To be argued by: Michael J. Grygiel
Time requested: 15 minutes

New York Supreme Court

Appellate Division — Fourth Department

Appellate Division Docket
Nos. 21-00779 and 21-01650

MASSA CONSTRUCTION, INC.,

Plaintiff-Appellant,

– against –

JAMES MEANEY, a/k/a THE GENEVA BELIEVER

Defendant-Respondent.

BRIEF FOR DEFENDANT-RESPONDENT JAMES MEANEY

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Q: Was it procedurally proper for Supreme Court, Ontario County (Dennis, J.), to grant Defendant-Respondent's anti-SLAPP motion for summary judgment when issue was joined prior to granting of the motion and nearly six months elapsed between Defendant-Respondent filing his answer and the motion being granted?

A: Yes.

2. Q: After finding that New York's 2020 anti-SLAPP amendments apply to this action and that even the previous version of the anti-SLAPP statute would apply, did Supreme Court, Ontario County, correctly grant Defendant-Respondent's motion for summary judgment dismissing Plaintiff-Appellant's cause of action for defamation by implication because Plaintiff-Appellant failed to demonstrate that its claim has a substantial basis in fact and law?

A: Yes.

3. Q: Did Supreme Court, Ontario County abuse its discretion in awarding Defendant-Respondent attorneys' fees pursuant to *Civil Rights Law* Section 70-a?

A: No.

PRELIMINARY STATEMENT

Citizen journalism is often thankless and rarely lucrative. New York's anti-SLAPP statute is designed to shield citizen journalists — among others who speak out on issues of public importance — from all too common attemptS by the powerful to place themselves beyond criticism. The suit underlying this appeal is a textbook anti-SLAPP suit: scrappy, independent, investigative journalist writes about politically-connected, well-financed local contractor; contractor dislikes what journalist uncovers; contractor sues to silence and punish journalist (and to deter others like him). Although this suit never should have entered the courthouse doors in the first place, once it did, New York's law functioned exactly as intended: the lower court engaged in a straightforward application of the anti-SLAPP statute to dispense of a meritless lawsuit at an early stage of litigation, without need of discovery.

In early 2020, Plaintiff-Appellant Massa Construction, Inc. ("Appellant" or "Massa"), a well-connected local contractor in Geneva, New York, commenced the underlying action in Supreme Court, Ontario County, against Defendant-Respondent James "Jim" Meaney, a/k/a *The Geneva Believer* ("Respondent," "Meaney," or "*The Geneva Believer*"). Massa's suit alleges Meaney defamed Massa through a series of articles which examined — and at times criticized — the City of Geneva's public works bidding and record keeping

procedures generally, and the relationship between Massa and the City specifically. Massa sought an injunction to silence Meaney, as well as damages and attorneys' fees.

After denying Massa's motion for a temporary restraining order, the Supreme Court granted in full *The Geneva Believer*'s motion for summary judgment pursuant to New York's anti-SLAPP statute. (R. 4–10)[1] As part of its decision, the lower court awarded mandatory attorneys' fees to *The Geneva Believer*'s counsel, which amounted to $46,000. (R. 19–20) In this consolidated appeal, Massa appeals from the order dismissing its complaint and the attorneys' fees award. (R. 1, 16)

In this Court, Massa has abandoned the bulk of its case. Massa does not attempt to revive its libel *per se* claim. Instead, it now relies solely on the disfavored theory of defamation by implication. Left chasing a shadow of its original suit, Massa spends the bulk of its brief hand-waving about form and procedure and second-guessing the Supreme Court's mandatory award of attorneys' fees.

None of Massa's arguments hold water. This suit falls squarely within the spirit and substance of New York's anti-SLAPP statute. The lower court correctly found as such.

This Court should affirm Supreme Court's decision granting summary judgment to Meaney because Massa has failed to demonstrate that its defamation by

[1] Citations to the two-volume Record on Appeal are denoted by page as "(R. _)."

implication cause of action has *any* basis — let alone a substantial basis — in fact and law as required under CPLR 3212(h). Moreover, Massa has not shown that it was entitled to discovery — a burden anti-SLAPP laws are specifically designed to eliminate in cases like this one — or that Meaney's motion was otherwise procedurally deficient. Additionally, this Court should affirm the lower court's fee award because such an award is mandatory under *Civil Rights Law* Section 70-a, and because the lower court did not abuse its discretion in deciding the fee award amount.

COUNTER-STATEMENT OF FACTS

In 2016, Defendant-Respondent James "Jim" Meaney founded *The Geneva Believer*, an independent citizen watchdog news outlet that covers public affairs in and around Meaney's hometown of Geneva, New York. (*See* R. 160, 161)

Massa Construction is a construction company in Geneva which has won numerous contracts with the City of Geneva over the last several years. (*See* R. 4, 193) In 2017, Meaney began reporting on Massa's work for and relationship with the City of Geneva. (*See* R. 27)

A. Meaney's Reporting Process.

By the time *The Geneva Believer* published the first article at issue in this appeal, Meaney had operated *The Geneva Believer* as an independent local journalist for over a year. (R. 26) Believing that "misinformation is worse than no information," Meaney endeavored to provide accurate reporting and forge a

reputation in his community as a credible source of information on local affairs. (R. 27) His fact-gathering methods were thorough and consistent with professional journalism practices. For example, Meaney submitted FOIL requests for City records and reviewed documents disclosed in response to those FOIL requests. He attended City Council meetings, and he collected and analyzed publicly-available information such as the minutes of public meetings and visual aids used at such meetings. Meaney also curated coverage by other news outlets in the area such as *The Finger Lakes Times*. (*See, e.g.*, R. 27, R. 47) Meaney frequently provided his readers the opportunity to review firsthand the facts with which he was working — for example, by publishing excerpts of documents he received in response to FOIL requests or by directing readers to government websites detailing the matters on which he reported. (*See* R. 28) In short, Meaney's reporting provided carefully researched journalism to Geneva residents on matters of significant local concern.

B. *The Geneva Believer*'s Reporting on Massa.

According to *The Geneva Believer's* reporting (and uncontested by Massa), between August 2008 and June 2018, Massa won nine contracts from the City of Geneva, totaling over $4 million in compensation. (*See* R. 87) Given Meaney's focus on issues of local importance in Geneva, the significant public spending Massa

received, and the number of total contracts awarded to Massa, it was inevitable that Meaney's reporting would cross paths with Massa and its relationship with the City.

Meaney's reporting ultimately covered a series of topics involving Massa and the City of Geneva. Two main threads run through the seven articles at issue in this appeal: (1) Meaney's reporting on the City's lack of transparency and faulty record keeping practices; and (2) his reporting on Massa's relationships with City elected officials. The articles speak for themselves, but a summary follows.

1. The City of Geneva's Lack of Transparency and Slipshod Recordkeeping Practices.

In several of the articles at issue, *The Geneva Believer* reported on various concerns regarding the City's transparency and record keeping practices. For example, an April 2018 article covering the City's search for a new City Manager criticized the City's process for selecting a candidate for that position, including the City's secrecy about the selection committee's members and how they were chosen, as well as the City's efforts (or lack thereof, in Meaney's view) to engage with the local community as part of the search. (R. 380–87) Meaney pointed out the absence of younger local business owners, community activists, Spanish-speaking members of the community, and other groups he believed were not adequately represented on the 18-member selection committee. (R. 385) Meaney also reported on the backgrounds of several members of the selection committee, including Nick Massa, president of Massa Construction. (R. 382–84, 386)

Another article detailed — and criticized — the process by which the City selected recipients of Downtown Revitalization Initiative ("DRI") grant funding. (R. 42–52) Meaney characterized one of the winning proposals — a proposal Massa submitted — as a "surprise project," reporting that there had "never been a mention" of the Massa proposal between an October 2016 workshop about the DRI grants and the January 2017 meeting where the City announced proposals selected for likely funding. (*See* R. 43) In addition to calling out what Meaney viewed as a lack of transparency around the Massa DRI project and criticizing the proposal itself, Meaney criticized the City for failing to select DRI proposals that would, in his view, "improve the quality of life for [Geneva] residents of all economic and social backgrounds." (R. 49) For example, Meaney took issue with the City's decision to allocate DRI funds to a new marina rather than a public beach, and to a "Welcome to Geneva" sign instead of a local park in need of renovations. (*Id*.)

In addition to reporting on what Meaney perceived as inadequate government transparency, *The Geneva Believer* also reported on issues surrounding the City's record keeping practices. Certain of the articles at issue in this appeal address the City's record keeping concerning several of the City's contracts with Massa. In one, *The Geneva Believer* reported that the City was only able to produce a record of all bids received for *two* of the nine projects Massa completed for the City over ten years. (R. 85–89) In another article, Meaney expressed skepticism regarding the

City's purported inability to find bid records for one project in particular, the Finger Lakes Welcome Center. (R. 77–84) Meaney reported that the City Comptroller provided certain bid information regarding this project to the *Finger Lakes Times* just months prior to Meaney's unsuccessful FOIL request for the same information. (R. 80)

Several of Meaney's articles in this category close with a plea for his readers to contact City Council or other government entities to advocate for enhanced government transparency. (*See, e.g.*, R. 51–52, 99, 387)

2. Massa's Relationship with the City.

Meaney's reporting also covered — and raised questions about — personal and business ties between Massa and several city officials — a network Meaney referred to colloquially as a "Good Old Boys Club." (*See, e.g.*, R. 74) Massa does not claim that any of the facts Meaney reported about these connections are false. Meaney's reporting on this relationship centered on three City officials: former City Councilman Gordy Eddington, City Councilman Frank Gaglianese, and former City Manager Matt Horn.

