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YAIRA DUBIN
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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 DEFENDANT/COUNTERCLAIM PLAINTIFF-RESPONDENT

DANIEL M. PETROCELLI
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 8th Floor
Los Angeles, California 90067
(310) 553-6700
dpetrocelli@omm.com

ANTON METLITSKY
LEAH GODESKY
YAIRA DUBIN
O'MELVENY & MYERS LLP
Times Square Tower
Seven Times Square
New York, New York 10036
(212) 326-2000
ametlitsky@omm.com
lgodesky@omm.com
ydubin@omm.com

Attorneys for Defendant/Counterclaim Plaintiff-Respondent

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether New York Civil Rights Law §§ 76-a and 70-a apply to defamation cases that were pending when those statutes became effective.

The trial court correctly answered "yes."

2. Whether a case that proceeds past summary judgment necessarily has a "substantial basis" under § 70-a in "he-said/she-said" cases not amenable to summary judgment.

The trial court correctly answered "no."

PRELIMINARY STATEMENT[1]

New York has long tried to stop frivolous defamation suits brought by powerful individuals to harass, intimidate, and ultimately silence their critics—i.e., Strategic Lawsuits Against Public Participation ("SLAPP suits"). In 1992, the Legislature enacted a landmark anti-SLAPP law, designed to secure "the utmost protection for the free exercise of speech, petition, and association rights" and to eliminate "the threat of personal damages and litigation costs" from being "used as a means of harassing, intimidating or punishing" such free exercise. L. 1992, Ch. 767, § 1.

But as many legislators have since recognized, that original effort floundered. As Senator Hoylman put it, "as drafted, and as narrowly interpreted by the

[1] Unless otherwise noted, all internal quotations and citations are omitted.

courts," the 1992 anti-SLAPP law "failed to accomplish [its] objective." Sponsor Mem. of Sen. Hoylman, L. 2020, Ch. 250 (July 22, 2020) ("Hoylman Sponsor Mem."). "In practice," the 1992 law "has been strictly limited to" those "embroiled in controversies over a public application or permit, usually in a real estate development situation." *Id.* And even if such defamation claims were ultimately deemed frivolous, the plaintiff was almost never sanctioned. *See id.* New York's "broken system" "led to journalists, … survivors of sexual abuse and others being dragged through the courts on retaliatory legal challenges solely intended to silence them"—with no consequences for the deep-pocketed perpetrators. Press Release, N.Y. State Legislature, *Senate and Assembly Majorities Advance Anti-SLAPP Legislation to Protect Free Speech* (July 22, 2020) ("Legislature Press Release").

In 2020, New York "SLAPP[ed] back." *Id.* To "better advance the purposes that the Legislature originally identified in enacting New York's anti-SLAPP law," Hoylman Sponsor Mem., *supra*, the Legislature amended the anti-SLAPP law in two critical ways. First, the Legislature expanded the law's scope: under the 2020 Act, any plaintiff seeking to recover damages for alleged defamation based on speech "in connection with an issue of public interest" must prove the speaker's actual malice by clear and convincing evidence. *See* Civ. Rights Law § 76-a (2020) ("CRL § 76-a"). Second, the Legislature strengthened the remedy provided

to victims of SLAPP suits: if a defamation claim is ultimately baseless, the defamation defendant is entitled to recover the costs and fees incurred defending the action, and can also seek damages. *See* Civ. Rights Law § 70-a (2020) ("CRL § 70-a").

Dr. Luke's principal contention before this Court is that the 2020 amendments do not apply "retroactively" to his pending claims against Kesha. He'd prefer if he were able to recover for his defamation claims—which allege that Kesha falsely accused him of sexual assault—by satisfying the standard of fault the 2020 Act conclusively rejected. And he says that even if a jury ultimately finds he is lying—i.e., that he did rape Kesha, and sued her for defamation to intimidate and bankrupt her—Kesha has no recourse under the law the Legislature passed to help defamation defendants exactly like her. The trial court, like every other court to have considered New York's new anti-SLAPP law, correctly rejected Dr. Luke's meritless arguments.

For one thing, this case does not even implicate a true retroactivity question. Application of the 2020 Act will neither alter the consequences for past conduct nor cast doubt on a prior judgment. All Kesha seeks is to apply current law to this pending case—so the current standard of fault applies in the upcoming 2022 trial, and so she can bring a post-enactment counterclaim based on SLAPP litigation Dr. Luke continued after the Act's effective date. It is black-letter law that a court "is

to apply the law in effect at the time it renders its decision." *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974). That is all Kesha seeks here.

But even if the question were whether the law were truly retroactive, the result would be the same: every interpretive tool recognized by the Court of Appeals and this Court makes clear that the Legislature intended the Act to apply retroactively. The 2020 amendments are plainly remedial; they are designed to correct defects that prevented the original law from accomplishing the Legislature' objective. The drafting history shows that the Legislature considered limiting the 2020 Act to apply prospectively, but deliberately deleted that limitation from the final Act. The Act expresses a sense of urgency, corrects judicial errors, and reaffirms what the anti-SLAPP law was always meant to do: stop New York courts from being used as a forum for abusive litigation that chills important speech.

Dr. Luke's doctrinal contentions to the contrary are meritless for the detailed reasons described below, and by every court that has considered these questions. Indeed, before taking the position on appeal that § 70-a is non-retroactive, Dr. Luke argued below that this provision is retroactive based on its plain language—a remarkable about-face that should tell the Court all it needs to know about his position's legal merit.

But it is worth pausing on one of Dr. Luke's main policy arguments, which highlights as well as anything why his position would undermine the Legislature's

intent. Dr. Luke suggests he might not have brought his defamation claims—which have nearly bankrupted Kesha and cost her millions of dollars and years of anxiety and distress—had he known he might suffer consequences if they were found frivolous. That is an extraordinary admission, but it is also an unwitting illustration of the quintessential SLAPP suit, in the worst of contexts: where an accused rapist with staggering net worth and public-relations resources retaliates by suing his victim for defamation. This Court should give effect to the Legislature's intent and prevent "survivors of sexual abuse [from] being dragged through the courts on retaliatory legal challenges solely intended to silence them," Legislature Press Release, *supra*, regardless of when those challenges were commenced.

