023 issue of Defendant Adirondack Explorer, Inc. ("Adirondack Explorer") about Plaintiff USL Marina LLC's ("USL Marina") proposal to develop a marina on Lower Fish Creek Pond, within the Adirondack Park, New York. Adirondack Explorer is the only nonprofit, independent media organization solely dedicated to covering the Adirondack region in Northern New York State. Through their news reporting and analysis, they aim to further the wise stewardship, public enjoyment for all, community vitality and lasting protection of the Adirondack Park.

[1] Pursuant to CPLR 3211 (g), "[t]he court shall grant preference in the hearing of such motion" to dismiss the Complaint as a SLAPP suit.

The facts published in the Adirondack Explorer announcement regarding USL Marina's development proposal were gathered directly from USL Marina's application materials to the Adirondack Park Agency ("APA") and focused on providing information to the public about the proceedings before the APA and the Department of Environmental Conservation ("DEC").

On or about March 12, 2024, Plaintiff USL Marina LLC's ("USL Marina")—dissatisfied with the publication about its marina application—commenced this action alleging that Adirondack Wild made "false" and "defamatory" statements in Adirondack Explorer and seeking "no less than $25,000.00 in special damages" and "no less than $1,000,000.00" in punitive damages, as well as injunctive relief.[2]

As demonstrated in more detail below, and in the accompanying Affidavit of David Gibson, sworn to March 29, 2024, each statement that USL Marina takes issue with was taken directly from its own application to the APA and is not false or defamatory, but constitutes an opinion based on disclosed facts about the proposal. As an example, USL Marina claims that one of the defamatory statements is that the proposed development is on a "small pond," because the marina as proposed is allegedly "located on Upper Saranac Lake." However, USL Marina's own marina expansion sketch illustrates that the proposed marina will not be developed on Upper Saranac Lake but is clearly located on Lower Fish Creek Pond, which connects via a long, navigable channel to Upper Saranac Lake. USL Marina's false statement that the marina will be developed on Upper Saranac Lake is both factually incorrect and misleading to the public as the proposed marina expansion is on Lower Fish Creek Pond according to its own submission to the APA. The

[2] Notably, USL Marina's principal (or his counsel, Matt Norfolk) has demonstrated a pattern of conduct to silence any discussions about his marina proposals, as LS Marina LLC, an affiliate of USL Marina, filed another SLAPP suit against a resident, Thomas Jorling, for his comments about another marina project during a public APA hearing, seeking special damages, pecuniary damages in the amount of $5,000,000.00 and punitive damages. *See LS Marina, LLC v. Thomas Jorling*, County of Franklin, Supreme Court (John T. Ellis, J.), Index No. E2020-443.

Complaint's remaining allegations of false statements are similarly easily shown as non-defamatory because they are based on USL Marina's own application materials before the APA, are true or constitute an opinion based on those disclosed facts.

USL Marina's Amended Complaint is nothing more than an attempt to silence Adirondack Wild's participation in the pending permit application because USL Marina fears any opposition to its proposal and how the truth and public participation may impact it. The New York State Legislature specifically amended the Civil Rights Law in November 2020, to strengthen and broaden protection to individuals faced with such lawsuits, also known as Strategic Lawsuits Against Public Participation ("SLAPP") suits (*see* Civil Rights Law § 70-a; 76[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" (Civil Rights Law § 76-a [1][a]). The statute broadly defines "[c]ommunication" to mean any "statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression" (*id.*). The statute also broadly construes public interest to mean anything other than a purely private matter (*see id.*).

Here, Adirondack Wild made a communication – a public statement – in a public forum, a non-for-profit publication is available to the public, regarding the USL's Marina's application before the APA and DEC, which is clearly an issue of public interest and is not simply a private matter. Thus, USL's Marina's lawsuit is a SLAPP suit that must be dismissed in its entirety. Adirondack Wild is also entitled to its attorney's fees, costs, compensatory and punitive damages

because there is no substantial basis in law or fact for this lawsuit, and this lawsuit was brought solely to silence and prevent Adirondack Wild's participation on an issue of public concern.

