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.

REPLY BRIEF FOR PLAINTIFFS/COUNTERCLAIM DEFENDANTS-APPELLANTS

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PRELIMINARY STATEMENT

Respondent's Opposition is replete with misdirection and mischaracterizations, but fails to present any valid argument as to why the decision below should not be reversed.

To overcome the "deeply rooted" presumption against retroactivity, Respondent relies on multiple mistaken arguments. She primarily asserts the fallacious premise that the amendments must be retroactive because they are supposedly "remedial." This gross misunderstanding of the law is plainly contradicted by multiple (very recent) Court of Appeals decisions. Retroactivity cannot be determined merely by calling an amendment "remedial," even were such categorization appropriate (here, it is not). Rather, in all circumstances, the Court must assess whether, from the statutory text and consideration of the factors identified by the Court of Appeals, there can be gleaned a sufficiently clear legislative intent to warrant the "extraordinary result" of retroactive application. *Regina Metro. Co., LLC v. New York State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 371 (2020). But the legislature here chose not to include language dictating retroactive application (such as the "claims pending" language in other statutes) (*infra* § I.C.1); or state in the legislative history that the law is mean to clarify what the law "is, and has always been" (*infra* § I.C.2.a); or expressly classify the statute as "remedial" (*infra* § I.B); or offer any indication whatsoever

of retroactive intent (*infra* § I.C). The absence of any such indication is dispositive, and the presumption against retroactivity cannot be overcome.

Having no legitimate evidence of retroactive intent, Respondent resorts to misdirection, such as repeatedly quoting excerpts from a press release and short sponsor's memorandum associated with the 2020 anti-SLAPP amendments. Remarkably, she seems to suggest that the Court should credit these recent statements in determining the intention behind the 1992 statute, but contends "[t]he 1992 history … is beside the point." Opp., 17 n.3. But since Respondent's entire "remedial" argument must turn on the original intent of the 1992 statute (not any 2020 legislature's *ex post facto* characterization of that intent), of course the Court should refer to the unambiguous language of the original statute, and the clearly-stated intention of the 1992 legislature to limit its application to "public applicant[s] or permittee[s]." With that in mind, it is clear that the 2020 amendments were not enacted to fix some technical error in, or misinterpretation of, the 1992 law.

Respondent's attempt to rely on the purported policy behind the 2020 amendments fares no better. That "policy"—promoting speech on issues of public concern by providing a means for prompt resolution of meritless lawsuits intended to stifle such speech—does not apply to Respondent. Years before the amendments were contemplated, it was Respondent who extorted Appellants by

threatening to publicize her false allegations unless Appellants agreed to her contractual demands. When that failed, it was Respondent that initiated litigation by filing a complaint riddled with false claims. And it was Respondent who then publicized her allegations pursuant to a "press plan" designed to "incit[e]a deluge of negative media attention" against Appellants. Nor has Appellants' responsive lawsuit "silenced" Respondent; to the contrary, her press campaign continues to this day.[1]

Despite all that, Respondent has the gall to now contend it was somehow Appellants' defamation claim that has "cost her millions of dollars and years of anxiety and distress[.]" Opp., 5. Yet, when it suited her purposes, Respondent previously argued to this Court that her affirmative claims had been her focus and the reason for her expenditure of time and resources. *See* App. No. 2020-01908, Dkt. 28 at 38. And of course, had Respondent's lawsuit not been a sham (which it was), that would have meant that Appellants were making the affirmative decision to submit to the time and expense of discovery and trial regarding her accusations.

Thus, neither law nor policy support retroactive application of the 2020 amendments to this long-pending litigation. Retroactive application would

[1] Respondent's true audience, the press, is even now evidenced by Respondent's insistence on referring to Appellants collectively as "Dr. Luke," even though "Dr. Luke" is merely a professional alias of one of the three Appellants. It also begs that question of why Respondent does not refer to herself by her stage name, "Ke$ha," if she believes that professional aliases are the proper designation for court submissions.

dramatically alter the standards applicable to Appellants' nearly-seven-year-old defamation claim, and create new potential liability that did not previously exist.[2] Since the amendments are not retroactive, Respondent's § 70-a Counterclaim necessarily fails. But even if the amendments applied, reversal remains necessary. Without question, Appellants submitted ample record evidence supporting their claim. While Respondent might dispute that evidence (or, more accurately, its impact), that does not make this just a "he said/she said" case. Regardless, Respondent's argument—that existence of "substantial basis" can only be determined by trial—is contrary to the express structure of New York's anti-SLAPP regime, and its purpose of providing a prompt means of resolving meritless SLAPP suits without expensive litigation.

The decision below should be reversed, and the amendments to Civil Rights Law ("CRL") §§ 76-a and 70-a should not be given retroactive effect—and certainly not as to this litigation, given the clear impairment of vested rights and due process violations that would result.

[2] Respondent's claim that Appellants made a "concession" that they would not have brought their claim had it been subject to the 2020 amendments is dishonest. Opp., 53. Appellants made no such "concession." Any litigant would rationally consider the possibility of a SLAPP suit, and the resultant consequences, as part of the calculus conducted in bringing legal claims.

