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GARY S. DEMARZO,

Plaintiff,

V.

SAMUEL PALOMBO, ZACHARY  
PALOMBO, BARBARA MURPHY-  
LEARY, ABC CORPS 1-10, AND JOHNS  
DOES 1 THROUGH 25, JOINTLY,  
SEVERALLY, AND IN THE  
ALTERNATIVE,

Defendants.

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION  
CAPE MAY COUNTY

CIVIL PART

Docket No.: CPM-L-498-24

Civil Action

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**DEFENDANT BARBARA LEARY'S BRIEF IN SUPPORT OF MOTION TO DISMISS  
AND FOR ISSUANCE OF AN ORDER TO SHOW CAUSE PURSUANT TO THE NEW  
JERSEY UNIFORM PUBLIC EXPRESSION PROTECTION ACT**

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Dated: February 6, 2025

### **PRELIMINARY STATEMENT**

Defendant Barbara Leary applies for a special order to show cause hearing pursuant to the New Jersey Anti-SLAPP Law for the dismissal of Plaintiff Gary DeMarzo's frivolous defamation lawsuit against her. DeMarzo, until recently the township administrator in Upper Township, purports to sue Leary for defamation for posts made on the "Politics and Promises in Upper Township and Cape May County" Facebook page between April and May of 2022, concerning his hiring as Township administrator.<sup>1</sup>

DeMarzo's claims against Leary are a law school issue spotting exercise in frivolous defamation claims and a posterchild for the Anti-SLAPP law.

First, all of DeMarzo's claims are barred by the one-year statute of limitations for defamation claims.

Second, since the allegedly defamatory statements relate to DeMarzo's hiring and service as a Township official, he is required to prove actual malice by Leary—that is that she knew her statements were false or that she harbored serious doubts to their veracity. New Jersey precedent requires a defamation complaint contain more than mere allegations of actual malice. Rather, a plaintiff must plead sufficient facts from which a factfinder could conclude that the defendant harbored actual malice at the time the defamatory statements. Yet, DeMarzo does not even make a cursory allegation of actual malice against Leary, let alone plead facts that would demonstrate actual malice.

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<sup>1</sup> DeMarzo, who was recently fired by the Township as administrator, also asserts claims for defamation against two Township elected officials, Samuel and Zachary Palombo, that are not the subject of this motion related to alleged statements they made about him while campaigning for office.

Third, DeMarzo does not articulate the allegedly defamatory statements made by Leary. Rather, he makes vague statements that Leary “used the Facebook page to target Plaintiff with criminal allegations [and] threats of criminal investigation.” When it comes to defamation, words matter, and New Jersey requires a plaintiff to identify the actual defamatory statement, date of publication, and the recipients thereof. DeMarzo has done none of those things.

DeMarzo is a public figure, and his public employment is a matter of public concern. The First Amendment protects citizens’ rights to speak about such issues and the New Jersey Legislature enacted the Anti-SLAPP statute to prevent the types of claims DeMarzo has asserted here—baseless defamation claims meant to silence citizens and dissuade them from participating in public discourse.

Accordingly, under the Anti-SLAPP Law, Leary is entitled to a 1) issuance of an order directing DeMarzo to show cause why the claims against Leary should not be dismissed with prejudice, 2) a stay of all proceedings until the court rules upon the application for dismissal, and 3) upon dismissal, a mandatory award of reasonable attorney’s fees and costs.

### **STATEMENT OF FACTS**

With respect to Leary, DeMarzo alleges the following operative facts:

3. On or around April 2022, Plaintiff was hired as the Township Administrator for Upper Township, with duties that included being the Personnel Officer.
4. Around the same time, Defendant Murphy-Leary, an Upper Township resident, created a Facebook page titled “Politics and Promises in Upper Township and Cape May County”.
5. Between April 2022 and May 2022, Defendant Murphy-Leary used the Facebook page to target Plaintiff with criminal allegations, threats of

criminal investigation, and post a statement saying she contacted the Cape May County Prosecutor's Office with some matter related to Plaintiff being hired as Township Administrator.

