To be Argued by:
CHRISTINE LEPERA
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—First Department

LUKASZ GOTTWALD p/k/a Dr. Luke, KASZ MONEY, INC. and PRESCRIPTION SONGS, LLC,

Plaintiffs-Appellants,

– against –

KESHA ROSE SEBERT p/k/a Kesha,

Defendant-Respondent,

– and –

PEBE SEBERT, VECTOR MANAGEMENT, LLC and JACK ROVNER,

Defendants.

Appellate Case No.: 2021-03036

KESHA ROSE SEBERT p/k/a Kesha,

Counterclaim Plaintiff-Respondent,

– against –

LUKASZ GOTTWALD p/k/a Dr. Luke, KASZ MONEY, INC. and PRESCRIPTION SONGS, LLC,

Counterclaim Defendants-Appellants,

– and –

DOES 1-25, inclusive,

Counterclaim Defendants.

BRIEF FOR PLAINTIFFS/COUNTERCLAIM DEFENDANTS-APPELLANTS

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Introduction[1]

This appeal presents this Court with a critical issue regarding the retroactive application of statutory amendments. Specifically, this appeal asks whether 2020 amendments to New York's "Anti-SLAPP[2]" law, which dramatically broaden the scope of the statute, and which on their face are not retroactive, can nonetheless be applied retroactively in this seven-year-old litigation in order to: (a) drastically alter, by making far more stringent, the standard of fault and burden of proof which will be applied to Appellants' causes of action at trial; and (b) create a counterclaim for Respondent, seeking millions of dollars in damages, arising from Appellants' past actions in filing and maintaining this lawsuit, even though those actions could not give rise to liability at the time Appellants engaged in them. The answer is an unequivocal "no." Such retroactive application violates the presumption against retroactivity, the principle that statutes in derogation of the common law must be strictly construed, and the fundamental tenets of predictability, fair play, and justice upon which our legal system is premised.

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[1] Plaintiffs-Appellants Lukasz Gottwald p/k/a Dr. Luke ("Gottwald"), Prescription Songs, LLC, and KMI Recordings, Inc. are referred to collectively herein as "Appellants." Defendant-Respondent Kesha Sebert p/k/a Kesha is referred to herein as "Respondent."

[2] "SLAPP" stands for strategic lawsuits against public participation.

In the Order on appeal, the motion court erroneously held that the amended provisions apply retroactively, such that they substantially increase Appellants' burden to prevail on their defamation claim, and permit Respondent to add a new counterclaim that was previously unavailable to her. This Court should reverse the decision below, and hold that the amendments to the Anti-SLAPP law do not apply retroactively here.

New York's Anti-SLAPP law was first enacted in 1992. That statute, which was embodied in, *inter alia*, Civil Rights Law §§ 70-a & 76-a, was intentionally drafted solely to apply to litigations commenced by a "public applicant or permittee," where their claims were "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." The courts consistently and correctly held over the next three decades that the 1992 Anti-SLAPP provisions only applied to disputes relating to public applications or permits, as proscribed by the clear terms of the statute.

On November 10, 2020, twenty-eight years after the passage of the original Anti-SLAPP law, the Legislature enacted amendments that broadly widened the scope of parties and claims to which the statute applied. Under the amended law, claims subject to the Anti-SLAPP provisions are no longer limited to those relating to "a public application or permittee," but now include all claims "based upon: (1) any communication in a place open to the public or a public forum in connection

with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition."

Undeniably, the amended statute dramatically expands the scope of the Anti-SLAPP law and the litigants and cases that are subject thereto. The impact on such litigants is substantial; as this Court has observed, "[a] finding that an action is a SLAPP suit entails serious consequences to the plaintiff". *Guerrero v. Carva*, 779 N.Y.S.2d 12, 21 (1st Dep't 2004). Specifically, where the Anti-SLAPP law applies, the amended § 76-a substantially increases the burden for a private figure plaintiff in a defamation suit, such that the plaintiff must prove that the defendant made the defamatory statements with "actual malice," as opposed to mere negligence. It is "much for difficult" for "a plaintiff in a defamation case to prevail" when the "actual malice standard" applies. 1B Lindey on Entertainment, Publ. & the Arts § 4:6 (3d ed.). In addition, § 70-a, which provides for a cause of action for recovery of attorney's fees in SLAPP suits, was amended to state that the recovery of fees should be automatic, rather than discretionary, where the action was "commenced or continued without a substantial basis in fact and law . . . ." The amendments to § 70-a further provided that the vast scope of potential recovery on such a claim could include actual and punitive damages.

Appellants filed this action, asserting claims for defamation and breach of contract, nearly seven years ago. Appellants' defamation claims unquestionably were not subject to the decades-old Anti-SLAPP law then in existence. Because the Anti-SLAPP law did not apply to Appellants' claims, the action was commenced, and prosecuted for almost seven years, in reliance on the facts that: (a) as private figures, Appellants could prove those claims by establishing, by a preponderance of the evidence, that Respondent was negligent, and (b) Respondent had no basis to assert a claim arising from the litigation pursuant to § 70-a.[3]

On April 6, 2021, after the motion court held Appellants to be private figures, Respondent moved for a ruling that the amended § 76-a applies to this case and therefore required proof of actual malice, and for leave to amend her answer to assert a counterclaim under § 70-a, seeking attorney's fees, emotional distress damages, and punitive damages.

Notwithstanding Appellants' reliance on the state of the law at the time they brought their claims, and notwithstanding "the presumption against retroactive

[3] Prior to the enactment of the 2020 Anti-SLAPP amendments, plaintiffs like Appellants would only be subject to the more onerous "actual malice" standard if they were "public figures." Appellants alleged, and both the motion court and the First Department subsequently held, that Appellants are not public figures, and "the actual-malice standard is inapplicable." *Gottwald v. Sebert*, 2020 WL 587348, at *6 (Sup Ct. N.Y. Cnty. Feb. 6, 2020), *aff'd*, 193 A.D.3d 573 (1st Dep't 2021).

legislation [which] is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic,"[4] the motion court held that the 2020 amendments should apply retroactively to Appellants' claims. The result, if the motion court's decision is affirmed, is that Appellants will not be subject to the law that existed when they brought their claims, but will instead be required to comply with the amended law as if that law had been in existence nearly a decade ago. This decision was erroneous, for multiple independent reasons.

First, when interpreted according to the canons of statutory interpretation, it is clear that the amended Anti-SLAPP provisions are not intended to apply retroactively. It is undisputed that the text of the amendments does not state that they shall apply retroactively, and that statutes "in derogation of the common law," such as New York's Anti-SLAPP law "must be strictly construed." *Hariri v. Amper*, 51 A.D.3d 146, 151 (1st Dep't 2008). Moreover, New York law presumes that statutes shall only be applied prospectively, not retroactively. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 584 (1998). However, the motion court wrongly held that the Anti-SLAPP law clearly evidenced a purported rationale to be applied retroactively, even though there is not even a suggestion of retroactivity in the text—let alone a clear statement thereof. The motion court

[4] *Majewski v. Broadalbin-Perth Cent. School Dist*., 91 N.Y.2d 577, 584 (1998) (*quoting Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)).

remarked, "the legislature . . . isn't always careful and if it were, we wouldn't be here dealing with this today . . . ." R-26, at 18:10-13.

The motion court erroneously held the statute should be applied retroactively, based upon two mistaken rationales: (1) that the Legislature sought for the amended provisions to take effect "immediately"; and (2) that the amendments were purportedly "designed to rewrite an unintended judicial interpretation" by "reaffirm[ing] legislative judgment about what the law was intended to have always been and be." R-60. Neither rationale supports the ruling below, as a matter of fact or law. To the contrary, New York courts have specifically held that the language used here—"shall take effect immediately"—affirmatively indicates prospective application only. *See infra*, § I(A)(2)(a). The motion court itself recognized that the term "immediate . . . isn't so helpful . . . in ascertaining whether or not . . . there's definitive legislative intent . . . for retroactive or prospective" effect. R- 16, at 7:12-17. Moreover, it is evident from the textual history of the Anti-SLAPP regime and its legislative history that the amendments were not a swift correction of some technical defect in the prior law that might justify retroactive application. Since its passage in 1994, the original Anti-SLAPP law was consistently and correctly given a narrow interpretation that was in line with its clear language and the legislative intent in passing it. Rather than correcting any purported misinterpretation of the original law, the

amendments—enacted 28 years after the original statute and employing clearly different language—sought to apply the Anti-SLAPP provisions to an entirely new class of parties and conduct. *See infra*, § I(A)(2)(b).[5]

There simply is no basis whatsoever to overcome the statutory presumption against retroactive application.

Second, although the Court need not reach the issue, the Anti-SLAPP amendments cannot be applied retroactively, for the additional reason that doing so would deprive Appellants of their vested rights. "[T]he concept of vested rights rests on … consideration of 'fairness to the parties' or, in other words, 'justice' in a specific situation."[6] The amendments to §§ 70-a and 76-a, which are part of a new legislative scheme, not only significantly increase the standard of fault and burden of proof, but moreover, they permit a defendant in a defamation action to assert a counterclaim based upon acts by the plaintiff that previously could not give rise to liability. Retroactive application would be particularly unfair and unjust here, in

[5] Because the Anti-SLAPP amendments do not correct any judicial misinterpretation of the original statutory text, they also do not fall within the limited exception to the presumption against retroactivity for "remedial" legislation. *See* discussion *infra* § I(B).

