SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ERIE
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AUDIOEYE, INC.,

Plaintiff,

- against -

ADRIAN ROSELLI,

Defendant.

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Motion Seq. 001

Index No. 803054/2023

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION FOR ANTI-SLAPP DISMISSAL AND SUMMARY JUDGMENT

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PRELIMINARY STATEMENT

This case is a classic strategic lawsuit against public participation, or "SLAPP." AudioEye, Inc., a massive corporation, has picked out and sued an individual critic ***explicitly*** to chill future speech. *See, e.g.,* First Amended Complaint (FAC) ¶ 65. Indeed, it does so after acknowledging the pre-existing "many" comments by a "growing community of digital-accessibility companies and individual consultants" all saying AudioEye's products do not work for the users AudioEye says it is serving. FAC ¶¶ 23-27.

But there is no serious question that the statements are all classic opinion under well-settled defamation law, and as true as such opinions can be anyway, and for both those reasons, the suit fails. Likewise, there is no serious theory of actual malice in the complaint — that is, that a "defendant[s] ***in fact*** entertained serious doubts as to the truth of [their] publication" (*St. Amant v Thompson*, 390 US 727, 731 (1968) (emphasis added)) — also meaning it fails.

Since New York has adopted an intentionally strong anti-SLAPP law, both shifting the burden of proof at the initial stage as well as the costs of attorneys onto a SLAPP plaintiff, the Court should grant this motion, and set down a hearing on fees.

FACTUAL BACKGROUND

The fuller factual background, given the breadth of the complaint, is set out in the accompanying Statement of Materials Facts ("SOMF"). In sum, Defendant Adrian Roselli, a disability and accessibility advocate of decades, who (among other things) served as an expert in developing HTML itself, has a long-held belief that

"overlay"-type accessibiltiy products harm the consumers with disabilities they purportedly help. SOMF ¶¶ 1-7; 26-28. As a producer of such products, AudioEye disagrees. SOMF ¶¶ 29-30. Roselli made four statements publicly expressing his honest criticisms of AudioEye. SOMF ¶¶ 31- 76.[1]

But before any statement at issue here, more than 700 industry experts and end consumers issued an open letter naming AudioEye and saying its products (and similar products from other companies) do not work. SOMF ¶¶ 20, 30. As have countless others, including in lawsuits, and one lawsuit that reached a consent-decree-like settlement. SOMF ¶¶ 14-20, 77-80.

There is no serious question Mr. Roselli genuinely believes everything he said to be true.After reviewing the complaint, his opinion and view of the facts is unchanged (to say nothing of proof his opinions are invented). SOMF ¶¶ 32-45; 52-55; 59-62; 71-76; 77.

Finally, everyone here agrees that the importance of accessibiltiy online is one of the major issues of our day. SOMF ¶ 82, *citing* FAC ¶¶ 15; 17-22. That is, the question of how to approach ADA accessibility online is a topic of significant public interest and concern. SOMF ¶ 81. 83. Therefore, this case is based upon statements in public fora, made in connection with an issue of public interest. SOMF ¶¶ 75-76; 78-83.

[1] All of the statements were made in public fora, and one even involved petitioning activity. SOMF ¶¶ 75-76.

ARGUMENT

I. The Anti-SLAPP Law Applies Because Abuse is a Topic of Public Concern and Plaintiff Alleges the Statements Were Made Publicly.

When litigants raise causes of action that touch upon speech in a public forum that touches on an issue of public interest, New York law provides a vehicle for a swift and final vindication of the speakers' free speech rights. So-called SLAPPs are a nuisance and are attempts by litigants to utilize the courts to bully, harass, and intimidate people into being quiet for fear of incurring great legal costs. *See, e.g.,* Roselli Aff. ¶¶ 95-99. This case easily fits in that category.

By its terms, New York's recently amended Anti-SLAPP law applies to cases concerning:

> "***any communication in*** a public place open to the public or ***a public forum in connection with an issue of public interest***;" or
>
> "***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."

N.Y. Civ.R.L. § 76-a(1)(a) (emphases added). The law also provides that "'Public interest' is construed broadly and means ***any subject other than a purely private matter***." N.Y. Civ.R.L. § 76-a(1)(d) (emphasis added).

Once a movant shows a case fits in either category in § 76-a(1)(a), the special motions in CPLR 3212(h) and CPLR 3211(g) — along with their procedural bells and whistles[2] — become available. Further, "in addition to all other necessary

[2] Namely, that the motions receive "preference" over other motions (CPLR 3211(g)(1); CPLR 3212(h)); that the motion shifts the burden to Plaintiff (*id.*); that all other aspects of the case are

elements, [plaintiff] shall have [to] establish[] 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[]." N.Y. Civ.R.L.§ 76-a(2). Or, put more simply, the *New York Times v. Sullivan* "actual malice" standard applies.