Finally, the Court should reject Dr. Luke's bizarre contention that his suit cannot as a matter of law lack a substantial basis because it was not resolved at summary judgment. Of course it wasn't—this is a "he-said/she-said" case that cannot possibly be resolved at summary judgment. That is why neither party sought summary judgment on the merits of Dr. Luke's defamation claim. But obviously, if Dr. Luke is lying, he knows he's lying, and his suit would be precisely the kind of baseless, retaliatory action the anti-SLAPP law is meant to reach.

The decision below should be affirmed.

NATURE OF THE CASE

A. Factual Background

In 2005, when she was a teenage aspiring singer-songwriter, Kesha met Dr. Luke—by then already a famous music producer in his mid-30s. Dkt. 1700 at 11-12; Dkt. 2177 at 1. Dr. Luke signed Kesha to an exclusive music-production contract, and relocated Kesha from Nashville to Los Angeles. Dkt. 1742 at 3, 10, 13-14; Dkt. 1762 at 64. Kesha alleges that shortly thereafter, Dr. Luke brought her to a Hollywood party, gave her a pill, took her to his hotel room, and sexually assaulted her while she was too incapacitated to consent or resist. Dkt. 1762 at 60, 63-64, 74, 78. Kesha reported the assault to friends, family, and her agent, Dkt. 1762 at 79; Dkt. 1840 at 11-13; Dkt. 1897—but as it all too frequently goes in Hollywood, Dr. Luke used his industry influence and the no-end-date contract Kesha signed as a teenager to intimidate her into silence, Dkt. 1847 at 15, 19; Dkt. 1881, 1886, 1888, 1889, 2125.

In the years after the assault, Kesha sought medical help and tried to sever her professional relationship with Dr. Luke. Dkt. 1724 at 9, 16; Dkt. 1865, 2120. But after multiple failed attempts, Kesha turned to the courts for help.

B. Procedural History

On October 14, 2014, Kesha filed a California state-court complaint alleging that Dr. Luke had drugged and raped her in 2005. Dkt. 1978. That same day, Dr.

Luke sued Kesha for defamation in New York, claiming that she fabricated her allegations because she was unhappy with the terms of their business deal. Dkt. 1. He also launched a brutal public-relations campaign to destroy Kesha's credibility. Dkt. 1916; Dkt. 2026; Dkt. 2029 at 2-4; Dkt. 2030; Dkt. 2101 at 29.

Dr. Luke has since amended his complaint three times. Dkt. 39; Dkt. 624; Dkt. 1539. He filed the operative Third Amended Complaint ("TAC") on September 5, 2018. R-212. Count I seeks to hold Kesha liable for dozens of statements about the assault, *see* Dkt. 1828, including:

— draft, filed, and amended versions of Kesha's California complaint;

— Kesha's counterclaims, amended counterclaims, and other litigation filings in New York;

— two social-media posts by Kesha;

— 17 press statements by Kesha's counsel regarding this litigation;

— 12 Twitter posts by Kesha's mother and one of Kesha's fans; and

— three e-mails by Kesha's mother.

Dr. Luke also sued Kesha for text messages she sent to Lady Gaga referencing a conversation where a music executive told the two friends that Dr. Luke had sexually assaulted another pop star, Katy Perry (Count II). R-242-45 ¶¶ 99-110, 118-24. Kesha served her Answer to the TAC on September 21, 2018, and "reserve[d] the right to raise and assert additional defenses after such defenses have

been ascertained." Dkt. 1540 at 40.

Since the outset of the case, Dr. Luke has couched his claims against Kesha in terms of actual malice. Under the First Amendment, public figures must prove—by clear and convincing evidence—that allegedly defamatory statements were both false and made with "actual malice." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). Presumably anticipating that a famous and successful music producer who routinely walks the red carpet might be deemed a "public figure," Dr. Luke has litigated the actual-malice issue since initiating this suit:

— Dr. Luke's initial 2014 complaint alleged that Kesha "acted with malice." Dkt. 1 ¶ 31.

— In response to Kesha's demand for a bill of particulars, Dr. Luke asserted in May 2018 that Kesha "acted with both actual and common law malice." Dkt. 1322 at 16-18.

— The TAC alleges that discovery yielded facts showing that "Kesha's assertions were made with common-law and Constitutional malice and wanton dishonesty." R-245 ¶ 122.

— Dr. Luke has since designated as trial exhibits several documents he says demonstrate Kesha's malice. R-66 ¶ 2.

In October 2018, Kesha moved for partial summary judgment seeking, among other things, "judgment as a matter of law that Dr. Luke is a public figure

who must prove actual malice to prevail." R-291. The trial court rejected that argument, and on April 22, 2021, a divided panel of this Court affirmed the trial court's public-figure ruling over a dissent from Justices Scarpulla and Oing. *Gottwald v. Sebert*, 193 A.D.3d 573, 576-78 (1st Dep't 2021). The panel then granted Kesha leave to appeal the close question to the Court of Appeals on July 22, 2021, so Dr. Luke's public-figure status still remains undecided.

C. The 2020 Anti-SLAPP Amendments

In November 2020, New York amended its anti-SLAPP law to strengthen two provisions relevant here:

1. The Legislature expanded the scope of Civil Rights Law § 76-a, which requires that a plaintiff in an "action involving public petition and participation" prove "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"—i.e., prove actual malice. CRL § 76-a(2).

The prior version of the law defined actions "involving public petition and participation" as actions "brought by a public applicant or permittee" relating to "efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." CRL § 76-a(2) (1992). As the Senate sponsor of the 2020 amendments, Senator Hoylman, explained, that statute was construed nar-

rowly and mostly limited to real-estate permits. *See* Hoylman Sponsor Mem., *supra*. Section 76-a, "as drafted, and as narrowly interpreted by the courts," thus "failed to accomplish" the Legislature's "objective" in enacting the original anti-SLAPP law: "to provide 'the utmost protection for the free exercise of speech, petition, and association rights.'" *Id.* (quoting L. 1992, Ch. 767, § 1); *accord* Sponsor Mem. of Assemblywoman Weinstein (July 23, 2020), Bill Jacket, L. 2020, Ch. 250 ("Weinstein Sponsor Mem.") (together with the Hoylman Sponsor Memorandum, the "Sponsor Memoranda").