[6] *Frontier Ins. Co. v. State*, 609 N.Y.S.2d 748, 755-56 (Ct. Cl. 1993) (quoting *Matter of Chrysler Properties, Inc. v. Morris*, 23 N.Y.2d 515, 518 (1969)).

light of the lengthy period of repose, and the reasonable reliance by Appellants, in litigating this action for many years, that the prior law would apply.[7]

Third, even if the amendments to the Anti-SLAPP law were held to apply retroactively in this case, they still would not apply to all of Appellants' defamation claims. One of Appellants' defamation claims pertain to a series of text messages Respondent sent to a well-known acquaintance, falsely accusing Gottwald of raping another recording artist (who denied under oath that any such misconduct ever occurred). These text messages, described by Respondent herself as "private," do not fall within the scope of even the amended § 76-a, which is limited to matters of public interest.

Fourth, even if the 2020 amendments to the Anti-SLAPP law were deemed to be retroactive (and they should not be), Respondent still would have no basis to assert a counterclaim under § 70-a, as she cannot possibly demonstrate that Appellants' defamation claims lack "a substantial basis in fact and law." Pointedly, Respondent herself testified under oath that, contrary to her defamatory assertions, Gottwald did not rape or drug her.

[7] For similar reasons, retroactive application would also improperly deprive Appellants of due process. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Again, however, the Court can and should overturn the motion court's ruling without the need to reach the issue of due process.

Thus, the motion court's rulings were in error, and must be reversed. Notably, courts in other states have held that newly enacted Anti-SLAPP laws should not be applied retroactively. *See Rogers v. Dupree*, 349 Ga. App. 777, 778 n.1 (2019) ("significantly revised" Georgia anti-SLAPP not retroactive); *Anagnost v. Tomecek*, 390 P.3d 707, 712 (2017) (Oklahoma anti-SLAPP not retroactive because "[a]fter-enacted legislation that would effectively act as a complete bar to the plaintiff's claim and permit newly recoverable damages are an enlargement of substantive rights and generally operate only prospectively."); *Sherrod v. Breitbart*, 843 F. Supp. 2d 83, 85 (D.D.C. 2012), *aff'd*, 720 F.3d 932 (D.C. Cir. 2013) (D.C. anti-SLAPP not retroactive "[b]ecause the statute is substantive—or at the very least, has substantive consequences—and there is no clear legislative intent of retroactivity"). The same result should obtain here.

Statement of Questions Presented

1. Did the motion court commit reversible error, in holding that the legislature's 2020 amendments to New York's Anti-SLAPP law, N.Y. Civ. Rights Law § 70-a *et seq.* (the "Anti-SLAPP Amendments) should be applied retroactively in this action given that: (a) the amendments are devoid of any express statement regarding retroactive application; (b) New York law contains a presumption against the retroactive application of statutes; and (c) the 2020

amendments do not, by necessary implication, require retroactive application? This Court should find the answer to be "yes."`

2. Did the motion court commit reversible error, in holding that the Anti-SLAPP Amendments should be applied retroactively in this action, even though retroactive application of the amendments impairs Appellants' vested rights by: (a) altering, after nearly seven years of litigation, the burden of proof and standard of fault applicable to Appellants' defamation claims in § 76-a; and (b) creating new potential liability under § 70-a for Appellants' actions in commencing and continuing this litigation, even though those actions could not have given rise to liability at the time Appellants engaged in them? This Court should find the answer to be "yes."

3. Did the motion court commit reversible error, in holding that the Anti-SLAPP Amendments should be applied retroactively in this action, even though retroactive application of the amendments violates Appellants' due process rights? This Court should find the answer to be "yes."

4. Did the motion court commit reversible error, in granting Respondent leave to assert a counterclaim under § 70-a, given that Appellants' underlying defamation claim against Respondent has a substantial basis in fact and law? This Court should find the answer to be "yes."

Nature of the Case

I. Factual Background

The facts underlying this dispute are well known to the Court from its consideration of prior appeals. In brief, Gottwald is a songwriter and producer of musical recordings. R-212. Gottwald is the principal and owner of Kasz Money Inc. ("KMI"), which furnishes the services of certain individuals in the entertainment industry. R-217. In or about 2005, Gottwald heard Respondent's demo tape. R-217. The parties entered into an exclusive recording agreement effective as of September 26, 2005. R-217-18.

Soon after, Respondent became frustrated that Gottwald was purportedly not devoting enough time to her recording career. R. 218. She retained new representatives, who in turn wanted to get her a richer recording agreement. R-219. In late 2005, Respondent sought to repudiate the KMI Agreement on several baseless grounds, which later included vague and fictitious assertions that Gottwald had purportedly engaged in some improper conduct with her. R-219. Gottwald refused to accede to extortion and give up his contractual rights. R-219. Later, in or about 2008, Respondent fired her representatives and asked Gottwald to forgive her for having made a mistake, and to work with her. R-219. Gottwald and KMI produced and promoted Respondent's debut album for KMI entitled *Animal* and follow-up EP entitled *Cannibal*, both of which were released in 2010,

selling millions of copies worldwide. R-220-21. Meanwhile, in court proceedings related to a dispute between Respondent and her former manager, Respondent and her mother testified under oath that Gottwald had not assaulted Respondent or acted inappropriately. R-222-25.

The relationship between Respondent and Gottwald started to deteriorate in or about late 2011 or early 2012. R-225. Respondent again began an aggressive campaign to obtain more favorable financial terms and change her contracts. R-227-28. As part of that campaign, Respondent filed a defamatory complaint in California Superior Court (the "Sham Complaint") on October 14, 2014 (the "California Action"). R-230. The Sham Complaint falsely claimed that Gottwald had drugged and raped Respondent. R-230. The Sham Complaint was filed to ensure that the lurid rape and drugging allegations would be widely disseminated by the press to gain the "maximum level of negative publicity" against Gottwald. R-231. The expressly stated goal of a written "Press Plan" designed by Respondent's agents was to maximize public pressure and negative publicity against Gottwald by disseminating these false allegations. R-214, R-231.

Appellants thereafter filed the instant action for defamation, also on October 14, 2014. R-214. After her California Action was stayed, Respondent filed sham Counterclaims in New York, asserting torts against Gottwald. R-232.

The motion court dismissed those Counterclaims with prejudice. *Gottwald v. Sebert*, 2016 WL 1365969 (Sup. Ct. N.Y. Cnty. Apr. 6, 2016). In August 2016, Respondent voluntarily dismissed the California Action (after falsely informing the California court she would be seeking to amend). R-214, R-232. On December 22, 2017, Respondent voluntarily withdrew her appeal of this Court's April 6, 2016 Order that had dismissed with prejudice all of her tort and statutory Counterclaims premised upon her false allegations that Gottwald had drugged and raped her—even though Respondent had falsely stated in a press release that she would be pursuing that appeal. R-232.

II. Procedural History

Appellants' operative complaint asserts two causes of action for defamation against Respondent. Count I is premised upon Respondent's defamatory campaign of falsely alleging that Gottwald raped and drugged her. Count II is premised upon Respondent's text-message conversation with Stefani Germanotta p/k/a "Lady Gaga" on February 26, 2016, in which Respondent falsely stated that she and another female recording artist, Katheryn Hudson p/k/a Katy Perry, had both been raped by the same man (Gottwald). R-242.

Throughout this litigation, Appellants always maintained that Gottwald was a private figure, who, in order to prevail on his defamation claims at trial, would only need to prove, by a preponderance of the evidence, that Respondent was

negligent in publishing her defamatory statements. Accordingly, throughout the litigation, the parties conducted extensive fact and expert discovery regarding the issue of whether Appellants were private figures or public figures. R-431-38.

On October 18, 2018, the parties filed dueling motions for partial summary judgment. Respondent's motion sought summary judgment that, among other things, "Dr. Luke is a public figure who cannot prevail [on his defamation claims] unless he proves Kesha's actual malice …." R-307. Respondent argued, in the alternative, that Appellants were required to prove that Defendant acted with gross irresponsibility, purportedly because "Kesha's statements fall squarely within the sphere of legitimate public concern." R-319.

On February 6, 2020, the motion court issued a Decision and Order adjudicating the parties' dueling motions. *Gottwald*, 2020 WL 587348. *Inter alia*, the motion court rejected Respondent's "actual malice" argument, holding that Appellants are not public figures, and to prevail on their defamation claims, Appellants need only prove that Respondent acted negligently. *Id.* at *13. The motion court further rejected Respondent's "public concern" argument, holding "[t]he grossly-irresponsible standard, by its terms, does not apply to a first-hand account of events not involving any media publication, investigation or newsgathering." *Id.* at *15 (internal citations omitted).

Respondent appealed the motion court's summary judgment ruling on March 9, 2020. In support of her appeal, Respondent argued, once again, that Appellants are "public figures" required to prove actual malice by clear and convincing evidence. On appeal, Respondent again argued, in the alternative, that her defamatory statements were matters of "public concern," such that Appellants were purportedly required to establish that Respondent acted with gross irresponsibility. This Court heard oral argument on November 25, 2020.