Courts have uniformly found that suits like this one over posts on social media are suits in connection with something beyond a purely private matter necessarily triggering the anti-SLAPP burden-shifting. *See, e.g., Aristocrat Plastic Surgery, P.C. v Silva*, 206 AD3d 26, 32 (1st Dept 2022) (negative review on Yelp triggered anti-SLAPP); *Center for Med. Progress v Planned Parenthood Fedn. of Am.*, 551 F Supp 3d 320, 332 (SDNY 2021) (statements on Twitter and Rewire News triggered anti-SLAPP).

The statements here are classic consumer complaints and reviews of a product publicly available for sale in interstate commerce. That is, they are not "purely private" by any stretch and were, without dispute, made "in a public place open to the public or a public forum." N.Y. Civ.R.L. § 76-a(1)(a). Aside from the Overlay Fact Sheet, published by an individual named Karl Groves and to which Roselli is merely a signatory, all the other statements AudioEye claims are libelous are published to Roselli's public Twitter feed or blog. FAC ¶¶ 67-84; SOMF ¶¶ 31-76. And as noted above, there is no question that ADA accessibility is topic of public concern — Plaintiff's own complaint says so. SOMF ¶ 81-83.

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stayed (CPLR 3211(g)(3)); and that attorneys' fees are mandatory if the Court grants a motion to dismiss or for summary judgment (N.Y. Civ.R.L. § 70-a).

Technically, Roselli need not engage in any further discussion. Once a movant meets the "very low standard" (*Cheung v. Harper*, 153780/2021 at 29:11-23 (N.Y. Cty. Sup. Ct. 2022)[3]) to trigger CPLR 3211(g) and 3212(h), everything else is up to Plaintiff. And there is nothing AudioEye could file in opposition that would save its suit or prevent the mandatory fee-shifting designed to chill frivolous suits like this one. But for completeness, Roselli walks through the full analysis below.

II. Roselli is Entitled to Both Dismissal and Summary Judgment Under the Anti-SLAPP Law (and Otherwise).

AudioEye's FAC does not come close to what the Anti-SLAPP law (or for that matter, the plain-vanilla CPLR 3211 standard) demands. That is, Plaintiff cannot satisfy the "heavy burden to survive the motion to dismiss" the Anti-SLAPP law demands at the pleading and the pre-discovery summary judgment stage. *161 Ludlow Food, LLC v. L.E.S. Dwellers, Inc.*, 107 N.Y.S.3d 618, at *4 (N.Y. Sup. Ct. 2018), *aff'd*, 176 A.D.3d 434 (1st Dep't 2019). Because it cannot meet its burden, this motion "shall be granted." CPLR 3212(h); CPLR 3211(g).

A. For actions involving public participation, motions to dismiss and for summary judgment "shall be granted" unless Plaintiff meets a heavy burden in opposition.

Once a "moving party has demonstrated that the action … subject to the motion is an action involving public petition and participation" (*see, inter alii,* SOMF ¶¶ 81-83) an Anti-SLAPP motion "shall be granted unless the party responding to the motion demonstrates that the action … has ***a substantial basis in fact and law*** or is supported by a substantial argument for an extension,

[3] This decision (rendered orally at a hearing) is Green Ex. 2.

modification or reversal of existing law." CPLR 3212(h) (emphasis added); *see also* CPLR 3211(g).

The pre-2020 iteration of the Anti-SLAPP law (which has not changed in this regard) often saw CPLR 3211(g) and CPLR 3212(h) working in concert. As the Second Department framed it, together they "require the plaintiff … to 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 existing law." *Southampton Day Camp Realty, LLC v Gormon*, 118 AD3d 976, 978 (2d Dept 2014) (cleaned up) (approving pre-discovery motion for summary judgment, where "plaintiffs failed to demonstrate a substantial basis in fact and law … that the statements were known to be false by the defendants, or that they were made with reckless disregard for the truth"). And the burden here is "heavy." *161 Ludlow*, Slip Op. at *4. *See also,* Daniel Novack and Christina Lee, *What Is a 'Substantial Basis' Under New York's Anti-SLAPP Law?*, NYLJ (Nov. 17, 2020).

A recitation of facts in a complaint fails, even without CPLR 3212(h). To avoid dismissal of a SLAPP suit complaint, a plaintiff must establish by clear and convincing **evidence** that there is a "substantial basis" in fact and law for its claim. *Sackler v. Am. Broad. Companies, Inc.*, 71 Misc. 3d 693, 700, 144 N.Y.S.3d 529, 534 (N.Y. Sup. Ct. 2021). The Legislature viewed "substantial" as a more stringent standard than the "reasonable" standard that would otherwise apply. *See Duane Reade, Inc. v. Clark*, 2 Misc. 3d 1007(A), 784 N.Y.S.2d 920 (Sup. Ct. 2004) (*citing* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:73). Note the distinction between clear and convincing facts as pled and

"evidence."

Put otherwise, CPLR 3211(g) "shifts the burden of persuasion and proof onto the plaintiffs to demonstrate by clear and convincing *evidence* the substantive merit of their action." *Reeve v. Andes*, No. 622900/2018, Slip Op at *10 (Sup Ct Suffolk Cty 2020). In that regard, the requirement to meet that shifted burden is that "plaintiffs [must] raise a triable question *of fact* that their action has substantial merit or exists to extend or modify existing law." *Id*, Slip OP at *12.