Accordingly, the 2020 amendments expanded the law to "better advance the purposes that the Legislature originally identified in enacting New York's anti-SLAPP law." Sponsor Memoranda, *supra*. Specifically, the Legislature revised the definition of an "action involving public petition and participation" so that the anti-SLAPP law now applies to claims based on:

> (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.

CRL § 76-a(1)(a). The amended provision further instructs: "'Public interest' shall be construed broadly, and shall mean any subject other than a purely private matter." CRL § 76-a(1)(d).

2. The Legislature also amended the anti-SLAPP law to strengthen § 70-a, the "principal remedy" it "provided to victims of SLAPP suits." Hoylman Sponsor Mem., *supra*. Section 70-a authorizes a defendant "in an action involving public petition and participation," as defined in § 76-a, to "maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees," from the plaintiff who initiated the SLAPP suit. CRL § 70-a(1). By broadening § 76-a, as discussed above, the Legislature thus broadened § 70-a too.

But the Legislature also amended § 70-a directly. The prior version provided that "costs and attorney's fees may be recovered" by a SLAPP defendant "upon a demonstration" that the action was "commenced or continued without a substantial basis in fact and law." CRL § 70-a(1)(a) (1992). But New York courts "failed to use their discretionary power to award costs and attorney's fees," so the law's "principal remedy" was "almost never actually imposed." Sponsor Memoranda, *supra*. The Legislature thus eliminated that judicial discretion: now, "costs and attorney's fees shall be recovered upon" the same demonstration. CRL § 70-a(1)(a). The Legislature left intact other provisions that permit compensatory damages upon an additional showing that the SLAPP suit "was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech," and punitive damages if the SLAPP suit is "commenced or continued for the sole purpose of" such harassment. *Id.* §§ 70-

a(1)(b), (c).

These amendments, Assemblywoman Weinstein explained, were necessary to protect "against the threat—and financial reality—of abusive litigation" and "discourage SLAPP lawsuits—which attempt to chill free speech by definition." Weinstein Sponsor Mem., *supra*. As Senator Hoylman explained, the amendments ensure that "survivors of sexual abuse"—among others—will not be "dragged through the courts on retaliatory legal challenges solely intended to silence them." Legislature Press Release, *supra*.

The Legislature directed that the amendments "shall take effect immediately." L. 2020, Ch. 250, § 4. The Governor signed the Act into law on November 10, 2020. *Id.*

D. Proceedings Below

On April 6, 2021, Kesha moved for a ruling that the current version of CRL § 76-a applies to Dr. Luke's defamation claims and for leave to assert a counterclaim against Dr. Luke under the newly amended CRL § 70-a. R-63-64. The trial court granted the motion on June 30, 2021.

The court concluded that the anti-SLAPP legislation is "clearly remedial" and must be "applied retroactively in order to give effect to its beneficial purpose." R-60-61 at 52:22-53:1. Further, the court explained, all indicia of retroactivity are

present here: the "legislative history" establishes "that the amended statute was intended to conform with the original intent of the provision"; the Legislature evinced a "sense of urgency"; "the statute was designed to rewrite … an unintended interpretation"; and "the enactment reaffirms legislative judgment about what the law was intended to have always been." R-60 at 52:12-23. Dr. Luke, moreover, had failed to establish that "retroactive application would affect his due process rights." R-61 at 53:2-3. Given the 2020 Act's "important purpose," the court concluded, "it should apply to pending cases." *Id.* at 53:10-11.

The court likewise granted Kesha leave to amend to assert her counterclaim. Emphasizing that "[l]eave is freely given," the court held that Kesha's proposed counterclaim was "not futile" and that allowing Kesha to assert a counterclaim for "a determination by the jury" would not prejudice Dr. Luke. *Id.* at 53:12-18.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT CIVIL RIGHTS LAW § 76-A APPLIES TO DR. LUKE'S DEFAMATION CLAIMS

A. Section 76-a Applies Retroactively

Every single court to consider the issue—fifteen and counting—has held that § 76-a applies retroactively.[2] That unanimous consensus is unsurprising. Retroactivity is a question of legislative intent, *see Duell v. Condon*, 84 N.Y.2d 773, 783

[2] *See* R-59-61 at 51:25-53:21; *Palin v. N.Y. Times Co.*, 510 F. Supp. 3d 21 (S.D.N.Y. 2020); *Coleman v. Grand*, -- F. Supp. 3d --, 2021 WL 768167 (E.D.N.Y. Feb. 26, 2021); *Sackler v. Am. Broad. Cos.*, 144 N.Y.S.3d 529 (N.Y.

(1995), and every interpretive tool compels the same conclusion: the Legislature unmistakably intended § 76-a to apply retroactively.