While Respondent's appeal was pending and before oral argument, the Legislature amended Civil Rights Law § 70 *et seq*.—New York's Anti-SLAPP law—to provide, among other things, that a plaintiff in a defamation action involving a communication in connection with "an issue of public interest" must establish "by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false . . . ." N.Y. Civ. Rights Law § 76-a(1)(a)(1), (2) (2020). Section 70-a of the new statute also provides that a defendant falling within the new law's purview may assert a counterclaim for compensatory and punitive damages, attorney's fees, and costs, if the defamation action is "without a substantial basis in fact and law . . . ." N.Y. Civ. Rights Law § 70-a(1)(a) (2020). The amendments became effective on November 10, 2020. On that date, Respondent's appeal had not yet been argued, much less decided. Unquestionably,

Respondent chose not to raise the legislation with this Court before or at the hearing of her appeal, which occurred more two weeks after the statute took effect, or at any time before this Court ruled on Respondent's appeal.

On April 22, 2021, over five months after the amended statute's effective date, this Court affirmed the motion Court's order granting partial summary judgment (the "First Department Private Figure Ruling"). *Gottwald v. Sebert*, 193 A.D.3d 573 (1st Dep't 2021). In the First Department Private Figure Ruling, the Court held that Appellants were private figures and need not establish actual malice or gross irresponsibility to prevail on their defamation claims. *Id.* at 585-86. Instead, this Court held that Appellants need only prove by a preponderance of the evidence that Respondent acted negligently.[8]

On April 6, 2021, Respondent filed a motion seeking: (i) a ruling that the amended § 76-a applies to all of the defamation claims which Appellants have asserted against her; and (ii) leave to amend her answer to assert a counterclaim pursuant to § 70-a, seeking relief including attorney's fees, emotional distress

[8] Respondent is presently appealing the First Department Private Figure Ruling to the Court of Appeals, with the briefing on that appeal expected to be completed by this winter.

damages, and punitive damages.[9] R-63. Appellants opposed that motion, and the motion court heard oral argument on June 30, 2021. R-9.

III. The Decision Below

The motion court ruled from the bench at oral argument. The motion court held that, pursuant to *Matter of Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117 (2001) ("*Gleason*"), § 76-a should applied retroactively, because the motion court believed that "the amended statute was intended to conform with the original intent of [§76-a]," and because "while … immediacy does not establish retroactive intent, it does show a sense of urgency that [the court] can take into account." R- 60. The motion court also granted leave to amend her answer, to add a Counterclaim against Appellants under § 70-a. R-61.

Standard of Review

Issues of law, such as the interpretation of a statute, are reviewed *de novo*. *Feldman v. CSX Transp., Inc.*, 31 A.D.3d 698, 704 (2d Dep't 2006). Critically, because New York's Anti-SLAPP law is "in derogation of the common law," it

[9] Respondent's counterclaim only seeks attorney's fees and other damages in connection with the litigation of Count I in Appellants' complaint (which asserts a cause of action for defamation based upon Respondent's false accusation that Gottwald raped and drugged her). Respondent's counterclaim does not seek fees or other damages in connection with Appellants' litigation of Count II in their complaint (which alleges that Respondent defamed Gottwald by falsely telling Lady Gaga that he purportedly raped Katy Perry).

"must be strictly construed." *Hariri v. Amper*, 51 A.D.3d 146, 151 (1st Dep't 2008).

Argument

I. The Motion Court Erred in Holding that the Amendments to Civil Rights Law § 76-a Apply Retroactively

A. Respondent Cannot Overcome the Strong Presumption Against Retroactivity

In holding that the amendments to New York's Anti-SLAPP law "should be applied retroactively" (R-60), the motion court deviated from the "deeply rooted presumption against retroactivity." *Matter of Regina Metro. Co., LLC v. New York State Div. of Hous. & Community Renewal*, 35 N.Y.3d 332, 370 (citing *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)). "It is a fundamental canon of statutory construction that retroactive operation is not favored by courts". *Majewski v. Broadalbin-Perth Cent. School Dist.*, 91 N.Y.2d 577, 584 (1998); *see also In re Regina*, 130 N.Y.S.3d at 370 ("[r]etroactive legislation is viewed with 'great suspicion'") (citation omitted); *People v. Oliver*, 1 N.Y.2d 152, 158 (1956) (this "rule recognizes that people guide their affairs in the light of existing laws and that it would be unfair to defeat expectations, rights and liabilities arising under those laws by subsequent retroactive changes.").

The general presumption against retroactive effect may only be overcome "by either [1] an express prescription of the statute's temporal reach or [2] a less explicit but 'comparably firm conclusion'—applying 'normal rules of

construction'—of legislative intent to apply the enactment to conduct that occurred previously." *In re Regina*, 130 N.Y.3d at 373 (internal citations omitted).[10] A statute cannot overcome the presumption under the second prong of the test "unless the language" of the statute "by necessary implication requires" retroactivity. *Majewski*, 91 N.Y.2d at 584. Again, in interpreting the language of the statute, it "must be strictly construed," because the anti-SLAPP law was implemented "in derogation of the common law" of defamation. *Hariri*, 51 A.D.3d at 151.

As demonstrated below, § 76-a is utterly devoid of any "express prescription" or other "comparably firm conclusion" of legislative intent to apply the amended Anti-SLAPP provisions retroactively.

1. The Amendments to Civil Rights Law § 76-a Contain No Express Statement of Retroactive Effect

Indisputably, the amended text of § 76-a contains no express statement whatsoever regarding any purported retroactive effect. As the motion court recognized: the statute contains "no words themselves that show whether it was intended to be prospective or whether it was intended to be retroactive." R-60.

[10] As discussed *infra*, the presumption against retroactivity may also be overcome if a statute is "remedial," but does not impair a party's vested rights. The Anti-SLAPP amendments are not remedial, and if applied retroactively, they will grievously impair Appellants' vested rights.

Accordingly, it is beyond dispute that § 76-a contains no express prescription of retroactivity.

2. The Amendments to Civil Rights Law § 76-a Do Not, By Necessary Implication, Require Retroactivity

Moreover, no retroactive intent for the amendment to § 76-a can be implied, to defeat presumption against retroactivity. This is because, when strictly construing the statute, one cannot draw a "firm conclusion" that the legislature intended "to apply the enactment to conduct that occurred previously." *In re Regina*, 130 N.Y.3d at 373; *Hariri*, 51 A.D.3d at 151. In other words, it cannot be said that the amendment to § 76-a "by necessary implication requires" retroactivity. *Majewski*, 91 N.Y.2d at 584. The motion court itself stated that "the legislature . . . isn't always careful and if it were, we wouldn't be here dealing with this today . . . ." R-26, at 18:10-13. The motion court's own statement underscores that a "firm conclusion" cannot be drawn that the statute was intended to be retroactive intent.

Nonetheless, the motion court erroneously held that the requisite clear legislative intent for retroactivity existed based on two findings: (1) the Assembly Bill stated that the amendments were to "take effect immediately"; and (2) "the statute" purportedly "was designed to rewrite an unintended judicial interpretation" by purportedly "reaffirm[ing] legislative judgment about what the law was intended to have always been and be." R-60.

The motion court's two findings were in error. Neither of these findings support retroactive application—indeed, as explained below, the motion court's second finding was completely mistaken as a factual matter.

a) The Statement that the Amendments "Shall Take Effect Immediately" Indicates Prospective, Not Retroactive, Application

The motion court held, in part, that retroactive application of the Anti-SLAPP amendments was justified by the statement in the Assembly Bill that the amendments "shall take effect immediately." R-16, R-60. This was error.

Numerous courts have recognized that "the language 'shall take effect immediately'"—*i.e.*, the very language used in connection with the amendment to § 76-a—affirmatively provides "a clear indication that prospective application is appropriate." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 231 A.D.2d 102, 106 (3d Dep't 1997), *aff'd*, 91 N.Y.2d 577 (1998) (citing cases). Indeed, the motion court itself acknowledged that, pursuant to the holding in *Majewski*, the term "immediate . . . isn't so helpful . . . in ascertaining whether or not . . . there's definitive legislative intent . . . for retroactive or prospective" effect. R-15, at 7:12-17.

Following the seminal *Majewski* ruling, the First Department has further held unequivocally:

> As a matter of statutory interpretation, "[w]here a statute by its terms directs that it is to take effect immediately, it does not have any retroactive operation or effect"

Aguaiza v. Vantage Props., LLC, 69 A.D.3d 422, 423 (1st Dep't 2010) (citing cases). In the statute at issue in *Aguaiza*, "[n]o provision was made in the statute for retroactive application of its terms," though the statute did provide "that its terms are to take effect 'immediately.'" *Id.* After the lower court held that the subject statute should apply retroactively, this Court reversed, finding such determination had been "improper[]." *Id.* In finding that the statute applied only prospectively, the Court held: "[T]he wording of the statute is clear with respect to the timing of its effective date. 'Immediately' is a term in statutory construction with a precise meaning." *Id.* at 424; *accord, Murphy v. Bd. of Educ. of N. Bellmore Union Free School Dist.*, 104 A.D.2d 796, 797 (2d Dep't 1984), *aff'd*, 64 N.Y.2d 856 (1985) ("where a statute directs that it is to take effect immediately, it does not have any retroactive operation or effect").[11]

[11] The motion court cited no authority other than *Gleason* in support of its finding that the term "immediately" purportedly conveyed a sense of "urgency" and thus an intent to apply the amendments retroactively. As discussed below, however, the "immediacy" identified in *Gleason* referred to the fact that the Legislature acted to amend the subject statute immediately after learning of an unintended judicial interpretation of that statute. 96 N.Y.2d at 122. This improper reliance on *Gleason*, and lack of consideration of the ample case law discussed above, is also true of other decisions that have incorrectly held that the language "shall take effect immediately" in any way indicates an intention of retroactivity. *See, e.g.*, *Palin v. New York Times Co.*, 510 F. Supp. 3d 21, 26-27 (S.D.N.Y. 2020) (citing

It has also long been established, and reinforced, that "[a] statute using words importing futurity, such as 'shall be,' is regarded as prospective only." *Weiler v. Dry Dock Sav. Inst.*, 258 A.D. 581, 582 (1st Dep't 1940), *aff'd*, 284 N.Y. 630 (1940); *see also Kuryak v. Adamczyk*, 265 A.D.2d 796, 796 (4th Dep't 1999) ("Here, the amendments use the term 'shall'. 'As a question of intention, a statute framed in future words, such as 'shall' or 'hereafter,' is construed as prospective only." (citing N.Y. Stat. Law § 51 (McKinney)).

