IN THE SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MICHAEL CISNEROS, et al.,

Plaintiffs,

v.

LOGAN COOK, et al.,

Defendants.

Index No.: **1575501/2020**

Oral Argument Requested

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT LOGAN COOK'S MOTION TO DISMISS THE COMPLAINT

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Defendant Logan ("Mr. Cook") respectfully submits this memorandum of law in support of his motion for an order pursuant to CPLR 3211(a)(7) dismissing plaintiffs' Complaint with prejudice.

INTRODUCTION

Plaintiffs filed this action after President Trump re-tweeted a parody "meme"[1] ("Parody Meme") – actually a short video – created and published by Mr. Cook on September 9, 2019. For the past three years, Mr. Cook has created Internet memes to express his political views and opinions, and they have in many instances been shared widely because of his talent, creativity and skill. Such conduct is pure political speech protected by the First Amendment, as is the conduct of any other party that shares Mr. Cook's publications. Plaintiffs have nonetheless concocted an implausible, time-shifted conspiracy between Mr. Cook, the President of the United States and the latter's reelection campaign to find some way to profit from the fact that the President re-tweeted a Parody Meme that incorporates a video ("Video") of plaintiffs' children which plaintiffs, themselves, published and disseminated around the world via the Internet. Besides being implausible, their Complaint fails to state a cause of action and should be dismissed with prejudice.

As an initial matter, it is undisputed that plaintiffs expressed no known objection to the Parody Meme during the first nine months it circulated online. It was not until the President engaged in his own free speech by retweeting the Parody Meme that plaintiffs sought to cash in from the President's retweet of Mr. Cook's creative work and, at the same time, chill defendants' First Amendment rights and their freedom to express political opinions. The Parody Meme is

[1] "Meme" has been defined as: "a cultural item in the form of an image, video, phrase, etc., that is spread via the internet and often altered in a creative or humorous way[,]" and "an image or video that is spread widely on the internet, often altered by internet users for humorous effect[.]" (first quoting dictionary.com; and then quoting Collins Dictionary.). See Dictionary.com, Search meme (11/27/20), https://www.dictionary.com/browse/meme; CollinsDictionary.com, Search meme (11/27/20), https://www.collinsdictionary.com/us/dictionary/english/meme.

protected under both the United States and New York Constitutions, and it is well-established that N.Y. Civil Rights Law §§ 50 and 51 do not apply to non-commercial publications regarding newsworthy events or matters of public concern.

Plaintiff's claim for intentional infliction of emotional distress also fails. To hold the contrary would require a finding, impossible under the facts alleged, that defendants' adaptation of a widely-disseminated video and exercise of free speech constitutes "extreme and outrageous conduct that transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society." For similar reasons, plaintiffs' claim alleging negligent infliction of emotional distress must be dismissed as well, based as it is on the meritless claim defendants' owed plaintiffs a legally cognizable duty to abstain from engaging in constitutionally protected speech, and that the breach of imagined duty "unreasonably endanger[ed] plaintiffs' physical safety or caused plaintiff[s] to fear for [their] own safety." *Sheila C. v. Povich*, 11 A.D.3d 120, 130, (2004). Of course, such argument has no merit.

As a last-ditch effort, plaintiffs assert a claim for general negligence, which in a claim sounding in defamation or otherwise involving speech in New York, requires a plaintiff to establish that a publisher "acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." Plaintiffs have not alleged, even in conclusory fashion, that Mr. Cook violated this heightened standard. These claims, too, should be dismissed.

In addition to seeking dismissal, defendant Mr. Cook also seeks attorney's fees and costs, which are recoverable under New York's anti-SLAPP law.

FACTUAL BACKGROUND

In September 2019, plaintiffs uploaded to the Internet the Video, a charming depiction of their two minor children – M.H., who is black, and F.M., who is white – embracing each other and running down the sidewalk. The Video immediately "went viral" and amassed millions of views on social media sites. Plaintiffs went above and beyond to disseminate the Video, making multiple appearances on national television, provided comments to countless news stations, and even persistently tweeted at celebrities in hopes of garnering more attention. It is through plaintiffs' own efforts that Mr. Cook obtained the Video.