1. The 2020 Act—Including § 76-a—Is Remedial And Thus Presumptively Applies Retroactively

Dr. Luke does not suggest that the 2020 Act contains some express statement of prospective effect. But he contends (repeatedly) that silence cuts in his favor, emphasizing the "presumption against retroactivity." Br. 1, 4-5, 7, 18-20, 35, 46. But as Dr. Luke elsewhere admits, Br. 19 n.10, 35, that is the rule only for non-remedial legislation. Where the "Legislature's preference" is not "explicitly stated or clearly indicated," (i) non-remedial legislation is "presumed to have prospective application," but (ii) "remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose." *Matter of Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117, 122 (2001); *accord, e.g.*, *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 584 (1998); *Matter of Jaquan L.*, 179 A.D.3d 457,

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Sup. Ct. 2021); *Veritas v. N.Y. Times Co.*, 2021 WL 2395290 (N.Y. Sup. Ct. Mar. 18, 2021); *Kurland & Assocs., P.C. v. Glassdoor, Inc.*, 2021 WL 1135187 (N.Y. Sup. Ct. Mar. 22, 2021); *Sweigert v. Goodman*, 2021 WL 1578097 (S.D.N.Y. Apr. 22, 2021); *Reus v. ETC Hous. Corp.*, 148 N.Y.S.3d 663 (N.Y. Sup. Ct. 2021); *Massa Constr., Inc. v. Meany*, Index No. 126837/2020 (N.Y. Sup. Ct. May 10, 2021) (at R-364); *Reilly v. Crane Tech Sols., LLC*, 2021 WL 2580281 (N.Y. Sup. Ct. June 23, 2021); *Cisneros v. Cook*, 2021 WL 2889924 (N.Y. Sup. Ct. July 7, 2021); *Griffith v. Daily Beast*, 2021 WL 2940950 (N.Y. Sup. Ct. July 13, 2021); *Cent. for Med. Progress v. Planned Parenthood Fed'n of Am.*, 2021 WL 3173804 (S.D.N.Y. July 27, 2021); *Lindberg v. Dow Jones & Co., Inc.*, 2021 WL 3605621 (S.D.N.Y. Aug. 11, 2021); *Goldman v. Reddington*, 2021 WL 4099462 (E.D.N.Y. Sept. 9, 2021).

459 (1st Dep't 2020).

Thus, where a statute is silent as to its temporal reach, the threshold question in the retroactivity analysis is whether the statute is remedial. And here, as every court to consider the question has correctly held, New York's anti-SLAPP amendments are unmistakably remedial.

"Remedial statutes are those designed to correct imperfections in prior law, by generally giving relief to the aggrieved party." *Nelson v. HSBC Bank USA*, 87 A.D.3d 995, 998 (2d Dep't 2011); *accord Asman v. Ambach*, 64 N.Y.2d 989, 991 (1985) ("Legislature clearly indicated that" amendments "designed to correct imperfections in prior law" "are to be viewed as remedial."). Amendments enacted to fix "defects" in "the original statute" are thus remedial. *Matter of Hynson*, 164 A.D.2d 41, 46-48 (2d Dep't 1990). Remedial statutes are "liberally construed" to have retroactive effect so as "to carry out the reform intended and spread its beneficial effects as widely as possible." *Jaquan L.*, 179 A.D.3d at 459.

Here, the Legislature enacted the 2020 anti-SLAPP amendments to remedy defects in the original law that undermined its central objective. In enacting the 1992 Act, the Legislature specified clear "Legislative findings and purpose":

> The legislature hereby declares it to be the policy of the state that the rights of citizens to participate freely in the public process must be safeguarded with great diligence. The laws of the state must provide the utmost protection for the free exercise of speech, petition and association rights, particularly where such rights are exercised in a

public forum with respect to issues of public concern.

L. 1992, Ch. 767, § 1.

But as the 2020 amendments' sponsors explained, the 1992 law "failed to accomplish [its] objective" because "[i]n practice," it "has been strictly limited to cases" involving a "public application or permit, usually in a real estate development situation." Sponsor Memoranda, *supra*. "[M]eanwhile, many frivolous lawsuits are filed each year that are calculated solely to silence free speech and public participation, which do not specifically arise in the context of the public 'permit' process." Weinstein Sponsor Mem., *supra*. Accordingly, "[b]y revising the definition of an 'action involving public petition and participation,'" the amendments "better advance the purposes that the Legislature originally identified in enacting New York's anti-SLAPP law"—namely, "to 'provide the utmost protection for the free exercise of speech, petition, and association rights.'" Sponsor Memoranda, *supra* (quoting L. 1992, Ch. 767, § 1); *accord* Letter from Assemblywoman Weinstein to Gov. Cuomo (Sept. 23, 2020), Bill Jacket, L. 2020, Ch. 250 ("Weinstein Letter").[3] The Legislature intended in 1992 to stem the rising tide of SLAPP suits

[3] Dr. Luke argues that the Court should ignore the statements of the legislators that drafted, sponsored, and enacted the 2020 amendments, Br. 27, but decisions of both the Court of Appeals and this Court refute that contention. *See, e.g.*, *Matter of OnBank & Tr. Co.*, 90 N.Y.2d 725, 731 (1997) (relying on sponsor memorandum); *Duell*, 84 N.Y.2d at 783-84 (same); *Jaquan L.*, 179 A.D.3d at 459 (same). And it is telling that Dr. Luke does not attempt to rehabilitate his position with any legislative history from the operative 2020 anti-SLAPP amendments.

but it failed, so the Legislature enacted the 2020 anti-SLAPP amendments to remedy the defects in the original law. That is textbook remedial legislation.

Dr. Luke's contrary arguments are wrong. He first argues that not all amendments that "purport[] to remedy a societal problem which previous legislation did not address" are remedial. Br. 36. That's true. The anti-SLAPP amendments are not remedial because they remedy a social problem—although they do—but because they "correct imperfections in [the] prior [SLAPP] law." *Asman*, 64 N.Y.2d at 991.