Gordy Eddington: *The Geneva Believer* reported several connections between Massa and former City Councilman Gordon "Gordy" Eddington. For example, Meaney reported that, in 2015, Massa hosted campaign signs supporting Eddington's run for a City Councilor-at-Large position. (R. 43, 71) Eddington was

ultimately elected; while Eddington sat on the City Council, his son apparently worked for Massa — a scenario which Meaney opined raised the specter of a conflict of interest. (R. 32, 72–73) Meaney pointed out that a personal testimonial from Eddington appeared on Massa's website as recently as 2015, and that, "for years," Eddington, former City Manager Matt Horn, and Nick Massa had a standing weekly breakfast at Friendly's on Friday mornings. (R. 71) Meaney also reported on the relationship between Eddington's company, Eddington Environmental, and the City of Geneva, as well as business dealings between Eddington and the City. (R. 53–57, 71) Meaney ultimately opined that the various connections among Eddington, Massa, and the City "gives the appearance of a functioning 'old boys club.'" (R. 75) Meaney stated his view that, given Eddington's ties to Massa, Eddington should not participate in a Council vote concerning the fate of Massa's then-pending, over-budget renovation of City Hall. (R. 71, 75)

Frank Gaglianese: *The Geneva Believer* reported that City Councilor Frank Gaglianese, elected to City Council in November 2019, was apparently employed by Massa beginning in March 2018. (R. 38–39) Against this backdrop, Meaney reported on Gaglianese's first City Council meeting as a Councilor, in which Gaglianese asked why part of Massa's over-budget City Hall renovation project changed had been cancelled—a question to which Meaney opined it would be "reasonable to assume" Gaglianese already knew the answer. (R. 156)

Matt Horn: *The Geneva Believer* also reported on connections between Massa and former City Manager Matthew "Matt" Horn. Meaney highlighted that Horn, like Eddington, had provided a testimonial posted on Massa's website. (R. 71) Meaney also reported that Horn was part of the Friday breakfasts at Friendly's with Nick Massa and Eddington, and that Horn worked alongside Nick Massa on the City Manager Search Committee beginning in April 2018. (R. 71, 195)

C. Massa's SLAPP Lawsuit Against *The Geneva Believer*.

At no point did Massa contact Meaney to request that Meaney correct any factual mistake or mischaracterization in Meaney's coverage of Massa. (*See* R. 27, 186) However, on January 23, 2020, Massa sent *The Geneva Believer* a cease and desist letter for allegedly publishing "false claims of collusion and unfair dealing" and "clearly intend[ing] to denigrate Massa's Italian-American heritage." (*See* R. 185–86) The letter demanded that *The Geneva Believer* remove its articles regarding Massa within 24 hours or face legal action. In response to this letter, Meaney posted the letter on *The Geneva Believer* and wrote, in part, "Geneva Believer has NEVER published *any* false claims or libelous attacks against Massa Construction." (R. 186 (emphasis in original)) Meaney included a link to his past reporting on Massa, refusing to bow to Massa's "attempt to intimidate Geneva Believer into removing articles that are critical of Massa's relationship with the City of Geneva." (*Id.*)

On February 5, 2020, Massa filed a verified complaint against Meaney asserting claims of defamation by implication and libel *per se* and requesting injunctive relief, damages, and attorneys' fees. (R. 177–310) Massa filed an Amended Complaint with the same causes of action on February 26, 2020, then sought emergency injunctive relief, asking Supreme Court to force *The Geneva Believer* to remove its articles from its website and restrain *The Geneva Believer* from publishing additional posts about Massa. (*See* R. 4, 311–29) On June 11, 2020, Supreme Court issued a decision and order (dated May 13, 2020) denying Massa's request for a temporary restraining order. (R. 4)

On August 7, 2020, Meaney moved for summary judgment pursuant to CPLR 3212(h), seeking to dismiss Massa's complaint pursuant to *Civil Rights Law* Section 70-a. (*See* R. 23) Meaney filed his Verified Answer and Counterclaim on November 13, 2020. (*See* R. 368)

D. Supreme Court's Order Granting Meaney's Anti-SLAPP Motion for Summary Judgment and Order Awarding Attorneys' Fees.

On May 10, 2021, Supreme Court, Ontario County (Dennis, J.), granted Meaney's motion for summary judgment and awarded costs and attorneys' fees to Meaney. (*See* R. 7)

Supreme Court found that New York's anti-SLAPP statute — both as amended effective November 10, 2020, and in its previous iteration — applied to Massa's suit, and that Massa therefore bore the heightened anti-SLAPP summary

judgment burden. (R. 5) The court observed that, "[w]ith respect to the articles referred to in the Amended Complaint, Meaney clearly sets out the facts via reference to public documents, City Council Meeting minutes, video of Council meetings, statements documented and attributable to the speakers, reputable traditional news sources, responses to FOIL requests, verifiable observations and information generally available in the community." (R. 6) As a result of this evidence, the court held that "Massa's allegations are conclusory at best and are insufficient to establish [Meaney's] statements are false. Therefore, Massa cannot sustain its burden of proof." (R. 6)

Supreme Court then shifted its focus to Massa's defamation by implication claim, finding that Massa failed to make the required "rigorous showing" to sustain a claim under this theory. (*Id*.) The court found that Meaney's articles "do not naturally lead a reader" to the conclusion, alleged mantra-like by Massa, that Massa was awarded City contracts through collusion, bribery, undue influence, and favoritism. (*Id*.) The Court further ruled that "the questions Meaney raises concerning the relationship between City Council and Massa are matters of opinion," which are nonactionable under New York law. (R. 7) Likewise, the court determined that the "augmented photographs" — or memes — Massa alleged were defamatory were "clearly hyperbole and opinion and therefore nonactionable." (*Id*.)

Because Supreme Court found that Massa's claim failed at the falsity threshold, it did not reach the issue of actual malice. (*Id*.)

On November 1, 2020, Supreme Court entered an order awarding $24,493 to the Cornell Law School First Amendment Clinic and $21,760 to co-counsel Michael Grygiel of Greenberg Traurig, LLP. (R. 18–21)

On May 24, 2021, Massa appealed from both the order granting Meaney's motion for summary judgment and the order awarding Meaney's attorneys' fees. (*See* R. 1, 16)

ARGUMENT

POINT I

THE TRIAL COURT'S ORDER GRANTING SUMMARY JUDGMENT PURSUANT TO CPLR 3212(h) WAS PROCEDURALLY CORRECT

Massa's claims that Meaney's CPLR 3212(h) motion for summary judgment ("Motion") was premature and procedurally defective ask this Court to exalt form over substance in the extreme. The grab bag of procedural arguments Massa articulates in its appeal brief ("Pl. Br.") turn up nothing that can revive its case. First, that Meaney filed his answer to Massa's complaint after filing the Motion (rather than before) is of no moment where the issue was joined nearly *six months before* the trial court decided the Motion. (Pl. Br. 17) Second, Massa has not satisfied the high bar necessary to show that he is entitled to discovery in this SLAPP suit. The information Massa seeks via discovery is evidence about Massa's *own*

conduct — evidence Massa made no attempt to introduce when it had the opportunity in the trial court (perhaps because Massa does not claim any of the facts Meaney reported are false). Massa's claim that it was entitled to discovery is nothing more than a plea to embark on a fishing expedition — something New York's anti-SLAPP statute is specifically designed to eliminate. Finally, Massa's argument that it need not satisfy the "clear and convincing" actual malice standard set forth in *Civil Rights Law* Section 76-a(2) is mistaken. (Pl. Br. 21–22)

A. Meaney's Summary Judgment Motion Was Properly Granted Because Issue Was Joined Nearly Six Months Prior to Supreme Court's Dismissal of Massa's Defamation Claims.

Massa argues that Meaney's CPLR 3212(h) summary judgment motion was procedurally defective and premature because it was filed prior to issue being joined — that is, before Meaney filed his answer to Massa's complaint. (Pl. Br. 17) Massa cites no case law to support this argument; to the contrary, binding precedent shows that Massa's interpretation of CPLR 3212 is overly formalistic. A summary judgment motion filed prior to issue joinder is not premature where joinder occurs prior to the motion being granted and the parties had ample opportunity to make all relevant arguments to the court ahead of a decision on the motion. *See Duell v. Hancock*, 83 A.D.2d 762, 762–63 (4th Dep't 1981) ("The fact that plaintiff moved for partial summary judgment before issue had been joined does not require reversal; defendants submitted their answer prior to the granting of the motion which, along

with their opposing affidavits and oral argument on the motion, allowed all triable issues of fact to be raised.").