On September 9, 2019, Mr. Cook published the sixty (60) second anti-racism Parody Meme on what was then his well-known Twitter account, @CarpeDonktum, with the caption "Content that I posted was 'Doctored' by me" making it unequivocally clear to reasonable viewers that the video was a parody of the original Video.

From 0:00-0:10 of the Video, the Parody Meme shows F.M. playfully chasing after M.H. – but with a CNN chyron and an added "Breaking News" notice laid over the lower-third of the screen. At 0:11-0:12, text reading "What really happened" is displayed and from 0:13-0:43, the entire Video plaintiffs published is re-played, giving viewers the full context of the children's joyous encounter. The meme then concludes from 0:44-1:00 with text, reading:

AMERICA IS NOT THE PROBLEM…FAKE NEWS IS.
IF YOU SEE SOMETHING, SAY SOMETHING.
ONLY YOU CAN PREVENT FAKE NEWS DUMPSTER FIRES.

The message of the Parody Meme was that, contrary to the depiction by major cultural and political messengers of a nation torn by hopeless racial strife, black and white Americans actually get along most of the time.

Nearly nine months after its publication, President Trump re-tweeted the Parody Meme on his personal Twitter account, @realDonaldTrump. Shortly thereafter, plaintiffs allegedly "saw or otherwise became aware" that President Trump and/or the Campaign re-tweeted the Parody Meme and as a result, allegedly "became distraught." (Compl. ¶ 36.) Plaintiffs then waited nearly three months to file this lawsuit, less than just two weeks before the 2020 Presidential Election. Since that time, the parties have entered into stipulations to extend time to respond to plaintiffs' Complaint, extending such deadline until December 2, 2020.

ARGUMENT

I. Legal Standard.

When evaluating a motion to dismiss under CPLR 3211(a)(7) for failure to state a claim, the court must "determine whether, accepting as true the factual averments of the complaint, plaintiff can succeed on any reasonable view of the facts stated." *Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 318 (1995) (citation omitted); *Klepetko v. Reisman*, 41 A.D.3d 551, 551 (2d Dep't 2007) (dismissing defamation claim). As under federal law, a "reasonable view" excludes "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, a "pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (internal quotations omitted); *Twombly* 550 U.S. at 555.

II. Plaintiffs' Claims Pursuant to NYCR §§ 50 and 51 Should be Dismissed.

New York does not recognize a common-law right of privacy. *Messenger ex rel. Messenger v. Gruner + Jahr Printing and Pub.*, 94 N.Y.2d 436, 441 (2000); *see also Wojtowicz v. Delacorte Press*, 43 N.Y.2d 858, 860 (1978). Instead, the Legislature enacted NYCR § 50, which makes it "a misdemeanor to use a living person's 'name, portrait or picture' for advertising or trade purposes

'without having first obtained the written consent of such person, or if a minor of his or her parent or guardian'." *Messenger*, 94 N.Y.2d at 441. Section 51 in relevant part also provides a right of private action:

> Any person whose name, portrait, picture or voice is used within this state for advertising purposes or for the purposes of trade without the written consent first obtained as above provided in section 50 may maintain an equitable action to prevent and restrain the use thereof; and may also sue and recover damages for any injuries sustained by reason of such use.

Id. (internal footnote omitted). For plaintiffs' claim under §§ 50 and 51 to survive a motion to dismiss, plaintiffs must allege that (1) the name, portrait, or picture of a living person; (2) was used for advertising or trade purposes; and, because their claim involves a minor, (3) a lack of parental consent. *Messenger*, 94 N.Y.2d at 441.