This case law comports with common sense. A statement that a statute "shall take effect immediately" indicates that the Legislature understood that the statute must come into effect on a going-forward basis without further delay. In contrast, a retroactive statute would apply to conduct that has already occurred. It would be nonsensical to state that a statute "shall" apply "immediately" if the intent of the statute was to go backwards in time to reach conduct which has already occurred.

Accordingly, the statement in the Assembly Bill that the amendments "shall take effect immediately" supports prospective, not retroactive, application.

Gleason only); *Sackler v. Am. Broad. Cos., Inc.*, 71 Misc. 3d 693, 698 (Sup. Ct. N.Y. Cnty. 2021) (adopting the reasoning of *Palin*, and citing *Gleason*).

b) The Amendments to § 76-a Represent a Major Change to the Unambiguous Text of the Prior Version, Not a Legislative Correction of Judicial Misinterpretation

The motion court's second purported basis for its finding of retroactivity was the determination, citing *Gleason*, that the amendments were "designed to rewrite an unintended judicial interpretation" by "reaffirm[ing] legislative judgment about what the law was intended to have always been and be." R-60. This is simply wrong as a factual matter.

The original Anti-SLAPP law from 1992 was not intended to be broadly applied. Quite the contrary. The 1992 version of § 76-a expressly applied only to claims "brought by a public application or permittee," which were "materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." N.Y. Civ. Rights Law § 76-a (1992). Accordingly, the original law was intentionally limited to the specific circumstances of governmental applications—and purposefully did not encompass any other circumstance. As the July 27, 1992 Memorandum to the Governor from Robert Abrams, Attorney General explains:

> This bill attempts to prevent the risk of its being applied too broadly by limiting its application to actions "materially related" to a governmental application submitted by the plaintiff.

Memorandum to the Governor from Robert Abrams, dated July 27, 1992, Assembly Bill 4299, Chapter 767 (N.Y. 1992). *See also* Sponsor Memorandum to Assembly Bill 4299 (N.Y. 2020) ("The bill provides that a plaintiff who is seeking or who has obtained a permit, license or other governmental permission must prove 'actual malice' in a lawsuit that is based on the defendant's opposition to the permit.").

Nor was there a judicial dispute regarding the scope of the original statute, because everyone recognized it was unambiguously and intentionally narrow. Indeed, the expressly-limited scope of the statute was recognized by the Court of Appeals the very year it was passed. *See 600 W. 115th St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 137, n.1 (1992) (1992 version of the statute was addressed to "those who speak out at public meetings against proposed land use development and other activities requiring approval of public boards."). For almost thirty years, the original, narrow version of the statute was recognized—by the courts at every level and the preeminent scholars of New York law—as only applying in the limited, specific circumstances that were unambiguously described in the statutory text.[12]

[12] *See, e.g.*, *Guerrero*, 10 A.D.3d at 116 ("The anti-SLAPP provisions of Civil Rights Law §§ 70-a and § 76-a were enacted in 1992 to protect citizen activists from lawsuits commenced by well-financed public permit holders in retaliation for their public advocacy."); *OSJ, Inc. v. Work*, 691 N.Y.S.2d 302, 306-07 (Sup. Ct. N.Y. Cnty. 1999), *aff'd*, 273 A.D.2d 721 (3d Dep't 2000) (citing Professor Siegel, who noted that the 1992 version was created to address the "increasingly common" effort by public applicants "to discourage . . . opposition . . . during or after the

In sharp contrast, the new Anti-SLAPP amendments constitute a dramatic sea change, which intentionally, and significantly, widened the scope of what was previously recognized by all to be a very narrow statute. Introduced as a bill in February of 2019 and enacted on November 10, 2020, the amendments to § 76-a substantively changed the terms of the statute to expand its application to vast categories of conduct that were never contemplated as falling under the ambit of the prior statute. The legislature accomplished this vast expansion of statutory scope by modifying the definition of an "action involving public petition and participation." Pursuant to the revised definition, such actions are no longer limited to claims "brought by a public application or permittee," but now broadly include all claims "based upon: (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition." N.Y. Civ. Rights Law § 76-a(1)

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agency proceedings, to bring an action against the opposer for damages, perhaps for defamation, perhaps on other grounds."); *Artisan Lofts Development Owner LLC v. Silvers*, 2010 WL 1640105, at *2 (Sup. Ct. N.Y. Cnty. Apr. 5, 2010) (citing Weinstein Korn & Miller for the proposition that the 1992 version "focuses on retaliatory litigation commenced or maintained for the purpose of intimidating persons who have voiced opinions in public meetings or discussions inimical to those of the person controlling the litigation.").

(2020). The Sponsor Memorandum acknowledged that these changes were significant, and touted that the amendments "broadly widen[] the ambit of the law to include matters of 'public interest', which is to be broadly construed, e.g. anything other than a 'purely private matter'." Sponsor Memorandum to Assembly Bill 4299 (N.Y. 2020).

Despite acknowledging the "broad" change, the Sponsor Memorandum also refers to the Sponsor's intention that the amendments "better advance the purposes that the legislature originally identified in enacting" the law. Sponsor Memorandum to Assembly Bill 4299 (N.Y. 2020). But this Memorandum was drafted by a single Senator; it was not a statement of the Legislature as a whole, and cannot simply be taken at face value. Rather, as the Court of Appeals has directed, statements such as those in the Sponsor Memorandum "must be cautiously used," as they "simply indicate that various people had various views." *Majewski*, 91 N.Y.2d at 586-87.

Thus, in truth, the notion that the 2020 amendments advance the purpose identified in the 1992 statute is unfounded, and wholly divorced from the actual language of the prior statute. *See Veritas v. The New York Times Co.*, 2021 WL 2395290, at *6 (Sup. Ct. N.Y. Cnty. Mar. 18, 2021) ("These recent amendments by the Legislature have turned the original purpose of the Anti-SLAPP law upside down."). If the Legislature's intent had been for the 1992 law to apply more

broadly than its express terms required, it certainly would have sought to amend with some urgency. The fact that it did not amend the statute for almost 30 years, despite repeated judicial interpretation of the statute's narrow scope, proves that the courts, in fact, had correctly interpreted that law, as it was intended in 1992.

Because the amended statute implemented substantive new provisions that were not included, or intended to be included, in the prior bill, this motion court's second purported justification for applying the statute retroactively was erroneous.

3. *Gleason* Does Not Support Retroactive Application Here

In support of its determination that the amendments to § 76-a should apply retroactively, the motion court (like other lower courts to have considered the question of retroactivity) relied almost exclusively on *Gleason*. But *Gleason*'s holdings, and the particular facts discussed therein, do not support a finding of retroactivity here; rather, they compel the opposite conclusion.

In *Gleason*, the Court of Appeals reaffirmed the fundamental axiom that "[a]mendments are presumed to have prospective application unless the Legislature's preference for retroactivity is explicitly stated or clearly indicated." 96 N.Y.2d at 122. The Court also noted that "factors in the retroactivity analysis include whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed

to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be." *Id.*

The factual analysis that the Court undertook in *Gleason* gives context to this formulation. The statute at issue in *Gleason* was CPLR 7502(a), which relates to special proceedings arising out of arbitrable controversies. *Gleason* involved a petition to confirm an arbitration award, which was filed under the same index number as had been used for an earlier special proceeding seeking to enjoin the respondents' pending the arbitration. *Id.* at 117.