The same applies to knowledge of a statement's falsity, or at least with reckless disregard for whether the statement was itself true, which involves, in either event, ***in fact*** entertaining serious doubts about the truth a statement. *See* N.Y. Civil Rights Law 76-a (McKinney); *see also* *Sweeney v. Prisoners' Legal Servs. Ov New York, Inc.*, 84 N.Y.2d 786, 792, 622 N.Y.S.2d 896, 647 N.E.2d 101 (1995). Failure to investigate alone does not support a finding of actual malice. *See* *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989); *St. Amant*, 390 U.S. at 731 ("reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated further before publishing"); *Kipper v. NYP Holdings Co.*, 12 N.Y.3d 348, 355, 884 N.Y.S.2d 194, 912 N.E.2d 26 (2009); *Rivera v. Time Warner Inc.*, 56 A.D.3d 298, 298, 867 N.Y.S.2d 405 (1st Dept. 2008) ("Actual malice cannot be inferred from factual allegations merely suggesting that [defendant] had reason to question the accuracy of the information at issue.").

In general, statements that act as online review of a commercial product are not actionable as defamation under New York law. *See* *Kerns v. Ishida*, 208 A.D.3d 1102, 1103, 175 N.Y.S.3d 22, 23 (2022) ("The complaint failed to state a cause of

action for defamation, as the challenged statements are expressions of opinion and are therefore not actionable") (*citing* *Mann v. Abel*, 10 N.Y.3d 271, 276, 856 N.Y.S.2d 31, 885 N.E.2d 884 [2008]). Even where such reviews mix factual statements with opinion, hyperbolic or otherwise loose or figurative statements that are "clearly grounded in opinion" communicate to a reasonable reader that such statements are opinions based on negative experiences. *See* *Torati v. Hodak*, 147 A.D.3d 502, 503, 47 N.Y.S.3d 288 (1st Dept. 2017); *see also* *Woodbridge Structured Funding LLC v. Pissed Consumer*, 125 A.D.3d 508, 509, 6 N.Y.S.3d 2 (1st Dept. 2015); *Frechtman v. Gutterman*, 115 A.D.3d 102, 106, 979 N.Y.S.2d 58 (1st Dept. 2014).

AudioEye cannot escape the overwhelming force of New York law that those who place goods and services in the stream of commerce run the risk that a dissatisfied customer or consumer advocate might criticize their product or business practices, even in ways that a business owner thinks are unfair or false. The mere fact that a litigant pleads such criticisms are "false" is insufficient to demonstrate by clear and convincing evidence that their umbrage with the criticisms has a "substantial basis in law and fact," let alone demonstrate that the criticisms were made with anything resembling reckless disregard for the truth. AudioEye has not, and cannot, show by clear and convincing evidence that its FAC meets the standard to survive summary dismissal.

Furthermore, should AudioEye seek some discovery, it falls to it to "sufficiently identif[y] what discovery in defendant's possession would enable it to defeat the motion." *161 Ludlow Food*, LLC, Slip Op at *5. Simply saying the case

needs discovery is not enough to overcome the burden imposed by the Anti-SLAPP law.

III. Plaintiff's Defamation Theories Lack Merit.

A. Republishing

AudioEye's FAC does a poor job of explaining how the so-called "Overlay Fact Sheet" is itself defamatory beyond conclusory allegations that it contains "false and disparaging statements" about AudioEye as an "overlay" company (FAC, ¶ 38, ¶ 67). Nowhere in its complaint does AudioEye identify which statements within either http://www.overlayfactsheet.com or http:///www.overlayfalseclaims.com are actually false, merely that Roselli has republished these websites (presumably by linking to them). That is, on its face, a failure to plead a cause of action, since defamation must be pleaded verbatim. *Glazier v Harris*, 99 AD3d 403, 952 NYS2d 112 (1st Dept 2012), *discussing* CPLR 3016.

But even digging in, any theory of liability for republication of an existing piece of web content is expressly preempted by 47 U.S.C. § 230. Without an alteration to or comment extending the statement being republished, Section 230 precludes liability. *See generally, Shiamili v. Real Estate Grp. of N.Y., Inc.*, 929 N.Y.S.2d 19, 952 N.E.2d 1011 (2011) (even with "material contributions" to republished material, including promoting it, adding editorial commentary, and illustrations, CDA § 230 still precludes republication liability). Since Mr. Roselli

republished the Overlay Fact Sheet and the Overlay False Claims without alteration, federal law prohibits liability.[4]

But even sans § 230, the liability theory here fails. AudioEye is one of several vendors mentioned throughout these websites, and there are no pleadings (nor after a review of the websites' content could there be) any allegations that AudioEye is listed as an "overlay" company.[5] Rather, the websites state that AudioEye provides overlay-type services, which Plaintiff's FAC admits outright (see FAC, ¶¶ 3-6) that AudioEye produces automated remediation or "overlay" services. AudioEye's gripe with this is that it thinks it implies that AudioEye is "***only***" an overlay vendor. But no reading of the republished websites supports that view. AudioEye can be accurately described as an "overlay" vendor. AudioEye may feel it is much more than an overlay vendor, but it is not false, let alone defamatory, to accurately state that AudioEye is an overlay vendor.