Sections 50 and 51 claims are to be narrowly construed and "strictly limited to nonconsensual commercial appropriations of the name, portrait or picture of a living person." *Finger v Omni Publs. Intl*., 77 N.Y.2d 138, 143 (1990) (emphasis added); *Arrington v New York Times Co*., 55 N.Y.2d 433, 440 (1982). Thus, even nonconsensual appropriations of a living person's portrait or picture[2] fail to satisfy the requisite pleading standard unless the nonconsensual appropriation must be commercial **and** used for advertising or trade purposes. Most important, however, "newsworthy publications are not deemed to be produced for the purposes of advertising or trade", *Messenger*, 94 N.Y.2d at 441, because such publications fall within "constitutional values in the area of free speech." *Howell v New York Post Co*., 81 N.Y.2d 115, 123 (1993); *see also Stephano v News Group Publs*., 64 N.Y.2d 174, 184 (1984). Because the use of the image in question was for purposes of fair commentary on a matter of public interest and the allegations

[2] Plaintiffs do not allege, nor is it subject to reasonable dispute, that the subject video only included the image of the two children. The names of the children or their parents were not included or revealed in any capacity.

also fail to establish a prima facie claim that, even absent this exception, the use was for trade advertisement purposes, plaintiffs' claim must fail.

A. The Parody Meme Cannot be Deemed Commercial as a Matter of Law Because it Concerns Newsworthy Events and Matters of Public Interest.

Plaintiffs' claim under §§ 50 and 51 fails as a matter of law because it can hardly be doubted the Parody Meme was a "newsworthy publication" and commentary regarding a matter of public interest, which per se cannot be actionable under these provisions. *Messenger*, *id*., *Stephano*, *id*. "Newsworthiness" is broadly construed and includes *inter alia* published matter concerning political events, social trends or any subject of public interest, *Messenger*, 94 N.Y.2d at 42; *Beverley v Choices Women's Med. Ctr*., 78 N.Y.2d 745, 752. It makes no difference whether the publication appears in a newspaper, *Lahiri v. Daily Mirror*, 295 N.Y.S. 382, 382 (1937); a magazine, *Oma v. Hillman Periodicals, Inc*., 118 N.Y.S.2d 720 (1953); a newsreel, *Redmond v. Columbia Pictures Corp*., 277 N.Y. 707 (1938); on television, *Gautier v. Pro-Football, Inc*., 304 N.Y. 354 (1952); or in a motion picture, *Merle v. Sociological Research Film Corp*., 152 N.Y.S. 829 (1915), as is the case here. "The test of permissible use is not the currency of the publication in which the picture appears but whether it is illustrative of a matter of legitimate public interest." *Dallesandro v. Henry Holt & Co*., 4 A.D.2d 470, 472 (1st Dep't. 1957) (citing *Molony v. Boy Comics Publishers, Inc*., 98 N.Y.S.2d 119, 122 (1950); *see also Sidis v. F-R Publishing Corp*., 113 F.2d 806 (1940).

Commentary regarding racial tensions and the dissemination of disinformation – the obvious subject matter of the Parody Meme – fall squarely within the broad construction of what constitutes "newsworthy" material and a matter of public interest. See, *Arrington*, 55 N.Y.2d at 440 (article regarding race and racial tensions relates to a subject of public interest, a clearly defined term). Here, the video depicts two children: one black, and one white (Compl. ¶ 12) in the

context of addressing racism and racial tensions exacerbated by disinformation campaigns led by major media outlets, such as CNN. The objective of the video, as made clear when watched in its entire context, is to raise awareness that the media skews information that best suits its "messaging," as opposed to news reporting, objective. Carpe Donktum's implied commentary is that, from the standpoint of CNN, President Trump is a racist. Mr. Cook's video specifically *combats* racism. The first ten seconds of the clip provides viewers with an overt satirical example of how the media creates disinformation campaigns. Then, the words "What actually happened" appear, followed by the video played in its entire context. The video concludes with text, reading: "America is not the problem, fake news is. If you see something, say something. Only you can prevent fake news dumpster fires."