6. Following this, Committeeman Mark Pancoast advised Defendant Murphy-Leary in a verbal statement during a committee meeting that she is to stop threatening, alleging, and making false and/or untrue statements about Plaintiff.

7. Despite this, Defendant Murphy-Leary has continued to post threatening statements that are false and/or untrue about Plaintiff.

33. Defendant Murphy-Leary used Facebook to post defamatory statements about Plaintiff alleging he engaged in illegal conduct.

34. Even though plaintiff was not identified by name, the information provided in the defamatory material provided sufficient material to identify plaintiff.

35. As a direct and proximate result of the defamatory conduct, Plaintiff has been damaged.

36. Plaintiff has suffered annoyance, inconvenience, stress, anxiety, humiliation, depression, physical pain and suffering, emotional distress, and pecuniary loss.

Exhibit A (Complaint).

## **ARGUMENT**

### **I. The Extraordinary Constitutional and Statutory Protections Afforded Speech in Connection with Public Officials and Matters of Public Concern.**

#### **A. The Constitutional Right to Free Speech**

“The First Amendment to the United States Constitution states, ‘Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’” E & J Equities, LLC v. Bd. of Adjustment of the Twp. of Franklin, 226 N.J. 549, 568 (2016) (quoting U.S. Const. amend. I). “Similarly, ‘[t]he New Jersey Constitution guarantees a

broad affirmative right to free speech[.]” Id. (quoting Dubliner v. 2000 Linwood Ave. Owners, Inc., 220 N.J. 71, 78 (2014) and N.J. Const. art. I, ¶ 6).

The New Jersey Constitution free speech “guarantee is one of the broadest in the nation, and it affords greater protection than the First Amendment. Federal law requires ‘state action’ to invoke the First Amendment. The State Constitution does not. As [the New Jersey Supreme Court] explained in [State v. Schmid, 84 N.J. 535, 557 (1980)], the New Jersey Constitution bars the government from abridging free speech and also protects ‘against unreasonably restrictive or oppressive conduct on the part of private entities.’” Dubliner, 220 N.J. at 78–79) (citing Schmid, 84 N.J. at 557 (1980)) (all other internal citations omitted). “The United States Supreme Court has also made it clear that special protection must extend as well to the right of citizens to petition government for redress of grievance....” LoBiondo v. Schwartz, 323 N.J. Super. 391, 408 (App. Div. 1999) (“LoBiondo I”) (citing City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365, 379 (1991); Fraser v. Bovino, 317 N.J. Super. 23, 37 (App. Div. 1998) (recognizing “the fundamental values that undergird a citizen's right to communicate on issues of public import.”)); see also United Mine Workers of Am., Dist. 12 v. Ill. State Bar Ass'n, 389 U.S. 217, 222 (1967) (Holding the right to petition the government for redress of grievances to be “among the most precious of the liberties safeguarded by the Bill of Rights . . . intimately connected, both in origin and in purpose, with other First Amendment rights of free speech and free press.”). Accordingly, “neither actionable defamation nor intentional infliction of emotional distress, nor tortious interference with business advantage” can exist where parties “were exercising their constitutional right to participate in public

debate, to express themselves regarding matters of public concern, and to petition governmental agencies and officers for redress of their legitimate grievances.” Id. at 396.