ARGUMENT[3]

I. THE 2020 AMENDMENTS ARE NOT RETROACTIVE

The presumption against retroactive application is "fundamental" and "deeply rooted." *See* Br., 5, 18; *Vartelas v. Holder*, 566 U.S. 257, 266 (2012) (presumption against retroactivity "embodies a legal doctrine centuries older than our Republic"). Thus, the general rule, overcome only by unmistakable legislative intent to the contrary, is that the law to be applied is that which was in effect at the time of the conduct at issue. *See Regina*, 35 N.Y.3d at 374. Yet Respondent disingenuously contends the opposite, claiming it is "black-letter law" that the applicable law is that in effect when the court renders its decision. Opp., 4, 40. But Respondent's conclusions are based on caselaw she misinterprets, and decisions that have been superseded by the "contemporary framework for analyzing retroactivity." Nothing in Respondent's Opposition remotely warrants upsetting the fundamental presumption against retroactive application.

A. The "Remedial" Nature of Legislation Is Not Determinative

Respondent's analysis largely rests on the premise that the 2020 amendments "presumptively" apply retroactively, because they purportedly are "remedial." Opp., 14-19. But this premise is flatly contrary to Court of Appeals precedent, including the 2020 *Regina* decision. Rather than relying on vague

[3] Unless otherwise noted, citations and internal quotation marks are omitted.

categorizations such as "remedial," the Court of Appeals has unambiguously articulated that the relevant question is whether the legislature provided a sufficiently clear indication of retroactivity to justify the "extraordinary result" of retroactive application.

In *Regina*, the Court of Appeals analyzed the "contemporary framework for analyzing retroactivity" articulated by the United States Supreme Court, which "limit[ed] the continued utility of the tenet that new 'remedial' statutes apply presumptively to pending cases." *Regina*, 35 N.Y.3d at 365 (citing *Landgraf v. USI Film Prod.*, 511 U.S. 244 (1994)). The amendment at issue in *Regina* was claimed as "remedial." Nonetheless, the Court did not rely on any purported "presumption" favoring retroactivity for remedial statutes. To the contrary, the Court reiterated the rule that:

> Retroactive legislation is viewed with 'great suspicion'. This 'deeply rooted' presumption against retroactivity is based on '[e]lementary considerations of fairness [that] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly'.

Id. at 370.

This was no new pronouncement. *See Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 584 (1998) ("[c]lassifying a statute as 'remedial' does not automatically overcome the strong presumption of prospectivity since the term may broadly encompass any attempt to 'supply some defect or abridge some

superfluity in the former law.'"); *Morales v. Gross*, 230 A.D.2d 7, 12 (2d Dep't 1997) (retroactivity "cannot be answered by slotting the law into precast niches or categories."). This only makes sense, given the potential breadth of the term: nearly any amendment could be classified as "remedial," as every amendment seeks to improve on some perceived imperfection in existing law. Such loose use of the word "remedial," as advocated by Respondent, would result in an "exception" so broad as to swallow the general rule disfavoring retroactive application.

Therefore, the true "ultimate question" is not whether a statute is "remedial," but whether the legislature expressed an intent "sufficient to show that the Legislature contemplated the retroactive impact on substantive rights and intended that extraordinary result." *Regina*, 35 N.Y.3d at 370-71; Br., 18-19. Unsurprisingly, Courts thus often find so-called "remedial" statutes prospective only. *See generally Aguaiza v. Vantage Props., LLC*, 69 A.D.3d 422, 423-24 (1st Dep't 2010); *Harris v. Israel*, 191 A.D.3d 468, 469-70 (1st Dep't 2021).[4]

[4] None of Respondent's authorities override this precedent. For example, *Matter of Hynson*, 164 A.D.2d 41, 46-48 (2d Dep't 1990), which Respondent calls "instructive," predates all of the binding authority cited above, and plainly related to a non-substantive change in a statute's "mechanism for dispute resolution."

B. The 2020 Amendments Are Not "Remedial"

Even were "remedial" classification relevant, the 2020 amendments cannot properly be categorized as such.[5] The word "remedial" does not appear in the amendments, or their legislative history. Certainly, if the legislature intended to classify the statute as such, it would have done so. *E.g.*, *In re Gleason*, 96 N.Y.2d 117, 121 (2001) (sponsor memorandum referred to the amendment as "remedial legislation").