## STATEMENT OF FACTS

USL Marina is the owner and operator of a commercial marina located in the Town of Santa Clara, County of Franklin, State of New York (*see* NYSCEF Doc. No. 10 ["Compl."], ¶4). USL Marina is seeking a permit under Article 15 Title 5 Docks, Platforms & Moorings with the DEC, and also filed a commercial use permit application with the APA for a proposed expansion of the current marina (*see* Affirmation of David Gibson ["Gibson Aff."], dated March 29, 2024, Ex. C). Neither agency has approved the respective applications (*id*).

Adirondack Wild is a not-for-profit membership organization whose mission is to safeguard the legal protections governing New York's Forest Preserve lands in the Adirondack and Catskill Parks, and to promote public and private land stewardship in those parks that is consistent with wild land values through education, advocacy and research (Gibson Aff., ¶4). The organization and its 900 members work hard to ensure that the Constitution, laws, and regulations protecting the Adirondack Park's wild lands, natural resources, and scenic beauty are not violated (Gibson Aff., ¶5).

In 2023, Adirondack Wild made an announcement in the Adirondack Explorer about USL Marina's proposed marina expansion (*see* Gibson Aff., ¶8). On December 29, 2023, Adirondack Wild received a letter from USL Marina's attorney demanding that Adirondack Wild cease and desist from publishing statements about USL Marina's proposal (*see* Gibson Aff., ¶ 9, Ex. A). This letter was a clear attempt to intimidate and harass Adirondack Wild's members and stop any future comments about the proposal, demanding that:

- By 3:00 pm tomorrow, Adk Wild ***shall post*** on its website and on all other online platforms hosted or managed by Adk Wild, as a featured topic or

headline, a retraction of the offending announcement and ***identify each and every false and misleading statement*** in the announcement and state the corresponding true and accurate facts as provided above. Additionally, at the same time, on its website and on all other online platforms hosted or managed by Adk Wild, it ***shall apologize to USL and the public at large*** for the false and misleading statements.

- In the next issue of the Adirondack Explorer magazine Adk Wild shall place on the magazine's inside cover ***a full-page color announcement therein identifying each and every false and misleading statement*** contained in the November/December announcement as listed above, providing the corresponding true and accurate facts as provided above, ***and apologizing to USL and the public at large*** for publishing the false and misleading statements.

- ***No further announcements, articles, commentaries or other publications about USL or its marina project shall be published by Adk Wild*** without it diligently performing a fact-check and contacting us as legal counsel for USL to allow us a reasonable amount of time to comment or rebut any bogus facts or misrepresentations. This demand does not apply to submissions Adk Wild files with APA or any other governmental entity.

(*See id.* [emphasis added]).

On or about March 12, 2024, USL Marina filed the Amended Verified Complaint against, as relevant here, Adirondack Wild, alleging that Adirondack Wild made false defamatory statements published in the Adirondack Explorer and seeking "no less than $25,000.00 in special damages" and "no less than $1,000,000.00" in punitive damages, as well as injunctive relief – to permanently prevent Adirondack Wild's members from speaking about or discussing USL Marina's application (Compl., ¶¶65-74).

As demonstrated below, each of the statements in the Adirondack Wild's announcement is based on USL Marina's own application materials or constitutes an opinion about the proposal. USL Marina's Complaint should therefore be dismissed in its entirety and Adirondack Wild is entitled to an award of its costs, fees and compensatory and punitive damages on account of USL Marina's blatant use of a SLAPP suit to attempt to silence protected public discourse regarding the USL Marina proposed marina expansion.

## ARGUMENT

## POINT I

### ADIRONDACK WILD'S STATEMENTS IN THE ADIRONDACK EXPLORER ARE TRUE AND SUPPORTED BY USL MARINA'S APPLICATION

USL Marina identifies five allegedly defamatory statements (Compl., ¶43). First, USL Marina alleges that the statement, "Off the Scale: Big Development on a Small Pond" is false and defamatory because it claims that its development is on Upper Saranac Lake (*see* Compl., ¶ 43[1]). USL Marina states that their marina is "not located on a small body of water, such as a pond" (*id.*). However, USL Marina's ***own sketch*** illustrates that the proposed marina ***will not*** be developed on Upper Saranac Lake but is clearly located on Lower Fish Creek Pond, which connects via a long, navigable channel to Upper Saranac Lake. Stating the marina will be developed on Upper Saranac Lake is both factually incorrect and misleading to the public as the marina is plainly on Lower Fish Creek Pond (*see* Gibson Aff., ¶16, Ex. B at 5-9). Thus, this statement is clearly true based on documentary evidence and non-defamatory.