Furthermore, AudioEye's marketing materials ***do*** promise compliance with certain disability laws. Therefore, it is hard to see how any mention of AudioEye specifically in the republished material rises to the level of being a false statement

[4] This is important, in part, because Plaintiff's FAC was filed outside of the statute of limitations for the Overlay Fact Sheet.

[5] By way of example, http://www.overlayfalseclaims.com contains 5 tabs, the "Main Article," an article on anti-competitive behaviors, a "how to use this resource" page, resources for filing consumer complaints, and a "downloads" section. In the main article, "AudioEye" appears twice, the first time quoting a marketing statement by AudioEye identifying it as an "overlay vendor" who promises compliance with disability laws and the second identifying AudioEye's software as making font-size adjustments. AudioEye appears in just one other place in the text of the website, a screenshot of a marketing article by an AudioEye employee. The only other mention of AudioEye is in the "downloads" section, being a compressed archive file of some marketing materials produced and published by AudioEye. Thus, if there is a defamatory statement to be found, it must be in one of the two instances of "AudioEye" in the main article.

of material fact. That being the case, there can be no defamation liability for Roselli for republishing the Overlay Fact Sheet[6] or the Overlay False Claims website.

B. Roselli's statements are protected statements of opinion.

As the Court of Appeals has explained, "[s]ince falsity is a *sine qua non of* a libel claim and since only assertions of fact are capable of being proven false, we have consistently held that a libel action cannot be maintained unless it is premised on published assertions of ***fact***." *Brian v Richardson*, 87 NY2d 46, 51 (1995) (emphasis in original). Thus, while "[d]istinguishing between assertions of fact and nonactionable expressions of opinion has often proved a difficult task," that *is* the Court's task in a defamation case. *Id.*

> To evaluate opinion versus fact, courts weigh three factors:
>
> "(1) whether the specific language in issue has a precise meaning which is readily understood;
>
> (2) whether the statements are capable of being proven true or false; and
>
> (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact."

Id. (spacing added, quotation marks omitted). The "last of these factors … lends both depth and difficulty to the analysis," since context helps determine "whether the reasonable reader would have believed that the challenged statements were conveying facts [with a precise meaning capable of being proven true or false] about the libel plaintiff." *Id.* Each factor favors a finding of opinion here.

[6] Any theory of liability for being a signatory to the Fact Sheet is barred by the statute of limitations.

i. Statements that the products "do not work" are classic opinion.

AudioEye first complains that Roselli stated falsely that "AudioEye's products and services do not work" (FAC, ¶ 69). An expression of pure opinion is not actionable. *Steinhilber v. Alphonse*, 68 N.Y.2d 283, 289, 501 N.E.2d 550, 552 (1986). A "pure opinion" is a statement of opinion which is accompanied by a recitation of the facts upon which it is based. An opinion not accompanied by such a factual recitation may, nevertheless, remain "pure opinion" so long as it does not imply that it is based upon ***undisclosed*** facts. *Id.*, *citing* *Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976). Only so-called "mixed opinions," where the speaker implies that he is in possession of facts that are unknown to the audience that justify the opinion are actionable. *See* *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir. 1977). The actionable element of a mixed opinion is not the opinion itself, but the implication that the speaker knows certain facts that support the opinion and are detrimental to the subject of the statement. *Rand v. New York Times Co.*, 75 A.D.2d 417, 422, 430 N.Y.S.2d 271 (1980). All such opinions are constitutionally protected. *Rinaldi v. Holt, Rinehart & Winston*, 42 N.Y.2d 369, 380, 397 N.Y.S.2d 943, 366 N.E.2d 1299 (1977).

AudioEye does not explain how the statement "does not work" is not protected opinion. Instead, it devotes only a single paragraph to the statement and says that the statement is "wrong" (FAC ¶ 36). It says "AudioEye's services work to enhance accessibility." But this does not show that the statement "does not work" is not itself an opinion statement under the *Richardson* standard. Nor does Roselli's three-tweet thread quoted in the FAC ¶ 35 imply that Roselli knows undisclosed facts that support the opinion. Instead, it contains a link to http://www.overlayfactsheet.com

and http://www.overlayfalseclaims.com, which, rather than being undisclosed facts, are the type of a disclosed factual basis that makes a statement pure opinion. *See Steinhilber*, 68 N.Y.S.2d at 289. Because the statement that AudioEye's products "do not work" is pure opinion, AudioEye cannot hope to show it has a substantial basis in law and fact for maintaining a claim for defamation regarding this statement.

ii. The "Will get you sued" post is pure opinion and prediction.