Dr. Luke next protests that the anti-SLAPP amendments are not remedial because they "do not correct any judicial misinterpretation of the original statutory text." Br. 7 n.5; *see also id.* at 26-28. But that is not the relevant question in determining whether a statute is remedial. Rather, the question is whether the Legislature enacted the statute to remedy defects in the prior law—regardless whether the defects result from legislative drafting, judicial error, unexpected execution difficulties, or anything else. Whether the amendments correct a judicial misstep is a distinct retroactivity consideration (also satisfied here, *see infra* at 25-27). As *Gleason* explains, "[i]n determining whether a statute should be given retroactive effect," courts must first ask whether a statute is "remedial"—because "remedial

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The 1992 history he cites, Br. 24-25, is beside the point. No one disputes that the original Act was limited to a "public applicant or permittee"; the question is simply whether the Legislature's 2020 decision to amend that definition was "remedial."

legislation should be given retroactive effect." 96 N.Y.2d at 122. After that threshold question, courts then consider "[o]ther factors in the retroactivity analysis"—including "whether the statute was designed to rewrite an unintended judicial interpretation." *Id.*

Hynson is instructive. New York's 1983 "New Car Lemon Law" created a statutory warranty for defective motor vehicles. *Hynson*, 164 A.D.2d at 45-46. "As originally enacted," however, the Law "did not formally establish an independent mechanism for dispute resolution," forcing consumers "to resort to the courts or to nonbinding informal arbitration programs." *Id.* at 46. "To alleviate growing consumer dissatisfaction with" the statute—as originally drafted, not as interpreted by any court—the Legislature amended the Law in 1986 so that consumers could "compel[] the manufacturer[s] to submit to arbitration by an impartial arbitrator." *Id.*

The Second Department held that the new legislation applied retroactively, reasoning that "the remedial nature of the amendment itself militates in favor of extending the statute's benefits to 'consumers' who purchased vehicles prior to" the amendment's enactment. *Id.* at 48. The "legislative history" showed that the amendment "was enacted as part of the evolving process of making the Lemon Law an effective means of redress for consumers" and thus was "unquestionably a remedial statute." *Id.* Accordingly, "in the absence of language to the contrary, a

remedial amendment of this nature should be retroactively applied so as to spread its benefits as widely as possible." *Id.*

So too here. The Legislature enacted the 2020 anti-SLAPP amendments—including and specifically § 76-a—"to correct imperfections in prior law." *Id.* Here, as in *Hynson*, the 1992 anti-SLAPP law as drafted failed to fulfill the Legislature's original objective, so the Legislature amended the law "as part of an evolving process" to make the law "an effective means of redress." *Id.*; *accord People v. Dyshawn B.*, 196 A.D.3d 638, 640 (2d Dep't 2021) (amendments "repeal[ing] the imposition of mandatory surcharges" were remedial because legislative history evinced "legislative judgment" that prior regime "negative[ly] impact[ed]" juveniles). The anti-SLAPP amendments, then, are remedial legislation and presumptively apply retroactively.

2. The 2020 Act's Drafting History Unmistakably Demonstrates Retroactive Legislative Intent

But the presumption of retroactivity is merely corroborative here, because the drafting history makes the Legislature's intent clear. The original draft bill, as introduced in both the Senate and Assembly, provided that the amendments would apply only to actions commenced after the Act's effective date: "This act shall take effect immediately and shall apply to actions commenced on or after such date." N.Y. Senate Bill S52 § 3 (Jan. 9, 2019); N.Y. Assembly Bill A5991 § 3 (Feb. 26, 2019). But the Legislature deleted that prospective-only language from the final

bill, instead instructing only that "this act shall take effect immediately." L. 2020, Ch. 250, § 4. The Legislature thus explicitly considered making the anti-SLAPP amendments apply only prospectively, and expressly amended the bill to eliminate that limitation.

Dr. Luke ignores this drafting history, but it conclusively resolves this case. "It is well settled that legislative intent may be inferred from the omission of proposed substantive changes in the final legislative enactment." *In re Grand Jury Subpoena Duces Tecum Served on Museum of Modern Art*, 93 N.Y.2d 729, 738 (1999); *see, e.g.*, *Woollcott v. Shubert*, 217 N.Y. 212, 221 (1916) ("[T]he history of the passage of a statute, that is, the changes and proposed changes in the original bill, as recorded in the legislative journals" is an "aid in construction."); *Majewski*, 91 N.Y.2d at 587 ("A court may examine changes in proposed legislation to determine intent."). This Court has likewise recognized that when a draft bill provision is "deleted from the version finally passed," that "development rather persuasively suggests … the Legislature's intent." *People v. Korkala*, 99 A.D.2d 161, 166 (1st Dep't 1984). Just so here.

Dr. Luke's most-cited authority, *Majewski*, is directly on point—but contra Dr. Luke, it compels retroactivity here. In *Majewski*, the Court of Appeals held that amendments to New York's Workers' Compensation Law were prospective because "the initial draft of the Act" "expressly provided that it would apply to

'lawsuits that have neither been settled nor reduced to judgment' by the date of its enactment." 91 N.Y.2d at 587. "That language" did not, however, "appear in the enacted version." *Id.* The Court found that omission powerful evidence that the Legislature did not intend for the statute to apply retroactively: "rejection of a specific statutory provision is a significant consideration when divining legislative intent." *Id*. Just as the Legislature's rejection of retroactivity language in *Majewski* supported prospective application, the Legislature's rejection of prospective-only language here supports retroactive application.[4]

Underscoring the point, before the 2020 Act was enacted into law, interested stakeholders highlighted the deletion of language specifying the law would apply only prospectively and implored the Governor to require the Legislature to reinstate the original nonretroactivity language as a "condition of signature." Letter of Rent Stabilization Ass'n to Gov. Cuomo (Nov. 4, 2020), Bill Jacket, L. 2020, Ch. 250. The Rent Stabilization Association wrote:

> Our concerns are premised upon the applicability of the legislation to already pending proceedings … This legislation, as initially introduced, expressly provided by its own terms that it applied only to newly-commenced cases. However, during the legislation process, it was amended to provide otherwise. It is this provision … which we urge should be amended and restored to its original terms so

[4] Dr. Luke likewise cites *Majewski* as altering the longstanding definition of "remedial" legislation. Br. 36. To the contrary, *Majewski* reaffirmed that the "term" "remedial" "may broadly encompass any attempt to supply some defect or abridge some superfluity in the former law." 91 N.Y.2d at 584.

> that it is clear and unambiguous that it shall only apply to cases commenced on and after the date of enactment.

Id. But the Legislature did not re-insert the prospective-only limitation, and the Governor signed the bill into law.

Thus, as in *Duell v. Condon*, "the apparent legislative intent to apply the statute retroactively was recognized by those commenting on the proposed legislation; indeed, they objected to the bill because it was retroactive." 84 N.Y.2d at 784. The Legislature's deliberate refusal to include prospective-only language in the final Act confirms that the Legislature intended the 2020 amendments to be retroactive. That should end the analysis.