Second, USL Marina alleges that this statement is false and misleading: "[USL Marina] 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" (Compl., ¶43[2]). USL Marina claims that it proposes to replace 8,600 square feet of docks with 10,989 square feet of docks, which it claims is a mere 27% increase. USL Marina also claims that it proposes to add 20 boat slips, and seventy-two (72) boat slips already exist.

Adirondack Wild's announcement stated that the proposed commercial marina is 34,000 square feet is accurate and even underestimates the actual square footage of the marina (Gibson

Aff., ¶19).[3] Adirondack Wild's estimate in this statement is based on USL Marina's site plan (*see id.*). The marina site plan shows a width of 50 feet per dock (*see* Gibson Aff., ¶20, Ex. B at 7-9). This figure was then multiplied by the dock lengths of 196 feet, 188 feet, 172 feet, and 160 feet to arrive at 35,800 square feet of commercial marina (*id.*). As such, the announcement only stated that the expanded marina would occupy an area of 34,000 square feet. The announcement actually conservatively stated the square footage in favor of USL because it did not include the area of water between docks which is part of the marina area, as it is only useable by docking marina boats and the boating public is otherwise excluded from that area. As noted above, the current dock size is 8,600 square feet, and the proposed marina expansion of 34,000 square feet is four times that size (*see* Gibson Aff., ¶22). Thus, this statement is factually and conservatively based on USL Marina's own permit application materials.

Third, USL Marina alleges that the following statement is false and defamatory: "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" (Compl., ¶43[3]). In a November 2022 letter to the APA, USL stated that "not all of the proposed docks extend the full 200'," implying that at least one of the proposed docks does extend 200 feet (*see* Gibson Aff., ¶25, Ex. B at 3). The difference between 200 feet and 196-, 188-, 172- and 160-foot docks cited in the Complaint is accounted for in the USL Marina sketch which shows four "No Wake Buoys" extending 50 feet beyond each dock (*see* Compl.

[3] Notably, USL Marina's dock space of 34,000 square feet discussed in Adirondack Wild's announcement was independently cited by the Adirondack Explorer's reporter Zachary Matson in a November 2022 article, which states:
"The developers plan to remove one 4,050-square-foot covered dock and 17 smaller uncovered docks totaling 4,525 square feet, which stretch the length of the site's roughly 910 feet of shoreline. The 8,575 square feet of removed docks would be replaced with over 34,000 square feet of new docks, including over 31,000 square feet of covered docks. The plan would add 22 new slips – a 29% increase – and triple the amount of dock space per boat slip, according to the application" (Gibson Aff., Ex. G).

¶43[3]; Gibson Aff., ¶26, Ex. B). Thus, the statement that the docks, buoys and lights extend 200 or more feet into the Lower Fish Creek Pond is factually correct based on USL Marina's own permit application materials.

Fourth, USL Marina alleges that this statement is false: "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 Lake 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" (Compl., ¶43[4]). USL Marina's application to the APA does not state, nor has USL Marina pointed to where in the application it is shown, that these impacts have been studied (*see* Gibson Aff., ¶28). Further, the geography of the Lower Fish Creek Pond supports Adirondack Wild's statement. It is a fact that Lower Fish Creek Pond has a navigable channel to Upper Saranac Lake, another channel to Follensby Clear Pond and a channel to Fish Creek Pond (*see* Gibson Aff., ¶30, Ex. B at 5). Adirondack Wild's published statement is also supported by the August 2023 Notice of Incomplete Application DEC sent to USL Marina (*see* Gibson Aff., Ex. C). In the Notice, DEC asked USL Marina "to provide a boat traffic assessment discussing the additional boat traffic that will result from expansion of this existing marina. The assessment should quantify the number of additional boats in relation to existing use of the lake with emphasis on the increase in boat traffic to and from the main body of the lake through the Fish Creek Channel" (*see* Gibson Aff., ¶32, Ex. C). DEC's request for additional information recognizes the potential impacts the proposed development may have on ponds and channels. Thus, this statement is also based on USL Marina's own permit application and/or constitutes opinions based on these facts.