The facts of this case diverge significantly from cases where New York courts have found summary judgment motions premature. *See, e.g., Rine v. Higgins*, 244 A.D.2d 963, 964 (4th Dep't 1997) ("essentially a summary judgment motion" where answer was filed one day prior to motion being granted and record showed trial court did not consider answer in its decision); *Pitts v. City of Buffalo*, 298 A.D.2d 1003, 1004 (4th Dep't 2002) (holding trial court properly denied plaintiff's request for "accelerated judgment" where defendants had yet to file answer ahead of trial court's decision on request for accelerated judgment).

Here, nearly six months elapsed between when Meaney filed his answer (November 13, 2020) and when Supreme Court granted Meaney's anti-SLAPP Motion (May 10, 2021). Consistent with the principles set forth in *Duell*, 83 A.D.2d at 762–63, the trial court had ample time to consider Meaney's answer — and Massa had ample time to submit relevant evidence and raise any additional arguments arising from Meaney's answer in its reply brief and at oral argument — before the

trial court decided the summary judgment motion. (*See* R. 4) Therefore, the trial court properly granted Meaney's motion.[2]

B. Massa Was Not Entitled to Conduct Discovery in This SLAPP Suit Where It Failed to Present Any Evidence Contradicting Meaney's Affidavit.

Massa claims that it was improperly denied the opportunity to conduct discovery "to evaluate whether [Meaney] omitted key facts" about Massa from his reporting. (Pl. Br. 18–21) Yet, curiously, Massa did not introduce any such "key facts" about itself into the record at the summary judgment phase when given the opportunity. Nor did Massa introduce any evidence contradicting Meaney's detailed

[2] Massa makes much of the difference between CPLR 3212(h)'s "substantial basis in fact and law" standard and CPLR 3211(g)(1)'s "substantial basis in law" standard. (Pl. Br. 17–18) Beyond the fact that the trial court correctly considered Meaney's CPLR 3212 motion (and therefore was correct in applying the "substantial basis in fact and law" standard), Massa's attempt to distinguish between the two standards is a throwaway. Regardless of whether this were a 3211 or a 3212 motion, Massa had the opportunity to submit, and the court would have been obligated to consider, opposing affidavits stating the facts upon which its action was based. *See* CPLR 3211(g)(2); CPLR 3212(f). Despite having had the opportunity to introduce facts in the lower court to support its claims, Massa failed to do so. Instead, Massa resorts to rigid formalism in reading New York's statutes and rules of civil procedure, without citations to supporting case law, to claim the "trial court improperly forced Plaintiff to demonstrate that its 'cause of action has a substantial basis in *fact and law*'[.]" (Pl. Br. 18 (emphasis in original)) But Massa ignores that the substance of New York's anti-SLAPP law *does* allow consideration of facts, even at the motion to dismiss phase. *See* CPLR 3211(g)(2) (in reviewing an anti-SLAPP motion to dismiss, "the court shall consider the pleadings, and supporting and opposing affidavits *stating the facts* upon which the action or defense is based") (emphasis supplied). Massa's distinction between CPLR 3211 and CPLR 3212 is therefore unavailing.

affidavit in support of his motion for summary judgment. Massa's argument that it was entitled to discovery amounts to no more than a request to engage in a fishing expedition — precisely the kind of protracted litigation that anti-SLAPP laws, and the corresponding prescription that libel suits should be resolved at the pleading stage whenever possible, are intended to curtail. *See, e.g., Immuno AG. v. Moor-Jankowski*, 77 N.Y.2d 235, 256 (1991) ("reaffirm[ing] [the New York Court of Appeals'] regard for the particular value of summary judgment, where appropriate, in libel cases," to guard against the "chilling effect of protracted litigation"); *Hariri v. Amper*, 51 A.D.3d 146, 148–49 (1st Dep't 2008) ("[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." (citation omitted)). Massa's request to conduct discovery boils down to a mere hope that Massa might be able to poke holes in Meaney's journalistic process. In the face of the high bar for conducting discovery in the anti-SLAPP context, Massa's arguments fall flat.

In order to avoid summary judgment pursuant to an anti-SLAPP motion, the non-moving party must show that "facts essential to justify [its] opposition" may exist but could not, when the motion was brought, be stated. *See* CPLR 3212(f); *Targeted Lease Cap., LLC v. Wheel Equip. Leasing, LLC*, 187 A.D.3d 1628, 1629 (4th Dep't 2020) (holding non-moving party was not entitled to additional discovery

where it "did not make the requisite evidentiary showing that facts essential to justify opposition to the motion [for summary judgment] may exist but could not then be stated"); *Mahoney v. George*, 28 A.D.3d 1074, 1075 (4th Dep't 2006) (affirming summary judgment where "nothing in the record indicate[d] that further discovery would lead to evidence" contradicting facts established by moving party). Especially in the SLAPP context, "a claimed need for discovery, without some evidentiary basis that discovery may lead to relevant evidence, is insufficient to avoid an award of summary judgment." *Hariri*, 51 A.D.3d at 152.

Massa claims "[i]t is well settled that a plaintiff is entitled the opportunity to develop the facts necessary to demonstrate that a defendant defamed a plaintiff by implication '*by omitting* or strategically juxtaposing key facts.'" (Pl. Br. 18, citing *Partridge v. State of New York*, 173 A.D.3d 86, 90–91 (3d Dep't 2019); *Bisimwa v. St. John Fisher Coll.*, 194 A.D.3d 1467, 1473 (4th Dep't 2021)). But far from being "well settled," neither of the cases which Massa cites for this proposition deal with the question of when discovery is permitted in an anti-SLAPP motion for summary judgment. In fact, *Bisimwa* affirmed (in relevant part) a pre-answer, pre-discovery motion to dismiss a defamation claim. *Bisimwa*, 194 A.D.3d at 1468.

The lone additional case Massa cites for its entitlement-to-discovery argument, *Pringle v. AC Bodyworks & Sons, LLC*, 145 A.D.3d 1410 (3d Dep't 2016), is similarly inapposite. (*See* Pl. Br. 19) *Pringle* was not an anti-SLAPP suit,

nor did it involve a defamation claim. Rather, *Pringle* concerned the applicability of New York's Workers' Compensation Law to a wrongful death claim. *Pringle*, 145 A.D.3d at 1411. There, the court determined that the defendant's motion for summary judgment should have been denied as premature because the parties' submissions provided directly conflicting information about two discrete, central questions concerning decedent's employer and the legal relationship between two business entities — evidence that was "within the exclusive knowledge of the [defendant.]." *Id*. at 1412 (citation omitted). Here, Massa can point to no such conflicting evidence, as Massa did not introduce *any* evidence of its own contradicting Meaney's affidavit. And the information Massa seeks — essentially, information about Massa which it believes would have obligated *The Geneva Believer* to cover it more favorably — is information to which Massa already has access, to the extent any such evidence exists.

At bottom, Massa's discovery requests essentially seek all information to which Meaney could have had access in the course of his reporting on Massa's relationship with the City of Geneva. (Pl. Br. 19–21) But the affidavit Meaney filed in support of his motion for summary judgment describes this newsgathering process in painstaking detail, and his articles extensively cite directly to his sources of information — primarily publicly available material or documents obtained through FOIL requests. (*See* R. 27–41) Ignoring this evidence while providing none of its

own, Massa merely seeks to further drag out this litigation to punish Meaney for critical news coverage. Supreme Court correctly decided Meaney's motion for summary judgment without allowing Massa to conduct burdensome discovery.

C. Massa Cannot Establish Actual Malice by Clear and Convincing Evidence With Respect to Any Factual Statements Complained Of.

Massa argues that the trial court erred in holding it to the "clear and convincing" evidentiary standard. (Pl. Br. 21–22) Massa's argument is incorrect because it misconstrues the applicable statute, *Civil Rights Law* Section 76-a(2), and ignores the constitutional standard of fault that controls here.

Civil Rights Law Section 76-a(2) provides that, in a SLAPP suit, a plaintiff may only recover damages if the plaintiff can prove actual malice by "clear and convincing evidence."[3] Massa confuses this standard by arguing that it "is reserved only for actions under the Civil Rights Law that seek monetary damages for actual malice." (Pl. Br. 22) Massa continues that "[i]t is undisputed Plaintiff made no such claim here that Defendant acted with malice[,] so the 'clear and convincing' standard should not have been applied." (*Id*.)

[3] "In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue." N.Y. *Civ. Rights Law* § 76-a(2) (McKinney's 2019 + 2022 Supp.).

This argument misconstrues the text of the statute. *Civil Rights Law* Section 76-a(2) does not state — either explicitly or implicitly — that, so long as a plaintiff does not allege actual malice, they need not satisfy the "clear and convincing" standard. Rather, the law states that, in order to recover damages in a SLAPP suit, a plaintiff must prove, by clear and convincing evidence, that the defendant acted with actual malice. *See also Mable Assets v. Rachmanov*, 192 A.D.3d 998, 1001 (2d Dep't 2021). Failing to prove actual malice by clear and convincing evidence in a SLAPP suit means that a plaintiff cannot establish liability. Failing to allege or prove actual malice does not somehow absolve a plaintiff from this burden, as Massa appears to claim.