B. The Statutory Protection Against SLAPP Suits that Infringe on Citizens’ Free Speech Rights

As our Supreme Court has explained, SLAPP suits (“Strategic Lawsuits Against Public Participation”) are part of a “nationwide trend in which large commercial interests utilized litigation to intimidate citizens who otherwise would exercise their constitutionally protected right to speak in protest against those interests.” LoBiondo v. Schwartz, 199 N.J. 62, 85–86 (2009) (“Lobiondo II”). The “goal of such litigation was not to prevail, but to silence or intimidate the target, or to cause the target sufficient expense so that he or she would cease speaking out. As...seen in this stark light, SLAPP suits are an improper use of our courts.” Id. at 86. Of course, “it is not only the defendant in a SLAPP suit who suffers. The common weal is obviously impaired as well since the consequence of a SLAPP suit is not only to silence the defendant but to deter others who might speak out as well. Suppression of public debate on public issues and the placing of a price—often a high one—on the right to petition for redress is [a] special grievance....” Lobiondo I, at 424. Early resolution by the court “has the salutary effect of discouraging frivolous lawsuits that might chill the exercise of free speech on matters of public concern.” G.D. v. Kenny, 205 N.J. 275, 305 (2011); see also DeAngelis v. Hill, 180 N.J. 1, 12 (2004) (encouraging early dismissal where “[t]he threat of prolonged and expensive litigation has a real potential for chilling ... criticism and comment upon public figures and public affairs”); Sedore v. Recorder Publ’g Co., 315 N.J. Super. 137, 163 (App. Div. 1998)

In order to address the problem of SLAPPs, New Jersey enacted the New Jersey Uniform Public Expression Protect Act, N.J.S.A. 2A:53A-49 et seq., effective on October

7, 2023, with the express purpose of preventing SLAPPS, and thus is often referred to as the Anti-SLAPP Law. N.J.S.A. 2A:53A-49.

The Anti-SLAPP Law “applies to a cause of action asserted in a civil action against a person based on the person’s” *inter alia* “communication on an issue under consideration or review in a legislative, executive, judicial or other governmental proceeding, **or**.... exercise of the right of freedom of speech or of the press, the right to assembly or petition, of the right of association, guaranteed by the United States Constitution or the New Jersey Constitution, on a matter of public concern.” N.J.S.A. 2A:53A-50(b) (emphasis supplied).

Within 60 days of being served with a pleading asserting a claim covered by the Anti-SLAPP Law, “the party may file an application for an order to show cause with the court to dismiss the cause of action or part of the cause of action.” N.J.S.A. 2A:53A-51. “[U]pon the filing of an application for an order to show cause” the court shall presumptively stay all further proceedings pending a hearing on the motion to dismiss. N.J.S.A. 2A:53A-52. The court must hear the order to show cause seeking dismissal “as expeditiously as possible.” N.J.S.A. 2A:53A-53. The Anti-SLAPP Law requires the court to dismiss *with prejudice* any claim to which the law applies if:

a) the responding party fails to establish a prima facie case as to each essential element of any cause of action in the complaint; or

(b) the moving party establishes that:

(i) the responding party failed to state a cause of action upon which relief can be granted; or

(ii) there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law on the cause of action or part of the cause of action.

N.J.S.A. 2A:53A-55(a)

“[T]he court shall award court costs, reasonable attorney’s fees, and reasonable litigation expenses related to the order to show cause to the moving party if the moving party prevails on the order to show cause.” N.J.S.A. 2A:53A-58. Moreover, unlike Rule 1:4-8 and N.J.S.A. 2A:15-59.1, dismissal by the plaintiff after filing of the order to show cause application does not insulate him from liability for attorney’s fees and costs:

b. A voluntary dismissal without prejudice of a responding party's cause of action, or part of a cause of action, that is the subject of an order to show cause under section 3 of P.L.2023, c. 155 (C.2A:53A-51) does not affect a moving party's right to obtain a ruling on the order to show cause and seek costs, attorney's fees, and expenses under section 10 of P.L.2023, c. 155 (C.2A:53A-58).

c. A voluntary dismissal with prejudice of a responding's party cause of action, or part of a cause of action, that is the subject of an order to show cause under section 3 of P.L.2023, c. 155 (C.2A:53A-51) establishes for the purpose of section 10 of P.L.2023, c. 155 (C.2A:53A-58) that the moving party prevailed on the motion."