Fifth, the Amended Complaint alleges that "there is no reasonable basis or rationale" to state that "USL Marina as proposed is completely out of scale with its environment" (Compl., ¶ 43[5]). This is a statement of opinion with a basis in fact regarding a public permit application that potentially impacts the environment. Further, nothing in this statement states or suggests that the process before the APA is "corrupt." That word is USL Marina's own invention. The announcement characterizes the application to APA and DEC as, in Adirondack Wild's opinion, deficient, and deserving of more comprehensive data and assessment. That statement is reasonable because APA has twice deemed the USL Marina application incomplete, and DEC has also deemed the USL Marina application incomplete (*see* Gibson Aff., Exs. C, E, F).

In short, as the documentary evidence shows, including documents referenced in the Amended Complaint and filed before the APA by USL Marina, none of the statements identified by USL Marina are defamatory or false.

## POINT II

## THE COMPLAINT MUST BE DISMISSED BECAUSE IT IS A BLATANT EFFORT TO INTIMIDATE ADIRONDACK WILD'S FREE SPEECH AND PUBLIC PARTICIPATION WITH NO SUBSTANTIAL BASIS IN LAW

As demonstrated above, every statement that USL Marina alleges to be false is either entirely true (based on USL Marina's own permit application) and/or is an opinion based on disclosed facts, and the challenged publication was unquestionably part of Adirondack Wild's participation in the public process related to the pending permits. As such, there is nothing false or defamatory alleged in the Complaint and nothing actionable, and USL Marina cannot point to any "substantial basis in law" for contending otherwise (*see* CPLR 3211[g]]). As such, this Court must dismiss the Complaint in its entirety, sending a message to a private company like USL

Marina that it cannot silence public participation of an environmental non-for-profit on an important public issue simply because it does not like its opinion.

SLAPP suits are subject to a specific provision of the CPLR (Rule 3211 (g)) that shifts the burden of proof to the plaintiff to overcome a motion to dismiss by requiring the plaintiff demonstrate the merits of its claims. Thus, court must grant a motion to dismiss where, as here, "the moving party has demonstrated that the action, claim, cross claim, or counterclaim subject to the motion is an action involving public petition or participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the Civil Rights Law" and the plaintiff cannot establish a "substantial basis in law" for the allegations of defamation (CPLR 3211[g]; *see* CPLR 3211 [a][7]; *161 Ludlow Food, LLC v L.E.S. Dwellers, Inc.*, 176 AD3d 434, 434 [1st Dept 2019] [dismissing the claim pursuant to CPLR 3211 (g) because it was "a case involving public petition or participation pursuant to Civil Rights Law § 76-a]; D. Siegel, Practice Commentaries, McKinney's Consol Laws of NY, Book 7B, CPLR 3211, supp. P. 26. [stating 3211[g] is "designed to deter such SLAPP suits [...] by tightening up the legal requirements for them and by making it easier for the opposer to get them dismissed."]). In addition, USL Marina must also show "by clear and convincing evidence" that Adirondack Wild made the statements at issue "with knowledge of its falsity or with reckless disregard of whether it was false" (Civil Rights Law § 76-a[2]).

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" (Civil Rights Law § 76-a [1][a]). The statute broadly defines

"[c]ommunication" to mean any "statement, claim, allegation in a proceeding, decision, protest, writing, argument, contention or other expression" (*id.*). The statute also broadly construes public interest to mean anything other than a purely private matter (*see id.*).

The clear purpose of anti-SLAPP law is "to safeguard the free exercise of speech, petition and association rights . . . against those who would try to interfere with a citizen's constitutional rights" (*Yeshiva Chofetz Chaim Radin, Inc. v Vil. of New Hempstead by its Bd. of Trustees of Vil. of New Hempstead*, 98 F Supp 2d 347, 360 [SDNY 2000] [internal quotation marks and citations omitted]; *see Gordon v Marrone*, 155 Misc 2d 726, 735 [Sup Ct 1992], *affd* 202 AD2d 104 [2d Dept 1994] [SLAPP suits are brought to "stop citizens from exercising their political rights" and to "punish the . . . exercise of the right to petition"]; *Hotel St. George Assoc. v Morgenstern*, 819 F Supp 310, 322 [SDNY 1993] [SLAPP suits are recognized as "an egregious abuse of the judicial process which violates the fundamental rights of those who become targets simply because they have exercised their right to petition"]).