During the pendency of the lower court proceeding in *Gleason*, the Court of Appeals rendered a decision in *Matter of Solkav Solartechnik, G.m.b.H. (Besicorp Grp.)*, 91 N.Y.2d 482 (1998) (hereinafter, "*Solartechnik*"). As the *Gleason* case explained, the *Solartechnick* Court construed CPLR 7502(a), and determined that, as it was written, CPLR 7502(a) required that "a new proceeding had to be commenced when a pre-arbitration proceeding ended with entry of final judgment because the pre-arbitration proceeding was no longer pending." *Gleason*, 96 N.Y.2d at 121. The Court in *Solartechnik* specifically invited the Legislature "to amend CPLR 7502(a) if it intended that all matters relating to a particular arbitration to be treated as a single, ongoing proceeding." *Id.*

As the *Gleason* decision notes, following *Solartechnik*, "Legislative reaction was swift." *Id.* at 121. At the next legislative session, the Assembly introduced a

bill to amend CPLR 7502(a), as suggested by the Court. *Id.* The Sponsor Memorandum for that bill "noted that the original purpose of CPLR 7502(a) was 'to ensure that all applications concerning an arbitration [be] presented in the same case,'" and that the interpretation set forth in *Solartechnik* "would add costs and also present the opportunity to bring a second proceeding before a different judge, or even in a different county." *Id.* (cleaned up). Legislators and the Governor agreed that the amendment was enacted specifically to address the "technical defect" and "problems" identified in *Solartechnik*. *Id.*

With respect to the dispute between the parties in *Gleason*, the Court reasoned that, although the amendment to CPLR 7502(a) was not enacted until after the Appellate Division had dismissed the application to confirm arbitration, the amendment should nonetheless apply. *Id.* at 121-22. The Court noted that this determination was supported by: (1) the urgency of the Legislature in enacting the amendment "swiftly after *Solartechnik*"; and (2) the extensive examples in the legislative history which "establishe[d] that the purpose of the amendment was to clarify what the law was always meant to do and say: that all arbitration-related applications should be concentrated in a single proceeding or action, to promote judicial economy and prevent forum shopping." *Id.*

The reasoning of the Court of Appeals in *Gleason* was sound and amply supported. It was clear that the "technical defect" identified in *Solartechnik* was

not intended by the original version of CPLR 7502(a), and the Legislature's "urgency" in promptly correcting this defect, coupled with the legislative history, demonstrated that the amendment merely corrected the statute so as to effect its original intent.[13]

The amendments at issue here, by contrast, bear none of the markers of retroactive intent that were so obvious in *Gleason*. The text of the amendment, as compared with the original statute, makes clear that the modifications are substantial and drastically alter the unambiguous purpose and intent of the original statute—which was expressly limited to participants in public hearings. This was not a "swift" correction of an unintended interpretation as to a technical matter, as in *Gleason*. It was, effectively, a new law with vastly broader application than the prior law.

4. The Cases That Held the 2020 Amendments Apply Retroactively Are Not Binding and Misapply Settled Law

In its decision on appeal, the motion court also relied on the opinions of lower courts which held that the 2020 amendments to the Anti-SLAPP law apply

[13] It was also notable in *Gleason* that retroactive application of the amended statute did not impair any substantive right belonging to the defendant. Rather, the retroactive change merely eliminated a procedural hurdle, thereby "promot[ing] judicial economy and prevent[ing] forum shopping." *Gleason*, 96 N.Y.2d 117, 121. Neither party lost or gained any substantive right or advantage by virtue of retroactive application. However, as discussed *infra*, retroactive application of the Anti-SLAPP amendments will seriously impair Appellants' substantive rights.

retroactively. R-60. These decisions should have no bearing on the outcome here, for multiple reasons.

First, none of the decisions on this issue are binding on this Court.

Second, the case most frequently cited in support of retroactivity, *Palin v. New York Times Co.,* 2020 WL 7711593 (S.D.N.Y. Dec. 29, 2020), is inapt. Indeed, the facts and procedural history of that case demonstrate why it should be disregarded completely. In *Palin*, the plaintiff was Sarah Palin, who had conceded that she is a "public figure." *Id.* at *1. On that basis, the court had already held "that the federal Constitution, under well-settled and binding precedent, imposed the actual malice standard." *Id.*

The defendants subsequently moved for a ruling that the "actual malice" standard applied for the additional reason that the 2020 amendments to § 76-a applied retroactively in that case. In granting the defendants' motion, the court relied on the same purported bases as the motion court here. As discussed above, those bases fail to support retroactive application. *See supra* § I(A)(2) & n.11. Indeed, the court's analysis in *Palin* only further supports Appellants' argument here.

As the *Palin* court acknowledged, granting the defendants' motion would have no impact on trial, since the plaintiff was already subject to the actual malice standard: "if, as plaintiff insists, the statute does not have retroactive effect, then

we are exactly where we began and, to prevail at trial, plaintiff will still have to prove actual malice". *Id.* at *3. Accordingly, in rejecting the plaintiff's argument that retroactivity would impair her substantive rights, the court justified its decision by explaining that "§ 76-a will not have any meaningful impact on plaintiff's 'substantive rights'" because "any public figure seeking to recover damages for defamation would already have had to prove actual malice". *Id.* at *4.

Of course, the situation in *Palin* is fundamentally different from the situation here, where Appellants have already been deemed not to be public figures. The *Palin* decision thus further confirms that retroactive application in this case would be improper.

The other lower court decisions that have addressed the potential retroactive application of the amendments to § 76-a fare no better. For the most part, these decisions simply reflect a series of dominos adopting the (incorrect) reasoning of *Palin*, with little to no independent analysis. *See Coleman v. Grand*, 2021 WL 768167, at *7-8 (E.D.N.Y. Feb. 26, 2021) (discussing retroactivity in a single paragraph, and relying on *Palin*); *Sackler*, 71 Misc.3d at 697-99 (following reasoning of *Palin* and *Coleman*); *Veritas*, 2021 WL 2395290, at *6-7 (Sup. Ct. N.Y. Cnty. Mar. 18, 2021) (following *Palin* and *Coleman*, without independent analysis); *Sweigert v. Goodman*, 2021 WL 1578097, at *2 (S.D.N.Y. Apr. 22, 2021) (following *Palin*, *Coleman*, and *Sackler* in a single sentence, without

analysis, where "the parties appear[ed] to agree that Plaintiff's defamation claims fall within the ambit of § 76-a"); *Reus v. ETC Hous. Corp.*, 72 Misc. 3d 479, 485 n.1 (Sup. Ct. Clinton Cnty. May 6, 2021) (following reasoning of *Palin*, *Coleman*, and *Sackler* in a footnote, without analysis); *Massa Construction, Inc. v. Meany*, Index No. 126837/2020, at 2 (Sup. Ct. Ontario Cnty. May 10, 2021) (following *Palin*, *Coleman*, and *Sackler*, but also holding that prior version of § 76-a would have been applicable to action) (R-364, R-366); *Griffith v. The Daily Beast*, 2021 WL 2940950, at *2 (Sup. Ct. N.Y. Cnty. July 13, 2021) (following *Palin*, *Coleman*, and *Sackler* without independent analysis); *Lindberg v. Dow Jones & Co., Inc*., 2021 WL 3605621, at *7 n.77 (S.D.N.Y. Aug. 11, 2021) (adopting *Palin* without discussion, and noting that the parties did not dispute the applicability of § 76-a). One recent decision did not even consider whether the amendments to § 76-a applied retroactively. *See Kurland & Associates, P.C. v. Glassdoor, Inc.*, 2021 WL 1135187, at *1 (Sup. Ct. N.Y. Cnty. Mar. 22, 2021) (applying amendment to pending litigation without analysis of retroactivity).

In other words, the sheer number of non-binding decisions that have adopted the flawed reasoning of *Palin*—a case where the determination of retroactivity admittedly had no bearing on the fault standard applicable to the plaintiff's claims, and where the plaintiff admittedly was not seeking to assert a counterclaim under § 70-a (510 F. Supp. 3d at 25, n.2)—should be absolutely irrelevant to this Court's

independent assessment of retroactivity. *See Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting) ("no amount of repetition of historical errors in judicial opinions can make the errors true."). And that independent assessment, applying the correct legal standards and factual background, can arrive at only one conclusion: the amendments to § 76-a do not apply retroactively to this litigation.

B. The Amendments to Section 76-a Are Not "Remedial," And Even If They Were, They Could Not Be Applied Retroactively Because Doing So Would Impair Vested Rights

While the presumption against retroactive application is strong, there are certain types of statutes for which retroactive application can be appropriate. Specifically, statutes governing procedural matters may be applied retroactively, as may "'remedial" legislation, provided that such legislation does not impair a party's vested rights. *See Majewski*, 91 N.Y.2d at 584; *Aguaiza*, 69 A.D.3d at 423.

Obviously, the amendments to § 76-a are not "procedural."[14] Nor, as explained, below, can they be classified as "remedial." Accordingly, the amendments cannot be applied retroactively on this basis (or any other). Further, although the Court need not reach the issue, the amendments cannot be applied

[14] "[M]atters dealing with the conduct of the litigation are procedural, and everything else is substantive." 19A N.Y. Jur. 2d Conflict of Laws § 4 (citing *Federal Ins. Co. v. Fries*, 78 Misc. 2d 805, 355 N.Y.S.2d 741 (N.Y. City Civ. Ct. 1974)).

retroactively for the additional reason that doing so would impair Appellants' vested rights.

1. The Amendments Are Not "Remedial"

A statute is not considered to be "remedial" for purposes of a retroactivity analysis merely because it purports to remedy a societal problem which previous legislation did not address (or adequately address). If that were the test, then nearly every statute would be considered "remedial." *See Majewski*, 91 N.Y.2d at 584 (a statute is not retroactive merely because it attempts "to 'supply some defect or abridge some superfluity in the former law.'"). (citation omitted). Rather, a statutory amendment is "remedial" when "the purpose of the amendment was to clarify what the law was always meant to do and say . . . ." *Gleason*, 96 N.Y.2d at 122. Thus, when a statute "alter[s] settled law" and "accordingly represent[s] a material, substantive departure from prior New York law," it is not considered "remedial" for purposes of a retroactivity analysis. *Majewski v. Broadalbin-Perth Cent. School Dist.*, 231 A.D.2d 102, 108 (3d Dep't 1997).

Here, as explained in Section I(A)(2) *supra*, the amendments to § 76-a do not merely "clarify what the law was always meant to do or say," but rather vastly expand the scope of the statute far beyond what was originally intended. The amendments simply are not "remedial" for purposes of the retroactivity analysis.

2. Retroactive Application Would Impair Appellants' Vested Rights

Although this Court need not reach the issue—because the amendments to § 76-a are neither procedural nor remedial—the amendments also cannot be applied retroactively for the additional reason that doing so would impair Appellants' vested rights.