Taken as a whole, a reasonable viewer would not be able to reach the conclusion that the subject video is anything beyond a satire of plaintiff's original, widely disseminated video dedicated to combatting racism. To that anti-racism message, Mr. Cook added his own in light of how the video was treated by the mainstream media and culture, which is as pure an example of newsworthy material and matters of public interest as could be imagined. It is clear that the video footage portraying two children of different races is connected to the subject matter of the video – the fight against racism in America – and that the news and commentary exception defeats any right of publicity claim here as a matter of law. *Compare*, *Thompson v Close-Up, Inc*., 277 App. Div. 848 (1950) ("no connection" between photograph of plaintiff and an article on dope peddling).

B. The Video was not Produced for Trade or Advertisement Purposes.

Besides failing as a matter of law because the Parody Meme is essentially pure political speech, plaintiffs' claim alleging violations of §§ 50 and 51 should be dismissed because they fail

to allege a coherent or plausible commercial or trade purpose. Plaintiffs make a game effort, but are able only to allege vaguely that Mr. Cook "sought and/or collected money from people for making memes including but not limited to the subject video" (Compl. ¶ 20) and that Mr. Cook "creat[ed] the video and shar[ed] it with Trump and or the Campaign for advertising purposes [and] for the purposes of commercial exploitation for his economic benefit." (*Id.* ¶¶ 15, 19.) But these formulaic attempts to meet the "trade or advertisement" prong of a New York right of publicity claim by fail to allege a coherent nexus between the specific allegedly unauthorized use and a specific commercial or trade interest, and are insufficient to survive a motion to dismiss.

An exception to the advertisement requirement states that "advertisements in disguise" may be actionable. *See, e.g., Beverley.*, 78 N.Y.2d at 752-53. However, "a publication constitutes an 'advertisement in disguise' only when it is used in an advertising context which conveys or reasonably suggests the subject's endorsement of the publication in question." *Velez v. VV Pub. Corp.*, 135 A.D. 47, 52 (N.Y.S. 1988). A plain viewing of the subject video is dispositive that it in no way constitutes an advertisement. Courts have repeatedly held that publications based on nothing more than the contents of the publication do not constitute disguised advertisements. *See Pagan v. New York Herald Tribune,* 301 N.Y.S. 120, 123 (1969); *La Forge v. Fairchild Pub.,* 257 N.Y.S.2d 127 (1965); *see also Dallesandro*, *4 A.D.2d 470* (accelerating judgment in favor of defendants despite the courts' references to the "advertisement in disguise" theory); *Murray v. New York Mag. Co.,* 27 N.Y.2d 406 (1971) (holding the same).

Notwithstanding the fuzzy claim that Mr. Cook has "sought and/or collected money" for "making memes," the complaint makes no attempt to explain how Mr. Cook seeks or collects money for the video that is the subject of the complaint, much less how much. "Naked assertions" devoid of further factual enhancement are insufficient to survive a motion to dismiss. *Iqbal*, 556

U.S. at 678 (internal quotations omitted); *Twombly* 550 U.S. at 555. There is no allegation of a commercial transaction between Mr. Cook and President Trump or the Campaign, which is the supposed – and entirely fanciful – axis around which plaintiffs' entire byzantine tale spins. Indeed: while the complaint focuses on the first ten seconds of the video, the entire sixty-second clip makes no mention of President Trump at all. He not depicted, referred to or hinted at in the Parody Meme. Donald Trump's supporters often mock their adversaries, who ascribe to the President omniscient powers of evil that influence matters clearly unrelated to him, saying that "Donald Trump is living rent-free in their heads." That is a choice a polemicist can make – but a lawsuit in New York Supreme Court is not the place for polemics, and there is no place in the Parody Meme where Donald Trump can be found.