USL Marina's Amended Complaint is clearly a SLAPP suit. USL Marina is a permit applicant seeking a permit under Article 15 Title 5 Docks, Platforms & Moorings with DEC. USL Marina also filed a commercial use permit application with the APA (*see* Gibson Aff., Ex. C). USL Marina's permit application is plainly a matter of public interest (*see T.S. Haulers, Inc. v. Kaplan*, No. 7313/01, 2001 WL 1359106, at *2 [Sup Ct, Suffolk Cty, 2001] [finding SLAPP protection applied to communication related to the opposition of two not-for-profit civic organizations to plaintiff's permit application]).

It is also clear that the subject of Adirondack Wild's announcement in the Adirondack Explorer is USL Marina's permit application. The announcement reports on the application and invites the public to contact the APA regarding the marina development (*see* Gibson Aff., ¶13).

The Adirondack Explorer announcements fits squarely within the language of the statute which protects a defendant's right to report on or challenge an application in the public forum (*see* Civil Rights Law § 76-a[1][a]; *T.S. Haulers, Inc. v. Kaplan*, No. 7313/01, 2001 WL 1359106 at *2; *Matter of Related Properties, Inc. v Town Bd. of Town/Vil. of Harrison*, 22 AD3d 587, 591 [2d Dept 2005] [finding the statutory definition of SLAPP suit met where plaintiff's breach of contract suit was brought by public applicants and was related to the environmental group's opposition to the application]).

There is no basis for this lawsuit, aside from USL Marina's sole purpose to intimidate and harass Adirondack Wild, because, as explained in Section I, *supra*, all statements published in the Adirondack Explorer announcement were based on USL Marina's own application materials submitted to the APA and the DEC or constitute an opinion based on those facts (*see* Gibson Aff., ¶36, Ex. B); *see Dynamic Energy Sols., LLC v Pinney*, 387 F Supp 3d 176, 183 [NDNY 2019] ["SLAPP suits 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."]).

Therefore, the Amended Complaint is plainly a SLAPP suit, as defined in Civil Rights Law, and is a blatant attempt to silence Adirondack Wild's right to public participation and free speech. Moreover, USL Marina cannot, as demonstrated in Point I of the Memorandum, meet its burden of showing that there is a "substantial basis in law" for its allegations of defamation (CPLR 3211 [g]). USL Marina also failed to plead any facts that Adirondack Wild made the statements at issue "with knowledge of its falsity or with reckless disregard of whether it was false" (Civil Rights Law § 76-a[2]). Accordingly, the Amended Complaint must be dismissed in its entirety and with

prejudice (*see* Civil Rights Law § 70-a; *Duane Reade, Inc. v Clark*, 2 Misc 3d 1007(A) [Sup Ct, NY County, 2004]).

## POINT III

## THE AMENDED COMPLAINT FAILS TO PLEAD THE ELEMENTS OF DEFAMATION

In any event, USL Marina's Amended Complaint should be dismissed in its entirety under CPLR 3211(a)(1) and (7) because it fails to sufficiently plead the elements of defamation.

On a motion to dismiss a defamation claim, "the court must decide whether the statements, considered in the context of the entire publication, are 'reasonably susceptible of a defamatory connotation,' such that the issue is worthy of submission to a jury" (*Stepanov v Dow Jones & Co., Inc.*, 120 AD3d 28, 34 [1st Dept 2014], quoting *Silsdorf v Levine*, 59 NY2d 8, 12 [1983]). In an action to recover damages for defamation, "the issue of whether particular words are defamatory presents a legal issue to be resolved by the court. Thus, this type of action lends itself well to analysis under CPLR 3211(a)(1) and (7)." (*Greenberg v Spitzer*, 155 AD3d 27, 44 [2d Dept 2017] [internal quotation marks and citations omitted]).