N.J.S.A. 2A:53A-55

Finally, the Anti-SLAPP Law “shall be broadly construed and applied to protect the exercise of the right of freedom of speech and of the press, the right to assembly and petition, and the right of association, guaranteed by the United State Constitution or the New Jersey Constitution.” N.J.S.A. 2A:53A-59,

## **II. The Elements and Pleading Requirements for a Claims Asserting Defamation by a Public Official or Arising out of Matter of Public Concern.**

“Every action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander.” N.J.S.A. 2A:14-3. “As has been widely recognized, the judicially created ‘discovery rule,’ which defers the accrual of certain causes of action until the plaintiff knows or should know that he has been injured, is



inapplicable to N.J.S.A. 2A:14–3, under which the statute of limitations begins to run upon publication.” R.K. v. Y.A.L.E. Sch., Inc., 621 F. Supp. 2d 188, 202 (D.N.J. 2008). Moreover, the single publication rule applies to online postings, such that the statute of limitation is triggered only by an initial online post and does not restart every time that post is viewed or accessed. See e.g. Petro-Lubricant Testing Labs., Inc. v. Adelman, 233 N.J. 236, 252 (2018).

To state a claim for defamation based on a statement about a public official or figure or touching on a matter of public interest or concern, a plaintiff must allege and then prove “(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the statement was communicated to another person (and was not privileged); and (3) that the defendant published the defamatory statement with actual malice.” Durando v. Nutley Sun, 209 N.J. 235, 248 (2012). Moreover, unlike “factual assertions that could be proven true or false,” expressions of opinion are not actionable because they are not amenable to being disproven. Ward v. Zelikovsky, 136 N.J. 516, 531 (1994). In the context of defamation, “actual malice” means “knowing that the statement is false or recklessly disregarding the truth.” Durando, 209 N.J. at 248; see also New York Times v. Sullivan, 376 U.S. at 254, 279-80 (1964); Associated Press v. Walker, 388 US 130 (1967).

Second, since the establishment of this principle by the United States Supreme Court, “New Jersey accepted the invitation to provide greater protection to speech involving matters of public concern than mandated by the United States Supreme Court’s First Amendment jurisprudence,” under the rubric of the “fair comment privilege,” Senna v. Florinont, 196 N.J. 469, 484-85 (2008); and therefore, New Jersey law also requires a

showing of actual malice where a defamation plaintiff-whether she is a public figure or private figure-sues over a statement on a matter of public interest. Id. at 496-97, (“the actual-malice standard will apply when the alleged defamatory statement concerns a public figure or a public official or involves a matter of public concern.”).

Under the actual malice standard, “reckless disregard for the truth” requires far more than negligent or accidental falsity. To meet this standard a plaintiff must plead facts that, if true, would establish that the defendant “actually doubt[ed] the veracity” of the statements, Durando, 209 N.J. at 252, or had a “high degree of awareness” as to their probable falsity, Harte-Hanks Commc'ns v. Connaughton, 491 U.S. 657, 667 (1989) (internal quotation marks omitted), at the time of publication. Sullivan, 376 U.S. at 286; see also Harte-Hanks, 491 U.S. at 688 (“failure to investigate before publishing ... is not sufficient to establish reckless disregard.”).

Actual malice is a “high or strict burden,” Sisler v. Gannett, 104 N.J. 256, 269 (1986), and is necessary to guarantee the “national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open[.]” Sullivan, 376 U.S. at 270; see also Senna, 196 N.J. at 491 (the actual malice standard ensures “adequate breathing room” for “speech involving matters of public interest and concern”). New Jersey requires a heightened pleading standard, and a rote recital of actual malice is legally insufficient to state a claim upon which relief may be granted. See e.g. Darakjian v. Hanna, 366 N.J. Super. 238, 247-248 (App. Div. 2004) (“bare conclusory assertion” of actual malice “with no other factual reference to lend support to the contention” is insufficient to plead actual malice).

Thus, the Appellate Division has directed courts to dismiss defamation claims at the pleading stage even where the plaintiff's complaint contains conclusory allegations of actual malice, but insufficient facts to support the actual malice element. See Neuwirth v. State, 476 N.J. Super. 377, 392-93 (App. Div. 2023). Actual malice, the Neuwirth Court instructed, requires a plaintiff to "show by clear and convincing evidence that the publisher either knew that the statement was false or published with reckless disregard for the truth." Id. Under New Jersey's pleading standard, it concluded, a defamation plaintiff in an actual malice case cannot survive a motion to dismiss unless he pleads "**facts from which a factfinder could conclude that [the defendant] knew, or had serious doubts about, the veracity of the allegedly defamatory statements he made.**" Id., at 393 (emphasis supplied).