Indeed, plaintiffs' impressionistic claim of commercial or trade benefit is equally imaginative. The complaint alleges that in essence, that Mr. Cook makes memes; that he would like to be paid for making them; and that any meme or video he makes must therefore be commerce. That logical leap, while logical enough in the sense that everyone would like to be "discovered" and indeed rewarded for doing what he does, nonetheless fails to connect this video with the Trump Campaign. Even if the video could be shown to have had an incidental promotional effect upon the Campaign – none of which is described in the complaint – that alone would not give rise to liability under the Civil Rights Law. See, *Murray*, 27 N.Y.2d at 409; *Oma*, 118 N.Y.S.2d at 720. But the fact that Mr. Cook uploaded the video **nearly one year before** President Trump "retweeted" the video on his Twitter account – Mr. Cook published the video on September 9, 2019, yet it was not until June 19, 2020 that President Trump shared the video – negates any plausible inference of a connection.

The inference on which the complaint hinges is that President Trump or the Campaign would have paid for this "advertisement," allowed the producer of the advertisement to share it on his own personal social media platforms for free and without reference to their "product," and then abstain from sharing the video for over nine months. Such a preposterous connection is unsupported by the law. *See*, *Heller v. Family Circle, Inc.*, 85 A.D.2d 679, 681 (1981) (no "advertisement in disguise" where article in question was published six years after publication of the first edition and about six months prior to publication of the second edition). Given the rule that §§ 50 and 51 are to be narrowly construed, *Finger*, *id.,* 77 N.Y.2d at 143; *Arrington*, *id*., 55 N.Y.2d at 440, this Court should not expand it to grant any subsequent user or re-publisher of content the power, intended or not, to retroactively expose its original creator to a *prima facie* claim under §§ 50 or 51.

Accordingly, plaintiffs' claim pursuant to §§ 50 and 51 must be dismissed because the video does not have any commercial purpose.

III. Plaintiffs Emotional Distress Claims Fail to Claim a Cause of Action.

Plaintiffs also allege claims for intentional infliction of emotional distress and negligent infliction of emotional distress, neither of which are sufficient to survive a motion to dismiss.

A. Plaintiffs Fail to Plead a Sustainable Claim for Intentional Infliction of Emotional Distress.

To plead a claim for intentional infliction of emotional distress, a plaintiff must allege "extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society." *Fischer v. Maloney*, 43 N.Y.2d 553, 557 (1978); *see also Murphy v. American Home Prods. Corp*., 58 N.Y.2d 293, 303 (1983). In *Fischer*, the New York Court of Appeals adopted the rule set forth in Restatement (Second) of Torts § 46 (1) that: "One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional

distress to another is subject to liability for such emotional distress." *Id.* The facts alleged in the complaint certainly do not meet this standard.

It is clear that the video is political satire. Moreover, it is highly unlikely – if not a near certainty – that a viewer would not be able to ascertain the identities of the children in the video and the parents are not portrayed at all. Their names are not mentioned, the location of the children are not revealed, and it is virtually impossible to see the children's faces unless the video is viewed in its unedited, original format. And it is not disputed that the video in its original context – which reveals the faces of the two children – was disseminated by **plaintiffs themselves**. Plaintiffs nonetheless ask this Court to believe that Mr. Cook intentionally or recklessly caused plaintiffs to suffer "severe emotional distress" in re-republishing the exact video plaintiffs themselves published, a claim which is simply ridiculous. And to the extent plaintiffs allege that only the first ten seconds of the video is at issue, their argument is even weaker, because the identity of the children are not revealed during the portion of the clip upon which plaintiffs base this frivolous action.

Nor do plaintiffs allege injuries sufficient to support a finding of severe emotional distress. The complaint simply recites a laundry list of supposed injuries: mental anguish, fright and shock, the denial of social pleasures and enjoyments, embarrassment, humiliation, mortification. (Compl. ¶ 48.) No facts are pleaded to support these conclusory claims, such as a description of the social pleasures or enjoyments the plaintiffs can no longer enjoy, how they have encountered or suffered embarrassment or humiliation, or, thankfully, any facts concerning "mortification" on the part of the children involved. All allegations regarding damages conclusory, and "a pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action" is insufficient

to survive a motion to dismiss. *Iqbal*, 556 U.S. at 678 (internal quotations omitted); *Twombly* 550 U.S. at 555.