In *Frontier Ins. Co. v. State*, 609 N.Y.S.2d 748 (Ct. Cl. 1993) ("*Frontier*"), *aff'd*, 197 A.D.2d 177 (3d Dep't 1994), *and aff'd*, 87 N.Y.2d 864 (1995), the court provided a thorough discussion of the meaning of the term "vested right" under binding New York case law. The *Frontier* court explained:

> The concept of vested rights has been called a "fiction", which "hides many unmentioned considerations of fairness to the parties, reliance on preexisting law, the extent of retroactivity and the nature of the public interest to be served by the law" (*Matter of Chrysler Properties, Inc. v. Morris*, 23 N.Y.2d 515, 523 (1969)). It is now recognized that the question of whether rights have "vested" rests on policy considerations and is to be determined on a "case-by-case" analysis (*Matter of Hodes v. Axelrod*, 70 N.Y.2d 364, 371 (1987)) . . . .
>
> As indicated in the quotation from *Matter of Chrysler Properties, Inc.,* . . . the concept of vested rights rests on similar consideration of "fairness to the parties" or, in other words, "justice" in a specific situation. . .

609 N.Y.S.2d at 755 (parallel citations omitted).

The situation-specific factors set forth in *Frontier*—including fairness and justice, reliance on preexisting law, and the extent of retroactivity—all demonstrate

that retroactive application of the amended Anti-SLAPP law would seriously impair Appellants' vested rights. Appellants commenced this action nearly seven years ago with the knowledge that, if they were held to be private figures (as they always maintained), then they would be able to prove their defamation claims by establishing, by a preponderance of the evidence, that Respondent acted with negligence (as opposed to the higher standard of having to prove, by clear and convincing evidence, that Respondent acted with "actual malice"). The parties then litigated this action for almost the entirety of those seven years based upon their (correctly) shared understanding that if Appellants were, indeed, private figures, then "actual malice" could not apply. Accordingly, the parties engaged in years of fact and expert discovery which was expressly directed to the issue of whether Appellants were public or private figures. R-431-38. Both the motion court and this Court, in its First Department Private Figure Ruling, expressly held that Appellants are not public figures, and therefore the "actual malice" standard does not apply. *Supra*, at 16.[15]

[15] In her arguments before the motion court, Respondent attempted to minimize the impairment that retroactivity would pose to Appellants' vested rights by contending Appellants had "litigated the actual-malice issues since the pleading stage of this case." But Respondent's argument is based on a feigned ignorance of the difference between "actual malice" (which is a standard of fault that requires a defendant to have acted with knowledge of, or reckless disregard for, the falsity of her statements), and "common-law malice" (which pertains to the defendant's state of mind in wishing to harm the plaintiff). This litigation has always involved

However, if the amendments to the Anti-SLAPP law are held to apply retroactively,[16] all of this hard-fought discovery and motion practice—not to mention Appellants' reliance on long-established legal standards in developing their litigation strategy during every phase of this action—will be for naught. Appellants would lose the right, already vested and confirmed by the courts, to prove their case based upon the burden of proof of preponderance of the evidence, and the standard of fault of negligence. Moreover, Appellants will face potential liability for the mere acts of commencing and continuing this litigation—acts for which Appellants could not have incurred liability at the time they engaged in them. To upend the applicable standards at the heart of this lawsuit, after nearly seven years of vigorous litigation based on the prior standards and numerous appeals, would grievously upset the concepts of fairness and justice which are at the heart of the doctrine of "vested rights."

In other analogous situations, New York courts have similarly recognized that the loss of a claim or defense, or addition of a benefit to the opposing party, impairs vested rights. *See, e.g.*, *Ruffolo v. Garbarini & Scher*, 239 A.D.2d 8, 12 (1st Dep't 1998) ("While the Legislature provided that the amendment 'shall take

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allegations of common-law malice (R-242) which allegations are utterly irrelevant to the vested rights that retroactivity would impair.

[16] As discussed in the Preliminary Statement *supra*, the 2020 amendments to §§ 70-a and 76-a are part of a single, unified statutory scheme.

effect immediately,' it cannot be applied to require dismissal of an action that was viable at the time it was filed. Such a result would impair vested rights and violate due process.") (internal citations omitted); *Byrnes v. Scott*, 167 A.D.2d 155, 155 (1st Dep't 1990) (vested right in the defense of lack of personal jurisdiction "may not be impaired by retrospective application"); *Hogan v. Kelly*, 86 A.D.3d 590, 592 (2d Dep't 2011) (amended statutory definition of "claim of right," as an element to a claim of adverse possession, could not apply retroactively to impair the vested rights of a party whose claim had accrued when the prior definition was in effect). The same conclusion applies here.

C. Retroactive Application Would Violate Due Process

Although this Court can and should reverse the motion court without reaching the issue, the amendments to § 76-a cannot be applied in this action for the independent reason that doing so would violate Appellants' due process rights.

The Court of Appeals, in *Regina*, recognized that "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation," and can have "potentially harsh" impacts. *In re Regina*, 35 N.Y.3d at 375. In *Regina*, the Court of Appeals set forth relevant factors in determining "whether a retroactive statute comports with due process." *Id.* at 376. These include "forewarning of a change in legislation as relevant to reliance interests" and "the length of the retroactivity period." *Id.* (citations omitted). For

example, the *Regina* Court cited *Chrysler Properties, Inc. v. Morris*, 23 N.Y.2d 515, 518-19 (1969), in which it rejected a "four-month period of retroactivity" for "a statute providing New York City a new right to seek judicial review of adverse determinations of the State Tax Commission." The *Regina* Court also cited *James Square Assocs. LP v. Mullen*, 21 N.Y.3d 233 (2013), in which the Court "invalidated the retroactive application of amendments to the Empire Zones Program Act that changed the criteria for receipt of tax benefits, noting businesses had no forewarning of the change, and that a 16–month period of retroactivity was excessive because businesses had 'gained a reasonable expectation that they would secure repose in the existing tax scheme.'" *Id.* at 378.

Turning to the statute at hand in *Regina*, which made "sweeping changes" to the Rent Stabilization Law, the Court found that retroactive application was even more inappropriate. *Id.* at 379. The amended provisions "expand[ed] a tenant's total overcharge recovery well beyond what was provided under the prior law," and its retroactive application "upends owners' expectations of repose relating to conduct that may have occurred many years prior to the recovery period," and could "either increase the penalty or impose a new penalty for damages that previously were not trebled." *Id.* at 379-80.

The factors identified in *Regina* preclude retroactive application here. First, applying the amended § 76-a here would result in a seven-year period of

retroactivity, with no forewarning to Appellants, "upend[ing]" their reasonable expectations. Second, this is not a case of "brief, defined periods" of retroactivity "that function in an administrative manner to assist in effectuating the legislation." As set forth above, no period of retroactivity is referenced, let alone defined, in the statute. Third, Appellants' substantive rights will be drastically affected by retroactive application. *See supra* § I(B)(2). This is precisely the kind of "harsh" impact that *Regina* indicated should be avoided.

II. The Amended § 76-a Cannot Apply In Any Event To Appellants' Defamation Claim Related To Katy Perry

Even were the Court to conclude that the amended § 76-a applies retroactively (and it should not), it still nonetheless must conclude that Appellants' defamation claim based on Respondent's text messages to another celebrity, Lady Gaga, accusing Gottwald of raping Katy Perry (who has unequivocally denied that charge), falls outside of that statute's scope. This is because even the amended statute is applicable only to claims based on communications or conduct made "in connection with an issue of public interest[.]" N.Y. Civ. Rights Law § 76-a(1)(a) (2020).

A statement is "within the sphere of legitimate public concern" when it is "reasonably related to matters warranting public exposition." *Chapadeau v. Utica Observer–Dispatch*, 38 N.Y.2d 196, 199 (1975). Moreover "[a] public controversy is a dispute that in fact has received public attention because its ramifications will

be felt by persons who are not direct participants … A general concern or interest will not suffice." *Mott v. Anheuser-Busch, Inc.*, 910 F. Supp. 868, 874 (N.D.N.Y. 1995), *aff'd*, 112 F.3d 504 (2d Cir. 1996). Publications directed only "to a limited, private audience" and "statements falling into the realm of mere gossip and prurient interest are also deemed matters of private concern." *Coleman*, 2021 WL 768167, at *8 (internal quotation marks omitted).

The text messages at issue here—between one wealthy celebrity and another—are a matter of private, not public, concern. By her admittedly "private" text messages, Respondent was not contributing to any larger societal discussion; she was simply chatting with a new acquaintance, with the obvious intention of engendering sympathy and support for Respondent's personal attacks on Gottwald. This is certainly not the type of speech that § 76-a was intended to protect. *See Kurland & Associates, P.C. v. Glassdoor, Inc.*, 2021 WL 2665656, at *3 (N.Y. Sup. Ct. June 28, 2021) ("the legislative history indicates that the purpose of the [amended § 76-a] is to prevent deep-pockets from stifling free speech by suing ordinary members of the community who "speak out" on matters of important public interest."

III. The Motion Court Erred In Granting Respondent Leave To Assert a Counterclaim under the Amended Section 70-a

In addition to erroneously concluding that the amended § 76-a has retroactive effect and applies to Appellants' defamation claim, the motion court

also erred by granting Appellant leave to amend to assert a counterclaim pursuant to the amended § 70-a. As set forth below, Respondent's proposed counterclaim is "clearly devoid of merit," and leave to amend her pleading should have been denied. *Fairpoint Cos., LLC v. Vella*, 134 A.D.3d 645, 645 (1st Dep't 2015).