In the context of retroactivity, a statutory amendment is "remedial" (in the legal, not colloquial, sense) 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. But "so-called remedial legislation" does not include "statutes affecting substantive rights and liabilities[.]" *Town of Greece v. Uniformed Patrolmen's Ass'n of Greece Police Dep't*, 147 A.D.3d 1382, 1383 (4th Dep't 2017); *see also State v. Daicel Chem. Indus., Ltd.*, 42 A.D.3d 301, 302 (1st Dep't 2007) ("Even remedial statutes are applied prospectively where they establish new rights, or where

[5] Respondent notes that multiple (non-binding) decisions have held the 2020 amendments retroactive, but ignores that almost every one has relied, without independent analysis, on the handful of initial trial court rulings that unfortunately got the question wrong. Br., 33-34; *see also Reilly v. Crane Tech Solutions, LLC*, 2021 WL 2580281, at *2 (Sup. Ct. N.Y. Cnty. June 23, 2021) (not discussing retroactivity)*; Cisneros v. Cook*, 2021 WL 2889924, at *5 (Sup. Ct. N.Y. Cnty. July 7, 2021) (adopting *Sackler* without analysis); *Ctr. for Med. Progress v. Planned Parenthood Fed'n of Am.*, 2021 WL 3173804, at *9 n.3 (S.D.N.Y. July 27, 2021) (adopting *Palin* without analysis; noting lack of clarity as to "whether a complaint filed prior to the November 2020 amendment to the anti-SLAPP law is governed by the new mandatory or the old discretionary standard [of § 70-a]"); *Goldman v. Reddington*, 2021 WL 4099462, at *1 (E.D.N.Y. Sept. 9, 2021) (not discussing retroactivity).

retroactive application would impair a previously available defense."). No doubt, the anti-SLAPP amendments affect substantive rights. The prior anti-SLAPP law "create[d] a new right of action for victims of SLAPP suits, and places additional restrictions on the ability of public applicants to seek redress from the courts" (*Hariri v. Amper*, 51 A.D.3d 146, 150 (1st Dep't 2008)), and the amendments undeniably expand those substantive changes to new classes of litigants.

Respondent calls the 2020 amendments "textbook remedial legislation" (Opp., 17), but only after completely misstating the history of the anti-SLAPP law. The 2020 amendments were not enacted to correct a "problem" with the prior law, as it was originally drafted and intended. The text and the legislative history of the 1992 law—which Respondent outrageously asks this Court to ignore—make clear the law applied only to claims "brought by a public application or permittee." CRL § 76-a (1992). This was no drafting error: the legislative history (ignored by Respondent) shows the law was enacted with the knowledge, and stated intent, that it be limited in scope. *See* Memorandum of Attorney General Robert Abrams to the Governor on Assembly 4299 (July 27, 1992), Bill Jacket, L. 1992, ch. 767 at 24 (1992 statute "attempts to prevent the risk of its being applied too broadly"). And the Courts (for almost 30 years) unanimously observed this clear legislative directive. Br., 24-25.

The fact that the 1992 law did not apply to cases like this—disputes unrelated to governmental applications—was a feature of that law, not a bug. Thus, when the 2020 legislature sought to "broadly widen[] the ambit of the law," it was not remedying a problem with the prior law, but rather making substantial changes that effectively created a new law, affecting new classes of parties and types of speech. "Even assuming that the ... amendment ... was a subsequent 'clarifying' amendment, such an enactment cannot retroactively declare a different legislative intent contrary to the plain meaning of the earlier law." *Boltja v. Southside Hosp.*, 186 A.D.2d 774, 775 (2d Dep't 1992); *see also Roosevelt Raceway, Inc. v. Monaghan*, 9 N.Y.2d 293, 304 (1961). Likewise, "[w]here a statute has long expressed legislative policy in a particular area, it may be assumed that a substantial amendment of its terms, particularly where such amendment represents a change in such policy, was to be confined to wholly prospective operation." N.Y. Stat. Law § 52 (Commentary).

C. Respondent Fails To Identify Any Retroactive Intent

Under the proper analysis, the presumption against retroactivity may only be overcome by "[1] an express prescription of the statute's temporal reach or [2] a less explicit but 'comparably firm conclusion' … of legislative intent to apply the enactment to conduct that occurred previously." *Regina*, 130 N.Y.3d at 373.

1. *The 2020 Amendments Contain No Express Statement of Retroactive Effect*

Without question, the 2020 amendments facially do not require retroactive application. Br., 19-20. Again, the legislature could have easily stated, in the amendments' text, that they apply to "claims pending" as of the date of enactment, as it did with respect to certain provision of the statute at issue in *Regina*. 35 N.Y.3d at 374 & n.22 (noting even this language was "less precise" than other statutes indicating retroactive intent). Its silence is telling.

2. *The 2020 Amendments Do Not, By Necessary Implication, Require Retroactivity*

Absent express language, retroactive application can only be justified by a "comparably firm conclusion" of the legislature's retroactive intent. *Regina*, 130 N.Y.3d at 373. Respondent identifies no such indication.

a) The Legislative History Does Not Support Retroactivity

Although the legislative history of the 2020 amendments are silent as to retroactivity, Respondent attempts nonetheless to draw an inference of such intent by referencing an earlier draft of the amendments stating they "shall apply to actions commenced on or after such date." Opp., 19-20. Respondent even argues the removal of this language from the enacted version "conclusively resolves this case." Hardly.