On February 26, 2023, Roselli published a blog post entitled "#AudioEye Will Get You Sued." Roselli included a disclaimer that the post and its headline were opinion based on disclosed facts in the website (see FAC at ¶ 57). AudioEye does not dispute this; rather, it highlights it in the First Amended Complaint. But then AudioEye goes on to say that this is somehow not a statement of opinion but rather one of fact. To demonstrate this, AudioEye identifies three specific parts of the post it believes are actionable defamation: paragraphs 58, 59, and 60 of the First Amended Complaint.

Paragraph 58 contains the statement by Roselli that merely using AudioEye's overlay services does not make a site "accessible" and can sometimes add features that fail to achieve its stated goals or have no impact. It is this "have no impact for users" statement that AudioEye takes to be actionable defamation because Roselli "has not, and cannot point to an instance where AudioEye's products have had 'no impact for users.'" (FAC ¶ 58).

Beyond being simply wrong (as discussed throughout), whether something has an impact for users is itself a statement of opinion, not fact. Going back to the *Richardson* standard, Roselli couched this claim in a post on his website he labeled

a "rant" and as his own personal opinion. So, in the statements' wider context and measured against how an audience member will perceive them, this remains a pure opinion, for many reasons, but not least of which is that all of the available context to support the opinion is placed within Roselli's blog post itself. The reader may judge for themselves whether or not Roselli's opinion is supported by adequate facts. So AudioEye cannot show a substantial basis in law or fact for this claim.

Paragraph 59 states that Roselli repeated "false" claims about an ADP settlement that he had previously published on Twitter on or about March 29, 2022 (see FAC at ¶ 37 and ¶ 59). Within this post, Roselli cited a *Tech Times* article that was allegedly retracted, but a dubious source or failing to investigate does not itself render an opinion actionable. *See Rivera*, 56 A.D.3d at 298. The fact that Roselli disclosed his basis for believing that use of AudioEye caused ADP to face a lawsuit renders his opinion that AudioEye "will get you sued" to be a non-actionable statement of opinion.[7] A forward-looking prediction cannot be the basis for liability. *See* *Immuno AG v. Moor-Jankowski*, 74 N.Y.2d 548, 549 N.E.2d 129, 134, 549 N.Y.S.2d 938 (1989), *reaffirmed after remand by* 77 N.Y.2d 235, 567 N.E.2d 1270, 566 N.Y.S.2d 906 (1991). And beyond that it's simply true that AudioEye products have led to quite a few people being sued. SOMF ¶ 69.

[7] By way of example, an actionable statement of opinion would be "using AudioEye will get you sued. Trust me, ***I have seen the lawsuits and they are out there***," since it implies the speaker is in possession of undisclosed facts that justify the opinion. Such statements are actionable because they imply knowingly false statements of fact that support the opinion. An opinion based on a disclosed fact, even an incorrect one, is still a protected opinion.

The last paragraph, paragraph 60, states that Roselli embedded in the post the same "doctored" video he posted to Twitter in May of 2022 attempting to demonstrate alleged failures of AudioEye's product (see FAC at ¶¶ 43-49, 60).

First, AudioEye does not give an account of how the videos are "doctored," and they are not. SOMF ¶¶ 46-49. Next, the Twitter thread consists of eight tweets, with each tweet containing a short video demonstration of what Roselli believe was a failure by AudioEye software (see FAC at ¶ 43). The complaint alleges that Roselli did not record these videos working off of a live webpage (see FAC at ¶ 46) and limited his critique solely to AudioEye's own "Accessibility Statement" section on a client's webpage (see FAC at ¶ 45). AudioEye goes on to allege that "[h]ad Roselli provided a full video of the iFrame actually live within the webpage, the pointer would have increased dramatically in size once it was outside the iFrame" (see FACT at ¶ 47). But crucially, AudioEye **admits in the same paragraph** that the functionality Roselli described actually occurs, just only in a limited circumstance:

> "Roselli has taken ***a tiny error*** in a tool that few people would use, in the iFrame, which is a place few people would go, ***to insinuate that AudioEye's entire product, which includes far more than just this toolbar***, 'seems to do nothing visually.'"

FAC at ¶ 47 (emphasis added). This is a far cry from the claim that Roselli used "doctored" videos. "Doctored" implies that Roselli somehow dishonestly or disparagingly manipulated an actual video to create a false impression. In reality, AudioEye admits that Roselli accurately demonstrated a "tiny error."[8] FAC ¶ 48.

[8] A "doctored" video would be one where the software behaved as AudioEye intended, but Roselli somehow edited the video to create the behavior Roselli described, even though Roselli knew the software behaved differently

That is, AudioEye admits that Roselli's 8-tweet-long thread demonstrates "purported dysfunctionality" of AudioEye's overlay services, but says it does not demonstrate errors in ***other*** types of automated or manual remediation that AudioEye offers. Which is true! But Roselli never makes the broader claim — nor has AudioEye pleaded that Roselli has made that claim — that his 8-tweet-long thread was exhaustive of AudioEye's offerings or potential problems with their remediation services. Defamation law focuses on the individual statements read in broader context, not potential statements that plaintiffs wish were made but were not.