Even assuming *arguendo* this court finds that the allegations are not conclusory in nature, the injuries allegedly sustained do not arise out of conduct that is "extreme in degree as to surpass the limits of decency so as to be regarded as atrocious and intolerable in a civilized society." *Leonard v. Reinhardt*, 20 A.D.3d 510, 510 (2nd Dept. 2005). Plaintiffs – not Mr. Cook – made the identity of the children known for their own purposes. To claim that Mr. Cook's re-publication of a video plaintiffs published caused this imaginary emotional damage is difficult to square with the legal standard for the intentional infliction of emotional distress, i.e., conduct so "extreme in degree as to surpass the limits of decency so as to be regarded as atrocious and intolerable in a civilized society." *Fischer*, 43 N.Y.2d at 557.

B. Plaintiffs Fail to Plead a Sustainable Claim for Negligent Infliction of Emotional Distress.

The complaint's fallback position on emotional distress, a claim for negligent infliction of that extreme harm, fares no better because of the absence of a duty, as required under New York law. *See*, *Ornstein v. New York Health & Hosp. Corp*., 10 N.Y.3d 1, 6 (2008) ("a claim of negligent infliction of emotional distress presupposes a duty of care running from the defendant to the plaintiff"). "A cause of action for negligent infliction of emotional distress…generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her own safety." *Povich*, 11 A.D.3d at 130. Plaintiffs fail to satisfy this standard in their pleading.

That failure is not for lack of trying. Plaintiffs do purport to identify a "duty" – merely one that has no support in the law, alleging that defendants "owed plaintiffs a duty to act reasonably and avoid using the video without written consent of plaintiffs and changing the video, adding

words to it that would harm plaintiffs, and to avoid using the video to make money." (Compl. ¶ 50.) None of this verbiage aligns with any duty recognized by New York law.

Nor do plaintiffs do not allege the video unreasonably endangered their physical safety, caused them to fear for their own safety, or caused plaintiffs to sustain physical injury. (Such an allegation would be utterly implausible, of course.) Rather, plaintiffs allege that they have suffered "conscious pain and suffering, severe emotional distress, mental anguish, fright and shock, denial of social pleasures and enjoyments, and embarrassment, humiliation, or mortification." (Compl. ¶ 52.) These allegations fail to satisfy the requisite pleading standard for the damages they seek, however. Their allegation that Mr. Cook's use of words or a political message – specifically, condemning false news stories that exacerbate racial tensions – caused harm to plaintiffs or "unreasonably endangered" plaintiffs' physical safety is not grounds for an emotional distress claim. "[A] cause of action to recover damages for negligent infliction of emotional distress must generally be premised upon conduct which 'unreasonably endangers' the plaintiff's physical safety." *Glendora v. Gallicano*, 206 A.D.2d 456, 456 (1994). Indeed, the Complaint is entirely devoid of allegations that the subject video endangered plaintiffs' physical safety. Accordingly, plaintiff's negligent infliction of emotional distress claim must too, be dismissed.

IV. Plaintiffs Fail to State a Claim for General Negligence.

Finally, plaintiffs assert a claim for general negligence, alleging that Mr. Cook "owed plaintiffs a duty to act reasonable and avoid using the video without written consent of plaintiffs and changing the video, adding words to it that would harm plaintiffs, and to avoid using the video to make money." (Compl. ¶ 54.) This formulation of new and inscrutable "duties" is the same unsupported formulation as the one proffered to support plaintiffs' claim for negligent infliction of emotional distress. As meritless as it is in in general, the invention of such free-floating "duties"

here is particularly inappropriate in light of the would-be content-regulating aspect of plaintiffs' claims.