Respondent cites only one case—*Majewski*—where a court considered the removal of language from a prior draft. But the Court's analysis there firmly

supports Appellants' position.[6] In *Majewski*, in rejecting retroactivity, the Court noted the deletion of language in a prior draft directing retroactive reach. Critically, the Court found this modification "consistent with the strong presumption of prospective application in the absence of a clear statement concerning retroactivity." *Majewski*, 91 N.Y.2d at 587. Thus, the removal of language supporting retroactivity (which, if left in the statute, could have overridden the general presumption) was insufficient to support the requisite "firm conclusion" of retroactive intent.

Here, the situation is reversed. The draft of the 2020 amendments expressly supported prospective application, thus simply confirming, superfluously, that its temporal scope was consistent with the general rule. The removal of this confirmatory language resulted in statutory text that is, by all admission, silent as to retroactivity—meaning, if anything, that operation of the general presumption against retroactivity was intended. The result is an enacted statute that, like the statute in *Majewski*, is devoid of the requisite "clear statement concerning retroactivity." *Id.*; *see also M & G Stromer v. Granata*, 124 Misc. 2d 934, 935 (1st

[6] Only one of Respondent's other cases even addressed retroactivity. *Duell v. Condon*, 84 N.Y.2d 773, 783 (1995). But there, unlike here, the statute's text, and its legislative history, consistently supported retroactive intent. *Id.* None of Respondent's other cases considered the removal of draft language. *See id.*; *In re Grand Jury Subpoena Duces Tecum Served on Museum of Mod. Art*, 93 N.Y.2d 729, 735-36 (1st Dep't 1999) (noting "unconditional language" and "consistent, unyielding legislative intent"); *Woollcott v. Shubert*, 217 N.Y. 212, 220-22 (1916) (statute "quite clear," and legislative debates "conclusive").

Dep't 1984) ("Under the circumstances, it must be assumed that had the Legislature intended [the statute] to apply retroactively, it would have been particularly careful to include a specific provision to that effect").

Ultimately, the insignificance of Respondent's solitary piece of purported evidence of retroactive intent reveals the weakness of her argument. Respondent searched for any shred of clear proof of such intent, and what she found was, at best, ambiguous. The evidentiary deficiency is even more glaring when considered in comparison with other statutes enacted contemporaneously with the 2020 amendments. For example, in 2021, the legislature enacted an amendment to the New York Labor Law clarifying that law's definition of "deduction." The amendment's legislative history is replete with specific statements of retroactive intent, including that "[t]he purpose of [that] remedial amendment is to clarify that … the unauthorized failure to pay wages, benefits and wage supplements has always been encompassed by the prohibitions of section 193." 2021 Sess. Law News of N.Y. Ch. 397 (S. 858); *see also* January 7, 2021, New York Committee Report, 2021 NY S.B. 858 (NS) (purpose was to reinforce what the law "is, and has always been.").

b) The Amendments' Language Indicates Prospective Intent

Lacking other language relating to the temporal scope of the amendments, Respondent clings to the phrase "shall take effect immediately," as though this

supports retroactivity. Not so. As the Court of Appeals recently noted, statements that a statute "shall take effect immediately," without additional "claims pending" language, is "forward-looking" and does not refer to "prior claims." *Regina*, 35 N.Y.3d at 373; *see also Aguaiza*, 69 A.D.3d at 423 (statute that "directs that it is to take effect immediately" "does not have any retroactive operation or effect"); *Hitchens v. Pentair, Inc.*, 1997 WL 578754, at *4 (W.D.N.Y. June 27, 1997) ("New York courts overwhelmingly" find "provision[s] indicat[ing] … [statute] is to take effect immediately" are "a clear indication that prospective application is appropriate." (collecting cases)). Again, Respondent's primary support is *Gleason*. But, as previously noted, the retroactive intent of the legislature in that case was plainly demonstrated by their "urgency" in "swiftly" correcting an unintended judicial interpretation. Br., 28-29.

Respondent also ignores the ample authority recognizing the prospective nature of similar "immediately" language. *Compare* Opp., 22-25 *with* Br., 21-22. And, remarkably, Respondent fails to even acknowledge (much less dispute) the import of the amendments' use of the word "shall," which has been held alone sufficient to indicate prospective application. Br., 23. Thus, if any intention is clear from the face of the 2020 amendments, it is one of prospective application.

3. *The 2020 Amendments Do Not Correct An Unintended Judicial Interpretation*

Respondent next contends that retroactivity may be inferred because the 2020 amendments were enacted to "correct" the "original intent" of the 1992 statute. Opp., 25-27. This is simply wrong. As discussed *supra* § I.B, because it is undebatable that the 1992 legislation was not intended to apply to cases like this one, the 2020 amendments were no mere "clarification," and cannot have retroactive effect.

Respondent contends that "[t]his case is no different" from *Gleason* (where the legislature "swiftly" acted to correct a "technical defect" in the prior law) or *Nelson v. HSBC Bank USA*, 87 A.D.3d 995, 997 (2d Dep't 2011) (where courts failed "to appreciate the scope" of the prior law, and the amendment supplemented that law to require it "be construed liberally"). But the text of the 1992 law, its judicial history, and the unanimous interpretation of the courts over the subsequent three decades belie such comparison. *Supra* § I.B. Indeed, not even the sponsors of the 2020 amendment stated that the purpose thereof was to correct some particular error or misinterpretation; rather, they merely stated their belief that the intentionally circumscribed scope of the original statute should be "broadly" expanded.