The trial court held, and Massa does not dispute on appeal, that this is a SLAPP suit. (R. 5) Therefore, in order to recover damages, Massa must prove actual malice by clear and convincing evidence. In fact, by going on to claim that it is "undisputed" that Massa "made no such claim here that Defendant acted with malice" (Pl. Br. 22), Massa undermines its entire case, as alleging actual malice in a SLAPP suit such as this one is a necessary condition to any recovery.[4]

[4] The lower court correctly found that Meaney's statements of fact were substantially true and therefore did not reach the question of actual malice. (R. 7) This Court similarly need not reach the question of actual malice. Even if it does reach this question, however, Massa appears to have conceded this element of its claim, therefore barring recovery.

In arguing that it need not establish actual malice, Massa also seeks to dispense with the First Amendment requirement that public figures seeking to recover for defamation prove actual malice by clear and convincing evidence. *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52, 56 (1988) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986). Within the context of its work for and relationships with the City of Geneva, Massa is clearly a limited public figure. *See Brimelow v. New York Times Co.*, No. 21-66-cv, 2021 U.S. App. LEXIS 31672 at *4 (2d Cir. Oct. 21, 2021) (holding that author was limited purpose public figure where he was "widely known" for running website). By Massa's own description, it is a "well-known" construction company which often does business with public entities. (Pl. Br. 4) Further, through its participation in Geneva's local politics over the years, Massa has injected itself into the public sphere. (R. 42–159) Thus, the First Amendment imposes the same actual malice requirement as the anti-SLAPP statute.

Massa's shirking of its burden of proof does not change the record, which is bereft of any evidence that even remotely suggests the articles at issue were published with actual malice. The lower court emphasized the comprehensive research and sourcing of the news reporting challenged by Massa: "Meaney clearly sets out the facts via reference to public documents, City Council Meeting minutes, video of Council meetings, statements documented and attributable to the speakers,

reputable traditional news sources, responses to FOIL requests, verifiable observations and information generally available in the community." (R. 6) Consequently, Meaney had no subjective awareness of probable falsity, and acted under circumstances which gave no indication that the information he relied on was false. *Bressler v. Fortune Magazine*, 971 F.2d 1226, 1233 (6th Cir. 1992), *cert. denied*, 507 U.S. 973 (1993) ("[T]he comparatively extensive research effort by [defendants] here, which gleaned consistent statements from multiple reliable sources, compels us to conclude that actual malice cannot be found on this record."); *see Trails West, Inc. v. Wolff*, 32 N.Y.2d 207, 219 (1973) ("[R]eliance upon reputable sources of information, whether official or simply a reliable newspaper, if unrefuted, is sufficient to disprove a claim of recklessness."). Meaney's reliance on official documents obtained from the City of Geneva through FOIL requests when there was no reason to doubt the veracity of the information they provided relative to matters of public interest further refutes Massa's conclusory claims of malice and recklessness. *Hatfill v. New York Times Co.,* 532 F.3d 312, 325 (4th Cir.) (no actual malice where author of newspaper article "reviewed numerous documents" including government reports), *cert. denied*, 555 U.S. 1085 (2008). Massa's defamation claim therefore cannot be sustained under CPLR 3212(h) and *Civil Rights Law* Section 76-a(2).

Despite facing both the constitutional requirement and New York statutory requirement to allege and prove actual malice by clear and convincing evidence, Massa parroted the standard's buzzwords but made little effort to prove it below. (*See* R. 342–362) On appeal, Massa appears to forfeit the point altogether, claiming to have never alleged it. (Pl. Br. 22) This is fatal to Massa's case.

POINT II

THE TRIAL COURT CORRECTLY DISMISSED MASSA'S DEFAMATION BY IMPLICATION CLAIM AS LACKING A SUBSTANTIAL BASIS IN LAW OR FACT

Massa's defamation claim — which now relies solely on the disfavored theory of defamation by implication — cannot survive an anti-SLAPP motion for summary judgment. The trial court correctly found that Massa's defamation by implication theory, which New York courts have strictly cabined because of the threat it poses to First Amendment freedoms, was not viable because it lacked a substantial basis in law or fact. (*See* R. 5–7)

As the trial court correctly ruled, Massa has not established — and cannot establish — that *The Geneva Believer's* articles created any defamatory implications, nor that Meaney ever endorsed or intended any such implications. In fact, Meaney expressly *disclaimed* that he had described any criminal behavior. (R. 265) Further, many of the words, statements, and images that Massa claims support its defamation by implication claim are nonactionable expressions of

opinion, hypotheses, and rhetorical hyperbole. As the trial court correctly stated, "[i]t is clear from the articles that Meaney is submitting facts and then asking the readers to think and draw their own conclusions . . . Meaney's questions and suggestions reflect his own opinion while encouraging readers to draw their own conclusions." (R. 7) Far from supporting an implication claim, this is a proper function of investigative journalism. *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1096 (4th Cir. 1993) (journalism which "invite[s] the public to ask" questions about matters of public concern is the "paradigm of a properly functioning press"); *see also Beverly Hills Foodland, Inc. v. UFCW Local 655*, 39 F.3d 191, 195 (8th Cir. 1994) (raising question whether plaintiff engaged in discriminatory hiring practices not an actionable false statement of fact).

A. Massa Fails to Meet the Rigorous Standard for a Claim of Defamation by Implication.

Due to concerns about exposing true speech to potential liability, New York courts were long reluctant to endorse defamation by implication as a cause of action. *See, e.g.*, *Armstrong v. Simon & Schuster*, 85 N.Y.2d 373, 381 (1995) ("The concern that substantially truthful speech be adequately protected has led courts to embrace different standards for measuring the sufficiency of claims of defamation by implication." (citations omitted)); *Garcia v. Puccio*, 17 A.D.3d 199, 200–01 (1st Dep't 2005). Last year, the Fourth Department "join[ed] the other [three New York Judicial] Departments in adopting the heightened legal standard for a claim of

defamation by implication." *Bisimwa v. St. John Fisher College*, 194 A.D.3d 1467, 1472 (4th Dep't 2021) (citations omitted).

Under *Bisimwa* and its sister cases, for a defamation by implication claim to survive threshold dismissal, the plaintiff "must make a *rigorous showing* that the language of the communication as a whole can be reasonably read both [1] to impart a defamatory inference and [2] to affirmatively suggest that the author intended or endorsed that inference." *Id*. (quoting *Stepanov v. Dow Jones & Co., Inc*., 987 N.Y.S.2d 37, 44 (1st Dep't 2014) (other citations omitted) (emphasis added). Massa gives lip service to this standard, but fails to meet either prong of the *Bisimwa* test. Nor does Massa consider the "language of the communication as a whole" from the perspective of a reasonable reader.

Instead, Massa asks this Court to make a series of unwarranted leaps from the uncontested facts underlying the articles at issue to reach the inferences Massa claims they impart — leaps no reasonable reader would make. Massa "may not enlarge upon the meaning of words so as to convey a meaning that is not expressed," but this is exactly what Massa is asking this Court to do. *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 466 (S.D.N.Y. 2012) (citation omitted). These leaps rely on a litany of cherry-picked words and images from seven articles spanning nearly three years. (*See* Pl. Br. 24-29) Once these aspects of Massa's claim are filtered out, Massa's claim essentially boils down to a schoolyard squabble: Massa doesn't like what *The*

Geneva Believer reported about it and wishes Meaney had provided further context for the truthful information he reported. (*Id*.) This showing is not sufficient to survive dismissal under *Bisimwa*. Massa's claim independently fails because Massa does not — and cannot — establish that Meaney intended or endorsed any defamatory inference. And any inferences about Massa which Meaney's reporting could have imparted — intentional or not — are nonactionable opinion. For these reasons, the trial court correctly dismissed Massa's defamation by implication claim.

1. The Articles Cannot Reasonably Be Read to Impart Any Defamatory Inference.

The lower court correctly found that the challenged articles "do not naturally lead a reader to the . . . conclusion" that Massa won contracts with the City through means of collusion, bribery, undue influence, and favoritism. (R. 6) Massa does not claim that the fact of its relationship with the City itself amounts to a defamatory inference, but, rather, that Meaney "overstated" this relationship. (Pl. Br. 24–25) Massa also variously claims that Meaney's articles imply that Massa obtained contracts with the City through "collusion," "bribery," and "undue influence." (Pl. Br. 24-25) Massa attempts to make its "rigorous showing" that *The Geneva Believer's* articles impart a defamatory inference along these lines by advancing strained theories of libel by omission or by challenging the juxtaposition of concededly true facts reported in the articles, while cherry-picking isolated phrases

and images without the context *Bisimwa* requires. None of these attempts revive Massa's claim.

Omission Theory: Massa claims that several alleged omissions in Meaney's reporting suffice to show defamation by implication:

- Massa claims that, when Meaney criticized the City's selection of a Massa project for grant funding, Meaney "omitted any serious discussion of the fact that similar projects by Plaintiff had been under consideration by the City Council on at least two prior occasions." (Pl. Br. 24) This is mere fiction — the article at issue raises the previous, similar proposals not once, but *twice*, and notes that the earlier proposals "were defeated." (R. 43, 45)
- Massa argues that Meaney "ignored purported evidence that Massa was the low bidder" for its contract building the Finger Lakes Welcome Center. (Pl. Br. 25) However, Meaney nowhere suggests that Massa was *not* the lowest bidder on the Welcome Center project. (R. 77–84) In any event, Meaney's article highlighted the fact that Meaney filed a FOIL request seeking the very information Massa faults Meaney for omitting. (R. 78–80) *The Geneva Believer* reported that the City claimed it was unable to find documentation regarding the bids submitted for this particular project. (R. 79) Meaney found this set of missing records particularly troubling, as the City Comptroller had evidently provided bidder identities and bid amounts for this project to the

Finger Lake Times just months prior to Meaney's FOIL request. (R. 80) Thus, Meaney specifically sought, but was unable to obtain, the information Massa faults him for omitting.