"The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se" (*Loch Sheldrake Beach and Tennis Inc. v Akulich*, 141 AD3d 809, 815 [3d Dept 2016] [internal quotation marks and citation omitted]; *accord Jule v Kiamesha Shores Prop. Owners Assn. Inc.*, 210 AD3d 1330, 1334 [3d Dept 2022], *appeal dismissed*, 39 NY3d 1124 [2023]). "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 [3d Dept 2005] [citations omitted]; *see Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369, 379-380 [1977]; *Hope v Hadley-Luzerne Pub. Lib.*, 169 AD3d

1276, 1277 [3d Dept 2019]; *Nekos v Kraus*, 62 AD3d 1144, 1145-1146 [3d Dept 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 [3d Dept 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 [3d Dept 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 [3d Dept 2010]; *Brown v Albany Citizens Council on Alcoholism*, 199 AD2d 904, 905 [3d Dept 1993]).

Since truth is an absolute defense to an action based on defamation, documentary evidence may be offered to establish that the allegedly defamatory statement is substantially true. *See Greenberg*, 155 AD3d at 45.

In addition, USL Marina is also required to plead that the alleged defamatory statements were made with actual malice. For purposes of a defamation claim, USL Marina is a limited public figure. "[P]ublic figure status is a matter of degree" (*Gottwald v Sebert*, 40 NY3d 240, 251 [2023] [internal quotation marks and citations omitted]). Certain individuals may be considered public figures for all purposes while others "may invite publicity only with respect to a narrow area of interest" and may fairly be considered public figures only where the alleged defamation relates to the publicity they sought (*id.*). One becomes such a limited-purpose public figure through some "purposeful activity," by which the individual has "thrust" themself "into the public spotlight and sought a continuing public interest in [their] activities" (*id.*). Here, USL Marina is the owner and operator of the marina, it submitted an application to the APA for the expansion of the marina, and submitted studies in support of the applications (Compl. ¶¶4, 43[4]). There is clearly a continuing

public interest in the application and USL Marina's plans because of USL Marina purposeful actions and activities (*see e.g. Greenbelt Co-op. Pub. Ass'n v Bresler*, 398 US 6, 8 [1970] [holding that the plaintiff was a public figure where he was deeply involved in future development of city, he had in the past entered into agreements with city for zoning variances, he was again seeking variances and city was trying to obtain another tract of land owned by him]; *Winklevoss v Steinberg*, 170 AD3d 618, 619 [1st Dept 2019] ["Plaintiffs are limited purpose public figures. Through their voluntary participation in numerous interviews, in widely-covered conferences and meetings with entrepreneurs, and in their own radio broadcasts, they have attracted public attention to themselves as investors in start-ups, have voluntarily injected themselves into the world of investing, and have sought to establish their reputation as authorities in the field"]; *Horowitz v Mannoia*, 10 Misc 3d 467 [Sup Ct, Nassau Cty 2005] [holding that sponsor of residential community and the sponsor's principal were "limited purpose public figures"]). As limited public figure, USL Marina is required to plead and prove that the allegedly defamatory statements were made with "actual malice" (*Gottwald*, 40 NY3d at 251).

Here, USL Marina failed to plead the elements of defamation and the documentary evidence refutes its allegations. As explained in detail in Section I, *supra*, and supported by extensive documentary evidence, the information contained in the Adirondack Explorer announcement regarding statements one, two, three and four were based upon information that was in the public domain surrounding USL Marina's permit application materials to DEC and APA, and was true.

Adirondack Wild's further statement that the development "as proposed is completely out of scale with its environment" is a matter of opinion informed by the factual size of the project relative to the size of Lower Fish Creek Pond, which is constitutionally protected and cannot

constitute defamation as a matter of law (*see Lapar v Morris*, 119 AD2d 635, 636 [2d Dept 1986]; *see also Rinaldi v Holt, Rinehart & Winston, Inc.*, 42 NY2d 369, 380 [1977]). Further, nothing in this statement states or suggests that the process before the APA is "corrupt." That word is USL Marina's own invention. The announcement characterizes the application to APA and DEC as, in Adirondack Wild's opinion, deficient, and deserving of more comprehensive data and assessment. That statement is reasonable because APA has twice deemed the USL Marina application incomplete, and DEC has also deemed the USL Marina application incomplete (Gibson Aff., Exs. C, E, F). Finally, USL Marina failed to plead any facts that Adirondack Wild made the statements at issue with actual malice.