D. Retroactive Application Would Be Particularly Unsuitable Here

Even if the 2020 amendments could be otherwise given retroactive effect, they still should not be held applicable to this litigation. Not only would doing so impair Appellants' vested rights, but it would also violate fundamental notions of due process.

1. *Respondent Cannot Dispute That Retroactive Application Would Impair Appellants' Vested Rights*

Respondent attempts to dismiss the concept of "vested rights" by imposing an inaccurate definition of that term. While Respondent asserts that it "only refers to the principle" "that a judgment, after it becomes final, may not be affected by subsequent legislation," this is simply not the law, and certainly not in New York.

In *Ruffolo v. Garbarini & Scher, P.C.*, 239 A.D.2d 8 (1st Dep't 1998), for example, the plaintiff commenced a suit prior to an amendment that reduced the relevant statute of limitations from six to three years. The plaintiff's suit was commenced more than three, but fewer than six, years after accrual. The motion court applied the amended limitations period and dismissed. This Court reversed, finding this determination violated the plaintiff's vested rights. *Id.* at 12. Obviously, the vested right did not relate to a final judgment. The plaintiff had obtained no judgment—he had merely commenced his claim. As this Court noted, the doctrine of "vested rights" mandated that the amendment could not be "applied to require dismissal of an action that was viable at the time it was filed." *Id.*

This fact pattern is remarkably similar to the one presented here. By increasing the burden of proof on his defamation claim, the 2020 amendments would deprive Appellants of recovery of damages for their defamation claim in the event they can prove negligence, but not actual malice. These changes "place[] additional restrictions" on Appellants' ability "to seek redress from the courts" (*Hariri*, 51 A.D.3d at 150), no different from restrictions based on changes in a statute of limitations.

2. *Retroactive Application Would Violate Due Process*

Respondent disingenuously classifies Appellants' due process argument as "half-hearted." It is anything but. The caselaw wholeheartedly establishes that retroactive application would violate Appellants' due process rights.

Indeed, each factor identified in *Regina* supports Appellants' position: retroactive application would result in a seven-year period of retroactivity, years longer than those *Regina* called "excessive"[7]; retroactivity would not "function in an administrative manner to assist in effectuating the legislation"; and Appellants would be deprived of rights this Court has identified as substantive. *Hariri*, 51 A.D.3d at 150; *Guerrero v. Carva*, 10 A.D.3d 105, 117 (1st Dep't 2004); *see also Palin v. New York Times Co.*, 510 F. Supp. 3d 21, 26 (S.D.N.Y. 2020).

[7] As discussed *infra* § I.E, the operative starting point for the period of retroactivity is 2014, when this action was filed.

Respondent again cites snippets of case law out of context to argue that due process is not implicated. She cites *Regina* for the purported principal that "provisions governing the procedure for adjudication of a claim going forward ha[ve] no potentially problematic retroactive effect[.]" Opp., 35. But this sentence is pulled from a section of *Regina* that does not even address due process. Moreover, the very next sentence makes clear that this principal applies where legislation revises clearly procedural technicalities like the "time and manner" of future payments awarded for prior injuries (*Regina*, 35 N.Y.3d at 366), not amendments that affect substantive rights.[8]

E. Application of § 76-a Here Would Be Impermissibly Retroactive

Despite not arguing it below, Respondent now confusingly contends retroactivity analysis is unnecessary because § 76-a does not "trigger" until the "recovery of damages[.]" Opp., 39-41. She makes this argument by seizing upon a single word—"damages"—in § 76-a (present in the 1992 version, not added in the 2020 amendments). While Respondent is correct that § 76-a only alters the standard necessary to recover damages (and not the other elements of a defamation claim), that in no way means that applying it to this case would not be retroactive. *Cf. People v. Sexton*, 284 N.Y. 57, 62 (1940) ("use of the word 'judgment'" did not

[8] Respondent calls the century-old decision in *Easterling Lumber Co. v. Pierce*, 235 U.S. 380, 382 (1914)—concerning a statute that "simply provided a rule of evidence"—"bedrock precedent." Not so. That memorandum opinion has been cited in just one decision in the last six decades, and never in New York.

mean "statute was intended to be retroactive"). Rather, § 76-a is "triggered" whenever a SLAPP action is filed, because the very purpose of the statutory regime is to promptly resolve such cases long before damages are decided. *E.g.*, Letter from Daniel Novack & Sandra Baron to Governor Cuomo (July 17, 2020), Bill Jacket, L. 2020, ch. 250. Thus, the operative time for consideration of retroactivity is 2014, when this case was filed, not whenever damages might be awarded. Indeed, taken to its inconsistent conclusion, Respondent's argument that § 76-a is only "triggered" at the damages stage must equally apply to her purported § 70-a counterclaim, meaning, under her theory, she should not have even asserted it.