Finally, AudioEye complains that Roselli "misleads" viewers by failing to reveal the Universal Resource Locator (or "URL") of the website on which he is testing the software, preventing viewers from "checking his work" (see FAC at ¶ 49). This is a perplexing claim, because it does not go to any element of a claim for defamation or show a basis in law or fact for AudioEye's claims.[9] There is no requirement in New York law that a defamation defendant provide a means for an audience to double-check a statement of opinion. Of course, any consumer wishing to test AudioEye's products for themselves and not rely on the opinion of Roselli is free to do so; nothing about Roselli's Twitter threads or blog posts in any way prevents consumers from doing so. To allow liability here would be to say that the food critic who labels a meal as "inedible" or the movie reviewer who calls a film

[9] It is also strange, given that, in light of the rest of its complaint, surely AudioEye would be more upset if Roselli identified the customer.

"unwatchable" or a literary critic that says a novel's plot is "unintelligible" must answer in tort for their opinions.

iii. "Create reputational harm" is opinion.

On March 29, 2022, Roselli posted a three-tweet thread to JD Power, criticizing JD Power's usage of AudioEye's product (FAC ¶¶ 34-36). In one of these three tweets, Roselli stated that JD Power's form for reporting accessibility issues goes to AudioEye itself rather than "hear[ing] complaints directly" (FAC ¶ 35). Roselli then states "all the tool does is create reputational harm." AudioEye claims that this statement is "wrong" (see FAC at ¶ 36).

Presuming "the tool" refers to AudioEye's automated remediation features, whether those tools cause reputational harm to companies that use them or not is a classic statement of pure opinion, and further one supported by disclosed facts, making it per se non-actionable. *Davis v. Boeheim*, 24 N.Y.3d 262, 269 (2014). Much like AudioEye's claims that Roselli stating using AudioEye "will get you sued" is a classic statement of opinion, the statement that AudioEye's software "causes reputational harm" is one of opinion. Roselli is free to believe and opine that any company that utilizes AudioEye's business will suffer a loss of reputation among people like Roselli who agree that AudioEye's software and services are not up to par.[10] Beyond that, the opinion is true, if it can have a truth value: using AudioEye

[10] Helpfully, AudioEye has shown that, rather than simply being a personal crusade by Roselli, a number of people, including Karl Groves (who initially published the Overlay Fact Sheet) as well as its numerous signatories and some of Roselli's 7,000-plus Twitter followers all share Roselli's opinions regarding AudioEye and its software. Roselli's statement that a well-known and public company such as JD Power prominently featuring its usage of AudioEye would cause it to be held in less regard by those like him is an accurate statement of opinion. AudioEye may not like that it has

tools will cause reputational harm among blind and other users. SOMF ¶ 79. So AudioEye cannot show a basis in law or fact (let alone a "substantial" one) for maintaining that this claim is defamatory.

iv. "Deceptive marketing practices."

AudioEye has pled that Roselli has claimed AudioEye engages in deceptive marketing practices (see FAC at ¶ 73). This is not Roselli's statement, it is an accurate summary of the content of a link. SOMF ¶ 38-40. Therefore, there can be no liability because Section 230 preempts all state law. *Green v. Am. Online (AOL)*, 318 F.3d 465, 471 (3d Cir. 2003).[11]

v. The specific claims in the videos are accurate disclosed facts, or opinions based on those facts.

As stated *supra* in part *ii*, Roselli posted an 8-tweet-thread with short video clips containing statements about how AudioEye's software did not behave as marketed by AudioEye. AudioEye alleges in ¶¶ 74-83 that each of these statements is individually defamatory.

But for the reasons stated *supra*, AudioEye has misleadingly told this Court that Roselli "doctored" those videos. A closer reading of AudioEye's First Amended Complaint shows that AudioEye admits Roselli did not "doctor" the videos, but rather that AudioEye claims user error produced inappropriate software behavior. So, because Roselli provided video evidence of each claim he made, Roselli did not

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detractors and that its customers can be tainted by association with AudioEye in the view of those detractors, but no one is entitled to engage in business free of critics and detractors.

[11] But even if there could, the original statement would have to be defamatory itself. And the Overlay False Claims site itself is classic, non-actionable opinion based on disclosed facts. *Davis*, 24 N.Y.3d at 269.

make false statement of fact: rather, he demonstrated why he holds the opinions he does based on disclosed facts. *Davis*, 24 N.Y.3d at 269.

Further, if Roselli did not operate the software in the way AudioEye expects or requires, that does not render his videos "false." Assume for purposes of argument that Roselli did experience user error — as opposed to identifying a broader problem, *see* SOMF ¶ 53 — in making the statement that his cursor did not increase in size. Roselli accurately described the software behavior as he saw it. Even if the cursor would have increased in size had Roselli done something different, Roselli's statement does not become false merely because the software could have operated differently in a different context. Roselli showed a correct video of his cursor not increasing in size.