- Similarly, Massa claims that Meaney "again all but ignored and omitted contrary evidence that Plaintiff was the low bidder on the [City Hall renovation] project." (Pl. Br. 26) But the article challenged here explicitly states that Massa "won the bid" for this project, and includes an image of a City document purporting to show the two bidders for the project and their bid amounts (with Massa's being the lower of the two bids). (R. 66, 68) Further, the article was not about how Massa obtained this project in the first place. (*See* R. 66-76) Rather, the article was concerned with the extent to which the project might exceed its budget — an amount *The Geneva Believer* reported ranged from an estimated $46,000 to $700,000. (R. 66)
- Finally, Massa makes a generalized claim that Meaney "omitted key information from the articles regarding how the City and other municipalities award public contracts." (Pl. Br. 28) This vague allegation amounts to no more than a grievance with *The Geneva Believer's* editorial discretion. "Courts must be slow to intrude" in such cases because how to express a situation "must always be left to writers and editors. It is not the business of

government." *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1306 (8th Cir. 1986).

In short, most of the alleged omissions Massa cites are actually not omissions at all, and none of them change the meaning of the articles as a whole to give rise to any defamatory inference. That Massa wishes *The Geneva Believer* had included or emphasized certain points in its reporting is irrelevant. *See Bisimwa*, 149 N.Y.S.3d at 435 ("[A]lthough plaintiff may wish that additional information from the [defendant] would have provided further context for the truthful information that was conveyed, the disclosure to [a third party] did not imply anything false about plaintiff."); *see also Biro v. Condé Nast*, 883 F. Supp. 2d 441, 466 (2012) (*citing Sprecher v. Dow Jones & Co., Inc.*, 88 A.D.2d 550, 551 (1st Dep't 1982), *aff'd*, 447 N.E.2d 75 (1983)) ("New York courts have been hesitant to find defamation by omission of facts, unless the omitted facts would materially change the meaning of the statements that are expressed."). Massa has not made the required showing that any omission gives rise to a defamatory inference.

Juxtaposition Theory: Massa also argues that Meaney's articles impart defamatory inferences through "strategically juxtaposing key facts" to convey a defamatory impression. (Pl. Br. 23–24) Massa relies on a Third Department decision, *Partridge v. State of New York*, for this theory of recovery. 100 N.Y.S.3d 730 (3d Dep't 2019). However, the facts of *Partridge* diverge starkly from the

"juxtapositions" Massa claims are defamatory. In *Partridge*, the Third Department affirmed a libel award against the state where state police, at a press conference regarding an initiative concerning online child sex abuse, juxtaposed on posterboards the mug shot of a man arrested for possession of marijuana alongside photographs of 60 individuals arrested for various crimes involving the online sexual exploitation of children. 100 N.Y.S.3d at 735–36.

The "juxtapositions" to which Massa points, on the other hand, are nothing like those in *Partridge*. In fact, they are not juxtapositions at all:

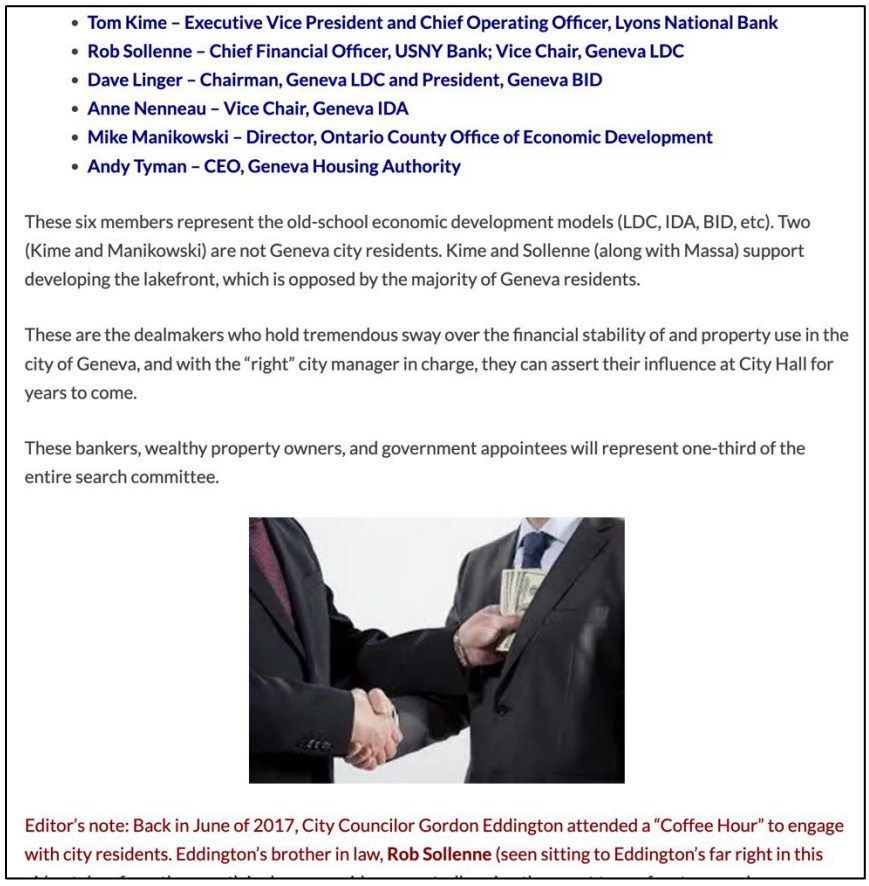
- Massa begins with a blanket claim that, "[t]he articles posted by Defendant about Plaintiff juxtaposed commentary and photographs in a manner that conveyed the false inference that Plaintiff secured contracts with the City and exerted influence over City officials through bribery and collusion." (Pl. Br. 24) Massa follows this broad assertion with several examples of uncontested facts about Massa's relationship with the City, then claims that Meaney "exploit[ed] that purported close personal relationship in the articles to falsely insinuate" that Massa was awarded public works contracts through unlawful means. (Pl. Br. 24) Massa apparently uses the term "juxtaposition" to mean merely that several undisputed facts which Massa dislikes appeared in just over a half-dozen articles published over a period of several years. Far from "strategic juxtaposition" to impart a defamatory inference, Meaney's

reporting represents classic investigative journalism: piecing together facts from different sources to provide readers with a fuller picture from which to draw their own conclusions. Massa asks this Court to make a far-fetched leap from Meaney's straightforward observations about the relationship between Massa and the City to implied allegations of bribery and collusion. (*Id*. 24–25) No reasonable reader would make this leap, nor should the Court.

- More specifically, Massa claims that Meaney "juxtaposed the fact that Plaintiff obtained numerous contracts with the City with the purported fact that Plaintiff placed campaign signs for a City Council candidate to falsely insinuate that Plaintiff obtained those contracts through collusion." (Pl. Br. 24) Again, Massa misuses the term "juxtaposition," and arrives at an inference no reasonable reader would draw from the article at issue. Massa admits this "juxtaposition" essentially amounts to Meaney (in Massa's view) "overstat[ing] the importance of a purported personal relationship between Massa and a City official." (*Id*. 24–25) As discussed above, Massa's disagreement with Meaney's editorial prerogatives has no place in a libel suit.
- Massa also appears to claim that the inclusion of the following image in an article — which discusses Nick Massa in an entirely *separate section* from the image — constitutes a juxtaposition giving rise to a defamatory inference "of collusion and bribery among those selected to serve on the [18-member

city manager selection] committee." (Pl. Br. 27) However, as evident from the text surrounding the image, the suit image has nothing to do with Massa. (*See* R. 383–84) Rather, a reasonable reader would conclude that the image is in reference to the six members of the selection committee described immediately above the image, who Meaney describes as "bankers, wealthy property owners, and government appointees" and who "represent the old-school economic development models" in Geneva.

The inclusion of the suit image in an entirely separate section of an article which elsewhere discusses Massa simply cannot give rise to any defamatory inference about Massa.



- **Tom Kime – Executive Vice President and Chief Operating Officer, Lyons National Bank**
- **Rob Sollenne – Chief Financial Officer, USNY Bank; Vice Chair, Geneva LDC**
- **Dave Linger – Chairman, Geneva LDC and President, Geneva BID**
- **Anne Nenneau – Vice Chair, Geneva IDA**
- **Mike Manikowski – Director, Ontario County Office of Economic Development**
- **Andy Tyman – CEO, Geneva Housing Authority**

These six members represent the old-school economic development models (LDC, IDA, BID, etc). Two (Kime and Manikowski) are not Geneva city residents. Kime and Sollenne (along with Massa) support developing the lakefront, which is opposed by the majority of Geneva residents.

These are the dealmakers who hold tremendous sway over the financial stability of and property use in the city of Geneva, and with the "right" city manager in charge, they can assert their influence at City Hall for years to come.