More unsettling is Respondent's reliance on the false claim that it is "black-letter law" that a court "is to apply the law in effect at the time it renders its decision." Br., 4, 40 (quoting *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974)).[9] Far from being "black-letter," this quotation reflects the opposite of settled law. *See Landgraf*, 511 U.S. at 277 ("*Bradley* did not alter the well-settled presumption against application of the class of new statutes that would have genuinely 'retroactive' effect."); *Regina*, 35 N.Y.3d at 370 ("elementary" that

[9] *Becker v. Huss Co.*, 43 N.Y.2d 527 (1978), is also inapposite. The amendment there—unlike here—"neither created a new right nor impaired an existing one[.]" *Id.* at 542.

"individuals should have an opportunity to know what the law is and to conform their conduct accordingly").

Indeed, Courts routinely (and properly) apply the law in effect at the time of the conduct at issue, except in the rare instances where a change in the law can properly be given retroactive effect. *E.g.*, *Blessinger v. Estee Lauder Companies, Inc.*, 246 A.D.2d 363, 364 (1st Dep't 1998); Br., 44. And because the only "action" at issue here is one filed in 2014, the law in place in 2014 must be applied in determining whether it is a SLAPP action under § 76-a.

II. § 76-a DOES NOT APPLY TO APPELLANTS' COUNT II DEFAMATION CLAIM

Respondent also contends Appellants' defamation claim pertaining to Respondent's false accusation that Gottwald raped Katy Perry, in a text message exchange, falls with the amended scope of § 76-a. Respondent fails to mention that she has not even purported to assert a § 70-a Counterclaim as to that defamation claim. Regardless, none of Respondent's arguments pass muster.

Respondent cannot seriously dispute that her texts were mere gossip, contained in a personal discussion about the individual beliefs of Respondent and her acquaintance. She does not, for example, contend that they were part of any broader societal conversation (*e.g.*, the #MeToo movement did not take off until a year after the messages were sent). Nor does she dispute that, pursuant to settled New York law, 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," as recognized even in the case on which she heavily relies. *Coleman v. Grand*, 523 F. Supp. 3d 244, 259 (E.D.N.Y. 2021) (collecting cases)[10]; *see also Huggins v. Moore*, 94 N.Y.2d 296, 303 (1999).

Respondent's private text messages fall squarely within these categories, and cannot be characterized as statements connected to an issue of "public interest." Respondent's only counter is that, essentially, any claim of assault or harassment made against someone in the music industry (or, presumably, any other industry) should be considered in the "public interest," regardless of context. But § 76-a must be strictly construed, as it is in derogation of the common law. *Hariri*, 51 A.D.3d at 151. Accepting Respondent's argument would do just the opposite, and expand the anti-SLAPP law to almost any assault allegation, regardless of individual circumstances. Neither law nor logic supports that result.

III. RESPONDENT'S COUNTERCLAIM CANNOT BE SUSTAINED

A. The Issue of § 70-a's Retroactivity Is Squarely Before the Court

Respondent seeks to evade the Court's review of the propriety of retroactive application of § 70-a by arguing Appellants waived that argument. But Respondent ignores the primary basis for Appellants' argument: that because

[10] In *Coleman*, unlike here, the emails at issue were widely distributed and attached an "open letter" that was "quite clearly frame[d]" as a "contribution to the larger discussions occurring at the time of the #MeToo movement." 523 F. Supp. 3d at 251-52, 259.

§ 76-a is not retroactive, the post-amendment definition of a SLAPP action, as incorporated into § 70-a, cannot apply to this long-pending litigation. Appellants' argument was fully raised below.[11]

Nor do Respondent's mischaracterizations of Appellants' arguments below establish waiver. Respondent's entire argument appears to be premised on a previously-held (incorrect) belief that the presence of "commenced or continued" language in § 70-a may have reflected retroactive intent. But as Respondent admits, that language was not introduced in the 2020 amendments, and therefore has no place in a proper retroactivity analysis. Opp., 48 n.10.

Regardless, there is no question that retroactivity was raised below, with Respondent affirmatively arguing that § 70-a is retroactive, thus clearly placing the question at issue. *E.g.*, Index No. 653118/2014, Dkt. 2303 at 13 (arguing both §§ 76-a and 70-a are "remedial"). In other words, because the issue presented on this appeal—the retroactivity of § 70-a—was presented in the record below, appellate review is certainly appropriate. *See Marcinak v. Tech. Mech. Servs., Inc.*, 17 A.D.3d 140, 141 (1st Dep't 2005) (issue "sufficiently preserved for appellate

[11] Appellants' Notice of Appeal does not expressly limit this appeal to any particular issues, making Respondent's legal authority inapposite. Opp., 46. Respondent actually cites Appellants' Informational Statement, but cites no authority for the proposition that the Informational Statement, in and of itself, provides a basis to narrow the issues on appeal.

review" despite failure to "specifically oppose" motion, where related argument was raised in the record below).

B. Absent Retroactivity, § 70-a Cannot Apply To This Litigation

Respondent's next argument, that § 70-a applies regardless of retroactivity because it refers to "continued" litigation, is also incorrect. Opp., 47-49. Respondent seems to be arguing that, simply because § 70-a applies when a plaintiff has "continued" a SLAPP action, then it must necessarily apply here because Appellants did not immediately drop their lawsuit the moment the legislature passed the amendments. Again, Respondent misses the point.