Moreover, mere allegations that a defendant made a defamatory statement about a plaintiff are insufficient, the complaint must set forth the alleged defamatory words and the meaning attached to them. As one New Jersey court explained:

Defamation, if actionable at all, is complete when committed. While obviously there are many things to be discovered in the normal evolution of the case, yet the basic words themselves, are available at once. Given the above factors it is not casting an onerous burden upon a plaintiff to require him to specify forthwith the defamatory words and the meaning plaintiff attaches to them. Only thus can a defendant be apprised of this charge attributed to him.

Kotok Bldg. v. Charvine Co., 183 N.J. Super. 101, 106–07 (Law. Div. 1981).

Thus, a defamation claim that "fails to recite the allegedly defamatory words, the circumstances in which they were uttered, whether a third party heard them, and what damaging effect their utterance had upon defendant-counterclaimant's business or professional reputation. It is, in short, wholly conclusory. It is, therefore, fatally defective."

Id., at 103; see also Zoneraich v. Overlook Hosp., 212 N.J. Super. 83, 101 (App. Div. 1986) (“In the case of a complaint charging defamation, plaintiff must plead facts sufficient to identify the defamatory words, their utterer and the fact of their publication. A vague conclusory allegation is not enough.”);<sup>2</sup> Doug Grant, Inc. v. Greate Bay Casino Corp., 3 F. Supp. 2d 518, 538 (D.N.J. 1998) (“In order to state a claim for libel or slander, a complaint must allege the defamatory words, the person who uttered them, and when, where, and to whom they were published.”). Thus, where “the complaint fails to identify any specific statement made by any specific defendants about any specific plaintiff within the one year limitations period” it fails as a matter of law. Doug Grant, Inc., 3 F. Supp. at 538.

### **III. DeMarzo has Failed to State a Claim Upon Which Relief May be Granted Against Leary.**

#### **A. The Statute of Limitations Bars DeMarzo’s Claims.**

The operative allegations of the complaint against Leary are:

3. On or around April 2022, Plaintiff was hired as the Township Administrator for Upper Township, with duties that included being the Personnel Officer.

4. Around the same time, Defendant Murphy-Leary, an Upper Township resident, created a Facebook page titled “Politics and Promises in Upper Township and Cape May County”.

5. Between April 2022 and May 2022, Defendant Murphy-Leary used the Facebook page to target Plaintiff with criminal allegations, threats of criminal investigation, and post a statement saying she contacted the Cape May County Prosecutor's Office with some matter related to Plaintiff being hired as Township Administrator.

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<sup>2</sup> The Appellate Division further cautioned that: “The need to plead a cause of action for defamation is not avoided by telling defendants to seek a more definite statement or discovery. A plaintiff may be permitted to bolster a defamation cause of action through discovery, but not to file a conclusory complaint to find out if one exists. Such a complaint must be dismissed.” Id., at 102-103.

...

33. Defendant Murphy-Leary used Facebook to post defamatory statements about Plaintiff alleging he engaged in illegal conduct.

Exhibit A (Complaint).

Any claim based on those statements (which, as discussed below are factually insufficient as a matter of law), are obviously barred by the one-year statute of limitations. Any claim that statute was tolled until DeMarzo discovered them or that every time someone views or accesses the Facebook page renews the statute fails as a matter of law for the reasons set forth above.

Accordingly, DeMarzo's claims against Leary are barred by the statute of limitations and must be dismissed.