These bankers, wealthy property owners, and government appointees will represent one-third of the entire search committee.

Editor's note: Back in June of 2017, City Councilor Gordon Eddington attended a "Coffee Hour" to engage with city residents. Eddington's brother in law, **Rob Sollenne** (seen sitting to Eddington's far right in this

In sum, nothing Massa points to as an example actually amounts to a misleading juxtaposition, and none of Massa's examples come close to the facts of *Partridge*, the lone authority on which Massa relies for this theory of its case. Massa cannot make out a defamation by implication theory based on the purported juxtaposition of key facts.

Cherry-Picking and Illogical Leaps: In a final effort to salvage its defamation by implication claim, Massa resorts to cherry-picking single sentences and individual words from the challenged articles and asking the Court to make nonsensical leaps from these statements. *Bisimwa* clearly requires a plaintiff to show that "the language of the communication *as a whole*" imparts a defamatory inference to a reasonable reader. *Bisimwa*, 194 A.D.3d at 1472. Under this instruction, Massa cannot make its case. In any event, a reasonable reader would not interpret the single sentences and words with which Massa takes issue as, on their own, creating any defamatory inference.

For example, Massa urges that Meaney "falsely insinuated collusion" by reporting that the City of Geneva was unable to produce bid records for seven of the nine contracts that the City awarded Massa over a ten-year period — specifically by characterizing Massa's relationship with the City as "unseemly" and noting that Matt Horn was the City Manager for most of the period in question. (Pl. Br. at 25, citing R. 98–99) The cherry-picking of two discrete, undisputed facts from a 14-page

article flouts *Bisimwa's* command to look at the communication *as a whole*. (*See* R. 85–99) Moreover, Meaney's characterization of the Massa-Geneva relationship as "unseemly" is clearly nonactionable opinion, as discussed further below. Finally, and again, Massa asks the Court to make an implausible leap that the article at issue does not invite.[5]

For these reasons, the lower court was correct in finding that Massa failed to "make the required 'rigorous showing'" that a reasonable reader could have drawn any defamatory inference about Massa from any of *The Geneva Believer's* articles. Massa's defamation by implication claim, which requires the presumption of extensive extraneous facts nowhere stated in the text of the articles, thus cannot satisfy the first prong of the *Bisimwa* standard and was properly dismissed.

2. Massa Fails to Establish that Meaney Intended or Endorsed Any Defamatory Inference.

The second prong of the *Bisimwa* standard for defamation by implication mandates a showing that a speaker intended or endorsed the statement's defamatory inference. *Bisimwa*, 194 A.D.3d at 1472. Notably, this is "not a subjective standard . . . but an objective one that asks whether the plain language of the communication itself suggests that an inference was intended or endorsed."

[5] The remainder of the statements and images which Massa claims support its defamation by implication claim could only be reasonably read as nonactionable statements of opinion, hypothesis, or rhetorical hyperbole. These statements and images are discussed below in Point II.A.3. i.-iii.

Stepanov, 120 A.D.3d at 37. A publication which, in context, conveys substantially true information in a less complete and flattering manner than the subject would have liked does not demonstrate that the statement's author endorsed or intended a defamatory inference. *See Marom v. Pierot*, No. 18 Civ. 12094, 2020 WL 1862974, *34 (S.D.N.Y. Jan. 16, 2020) (citations omitted).

Massa devotes merely a single paragraph of its brief to this point, arguing summarily that *The Geneva Believer's* articles as a whole "suggest[ ]" that Meaney "endorsed the false inference that Plaintiff obtained it[s] City contract through bribery, collusion, and undue inference [*sic*]." (Pl. Br. 29) Massa attempts to use Meaney's statements of opinion based on uncontested reported facts as evidence of such endorsement — specifically, that the relationship between Massa and the City is "unseemly" or "unusual," and that Massa did a "staggering" amount of business with the City given its size. (*Id*.) But these isolated expressions of opinion do nothing to help Massa's case.

A full reading of the record reveals, contrary to Massa's assertions, that Meaney expressly *disclaims* that his articles describe any criminal behavior or make criminal accusations, and clarifies that he seeks only to present facts which he believes show a pattern. In reply to a comment on one of the challenged articles suggesting that Massa has described criminal behavior that "should be investigated by the State Police, if not Federal authority," Meaney wrote:

> The only "accusation" is related to Eddington's conflict of interest. If his son is not a dependent or is no longer employed by Massa, then Gordy should have nothing to worry about when he votes on the project this Wednesday.
>
> A number of facts have been presented that show a pattern, and that pattern gives the appearance of undue influence within city government by a local company. I have not "described" any criminal behavior. If this were to be investigated, I would assume the state comptroller or attorney general's office would be a more appropriate authority than the state police.

(R. 32–33, 264–65)

In his unopposed affidavit, Meaney wrote that it "seemed to [him]," based on the documentary evidence he reviewed, that "certain aspects of the City's relationship with Massa were unusual or abnormal." (R. 40) But Meaney "did not know the cause of these suspicious circumstances and was careful not to suggest one in [his] journalism." (*Id*.) Meaney's sworn statement confirms what is evident from the challenged articles themselves: Meaney did not intend or endorse any defamatory inference in any of his articles for *The Geneva Believer*.

Because Massa cannot show that Meaney intended or endorsed any purported defamatory implication in any of the challenged articles, Massa's remaining defamation claim fails the second prong of *Bisimwa*. That is, the claim fails both because (1) Massa cannot show that the challenged articles as a whole impart a reasonable defamatory inference, and (2) even if a reasonable reader could have

gleaned a defamatory inference from the challenged articles, Massa cannot show that Meaney endorsed or intended any such inference.

3. The Use of Hypotheses, Exaggerated Figurative Language, and Rhetorical Hyperbole Signals Nonactionable Opinion.

Many of the words, statements, and images Massa claims support its defamation by implication claim are nonactionable expressions of opinion, hypotheses, and political hyperbole. As the trial court correctly found, "[i]t is clear from the articles that Meaney is submitting facts and then asking the readers to think and draw their own conclusions . . . Meaney's questions and suggestions reflect his own opinion while encouraging readers to draw their own conclusions." (R. 7) Massa takes issue with several of Meaney's opinions and other nonactionable statements, but such discontent simply does not give rise to a libel claim (particularly on a defamation by implication theory). Massa relies on (1) personal viewpoints, (2) statements of hypothesis and speculation, and (3) rhetorically hyperbolic expressions to prop up its implication theory. The trial court was correct to find all of these nonactionable opinions under New York defamation law.

i. Meaney's Expressions of Opinion Are Nonactionable.

Statements of opinion are not actionable under New York defamation law. *60th W. 115th Street Corp. v. Von Gutfeld,* 80 N.Y.2d 130, *rearg. denied*, 81 N.Y.2d 759 (1992); *Brian v. Richardson*, 87 N.Y.2d 46, 51 (1995). To determine whether a statement qualifies as protected opinion, courts examine 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." *Gross v. New York Times Co.*, 82 N.Y.2d 146, 152 (1993); *Wexler v. Dorsey & Whitney LLP*, 815 F. App'x 618, 621 (2d Cir. 2020).

As the lower court correctly found, "as a practical matter, like Op Ed pieces in traditional media, the articles published in *The Geneva Believer* involving matters of public concern serve to signal to the reader that they are expressions of opinion." (R. 7) Within this context, Meaney expresses several viewpoints which do not have a precise meaning and are incapable of being proven true or false (and are therefore nonactionable). Specifically, the following statements which Massa claims give rise to a defamation by implication claim instead reflect only protected opinion:

- **Adjectives:** Massa takes issue with certain adjectives Meaney uses to characterize the uncontested facts reported in the challenged articles. For example, Meaney complains that *The Geneva Believer* "implies that the relationship between Plaintiff and the City is 'unseemly' or 'unusual' and that Plaintiff did a 'staggering' amount of business with the City given that the City consists of only 13,000 residents." (See Pl. Br. 13–14, 26, 28–29, citing

R. 98-99, 193-194, 275 (emphasis added)) Massa also takes issue with Meaney labeling the appointment of Nick Massa to a city manager search committee as a "baffling" decision, and the selection of a Massa proposal for grant funding as a "surprise." (See Pl. Br. 5, 24–25, 27 (emphasis added)) These subjective words lack a precise meaning that can be proven true or false — they are clearly the stuff of opinion. *Falk v. Anesthesia Assoc. of Jamaica*, 228 A.D.2d 326, 328 (1st Dep't 1996) (held, statements that plaintiff was a "troublemaker" and "not a team player" constituted nonactionable opinion); *Springer v. Almontaser*, 75 A.D.3d 539, 540-42 (2d Dep't 2010) (terms "stalked" and "harassed" had no precise, readily understood meaning). And nowhere does Massa claim the facts on which Meaney bases these opinions are untrue. These statements are therefore nonactionable.