As a matter of New York State and federal constitutional law, plaintiffs' allegations, couched in terms of ordinary negligence, pertain to matters of legitimate public concern and are patently insufficient. *Virelli v. Goodson-Todman Enterprises, Ltd.*, 142 A.D.2d 479, 487 (3rd Dep't. 1989). In *Gertz v. Robert Welch, Inc*., 418 U.S. 323 (1974), the United States Supreme Court held that ordinary negligence is a constitutionally sufficient fault standard of liability under the 1st Amendment of the Federal Constitution in the case of a defamation suit by a private person-plaintiff against a news media defendant for publication on a matter of public concern. The Court left it expressly left to the individual states the decision whether to impose a higher standard of culpability. *Id*. at 345–347. In New York, to prevail on a negligence claim for injuries arising out of a publication, a plaintiff must establish that the "publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties." *Chapadeau v. Utica Observer–Dispatch*, 38 N.Y.2d 196, 199 (1975); *see Gaeta v. New York News*, 62 N.Y.2d 340 (1984). Plaintiffs have not alleged, even in conclusory fashion, that this heightened standard of fault was violated by defendants here. Accordingly, dismissal must be granted as to this cause of action as well.

V. New York's Anti-SLAPP Law Bars All of Plaintiffs' Claims.

New York Civil Rights Law § 76–a was enacted "to protect citizens facing litigation arising from their public petitioning and participation by deterring strategic lawsuits against public participation, termed SLAPP suits." *Southampton Day Camp Realty, LLC v. Gormon*, 118 A.D.3d 976, 977 (2014); *Waterways at Bay Pointe Homeowners Ass'n, Inc. v. Waterways Dev. Corp.*, 132 A.D.3d 975, 979 (2015). To survive an anti-SLAPP challenge brought under CPLR 3211(a)(7), a

plaintiff must demonstrate that the action "has a substantial basis in fact and law or is supported by a substantial argument for an extension, modification, or reversal of law." *Gormon*, 118 A.D.3d at 978; *see Singh v. Sukhram*, 56 A.D.3d. 194 (2nd Dep't. 2008) (internal quotation marks omitted); *Hariri v. Amper*, 51 A.D.3d. 146, 150-51 (1st Dep't. 2008). Plaintiffs do not seek to alter current law; nor is there a good faith basis for them to assert that such a change is warranted. Thus, the relevant inquiry is whether plaintiffs' Complaint demonstrates a "substantial basis in fact and law" to prevail on the merits of its claims.

A. Plaintiffs' Lawsuit Pertains to Defendants' Involvement in Public Petition and Participation.

On November 10, 2020, the New York Legislature enacted N.Y. Civ. Rights Law§ 76–a(1)(a), which states in pertinent part:

> 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.

Id. Here, the Complaint fails to satisfy both requirements.

The first prong requires an analysis parallel to that of a First Amendment analysis. For the reasons stated above, the content, context, and form of defendants' speech easily satisfies the requisite "public interest" element, especially in light that the term "shall be construed broadly, and shall mean any subject other than a purely private matter." N.Y. Civ. Rights Law § 76-a(1)(d).

The second prong holds that there can be no basis in fact and law to challenge constitutionally protected activity–let alone a substantial basis as required to survive an anti-SLAPP motion. "At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. The

freedom to speak one's mind is not only an aspect of individual liberty – and thus a good unto itself – but also is essential to the common quest for truth and the vitality of society as a whole." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–51 (1988) (quoting *Bose Corp. v. Consumers Union of United States, Inc*., 466 U.S. 485, 503–04 (1984)). A "matter of public concern" is "any matter of political, social, or other concern to the community, or… is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *Snyder v. Phelps*, 562 U.S. 443, 453 (2011). Of course, issues regarding biased reporting, newsworthy events, and racial tensions certainly constitute matters of public concern.