A. Because the Amendments to § 76-a Are Not Retroactive, § 70-a Is Inapplicable To This Litigation

First, and most simply, Respondent's proposed counterclaim is futile, because Appellants' defamation claim does not fall within the applicable terms of that statute. On its face, § 70-a only permits a party to assert a claim thereunder "in an action involving public petition and participation," as that phrase is defined in § 76-a. But because the 2020 amendments to § 76-a are not retroactive for the reasons stated above, Respondent's proposed counterclaim must be assessed under the definition included in the prior version of § 76-a. *See Clean Earth of N. Jersey, Inc. v. Northcoast Maint. Corp.*, 142 A.D.3d 1032, 1036 (2d Dep't 2016) (where amendment was held to not be retroactive, prior version of statute applicable to existing claim); *Rochez v. Travelers Cas. & Sur. Co. of Am.*, 8 A.D.3d 121, 122 (1st Dep't 2004) (same); *see also Rogers v. Dupree*, 349 Ga. App. 777, 778 n.1 (because amendments to Anti-SLAPP statute were not retroactive, "[t]he prior version of the statute … applies to this case, which was filed several years before the 2016 amendment.").

Under the prior definition (which must be applied to this case), an "action involving public petition and participation" is limited to an action that is "brought by a public applicant or permittee, and is materially related to any efforts on the defendant to report on, comment on, rule on, challenge or oppose such application or permission." N.Y. Civ. Rights Law § 76-a (1992), *amended by* N.Y. Civ. Rights Law § 76-a (2020). Appellants are not public applicants or permittees, and Appellants' defamation claims are not in any way related to any efforts by Respondent to report on, comment on, rule on, challenge or oppose any application or permission sought by Appellants. Thus, on its face, § 70-a does not apply to this litigation, and Respondent's counterclaim fails as a matter of law. *See Hariri v. Amper*, 51 A.D.3d 146, 151 (1st Dep't 2008) (affirming dismissal of § 70-a counterclaim where "defendants present absolutely no evidence that plaintiff made any attempt to comply with, or initiate an application process"); *Guerrero v. Carva*, 10 A.D.3d 105, 117 (1st Dep't 2004) ("At a minimum, the anti-SLAPP statute should be read to require that a defendant identify, at least in general terms, the application or permit being challenged or commented on, and that the defendant's communications be substantially related to such application or permit.").

B. The Amendments To § 70-a Are Also Not Retroactive

No doubt, the most impactful changes made to New York's Anti-SLAPP regime by the 2020 amendments were those made to the definition of an "action involving public petition and participation" in § 76-a. The Legislature, however, also made significant, substantive modifications to § 70-a, including: (i) making an award of costs and attorney's fees mandatory, rather than discretionary (subject to a determination that the action was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification, or reversal of existing law); and (ii) clarifying that costs and fees may be awarded following an adjudication in a defendant's favor on a motion brought pursuant to CPLR §§ 3211(g) or 3212(h).[17]

Respondent cannot overcome the presumption that these amendments—just like the amendments to § 76-a—should also not be given retroactive effect.

First, the amendments to § 70-a do not contain any express statement of retroactive effect. Although the amended text of § 70-a states that it applies to certain actions that are "commenced or continued" without a substantial basis in fact or law, that identical "commenced or continued" language was contained in the original 1992 version of the statute. Plainly, this "commenced or continued"

[17] Respondent has not purported to bring a motion under either of these procedural vehicles.

language was merely intended to cover a situation where something occurs after a plaintiff files suit (*i.e.*, a change in the applicable law, or the discovery of some dispositive evidence) that eliminates a substantial basis for the suit that may have existed previously.[18]

Second, no retroactive intent for the amendments to § 70-a can be implied from the language of the statute, for the very same reasons why there is no implication of retroactivity in the text of § 76-a. *See supra* § I(A)(2).

Third, the amendments to § 70-a are not "remedial" for purpose of a retroactivity analysis. This is because the amendments do not "clarify what the

[18] In their briefing before the motion court, Appellants discussed the lack of any indication in the text of § 76-a that the Legislature intended for that statute to be applied retroactively. As part of that discussion, Appellants noted that the language of § 70-a expressly states that it applies to an action that is "commenced or continued" without a substantial basis in fact or law. In contrast, the amended text of § 76-a does not contain that "commenced or continued" language, even though the Legislature easily could have included that language. (This difference in language between § 70-a and § 76-a was also noted, albeit disregarded, by the erroneous *Palin* decision.) In their argument before the motion court, Appellants mistakenly stated that the "commenced or continued" language had been added in the 2020 amendments to § 70-a, when, in fact, that language also was included in the original 1992 version of § 70-a. To the extent that, *arguendo*, the "commenced or continued language" in the 2020 amendments to § 70-a have any effect upon actions that were commenced prior to the passage of those amendments, that effect would be limited to making an award of attorney's fees mandatory, rather than discretionary, in an action brought by a public applicant or permittee without a substantial basis in fact or law. As discussed herein, any application of § 70-a to other types of actions would create new economic liabilities based upon preexisting conduct, thereby causing substantial impairment of vested rights and violating due process.

law was always meant to do and say…." *Gleason*, 96 N.Y.2d at 122. Rather, the amendments are non-remedial because they significantly "alter settled law" and "accordingly represent a material, substantive departure from prior New York law." *Majewski v. Broadalbin-Perth Cent. School Dist.*, 231 A.D.2d 102, 108 (3d Dep't 1997). These amendments create new forms of liability that did not previously exist, and allow claims under § 70-a to be asserted against vast classes of individuals who previously were not subject to liability under this statute.

Fourth, there is no question that the amendments to § 70-a significantly impair Appellants' vested rights. Appellants instituted this action nearly seven years ago, and the parties have engaged in a great deal of litigation with substantial legal fees being incurred by both sides. Up until November 2020, there was no possibility for Respondent to assert a counterclaim for recovery of any portion of her attorney's fees—let alone to seek emotional distress damages, or punitive damages. Yet, Respondent now contends that, based on an unanticipated and extreme change in the law, she should be permitted to recover her fees for the entirety of this litigation, plus additional damages for alleged emotional distress, as well as punitive damages. This creation of new and expansive potential liability, based on actions which at the time they were undertaken could not give rise to liability, is an extraordinary change in Appellants' vested rights.

Majewski is instructive. In *Majewski*, the Court of Appeals affirmed the judgment of the Third Department holding that amendments to the worker's compensation law—which, eliminated, except in cases of "grave injury", an employer's liability for contribution or indemnity to any third person—could not be applied retroactively. 661 N.Y.S.2d 293 (3d Dep't 1997), *aff'd*, 673 N.Y.S.2d 966 (1998). The identical analysis applies here. The imposition of liability for past conduct, which at the time it was committed, is a material, substantive departure from prior law, and would thus grievously impair Appellants' vested rights.

Fifth, retroactive application of the amendments to § 70-a would violate Appellants' due process rights. This is demonstrated by the U.S. Supreme Court's retroactivity and due-process analysis in the seminal case of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which has been adopted as New York law.[19] In *Landgraf*, the Supreme Court considered whether 1991 amendments to Title VII of the Civil Rights Act of 1964 applied to a pending litigation. The 1991 amendments "significantly expand[ed] the monetary relief potentially available to plaintiffs," including punitive damages, and "allow[ed] monetary relief for some [cases] that would not previously have justified any relief under Title VII. . . ." *Id.*

[19] *See In re Regina*, 35 N.Y.3d at 365 ("In *Landgraf v. USI Film Prods*., the Supreme Court articulated a contemporary framework for analyzing retroactivity – adopted by this Court . . . .").

at 253. The Supreme Court held that these amendments could not be applied retroactively to the case before the Court, explaining:

> Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal."

Landgraf, 511 U.S. at 265 (internal citation omitted). In holding that the amendments could not be applied retroactively, the Supreme Court further explained that "[t]he very labels given 'punitive' or 'exemplary' damages, as well as the rationales that support them, demonstrate that they share key characteristics of criminal sanctions. Retroactive imposition of punitive damages would raise a serious constitutional question." *Id.* at 281.

The identical analysis applies here. Pursuant to the amended § 70-a, Respondent seeks an award of attorney's fees, emotional distress damages and punitive damages for Appellants' conduct in commencing and litigating a defamation action—conduct which, at the time it took place, could not have given rise to any such liability. This runs directly counter to the bedrock "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place . . ." *Id.* at 265. Moreover, the "retroactive imposition of punitive damages" which Respondent seeks to impose for past

conduct "raise[s] a serious constitutional question" and thus should not be permitted. *Id.* at 281.

C. Even If The 2020 Amendments Were Applicable Retroactively, Respondent's Counterclaim Would Still Be Without Merit

Lack of retroactivity is not the only reason that Respondent's counterclaim is futile. Even were the Court to give the 2020 amendments to §§ 70-a and 76-a retroactive effect, Respondent would still be unable to demonstrate merit to her counterclaim. This is because § 70-a has always stated that costs and attorney's fees can be awarded only if the defendant (here, Respondent) is able to demonstrate that "the action involving public petition and participation was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law." N.Y. Civ. Rights Law § 70-a(1)(a) (2020) (emphasis added).