**B. DeMarzo Does Not Even Allege Actual Malice, Let Alone Plead Sufficient Facts to Establish It.**

Here, DeMarzo alleges that Leary made defamatory statements about him on a Facebook page about Upper Township politics and government concerning his hiring as Township administrator. In that context, he is clearly a public official and his service as a Township employee is a matter of public concern. Yet, DeMarzo's complaint does not even include a cursory allegation that Leary acted with actual malice—that is that she knew her statements were false or that she actually harbored serious doubts about their truthfulness. Of course, as the Neuwirth Court held, such a conclusory allegation—even if it were present—would still be insufficient as matter of law, because DeMarzo is required to plead “facts from which a factfinder could conclude that [the defendant] knew, or had serious doubts about, the veracity of the allegedly defamatory statements he made.” Id. at 393. He failed to do so.

Accordingly, he has failed to state a claim upon which relief may be granted against Leary because he has failed to plead facts supporting a *prima facie* case. Therefore, his complaint must be dismissed.

C. The Complaint Fails to Identify Any Actual Defamatory Statement by Leary.

DeMarzo's complaint sets forth only vague allegations about Leary, like that she "used Facebook to post defamatory statements about Plaintiff alleging he engaged in illegal conduct." See Exhibit A (Complaint), at ¶133.<sup>3</sup> The complaint never identifies the actual words of the defamatory statements, how many statements were made, the identity of any third person who received them, or when, specifically, they were made (other than between April and May of 2022).

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<sup>3</sup> For the reasons set forth above, these allegations are insufficient as a matter of law in any context. But for DeMarzo, in particular, the failure is even more fatal. The Court may take judicial notice of DeMarzo was indicted for official misconduct in his capacity as mayor of Wildwood (though the charges were later dismissed) and received significant disciplinary action for various violations in his capacity as Wildwood police officer following hearings before the Office of Administrative Law. See e.g. State v. DeMarzo, 2014 WL 1716088 (App. Div. 2014); DeMarzo v. City of Wildwood, 2015 WL 9694304, (App. Div. 2015); N.J.R.E. 201(b)(4). Likewise, DeMarzo was found to have violated the New Jersey law against holding incompatible public offices by simultaneously holding the offices of mayor and police officer in the same municipality and was ordered to forfeit one office, which order he was later found to have violated. See City of Wildwood v. DeMarzo, 412 N.J. Super. 105 (App. Div. 2010); Adair v. City of Wildwood, 2013 WL 4746504 (App. Div. 2013) (holding *inter alia* that "DeMarzo did not comply with our clear and straightforward order" to vacate one office). Thus, the exact words and context in which DeMarzo alleges false statements were made that he "engaged in illegal conduct" are particularly necessary to state a viable defamation claim. See e.g. G.D., 205 N.J. at 293 (Holding in defamation action the truth is "absolutely protected" as a "defense of constitutional magnitude."). Copies of all unreported decisions are included herewith pursuant Rule 1:36-3 and may be relied upon by the court for historical and evidential, but not precedential, purposes. See e.g. Mt. Hill v. Tp. Comm. Of Middletown, 403 N.J. Super. 146, 155 n3 (App. Div. 2008); State v. Robertson, 438 N.J. Super. 47, 60 n8 (App. Div. 2014).

Thus, DeMarzo has failed to state a claim upon which relief may be granted against Leary and his complaint must be dismissed.

### **CONCLUSION**

DeMarzo has failed to state a viable defamation claim against Leary because 1) his claims are barred by the statute of limitations, 2) he has not alleged actual malice or plead facts sufficient to support a finding of actual malice, and 3) he does not identify any actual defamatory statement by Leary.

DeMarzo obviously preferred not to have been fired by the Township and does not want people to criticize his hiring or job performance as Township administrator. However, "[I]f life is structured so that a litigant can't always get what is wanted." Delaware River & Bay Auth. v. York Hunter Const., Inc., 344 N.J. Super. 361, 368 (Ch. Div. 2001). This is one such case.

Accordingly, for all of the foregoing reasons, the Court should issue an order directing DeMarzo to show cause why his complaint against Leary should not be dismissed with prejudice, staying all further proceedings until such application is decided, and, upon dismissal, awarding Leary reasonable attorney's fees and costs incurred in this action.

**HANKIN PALLADINO WEINTROB  
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By: /s/ Colin G. Bell

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Dated: February 6, 2025