3. Every Other Retroactivity Factor Confirms That § 76-a Should Be Given Retroactive Effect

Nevertheless, all three additional factors the Court of Appeals identified in *Gleason* support applying the anti-SLAPP amendments retroactively.

a. *The Legislature Conveyed Urgency In Enacting § 76-a*

When the Legislature "convey[s] a sense of urgency" in enacting a statute, that urgency supports retroactive application. *Gleason*, 96 N.Y.2d at 122.

Here, the Legislature "conveyed a sense of urgency," as the trial court correctly found, by directing that the anti-SLAPP amendments "shall take effect immediately." L. 2020, Ch. 250, § 4. Both the Court of Appeals and this Court have repeatedly held that this exact phrase conveys a sense of urgency and supports a

finding of retroactivity. *See, e.g.*, *Gleason*, 96 N.Y.2d at 122 (The Legislature "directed that the amendment was to take effect immediately, thus evincing 'a sense of urgency'"); *Brothers v. Florence*, 95 N.Y.2d 290, 299 (2000) ("[T]he law states that it is to take effect immediately. While this language is not alone determinative, it does 'evince a sense of urgency.'"); *Jaquan L.*, 179 A.D.3d at 460 ("[T]he statute also states that the amendment 'shall take effect immediately,'" "indicat[ing] a sense of urgency."); *accord*, *e.g.*, *Asman*, 64 N.Y.2d at 991 (same); *Dyshawn B.*, 196 A.D.3d at 640 (same); *Cady v. Broome County*, 87 A.D.2d 964, 965 (3d Dep't 1982) (same). By contrast, a "postponed effective date … furnishe[s] critical and clear indicia of [legislative] intent that the statute [i]s to have prospective effect only." *Cady*, 87 A.D.2d at 965.

Dr. Luke claims that "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." Br. 22 n.11. Not so. *Gleason* noted that the Legislature "in two respects … conveyed a sense of immediacy: it acted swiftly after [the unintended judicial interpretation], and it directed that the amendment was to take effect immediately." 96 N.Y.2d at 122.

Remarkably, Dr. Luke suggests that the phrase "shall take effect immediately" actually supports prospective application. Br. 21-23. The problem, how-

ever, is that both this Court and the Court of Appeals have repeatedly held the opposite. *See supra* at 22-23. Dr. Luke's best authority is the Third Department's decision in *Majewski*, but he omits that the Court of Appeals said on review that "the fact that a statute is to take effect immediately 'evinces a sense of urgency.'" *Majewski*, 91 N.Y.2d at 583. And in that case, other factors—including legislative history reflecting the deletion of critical retroactivity language, *see supra* at 20-21—strongly favored prospective application. *Majewski*, 91 N.Y.2d at 583, 585-90. But here, all available evidence supports retroactivity, and the Legislature's urgent directive that the amendments "take effect immediately" only underscores that conclusion. *See Gleason*, 96 N.Y.2d at 122; *Jaquan L.*, 179 A.D.3d at 460.

Dr. Luke says "[i]t 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." Br. 23. But Dr. Luke conflates two "separate question[s]": when a statute "take[s] effect," and whether the statute applies prospectively or retroactively. *Majewski*, 91 N.Y.2d at 583. There is no strangeness in specifying that a retroactive statute "shall take effect immediately": that phrase specifies the effective date of a statute, and thus most obviously means that the legislation assumes the force of law as soon as it is signed, rather than at some later date. *See, e.g.*, *Aguaiza v. Vantage Props., LLC*, 69 A.D.3d 422, 424 (1st Dep't 2010); *Weiler v. Dry Dock Sav. Inst.*, 258 A.D. 581, 582-83 (1st Dep't 1940). But

under *Gleason* and its progeny, such language can also be relevant to the retroactivity inquiry because it demonstrates a sense of urgency relative to a statute with a future effective date. Where, as here, the amendments' remedial nature and drafting history counsel in favor of retroactivity, the phrase both establishes an immediate effective date and provides additional evidence of retroactivity. *See, e.g.*, *Jaquan L.*, 179 A.D.3d at 460-61; *Gleason*, 96 N.Y.2d at 122.

b. *The Legislature Intended To Correct Prior Narrow Judicial Interpretations Of The Anti-SLAPP Law*

Evidence that a "statute was designed to rewrite an unintended judicial interpretation" likewise counsels in favor of retroactivity. *Gleason*, 96 N.Y.2d at 122. In some cases, the Legislature swiftly rewrites a statute in response to a flagrant judicial misinterpretation. *See id.*; *Brothers*, 95 N.Y.2d 290. But what matters is simply that the new legislation responds to a judicial interpretation that deviates from the Legislature's original intent, whether as a matter of kind or degree. *See Nelson v. HSBC Bank USA*, 87 A.D.3d 995 (2d Dep't 2011); *Puig v. City of Middletown*, 147 N.Y.S.3d 348 (N.Y. Sup. Ct. 2021).

In *Nelson*, for example, the Second Department considered amendments to New York City's Human Rights Law. "The express purpose" of those amendments "was 'to clarify the scope' of the City's Human Rights Law because it was 'the sense of the Council that [the] Law ha[d] been construed too narrowly to ensure protection of the civil rights of all persons covered by the law.'" *Nelson*, 87

A.D.3d at 996. The new legislation provided, *inter alia*, that the Law was to "be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof." *Id.* at 997. The Second Department reasoned that the "legislative history of the 2005 amendments conveys that they were undertaken to correct a perceived failure by courts to appreciate the scope of earlier comprehensive amendments to the City's Human Rights Law." *Id.* The legislation was thus "designed to rewrite an unintended judicial interpretation." *Id.* at 998.