Unless AudioEye has evidence and can show that Roselli **deliberately** misused the product **in order** to create a false impression, it could never maintain an action. And indeed, to the extent that AudioEye is attempting to do that here, mere conclusory statements in a pleading do not suffice to overcome the burden that a litigant must show by clear and convincing **evidence** a substantial basis in law and fact. *See* CPLR 3211(g); 3212(h). And here, AudioEye has done little more than say the videos are false and misrepresent to this Court that Roselli has somehow fabricated the videos. Because AudioEye cannot show that these statements are anything more than pure opinion, each of these claims should be summarily dismissed.

vi. "Overlay does not offer much value, sometimes the script does not load, user has none of the claimed benefits of the overlay" and "overlay failing to run seems to be no loss to the user" are classic opinion.

In paragraphs 82 and 83 of the FAC, AudioEye claims that Roselli makes false statements about the operation of the overlay. However, in each of these statements, Roselli qualifies his statement that the overlay "seems" to behave in the ways Roselli claims and that if the overlay fails to run, it "seems" to be no loss to the user experience (see FAC at ¶¶ 82-83). The use of "seems," under the rule of *Richardson*, signals to the reader that this is a statement of opinion, and because Roselli makes this statement within the context of a broader explanation of why he holds that opinion, these are pure statements of opinion that are not actionable. Furthermore, AudioEye offers no other context or explanation for why these statements are not pure statements of opinion, merely asserts in a conclusory fashion that the statements are "false." Such bare pleading cannot overcome the strong presumption that opinion statements should be protected. AudioEye has failed to show a substantial basis in law or fact for how these statements are defamatory, and so the claims in these paragraphs should be summarily dismissed.

vii. Opining on suspected Orange County bid rigging is opinion about a non-party.

Finally, AudioEye charges that Roselli has "falsely impl[ied]" that Orange County rigged its bidding process for AudioEye. Even if this statement were not one of opinion (and it absolutely is, in addition to being hyperbolic comment on a public issue), the subject of the defamation would be Orange County and not

AudioEye. AudioEye cannot assert a claim that would only harm Orange County's reputation.

Specifically, on or about December 7, 2022, Roselli posted a tweet discussing AudioEye's contract with Orange County, California, where he said "I wonder if this 9 day fake-bid is fully locked in, or someone in CA can warn the county" (FAC ¶ 53). The language of "I wonder" indicates that the statement which follows is not one of fact but rather hyperbolic opinion, which, under the rule of *Richardson*, no reader would take as a statement of fact but rather one of opinion, based on the disclosed — and admitted — fact that the bid process was extremely fast for a major government contract (a mere 9 days). It does not imply any undisclosed facts or special knowledge. In this case, the claim that the Orange County tweet is defamatory should be summarily dismissed because AudioEye has failed to show a substantial basis in law or fact for maintaining that it is libelous.

C. Actual malice.

Any defamation claim that is (1) brought by a public figure (*NY Times Co. v Sullivan,* 376 US 254 (1964)); (2) that involves the qualified common interest privilege (*Liberman v. Gelstein*, 590 N.Y.S.2d 857, 862 (1992)); or (3) just that involves the Anti-SLAPP law (N.Y. Civ.R.L.§ 76-a(2)) requires a plaintiff to show "actual malice." All three actual malice triggers apply here. Actual malice means that a plaintiff must show — by clear and convincing evidence — that the "defendant[s] ***in fact*** entertained serious doubts as to the truth of [their] publication." *St. Amant*, 390 US at 731 (emphasis added). In that context, "[a] publisher's hostility or ill will is not dispositive of malice." *Matter of Trump v*

Sulzberger, 20 Misc 3d 1140[A], 1140A, 2008 NY Slip Op 51810[U], *4 (Sup Ct, NY County 2008), *quoting DeAngelis v Hill*, 180 NJ 1, 14 (N.J. 2004). Instead, "only evidence demonstrating that the publication was made with knowledge of its falsity or a reckless disregard for its truth will establish the actual malice requirement." *Id*, *quoting DeAngelis*, 180 NJ at 15.

As stated *supra*, for Roselli to have acted with actual malice, he would have had to know that the facts he repeated were false. As shown above, the vast majority of the statements AudioEye claims are defamatory are not even statements of fact, merely statements of opinion. The one claim that could be a statement of fact would be the claim regarding the ADP settlement (see SOMF ¶¶ 33-35; FAC at ¶ 59). But (1) Roselli provided his source for the claim: the allegedly-retracted *Tech Times* article (see FAC at ¶ 59); (2) he linked the settlement itself; and (3) his description is a fair summary of the *LightHouse* Settlement (SOMF ¶¶ 33-35; Roselli Ex. 1). So, since AudioEye cannot prove that Roselli harbored serious doubt as to the truth of his publications or knew they were false when they were made, AudioEye cannot show actual malice, and that is fatal to each and every one of their defamation claims.

IV.Defamation per se.