Plaintiffs take issue with subject matter of the Parody Meme; however, "inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern." *Rankin v. McPherson*, 483 U.S. 378, 387 (1987); see also *Bond v. Floyd*, 385 U.S. 116, 136 (1966) ("Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected."). While satisfaction of any single classification is enough to prevail on an anti-SLAPP defense, the Parody Meme at issue satisfies numerous classifications–it not only addresses a "matter of political, social, [and] other concern to the community…," but also, "is a subject of legitimate news interest." *Snyder*, 562 U.S. at 453.

B. This Action Lacks Substantial Basis in Fact and Law.

"A motion to dismiss based on [CPLR 3211(a)(7)], in which the moving party has demonstrated that the action [or] claim…subject to the motion is an action involving public petition and participation as defined in [N.Y. Civ. Rights Law § 76-a(1)(a)], **shall be granted,** unless the party responding to the motion demonstrates that the cause of action has a substantial

basis in law…". CPLR 3211(g)(1) (emphasis added). Moreover, N.Y. Civ. Rights Law § 76-a(2) states that:

> 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.

Mr. Cook has demonstrated above that the entirety of this action should be dismissed under CPLR 3211(a)(7) for failure to state a claim. He has additionally established a viable anti-SLAPP defense. As a result, the burden has shifted to the plaintiffs to establish that each claim alleged has the requisite "substantial basis" in fact and law. *See* CPLR 3211(g)(1); *Matter of Related Properties, Inc. v. Town Board of Town/Village of Harrison*, 22 A.D.3d 587 (2nd Dep't. 2005). Plaintiffs cannot satisfy this burden because (1) the Parody Meme constitutes protected First Amendment activity and (2) plaintiffs are limited-purpose public figures and therefore must allege facts that meet the First Amendment's standard for actual malice. Plaintiffs have not alleged such facts.

1. The Parody Meme Constitutes First Amendment Protected Activity.

The New York Constitution provides that "every citizen may freely speak, write, and **publish his or her sentiments on all subjects**, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press." N.Y. Const. Art. I § 8 (emphasis added). The "protection afforded by the guarantees of free press and speech in the New York Constitution is often broader than the minimum required by the Federal Constitution." *Immuno AG v. Moor-Jankowski*, 77 N.Y.2d 235, 249 (1991). As stated above, based on the facts alleged in the Complaint this action fails to survive even the minimum standards under the First Amendment.

2. As Limited Public Figures, Plaintiffs Must Demonstrate Actual Malice.

A limited public figure is one who "voluntarily injects himself or is drawn into a particular public controversy". *Gertz*, 418 U.S. at 351. Thus, in order to satisfy its burden under CPLR 3211(g)(1), plaintiffs must demonstrate "actual malice" by presenting clear and convincing evidence that Defendants' speech "was made with knowledge of its falsity or with reckless disregard of whether it was false[." N.Y. Civ. Rights Law § 76-a(2); *Edwards v. Martin*, 158 A.D.3d 1044, 1048 (2018). While the plaintiffs allege "falsity" (albeit in conclusory terms), the Complaint is devoid of allegations as to malice. Thus, it is not subject to reasonable dispute that plaintiffs cannot satisfy the burden imposed by CPLR 3211(g)(1). *See Dominski v. Frank Williams & Son, LLC*, 46 A.D.3d 1443, 1444 (2007) ("While it is axiomatic that a court must assume the truth of the complaint's allegations, such an assumption must fail where there are conclusory allegations lacking actual support."); *see also De Lesline v. State*, 91 A.D.2d 785, 786 (1982) (holding plaintiffs failed to state a claim because the Complaint lacked even conclusory allegations of malice). Accordingly, the Complaint should be dismissed under New York's anti-SLAPP defense and an appropriate award of attorneys' fees be made to defendants.

CONCLUSION

For the foregoing reasons, defendant Logan Cook respectfully requests that this Court dismiss the Complaint with prejudice and award attorney's fees and costs pursuant to N.Y. Civ. Rights Law § 70–a, 76–a, *et al.*, as amended on November 10, 2020.

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