- **Good Old Boys Club:** Meaney's statements that Massa is part of a proverbial "good old boys club" or "old boys network" similarly lack a precise meaning that can be proven true or false. (*See* Pl. Br. 26, 29) This opinion is based on a series of uncontested facts which Meaney sets forth in detail over the span of the challenged articles (and in even further detail in his unopposed affidavit). While viewpoints may differ as to the existence of a "good old boys club" in any given town, as well as the desirability of such a network, these are nothing more than opinions. *Levittown Norse Assoc. v. Day Realty*

Corp., 150 A.D. 2d 263, 264 (1st Dep't 1989), *app. denied*, 75 N.Y.2d 703 (1990). They surely do not give rise to a libel claim — by implication or otherwise.

- **Collusion, Bribery, and Undue Influence:** Massa's brief is rife with sweeping accusations that the challenged articles give rise to a defamatory narrative that Massa obtained contracts with the City through some combination of collusion, bribery, and undue influence. (*See* Pl. Br. 2, 5–8, 10–11, 14, 19, 21–22, 24–25, 27–29) These allegations ultimately amount to nothing. As explained above, the vast majority of these allegations require leaps that no reasonable reader would make based on the challenged articles. To the extent Massa intends to argue that Meaney implied Massa engaged in criminal activity related to collusion, bribery, or undue influence, "[i]t is well settled that, in the absence of some *clear assertion of criminality*[,] such an accusation is not defamatory." *See Suozzi v. Parente*, 202 A.D.2d 94, 100–01 (1st Dep't 1994) (holding article did not constitute libel *per se* where article "at most, suggest[ed] that plaintiff took advantage of his political connections to gain some governmental benefit," but did not expressly assert criminality on plaintiff's part) (emphasis added); *Di Bernardo v. Tonawanda Publ'g Corp.*, 117 A.D.2d 1009, 1010 (4th Dep't 1986) ("absent a clear assertion of criminality, accusations of political influence to obtain a benefit are not

defamatory"). To the extent Massa is concerned with Meaney's hypotheses about former Councilman Eddington's potential conflicts with Massa, this point is discussed and disposed of below in Point II.A.3.ii. After wading through Massa's fluff on this point, all that remains is bread-and-butter opinion: Meaney's critique of the interplay between local business and politics in a small town. What is more, Meaney supports these opinions with meticulous reporting and disclosure of the facts underlying his opinions and the questions he poses to his readers.

> Based upon the facts stated and public debate provoked by the statements, each reader may draw his own conclusion as to whether the [the author's] views should be supported or challenged. In short, the matter is subject to public debate. ***Plaintiff may not delimit that debate by seeking to punish, through libel damages, those who would contribute to the debate through the circulation of strong, even harsh, contrasting opinions.***

Rinaldi v. Holt, Rinehart & Winston, Inc., 42 N.Y.2d 369, 381 (1977) (emphasis supplied). Such commentary on issues of public concern is at the heart of First Amendment-protected activity, and it makes up the core of high-quality community investigative journalism.

ii. Meaney's Hypotheses and Speculation Based on Disclosed, Uncontested Facts Are Nonactionable "Pure Opinion."

For defamation law purposes, matters of speculation, hypothesis, and conjecture are treated like matters of opinion — that is, such statements are nonactionable as long as they are "offered after a full recitation of the facts on which

[they are] based." *See Gross v. New York Times Co*., 82 N.Y.2d 146, 154 (1993) (citation omitted). In such cases, the statement "is readily understood by the audience as conjecture." *Id*. (citation omitted). Even "accusations of criminality could be regarded as mere hypothesis and therefore not actionable if the facts on which they are based are fully and accurately set forth and it is clear to the reasonable reader or listener that the accusation is merely a personal surmise built upon those facts." *Id*. at 155; *Bruno v. New York News*, 89 A.D.2d 260, 264 (3d Dep't 1982) ("Expressions of opinion are constitutionally privileged when accompanied in the articles by objective facts supporting them."). In the challenged articles, Meaney sets forth two statements of hypothesis and conjecture based on disclosed, true facts. Both statements are nonactionable:

> **M.A. Bongiovanni Bid:** Massa claims *The Geneva Believer* "challenged the authenticity of a bid record it apparently received from the City — without any proof — in order to falsely imply that a City official altered a bid to award the project to Plaintiff." (Pl. Br. 27 (citing R. 94, 98)) As an initial point, Massa's claim mischaracterizes Meaney's reporting and the inferences that could reasonably be drawn from this article as a whole. (*See* R. 94–95, 98) In the article, Meaney reprinted two photographs of a handwritten document he received from the City in response to a FOIL request for bid records concerning a wastewater treatment plant upgrade project, noting that "[i]t

appears that the bid amount for Massa's competitor [M.A. Bongiovanni] was changed by the author of this document." (R. 94) Meaney also observed that, based on this document, "Massa apparently outbid M.A. Bongiovanni by just $1,000." (R. 95) Later in the same article, in the context of criticizing the City's record keeping practices, Meaney refers back to the handwritten document for the wastewater plant project: "One of the 'records' that the city released feature two company names and dollar amounts hand-scrawled in pen on a sheet of yellow lined paper, with one of the dollar amounts clearly altered by the unidentified author of the document." (R. 98) Nowhere does Meaney suggest that *Massa* altered the document; in fact, Meaney explicitly reports that Massa "apparently outbid" Bongiovanni, with no hint of sarcasm. This is plainly an instance where Massa improperly seeks to "enlarge upon the meaning of words so as to convey a meaning that is not expressed," *Biro*, 883 F. Supp. 2d at 466.[6] Setting aside Massa's nonsensical extrapolations from what *The Geneva Believer* actually published, the article sets forth a simple conjecture — that the unknown author of the handwritten bid record

[6] As Meaney elaborated in his unopposed affidavit submitted in support of his motion for summary judgment, he thought the apparently altered number "was a suspicious circumstance," but "at no point" thought or published that Massa was the author of the document or responsible for the apparent alteration. Rather, Meaney surmised (but did not speculate publicly) that whoever wrote the handwritten document had lost the original bid documentation and was trying to recreate it, to cover up for the fact that the original documentation was missing. (R. 41)

appeared to have altered the Bongiovanni bid amount — based on disclosed facts (images of the handwritten record Meaney received from the City). *Zuber v. Bordier*, 135 A.D.2d 709, 710 (2d Dep't 1987) ("The statements at issue in the case at bar expressed the defendant's opinion . . . based on the defendant's observation."). This reporting falls squarely within the realm of nonactionable hypothesis or conjecture.

Former Councilman Eddington: To the extent Massa takes issue with Meaney's conjecture about whether former Councilman Gordy Eddington risked violating Article 18 of the New York State General Municipal Law due to his son's apparent employment with Massa, this reporting also constitutes nonactionable hypothesis. (*See* Pl. Br. 7–8, 24, 26) In his reporting on the appearance of potential conflicts of interest arising from Eddington's relationships with the City and with Massa, Meaney discloses the facts on which he is relying (which are uncontested), the sources for these facts, and his analysis of how the law might apply to these facts, if true. (R. 72–74) Meaney qualifies his conjecture with facts which Meaney admits to not knowing for certain, such as whether or not Eddington's son is a legal dependent and whether Eddington's son does in fact work for Massa (R. 72) ("Eddington's son has *apparently* been employed by Massa Construction since June 2017"), (R. 73) (referring to the "*apparent* employment of

Eddington's son by Massa," reprinting a redacted screenshot of the son's LinkedIn profile, and describing Eddington's son as "a recent college student under the age of 24" who "is *likely* a dependent of Eddington") (emphases added)). This reporting clearly reflects nonactionable conjecture, as Meaney lays out the basis for the facts he claims to know and is transparent about which facts he does not know for certain.[7] *Di Bernardo*, 117 A.D.2d at 1010 ("Editorial opinion may not be the subject of a defamation action provided that the facts supporting the opinion are set forth.").

iii. Meaney's Memes Are Nonactionable Hyperbole.

Two "memes" — the Internet equivalent of political cartoons — make up the final category of nonactionable expression Massa attempts to shoehorn into its defamation by implication claim. The lower court correctly found that these memes — which the court described as "augmented photographs" — were "clearly hyperbole and opinion and therefore nonactionable." (R. 7.)

American history has been shaped by cartoons, "from the early cartoon portraying George Washington as an ass to the present day," and "from the viewpoint of history it is clear that our political discourse would have been considerably poorer without them." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46,

[7] As discussed above, in response to a comment on this article, Meaney further hedged his reporting and cautioned against his readers making assumptions based on the facts and hypotheses Meaney reported. (*See* R. 32–33, 264–65)

55 (1988). *The Geneva Believer* joins a long tradition of American satire conveyed through images to supplement words — a tradition which courts have pointedly been loath to repress. *See, e.g.*, *Falwell*, 485 U.S. at 55; *DRT Constr. Co. v. Lenkei*, 176 A.D.2d 1229, 1230 (4th Dep't 1991).

The first meme with which Massa takes issue is an image of Joey and Ross from the sitcom "Friends" asleep together on a couch. The logo of the City of Geneva is superimposed on Joey; Massa's logo is superimposed on Ross. (R. 79; Pl. Br. 26)

Massa claims that this image "implied collusion between the City and Plaintiff when the City could not locate bid information for the [Finger Lakes Welcome Center] project," and that Meaney "also used this photograph to explain why [Massa] was 'the winning bidder on an *unusually* large number of City contracts worth millions.'" (Pl. Br. 25–26)

The second meme at issue depicts former Councilman Eddington using a printing calculator, featuring a cartoon thought bubble with Massa's logo inside.