This case is no different. The Legislature undisputedly enacted the 2020 anti-SLAPP amendments in part to correct its own original drafting, *see* Br. 24-25; *supra* at 15-19, but the Legislature also responded to overly narrow judicial construction of the original anti-SLAPP statute. Both sponsors noted that § 76-a, "as drafted, and as narrowly interpreted by the courts … failed to accomplish" the Legislature's objectives. Sponsor Memoranda, *supra*. Assemblywoman Weinstein explained that "the courts ha[d] construed the [original] law quite narrowly." Weinstein Letter, *supra*. The legislative press release, issued after the Senate and Assembly passed the 2020 Act, explained that the Act was necessary because the 1992 "law has been narrowly interpreted by the courts." Legislature Press Release, *supra*. The New York State Law Revision Commission lamented that the 1992 statute "ha[d] been strictly construed by the courts" in urging the Governor to sign the 2020 legislation. Letter from N.Y. State Law Revision Comm'n to Gov.

Cuomo (Oct. 23, 2020), Bill Jacket, L. 2020, Ch. 250. And the New York City Bar complained that "courts have held that the [1992] statute must be narrowly construed, making it useless in all but the most limited circumstances." Letter from N.Y. City Bar to Gov. Cuomo (Oct. 15, 2020), Bill Jacket, L. 2020, Ch. 250.

At bottom, Dr. Luke's argument—that correction of both too-narrow statutory text and too-narrow judicial interpretation somehow counsels against retroactivity—makes no sense. Obviously amendments need not correct only judicial errors to support a finding of retroactivity. All amendments "change" the "text of the prior version," Br. 24—that is the definition of an amendment. That the 2020 Act corrected both the Legislature's own ineffectual drafting and the Judiciary's too-narrow interpretation only further underscores its remedial nature.

c. *The 2020 Amendments Confirm The Legislature's Judgment About What The Anti-SLAPP Law Should Be*

Finally, retroactive application is proper where "the enactment itself reaffirms a legislative judgment about what the law in question should be." *Gleason*, 96 N.Y.2d at 122; *see Majewski*, 91 N.Y.2d at 585. Here, as explained above, *supra* at 15-17, the 1992 anti-SLAPP law made clear that the Legislature enacted the law to secure "the utmost protection for the free exercise of speech." L. 1992, Ch. 767, § 1. But that law fell short—allowing a "rising tide" of SLAPP lawsuits, Weinstein Letter, *supra*, including "many frivolous lawsuits … filed each year that are calculated solely to silence free speech and public participation," Weinstein

Sponsor Mem., *supra*, by "journalists, consumer advocates, survivors of sexual abuse and others," Legislature Press Release, *supra*. So the Legislature enacted the 2020 amendments to "better advance the purposes that the Legislature originally identified in enacting New York's anti-SLAPP law." Sponsor Memoranda, *supra*; *accord* Weinstein Letter, *supra*. The Legislature thus reaffirmed in 2020 its earlier judgment about what the anti-SLAPP statute was "always meant to do": shield victims from suits that stifle free speech. *See Gleason*, 96 N.Y.2d at 122.

4. Applying § 76-a To Dr. Luke's Claims Would Neither Impair His Vested Rights Nor Violate Due Process

Dr. Luke thus resorts to arguing that this Court should override clear New York retroactivity law and unmistakable legislative intent to avoid violating Dr. Luke's "vested rights" and the Due Process Clause. Both arguments are meritless.

a. *The Vested Rights Doctrine Has No Application Here*

1. Although courts sometimes characterize the "vested rights" doctrine as a "fiction," *Frontier Ins. Co. v. State*, 609 N.Y.S.2d 748, 755 (Ct. Cl. 1993), to the extent it exists, it refers to the principle "that a judgment, after it becomes final, may not be affected by subsequent legislation," *Hodes v. Axelrod*, 70 N.Y.2d 364, 37 (1987). "Once all avenues of appeal have been exhausted, under this doctrine a judgment becomes an inviolable property right which thereafter may not constitutionally be abridged by subsequent legislation." *Id.*

This case is pre-trial; Dr. Luke has obtained no final judgment on Kesha's

defamation claims—let alone without satisfying the actual-malice standard. Dr. Luke thus has no "vested right" to a more lenient standard the Legislature rejected before he tried his claims. *See Frontier*, 609 N.Y.S.2d at 755 ("vested" right must be "something more than a mere expectation based upon an anticipated continuation of the present general laws"); *Vested*, Black's Law Dictionary (11th ed. 2019) ("a completed, consummated right"; "not contingent; unconditional; absolute").

Dr. Luke points to previous rulings on the constitutional public figure question as somehow creating the relevant "vested right." Br. 38-39. Those arguments fail for two reasons.

First, public-figure constitutional law and New York statutory law provide two independent paths to the actual-malice standard. *See, e.g.*, *Palin*, 510 F. Supp. 3d at 26-27. Private-figure status thus could never give Dr. Luke a "vested right" to freedom from the "actual malice" standard. It might mean that he cannot be subject to the actual-malice standard as a constitutional matter, but it would say nothing about the relevance of malice under § 76-a. No court had ever ruled on the latter question (until the trial court, in the decision below, ruled in Kesha's favor), so application of the current version of § 76-a cannot possibly disturb a final judgment.

Second, Kesha's appeal as to whether Dr. Luke is a public figure is currently pending before the Court of Appeals. "Parties obtain no vested rights in the orders

or judgments of courts while they are subject to review." *Boardwalk & Seashore Corp. v. Murdock*, 286 N.Y. 494, 498 (1941); *accord Hodes*, 70 N.Y.2d at 37. Dr. Luke's "right" to prove his "case based upon the burden of proof of preponderance of the evidence, and the standard of fault of negligence," Br. 39, cannot possibly be "already vested and confirmed by the courts" when the court that supposedly vested the right (i.e., this Court) granted Kesha leave to appeal.