Thus, since USL Marina failed to plead the elements of defamation, this Amended Complaint must be dismissed in its entirety under CPLR 3211 (a)(1) and (7).

## POINT IV

## ADIRONDACK WILD IS ENTITLED TO COSTS, ATTORNEY'S FEES, COMPENSATORY AND PUNITIVE DAMAGES AS A RESULT OF USL MARINA'S FRIVOLOUS SLAPP SUIT

Adirondack Wild is also entitled to costs and attorney's fees as well as compensatory and punitive damages as a result of USL Marina's frivolous SLAPP suit.

Civil Rights Law § 70(a) provides that a prevailing defendant in a SLAPP suit may recover costs and attorney's fees as well as compensatory and punitive damages:

> (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 or subdivision (h) of rule thirty-two hundred twelve of the civil practice law and rules, 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.

(Civil Rights Law § 70-a[1][a][b];[c]).

USL Marina commenced this defamation action without a substantial basis in fact because all of the statements that it is alleging are defamatory are based on its own application, fact and are substantially true or constitute an opinion based on facts (Civil Rights Law § 70[a][1][a]). Since USL Marina's permit application is still ongoing and USL Marina knows or should have known that the statements at issue are true, USL Marina purposely filed this action now in order to intimidate, harass, prevent and chill Adirondack Wild's future participation and public opinion. As such, Adirondack Wild is entitled to costs and attorney's fees as a result of having to respond to this frivolous action. Adirondack Wild is also entitled to compensatory and punitive damages because USL Marina commenced this lawsuit for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights of Adirondack Wild. Indeed, USL Marina's intention to intimate is evidenced in its December 29 letter, which demanded that Adirondack Wild retract their announcement, identify each alleged false statement, issue an apology, and abstain from further publications regarding USL Marina's development without contacting USL Marina's legal counsel (*see* Gibson Aff., Ex. A).

Further, the regulations in 22 NYCRR part 130 provide that a "court, in its discretion, may award to any party or attorney in any civil action or proceeding before the court, except where prohibited by law, costs in the form of reimbursement for actual expenses reasonably incurred and

reasonable [counsel] fees, resulting from frivolous conduct," without any monetary limit on the award (22 NYCRR 130–1.1[a]).

In *Pilatich v Town of New Baltimore* (188 AD3d 1386 [3d Dept 2020]), the Third Department affirmed the award of sanctions:

> Supreme Court found that plaintiff either knew or should have known that his arguments lacked merit in both fact and law, that plaintiff's sole design was to harass and maliciously cause injury, that plaintiff asserted material factual statements that were false and that plaintiff's conduct continued when the lack of merit was apparent.

(*Id.* [emphasis added]). Here, similarly, USL Marina's complaint was intended to harass Adirondack Wild and prevent them from exercising their constitutional rights. Thus, Adirondack Wild is entitled to reasonable costs and attorney's fees as a result of this frivolous lawsuit (*see id.*; *see also Gottlieb v Colonel*, 180 AD3d 877, 881 [2d Dept 2020] [the Court was "'deeply troubled' that the plaintiff had commenced two defamation actions" as "it was 'reasonable to conclude' that the defamation actions were undertaken to harass and/or deter individuals from reporting future violations"]; *Citibank (S. Dakota) N.A. v Jones*, 272 AD2d 815, 817 [3d Dept 2000]).

## CONCLUSION

For all of the foregoing reasons, Adirondack Wild respectfully requests that this Court issue an order dismissing the Amended Complaint in its entirety, awarding Adirondack Wild costs and

attorney's fees incurred in this proceeding, compensatory and punitive damages, together with such other and further relief as the Court deems just and proper.

Dated: April 1, 2024

WHITEMAN OSTERMAN & HANNA LLP

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**CERTIFICATION OF COMPLIANCE WITH UNIFORM CIVIL RULE 202.8-b**

I hereby certify the foregoing Memorandum of Law, exclusive of caption and signature block, comprises 5,801 words, and thus complies with Uniform Civil Rule 202.8-b.

Dated: April 1, 2024

PHILIP H. GITLEN

4895-5858-8594