The determinative question is what definition of an "action involving public petition or participation" is applicable. If Appellants' lawsuit (filed in 2014) does not fall within the 2020 definition, then it does not matter whether it was "commenced" or "continued." Because the 1992 definition in § 76-a is effective for purposes of Appellants' lawsuit, that definition applies in determining whether this action falls within the purview of § 70-a.[12] And there is no dispute that this lawsuit does not fall within that definition. Br., 46-47.

Respondent, of course, cites no authority for her "retroactivity through the back door" theory, adoption of which would go against all general presumptions

[12] Even under Respondent's theory, this would mean that she is only entitled to assert a counterclaim for damages or fees incurred after the passage of the 2020 amendments.

against retroactivity. If the 2020 definition of a SLAPP action in § 76-a does not apply to this litigation, then § 70-a—which adopts that definition—by necessity also cannot apply. This is supported by ample law, including decisions from this Court, recognizing that, where an amendment is not retroactive, claims are assessed under the statutory provisions in place at the time of the conduct at issue (here, filing this lawsuit in 2014). Br., 49. Respondent simply ignores this law, and for her part, cites only a single federal case that does not even concern retroactivity, much less support Respondent's argument. Opp., 44.

Simply put, under the applicable definition derived from the 1992 version of § 76-a, Appellants' lawsuit is not an "action involving public petition or participation." Therefore, § 70-a, on its face, cannot apply.[13]

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

Largely parroting her meritless arguments as to § 76-a, Respondent next argues that the amendments to § 70-a are retroactive as to all pending litigation, irrespective of its "continued" language.

But just as the § 76-a amendments are not "remedial," neither are the § 70-a amendments. Those amendments did not "correct" the prior statute. Rather, the legislature made a new policy judgment to make fee awards mandatory (if the

[13] Respondent also wrongly contends that, if she were to file her counterclaim as a separate action, some different analysis would apply. But the question would still be which definition of a SLAPP action would be applicable. Because the pre-amendment definition must govern, the outcome would be the same.

action lacked substantial basis), rather than permissive. Respondent cites no authority deeming this type of substantive change "remedial," as none exists. *See Landgraf*, 511 U.S. at 285 n.37 ("statute introducing damages liability" not "the sort of 'remedial' change that should presumptively apply in pending cases.").

Nor does the limited drafting history so heavily relied upon by Respondent (despite having not raised it below) support retroactivity. Again, the end result was clear: the legislature stated the amendments "shall" take effect "immediately"—two words Courts routinely recognize affirmatively indicate prospective application only. *See supra* § I.C.2.b.

Also unavailing is Respondent's argument that retroactive application of the amended § 70-a would not impair any vested rights or offend due process. Applying § 70-a to this litigation would undeniably create a remedy for Respondent—and potential liability for Appellants—that did not exist previously. Before, there was no possibility that Respondent could seek attorneys' fees, compensatory, and punitive damages.[14] Now, despite nothing having changed but the law, Respondent contends there is just such a possibility. That cannot be the

[14] Respondent claims § 70-a changes nothing, "because New York has long provided that meritless litigation could be deterred and punished." Opp., 53. But none of Respondent's authorities provide for anything like the award of punitive damages potentially permissible under § 70-a.

case.[15] *See Jacobus v. Colgate*, 217 N.Y. 235, 240-242 (1916) (Cardozo, J.) (where effect of statute "is to create a right of action" which did not previously exist, prospective application is presumed).

Finally, the only comment even theoretically relevant to retroactive application of the amended § 70-a is the reference in the legislative history to the belief that discretionary fees were rarely awarded, contrary to the original intention of the 1992 statute. But more than anything, this only stresses why the § 76-a amendments are not retroactive—the legislature did not (and could not) point to any decisions construing the 1992 SLAPP definition in any way other than as expressly set forth in the original statute. So while, at best, there could potentially be an argument that the mandatory versus permissive fee awards amendment of § 70-a was intended to be retroactive, the amendments to § 76-a were not. *Regina*, 35 N.Y.3d at 373. Here, given the issues raised above, such as the obvious impairment of vested rights, both amendments should be given prospective application only.

[15] *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44-45 (2006) is inapposite, as the "continuing wrong" there—illegal presence in the United States—was illegal both before and after the amendments at issue. Here, there was no possibility of this litigation being construed as a SLAPP action prior to the 2020 amendments.

D. Even If § 70-a Applied, Respondent's Counterclaim Still Fails

Finally, even if § 70-a applies, Appellants have already established a "substantial basis" for their claim, which itself warrants rejection of Respondent's Counterclaim.

Respondent's argument can be distilled as follows: because this litigation is (purportedly) a "he said/she said" dispute, and because Appellants did not seek summary judgment determining their claim as a matter of law, then, *ipso facto*, the question of "substantial basis" cannot be determined until after a jury rules. This defies both law and logic.