A necessary element of defamation is proof of damages. That is, a plaintiff must show the statements at issue caused harm. Here, AudioEye has attempted to show that it has suffered defamation *per se* in its trade, business, or profession (which would eliminate the need to plead and prove damages) but cannot do so because it is defamation-proof.

A. Audio Eye affirmatively pleads it is defamation-proof.[12]

A defamation action fails as a matter of law if the reputation of the plaintiff is such that it cannot be further injured. *Dykstra v. St. Martin's Press LLC*, 2020 NY Slip Op 31813[U] at *1, *20-22 (Sup Ct, NY County 2020). "The rationale behind the doctrine is that free speech interests should prevail over the interests of an individual who, due to an already soiled reputation, would not be entitled to recover anything other than nominal damages." *Id.* at *21-22 (quoting *Simmons Ford, Inc. v. Consumers Union of US*, 516 F Supp at 750-51 (SDNY 1981)). Whether a plaintiff is defamation-proof "is a question of law for the Court to decide." *Id.*

AudioEye acknowledges that Roselli is one among a loud choir of critics (SOMF ¶¶ 10-20; 78-79). AudioEye further admits that Roselli is merely one signatory among hundreds to the Overlay Fact Sheet prepared by Groves (FAC ¶ 25). And AudioEye even notes that "many others have disseminated similarly false and disparaging information about AudioEye" (see FAC at ¶ 26) — and that countless of them did so before the statements at issue here: it even says,

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[12] AudioEye's claims likely also fail because Roselli has an incremental harm defense as a matter of law.

> "The incremental harm defense is also different from the libel-proof plaintiff doctrine. A libel-proof plaintiff cannot be further harmed due to his or her already tarnished reputation with regard to a particular subject. The incremental harm defense differs in that "a plaintiff is harmed, but the question is whether the ability to recover for that harm, when it is incremental to non-actionable harm, is justified."

Dykstra v St. Martin's Press LLC, 2020 NY Slip Op 31813[U], *11 (Sup Ct, NY County 2020). Here, because the two defenses have a near-complete overlap, Roselli only address the defamation-proof doctrine in the body — but to the extent AudioEye raises some difference between that and the incremental harm doctrine, Roselli intends to raise both defenses.

"**Groves's** aggressive tactics and unwarranted confidence **have emboldened other individuals**, including Defendant Adrian Roselli." FAC ¶ 29.

It is not every day that a defamation plaintiff pleads themselves out of court by acknowledging that their critics are multitudinous, loud, and pre-existing. And yet that is exactly what has happened here. AudioEye does not even try to show how Roselli is unique in his criticism or the source of much of the criticism (indeed, AudioEye admits that Roselli is no different than any of the other critics), and causation is therefore impossible. That being the case, AudioEye cannot hope to overcome an affirmative defense of being libel-proof or that Roselli's publications only cause so-called "incremental" harm.

B. AudioEye's damages theory is illusory.

AudioEye makes the bare assertion that it has suffered damages. But this is not enough; AudioEye must provide clear and convincing evidence that it has been damaged in its reputation. AudioEye has not alleged, much less attempted to prove, that anyone viewing Roselli's posts or tweets has taken Roselli's criticisms to heart and changed their mind about purchasing or using AudioEye's products. AudioEye cannot point to a single lost sale, dissatisfied customer, or customer complaint that has its genesis in Roselli's statements (let alone attempt to disentangle causation).

V. The Court Should Award Costs and Attorneys' Fees as Required by the Anti-SLAPP Law.

If the Court grants the motion to dismiss relying on the new Anti-SLAPP law, it should award Roselli his attorney's fees. The Anti-SLAPP law specifically provides:

"costs and attorney's fees ***shall be recovered*** upon a demonstration,

> including an adjudication pursuant to [CPLR 3211(g) or 3212(h)], that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law."

N.Y. Civ.R.L. § 70-a (emphasis added). That is, "the Anti-SLAPP law mandates that a defendant be awarded costs and fees if successful." *VDare*, 2022 N.Y. Misc. LEXIS 6432, at *11-12; *see also, Gottwald v. Sebert,* __ N.Y. __, 2023 NY Slip Op 03183, ¶ 4 (2023) (under the 2020 amendments, the "award of costs and attorney's fees to defendants was made mandatory rather than a matter of discretion").

It has not been an easy road for Roselli to hire counsel and respond to these baseless claims; the only thing that will adequately compensate him and deter AudioEye from bringing SLAPP suits like this in the future is for the Court to award costs and attorneys' fees as required by the statute.

CONCLUSION

For all the reasons above, Roselli respectfully requests that the Court grant the motion in all respects.

Dated: July 5, 2023

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WORD COUNT CERTIFICATION

As required by the Uniform Rules for the Supreme Court and the County Court § 202.8-b, I certify that this memorandum complies with 7,000 word limit for a primary memorandum of law. Using the word count feature in Microsoft Word, with permitted exclusions, I have determined this memorandum contains 6,983 words.

Dated: July 5, 2023

/s/
J. Remy Green