Below, Respondent contended that, in a case like this where the parties are presenting vastly different version of events, § 70-a is nothing more than a prevailing party provision, meaning that Respondent is entitled to an award simply if Appellants do not succeed at trial. But that is wrong. Section 70-a does not provide for an award of costs and attorney's fees to all successful defendants in a so-called "SLAPP action"; it only provides for such an award if the action was brought "without substantial basis in fact or law." As Respondent surely knows, there are reasons why Appellants might ultimately be unsuccessful in proving their

claims, but that in no way means that those claims lacked substantial basis. *See Clemente v. Impastato*, 290 A.D.2d 864, 865 (3d Dep't 2002) ("plaintiff's defamation action, although now dismissed, was commenced with a substantial basis in fact and law"); *Egiazaryan v. Zalmayev*, 2014 WL 1244790, at *7 (S.D.N.Y. Mar. 19, 2014) ("Although the statements were determined to be non-defamatory, the detailed analysis necessary to dispose of the claims supports the conclusion that the action was commenced and continued with a substantial basis in fact and law.").

The reality is that even Respondent cannot plausibly dispute that Appellants have demonstrated a substantial basis for their primary defamation claim, pertaining to Respondent's contention that she was raped and drugged by Gottwald. Nor is this even a case of "he said, she said," as Respondent contends. Critically, it is not merely Gottwald who has denied Respondent's false accusation of rape and drugging. Respondent herself swore, under oath, that Gottwald did not rape or drug her, during a deposition taken in a prior legal proceeding in 2011. Respondent concedes she was not under legal duress when she gave this testimony. R-387-88. Even now, Respondent admits that she does not recall being (allegedly) raped by Gottwald; she admits that she has no recollection of Gottwald even being in the hotel room with her. R-387-88.

Thus, while a jury might ultimately decide against Gottwald, for example, by determining that he had not met his burden of proof, that does not mean Gottwald's and Respondent's sworn denials of rape and drugging are meaningless. And it certainly does not mean that Gottwald lacked a substantial basis to have spent seven years (and counting) vigilantly fighting and subjecting himself to extraordinarily extensive discovery, all in order to clear his name in a court of law. *See Gaetano v. Sharon Herald Co.*, 426 Pa. 179, 183 (1967) ("The most important function of an action for defamation is to give the innocent and injured plaintiff a public vindication of his good name.").

In short, the substantial evidence which contradicts Respondent's false rape accusation, all of which is unquestionably sufficient to raise a question of fact that should be triable by a jury, should also be enough to establish the requisite substantial basis to defeat, as a matter of law, Respondent's proposed counterclaim under § 70-a. While there is limited authority discussing what constitutes a "substantial basis" under § 70-a,[20] other similarly worded statutes are informative. For example, Finance Law § 137(4)(c) utilizes almost identical language, providing for an award of fees in actions arising from payment bonds related to

[20] In *Kurland & Associates, P.C. v. Glassdoor, Inc*., 2021 WL 2665656, *3 (Sup. Ct. N.Y. Cnty. June 28, 2021), the court aptly held the "without a substantial basis in fact and law" standard under § 70-a "to equate, more or less, to the well-known 'frivolous' standard." For the reasons discussed herein, Appellants' defamation claim against Respondent plainly is not frivolous; rather, it is highly meritorious.

public contracts when "it appears that either the original claim or the defense interpose to such claim is without substantial basis in fact or law." Courts construing that language, including this one, have found that all is required to meet this "substantial basis" standard is that there be a "plausible ground for [the] claim." *Beninati Roofing & Sheet Metal Co. v. Gelco Bldrs.*, 279 A.D.2d 412, 412-13 (1st Dep't 2001); *see also Exp. Dev. Canada v. Elec. Apparatus & Power, LLC*, 2008 WL 4900557, at *19 (S.D.N.Y. Nov. 14, 2008) (declining to award fees where "[a]lthough I find [plaintiff's] claims to be unavailing, I cannot conclude that they lack any plausible basis."). Also informative is the detailed analysis from the Delaware Chancellery Court of a statute "substantively identical" to New York's Anti-SLAPP legislation. *Agar v. Judy*, 151 A.3d 456, 472 (Del. Ch. 2017). Specifically, in *Nichols v. Lewis*, the Delaware court concluded that a substantial basis was shown, where the plaintiff had established "the requisite basis to take discovery to prove his claim and to defend a motion for summary judgment." 2008 WL 2253192, at *8 (Del. Ch. May 29, 2008), *aff'd sub nom.*, *Arday v. Nichols*, 956 A.2d 31 (Del. 2008).

This, of course, is consistent with the very purpose of New York's Anti-SLAPP regime, which is to provide for a means of prompt resolution of improper lawsuits. In that regard, it is important to remember that the "substantial basis" standard is not pertinent only to fee awards; it is also the standard that must be met

to overcome a motion pursuant to CPLR 3212(h) or 3211(g). *See* N.Y. CPLR 3212(h) (stating that motion for summary judgment in SLAPP suits shall be granted "unless the party responding to the motion demonstrates that the action, claim, cross claim or counterclaim has a substantial basis in fact and law"); N.Y. CPLR 3212(g) (similar, but for motions to dismiss). Given that these procedural provisions were added as part of the same bill that created § 70-a, it only stands to reason that the "substantial basis" requirement should be interpreted in the same manner for each. *See* N.Y. Stat. Law § 236 (McKinney) ("In the absence of anything in the statute indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout, and the same meaning will be attached to similar expressions in the same or a related statute."). And New York courts consistently recognize that raising a disputed factual issue is sufficient to establish a "substantial basis" under CPLR 3212 (h) or CPLR 3211(g). *See Matter of Related Properties, Inc. v. Town Bd. of Town/Vill. of Harrison*, 22 A.D.3d 587, 591 (2d Dep't 2005) (finding substantial basis for claim based on "unresolved issues of fact"); *Nat'l Fuel Gas Distrib, Corp. v. PUSH Buffalo*, 104 A.D.3d 1307, 1309 (4th Dep't 2013) (affirming decision to grant summary judgment dismissing counterclaim pursuant to § 70-a where plaintiff's action had "substantial basis in fact and law"); *Waterways at Bay Pointe Homeowners Ass'n, Inc. v. Waterways*

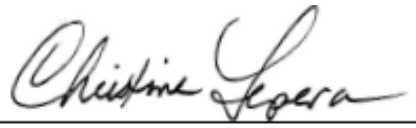
Dev. Corp., 38 Misc. 3d 1225(A), at *9-10 (Sup. Ct. Suffolk Cnty. 2013) (dismissing claim pursuant to § 70-a on summary judgment where "defendants have met their burden of demonstrating that the first counterclaim has a substantial basis in fact and law."), *aff'd*, 132 A.D.3d 975 (2d Dep't 2015); *Scansarole v. Madison Square Garden, L.P.*, 24 Misc. 3d 1246(A), at *9 (Sup. Ct. N.Y. Cnty. Aug. 4, 2009) (substantial basis established where "'battle of the experts' presents quintessential triable issues of fact").

So too here, Appellants have certainly presented a far more than "plausible" basis for their allegations, as amply demonstrated by the extensive discovery taken in this litigation and the fact that none of the core defamation claims were susceptible to resolution on summary judgment. That is all that is necessary to establish a "substantial basis" for Appellants' claims, and thus is also sufficient reason to reject Respondent's proposed counterclaim pursuant to § 70-a outright.

Conclusion

For the reasons stated herein, the motion court's decision should be reversed.

Dated: September 7, 2021
New York, New York

By 

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Dated: September 7, 2021

STATEMENT PURSUANT TO CPLR § 5531

New York Supreme Court

Appellate Division—First Department

LUKASZ GOTTWALD p/k/a Dr. Luke, KASZ MONEY, INC. and PRESCRIPTION SONGS, LLC,

Plaintiffs-Appellants,

– against –

KESHA ROSE SEBERT p/k/a Kesha,

Defendant-Respondent,

– and –

PEBE SEBERT, VECTOR MANAGEMENT, LLC and JACK ROVNER,

Defendants.

KESHA ROSE SEBERT p/k/a Kesha,

Counterclaim Plaintiff-Respondent,

– against –

LUKASZ GOTTWALD p/k/a Dr. Luke, KASZ MONEY, INC. and PRESCRIPTION SONGS, LLC,

Counterclaim Defendants-Appellants,

– and –

DOES 1-25, inclusive,

Counterclaim Defendants.

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1. The index number of the case in the court below is 653118/14.

2. The full names of the original parties are as set forth above. There have been no changes since the Third Amended Complaint filed on August 31, 2018.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about October 14, 2014, by filing of a Summons and Complaint; Amended Complaints were served and filed on December 22, 2014, January 30, 2017 (served on March 10, 2017 per Court Order NYSCEF 794) and August 31, 2018, respectively. Issue was joined by filing Answers and Answer with Counterclaims on or about July 7, 2015, April 18, 2016, April 3, 2017, September 21, 2018 and June 30, 2021, respectively. Plaintiffs served and filed their Reply to the Counterclaims on or about April 18, 2016 and July 20, 2021, respectively.

5. The nature and object of the action involves defamation and breach of contract.

6. This appeal seeks reversal of the Order of the Honorable Jennifer G. Schecter, dated June 30, 2021, granting Defendant-Respondent's Motion for a ruling that Civil Rights Law § 76-a applies to Plaintiffs-Appellants' defamation claims and for leave to assert a counterclaim under Civil Rights Law § 70-a.

7. This appeal is on the full reproduced record.