First, Respondent provides no support for her contention that some unique § 70-a standard applies to "he said/she said" cases.[16] A plaintiff in one type of defamation lawsuit should not be held to a higher standard than the plaintiff in any other, simply because there were no eye-witnesses to the alleged conduct at issue in the defamatory statement.

[16] Respondent references a press release stating that assault survivors (among others) should be protected by the amended anti-SLAPP statute, and argues this must mean the existence of a "substantial basis" can only be assessed after trial. Opp., 58. But one legislator's statement in a press release cannot dictate the proper interpretation of § 70-a, particularly given that the "substantial basis" language comes from the original 1992 statute, not the 2020 amendments. Regardless, the purpose of the anti-SLAPP statute will be fully served by Appellants' rational interpretation. In the future, individuals whose speech falls within the expanded scope of § 76-a will be able to bring early motions requiring their accusers to produce evidence or allegations sufficient to establish a substantial basis for their claims. Just because such evidence exists in this case, does not mean that it will necessarily exist in any other.

Second, Respondent's reliance on the purported unsuitability of this case for a resolution on summary judgment is misguided. In order for Appellants (or Respondent) to have been successful on summary judgment, they would have needed to establish the absence of disputed facts. But no one is denying the existence of disputed facts that should go to a jury. That said, it makes no sense to equate "substantial basis" with "absence of disputed factual issues" or "ultimately successful as trial," as Respondent seems to want. Respondent does not even dispute that all that is required to demonstrate a "substantial basis" is that there be a "plausible ground for [the] claim"—not a ground that is ultimately successful at trial. Br., 54. And, certainly, even claims that are ultimately unsuccessful can nonetheless have a "substantial basis." Br., 52.

Respondent cannot deny the ample facts in the record—far beyond just what Appellants ("he") or Respondent ("she") have said—that support Appellants' claim. Among other things (such as her contract motivations), Respondent does not dispute she testified under oath that she was not raped or drugged by Gottwald; rather, she merely attempts to minimize the import of that testimony. Opp., 56-57. Nor does she dispute that she does not recall having any sexual interaction with Gottwald, and that, at best, her rape allegation is based on her own inferences from (alleged) circumstantial evidence (inferences that were largely omitted from her public accusations, of course). *Id.* These facts alone create a substantial basis in

fact for Appellants' claims as they are more than sufficient to require a trial by jury. Whatever the outcome of the trial, Appellants' claims cannot suddenly be found to lack "substantial basis."

This conclusion—that "substantial basis" means establishing the existence of disputed facts, rather than ultimate success before a jury—is compelled by the structure of New York's anti-SLAPP legislation. As Respondent concedes, nearly identical "substantial basis" language is present in § 70-a, as is in CPLR 3211(g) and 3212(h). Opp., 55. Respondent, however, contends that the Court should ascribe a different meaning to the use of "substantial basis" in § 70-a than that accorded to the same phrase in those CPLR provisions (which were all added as part of single bill). *Id.* But that is directly contrary to well-established rules of statutory construction, which Respondent ignores. *See Riley v. Cty. of Broome*, 95 N.Y.2d 455, 466 (2000) ("whenever a word is used in a statute in one sense and with one meaning, and subsequently the same word is used in a statute on the same subject matter, it is understood as having been used in the same sense").

Respondent cannot seriously dispute that establishing a disputed fact issue sufficient to overcome a defendant's summary judgment motion is also sufficient to demonstrate a "substantial basis," as that phrase is used in CPLR 3212(h). *See* Br., 55-56. And since the wording of CPLR 3212(h) and § 70-a is near identical, it must be accorded the same meaning.

This interpretation is compelled by the very purpose of the anti-SLAPP regime—to provide prompt resolution of meritless claims, not require full trial. *See* Letter from Matthew Schafer to Governor Cuomo (October 15, 2020), Bill Jacket, L. 2020, ch. 250. Moreover, supporters of the 2020 amendments expressly recognized that both "dismissal and fee decisions will now turn on the same 'substantial basis' standard, which will serve to streamline the court's analysis of SLAPP suits." Letter from Daniel Novack & Jacquelyn Schell to Governor Cuomo, Bill Jacket, L. 2020, ch. 250. Because the submission of extensive evidence establishing a disputed factual issue is surely sufficient to demonstrate a substantial basis as necessary to overcome a CPLR 3212(h) motion, under black-letter law, it must also be sufficient to demonstrate a substantial basis under § 70-a—and therefore sufficient to defeat Respondent's Counterclaim as a matter of law.[17] *See Waterways at Bay Pointe Homeowners Ass'n, Inc. v. Waterways Dev. Corp.*, 132 A.D.3d 975, 980 (2d Dep't 2015) (dismissing § 70-a counterclaim where party asserting SLAPP claim presented evidence sufficient to overcome summary judgment motion against claim).

CONCLUSION

For these reasons, the decision below should be reversed.

[17] None of the cases cited by Respondent (Opp., 56) delve into what it actually means to establish a "substantial basis," or the interaction between the use of that phrase in both § 70-a and CPLR 3212(h).

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