(R. 71; Pl. Br. 26) Massa claims that this meme "falsely insinuate[s] that Eddington and Plaintiff worked behind the scenes at the City as part of the 'old boys network' or the 'good old boys club' to secure City contracts and line [Massa's] pockets with money." (Pl. Br. 26)

Massa's characterizations of these images extrapolate far beyond what any reader could infer from the images. But, more importantly, the images clearly amount to nonactionable expressions of opinion through hyperbole. Memes can be likened to political cartoons, in that they do not purport to depict reality and are not intended to be taken seriously. Instead, they utilize satirical humor and exaggeration in the employ of political and social commentary. *See DRT Constr. Co.,* 176 A.D.2d at 1230 ("Cartoons, by their very nature, are rhetorical hyperbole or exaggerated

statements of opinion."); *J.S. by M.S. v. Manheim Twp. Sch. Dist.*, 263 A.3d 295, 298 n.3, 299 (Pa. 2021) ("A meme is a photo or video image with caption superimposed on the image . . . Memes are often used for humor and political commentary."). Meaney's memes clearly serve as vehicles for expressing his personal viewpoints and political commentary about the relationships between the City and Massa. The memes are not actionable for purposes of Massa's defamation by implication claim. The lower court's findings on this point should be affirmed.

POINT III

THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN AWARDING ATTORNEYS' FEES UNDER CIVIL RIGHTS LAW SECTION 70-a

A. Massa's Arguments Opposing a Fee-Shifting Award Contravene the Central Purpose of New York's Anti-SLAPP Law.

The trial court properly awarded attorneys' fees to Meaney's counsel under New York's anti-SLAPP statute. *See Civ. Rights Law* § 70-a(1)(a). Meaney argues that the trial court abused its discretion in awarding *any* attorneys' fees to Meaney's counsel, because (1) Massa's complaint should not have been dismissed; (2) the application for attorneys' fees was not properly before the lower court because Meaney did not file a counterclaim for attorneys' fees until after Massa filed its opposition to the motion for summary judgment; and (3) Meaney retained *pro bono* counsel in this action. (Pl. Br. 30–33.) None of these arguments withstand scrutiny.

First, the trial court's order awarding attorneys' fees to Meaney was proper because, for the reasons stated above, the trial court correctly granted Meaney's motion for summary judgment. (*See* R. 19–20) Consequently, the current version of New York's anti-SLAPP statute — the applicability of which Massa does not contest — *mandates* an award of attorneys' fees in this case.

Second, Meaney sought attorneys' fees in its counterclaim, filed well ahead of the trial court's decision granting Meaney's motion for summary judgment and attorneys' fee award. The trial court therefore did not err in considering Meaney's fee application when it did.

Finally, Massa cites no direct authority for its assertion that *pro bono* counsel are not entitled to recover fees in an anti-SLAPP suit, nor does Massa distinguish contradictory authority supporting the award of fees in such scenarios. In the absence of such support, citizen journalists would be at the mercy of defamation plaintiffs secure in the knowledge that their targets are unlikely to have procured libel insurance and do not otherwise have the financial wherewithal to retain defense counsel. In such circumstances, citizen journalists would be relegated to the quixotic availability of counsel who, knowing they will not be paid, nevertheless mount a defense out of their good graces and an abiding commitment to free speech principles. The state of affairs championed by Massa ignores the reality that the "threat of being put to the defense of a lawsuit may be as chilling to the exercise of

First Amendment freedoms as fear of the outcome of the lawsuit itself." *Karaduman v. Newsday, Inc.*, 51 N.Y.2d 531, 545 (1980) (internal quotations and citation omitted). It is inimical to the core purpose of the anti-SLAPP law, which is to prevent speakers on public issues from being intimidated into silence or cowed into conformity by the threat of a defamation lawsuit from a deep-pocketed plaintiff. Finally, it cannot be reconciled with our "proud national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]" *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). The lower court properly awarded attorneys' fees.

Massa also claims that, even if a fee award *was* warranted, the lower court abused its discretion in setting the fee award amount. (Pl. Br. 33–36) But this ignores that the trial court awarded less than 40 percent of the total fees Meaney requested, specifically citing considerations Massa raises on appeal such as the *pro bono* nature of Meaney's representation, their practical litigation experience, the hourly rate of similarly-experienced local attorneys, and the pre-discovery disposition of the suit. (*See* R. 19–20.) The trial court's fee award should be affirmed in full.

B. The Anti-SLAPP Statute Mandates the Award of Attorneys' Fees to Meaney.

The current version of New York's anti-SLAPP statute — the applicability of which Massa does not contest on appeal — mandates that "costs and attorney's fees

shall be recovered" by a defendant who prevails on an anti-SLAPP motion for summary judgment. *Civ. Rights Law* § 70-a(1)(a) (emphasis added). Thus, since the trial court correctly granted Meaney's summary judgment motion, the court's subsequent award of attorneys' fees was also correct — and, in fact, mandatory.

Massa cites *National Fuel Gas Distribution Corporation v. PUSH Buffalo*, 962 N.Y.S.2d 559, 1309 (4th Dep't 2013), for the proposition that "[a] court is not required to award attorneys' fees under *Civil Rights Law* Section 70-a simply because a complaint is dismissed." (Pl. Br. 31) But this case relies on a previous version of the anti-SLAPP statute, which provided for discretionary, not mandatory, attorneys' fee awards for prevailing anti-SLAPP defendants. *See National Fuel Gas Distribution Corporation*, 962 N.Y.S.2d 559 at 1309 ("That section [the then-effective version of *Civil Rights Law* section 70-a(1)] provides only that such fees *may* be recovered, and we perceive no abuse of discretion or improvident exercise of discretion in the court's refusal to award such fees in this case." (emphasis in original)). Under the current version of the statute, Meaney is entitled to a mandatory fee award.

C. The Trial Court Properly Awarded Attorneys' Fees in Response to Meaney's Counterclaim.

Massa claims that Meaney's request for attorneys' fees was not properly before the trial court because Meaney "had yet to assert a counterclaim for attorneys' fees" when Meaney filed his motion for summary judgment. (Pl. Br. 30) Massa

acknowledges, however, that Meaney *did* file and serve a verified answer and counterclaim for attorneys' fees ahead of filing his reply in support of his motion for summary judgment — months before the trial court's decision granting Meaney's motion and awarding fees. (Pl. Br. 30–31; *see also* R. 4–8, 19–20, 368–79) Moreover, the trial court's orders state explicitly that the fee award is based on Meaney's counterclaim, not on a request for fees reflected in Meaney's summary judgment briefing. (R. 14, 19) Thus, any reflection of Meaney's request for attorneys' fees in his summary judgment briefing is inapposite: Meaney asserted his fee request in his counterclaim, which is all the anti-SLAPP statute requires. *See N.Y. Civ. Rights Law* § 70-a(1). The trial court properly considered — and granted — Meaney's request for attorneys' fees.

D. The Trial Court Acted Within Its Discretion in Setting the Fee Award Amount.

In addition to properly awarding attorneys' fees, the trial court acted within its discretion in setting the fee award amount — an amount substantially less than what Meaney's counsel requested, determined by taking into account the various factors Massa claims the trial court ignored. (*See* R. 19; Pl. Br. 31–35) Massa concedes that the relevant standard for review for an attorneys' fees award is abuse of discretion. (*See* Pl. Br. 31) "It is well settled that a trial court is in the best position to determine those factors integral to fixing attorney's fees and, absent an abuse of discretion, the trial court's determination will not be disturbed." *Pelc v. Berg*, 893

N.Y.S.2d 404 (4th Dep't 2009) (citations and quotation marks omitted). There is no abuse of discretion where "conflicting facts and inferences reasonably support a decision for or against a certain result." *See People v. Cook*, 34 N.Y.3d 412, 423 (2019) (citations and quotation marks omitted).

Rather than explain in any nonconclusory manner how the trial court abused its discretion in setting the fee award, Massa merely rehashes the same arguments it made in the trial court about the *pro bono* nature of Meaney's representation, the reasonableness of their hourly rates, and the number of hours they billed for this matter. (Pl. Br. 31–35) But nowhere does Massa acknowledge that Supreme Court awarded less than 40 percent of the total fees Meaney requested. In setting this award amount, the Supreme Court specifically cited the very considerations Massa raised in opposition to Meaney's fee application — and raises again on appeal — such as the *pro bono* nature of Meaney's representation, his lawyers' litigation experience, and the hourly rate of similarly-experienced local attorneys. (*See* R. 19-20)

In sum, the trial court correctly awarded attorneys' fees to Meaney's counsel, as it was required to do when Meaney prevailed on his anti-SLAPP motion for summary judgment. Further, the trial court acted well within its discretion when setting the fee award amount.

CONCLUSION

For these reasons, Defendant-Respondent Jim Meaney, a/k/a *The Geneva Believer,* respectfully requests that this Court affirm Supreme Court, Ontario County's May 21, 2021 order granting his motion for summary judgment, as well as the November 1, 2021, order awarding attorneys' fees, in full.

Dated: May 24, 2022

Respectfully submitted,

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Michael J. Grygiel