Lacking a final judgment, Dr. Luke points to cases in which (he says) courts found vested rights before the end of a case. But those cases are nothing like this one. Each case Dr. Luke cites (Br. 37-40) suggests only that a party may, in certain circumstances, acquire a vested right to bring a cause of action or assert a certain defense at some earlier point.[5] But here, the amendment to § 76-a will not deprive Dr. Luke of the right to bring a particular cause of action or assert any defense at all—it will only require him to prove defamation under a more stringent standard. Dr. Luke does not identify a single authority suggesting that a party can claim a "vested right" in a standard of fault or rule of evidence before any trial occurs. For good reason: Dr. Luke's argument is simply another way of saying he

[5] *See Frontier*, 609 N.Y.S.2d at 755-57 (right to state-funded defense in medical-malpractice action); *Ruffolo v. Garbarini & Scher*, 239 A.D.2d 8 (1st Dep't 1998) (right to pursue malpractice claim that was timely when filed); *Byrnes v. Scott*, 167 A.D.2d 155 (1st Dep't 1990) (right to present personal-jurisdiction defense); *Hogan v. Kelly*, 86 A.D.3d 590 (2d Dep't 2011) (right to present adverse-possession defense).

expected the law wouldn't change—i.e., that § 76-a would never be amended. But as long-settled law makes clear, that expectation cannot create a "vested right." *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 n.24 (1994) ("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever."); 9 N.Y. Jur., Constitutional Law § 248 ("[T]here is no vested right in a rule of evidence."); *Terry v. Anderson*, 95 U.S. 628, 633 (1877) ("[A]s to the forms of action or modes of remedy, it is well settled that the legislature may change them at its discretion."); *Gilbert v. Ackerman*, 159 N.Y. 118, 124 (1899) ("A party has no more a vested interest in the time for the commencement of the action than he has in the form of the action.").

The "vested rights" doctrine thus has no application here at all. And absent a "vested right," free-floating "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," Br. 37, carry no weight in the face of the Legislature's unmistakable retroactive intent.

2. But those considerations would not help Dr. Luke here anyway.

Unfairness or Injustice. Dr. Luke, a celebrity music producer, was always at risk of having to litigate this suit under the actual-malice standard because of the constitutional public-figure analysis, and it cannot be "unfair or unjust" for that

standard to apply—indeed, two Justices of this Court believe he is a public figure, and that question is now pending in the Court of Appeals. *See supra* at 9. Moreover, Dr. Luke has used the possibility of an actual-malice standard to obtain sweeping discovery and has bent over backward to tout for years his ability to satisfy the heightened standard. *See supra* at 8.

Dr. Luke oddly suggests that this case, as litigated, concerned only common-law malice, not actual malice. Br. 38 n.15. That is incorrect. If Dr. Luke is a public figure, he would have to satisfy (as a constitutional matter) the actual-malice standard. *See supra* at 8. The parties also but separately are litigating common-law malice because it is relevant to punitive damages (and can, in certain circumstances, be offered as circumstantial evidence of actual malice, *see Kipper v. NYP Holdings Co.*, 12 N.Y.3d 348, 354 n.4 (2009)). That is why Dr. Luke repeatedly alleged in his complaint and other pleadings that he would show both constitutional and common-law malice. *See supra* at 8.

Reliance. Nor can Dr. Luke identify any cognizable reliance interest implicated by applying the current version of § 76-a. It is Kesha's conduct—i.e., her reporting of Dr. Luke's rape and drugging—that underlies this lawsuit, and § 76-a relates to Kesha's ability to speak freely about issues of public concern without risk of retaliation. Section 76-a does not address Dr. Luke's conduct at all.

Insofar as Dr. Luke suggests that he would not have engaged in "discovery

and motion practice" on the constitutional public-figure question had he known he would be subject to the current version of § 76-a, Br. 38-39, his argument makes no sense. Had the current version of § 76-a been in effect from the outset of this case, Kesha would have pressed both her constitutional public-figure argument and her statutory § 76-a argument as two independent routes to the actual-malice standard. *See supra* at 29. So Dr. Luke never could have avoided litigating the public figure-question; had he conceded that issue outright, he would have been subject to the actual-malice standard as a constitutional matter—a result he obviously wishes to avoid. In any event, discovery and motion practice will often have already occurred when a newly amended statute is applied to a pending case. That is no reason to ignore the Legislature's intent.

Nature of Public Interest. Remarkably, Dr. Luke also suggests that he might not have brought this suit at all had the amended version of § 76-a been in effect in 2014. Br. 38; R-29 at 21:8-18. But that concession only confirms the importance of applying § 76-a here. In amending § 76-a, the Legislature saw a serious problem—that "many frivolous lawsuits are filed each year that are calculated solely to silence free speech," Weinstein Sponsor Mem., *supra*—and wanted to fix it. One of the ways it did so was by requiring plaintiffs to prove actual malice by clear and convincing evidence in cases like this one. That Dr. Luke is now concerned about the viability of his long-running suit—which has cost Kesha millions of dollars and

years of her life—shows that it is exactly the type of abusive suit the Legislature designed § 76-a to address.

Extent of Retroactivity. As discussed below, *see infra* at 39-41, applying the current version of § 76-a here does not present any serious retroactivity concerns. Section 76-a, applied to this ongoing dispute, is not retroactive in the typical sense—that is, it does not alter the consequences of past conduct or disturb a prior judgment. It will simply ensure that a trial that has not yet occurred is governed by the standard of fault under current law.[6]

b. *Dr. Luke's Due Process Argument Is Meritless*

1. Dr. Luke's half-hearted due process argument (which he urges the Court not to reach, Br. 40) also fails, as he does not even attempt to identify any recognized property interest implicated by the § 76-a amendment. *See* Br. 40-42.

Nor could he. It is well-settled that amendments affecting only the "provisions governing the procedure for adjudication of a claim going forward ha[ve] no potentially problematic retroactive effect even when the liability arises from past conduct." *Regina Metro. Co. v. New York State Div. of Hous. & Cmty. Renewal*, 35 N.Y.3d 332, 365 (2020). This is so because property rights that "have been cre-

[6] Even if § 76-a did affect Dr. Luke's vested rights (it does not), that is not dispositive if, as here, the Legislature intended retroactive application. *See Palin*, 510 F. Supp. 3d at 27-28; *Chan v. Gantner*, 464 F.3d 289, 293 (2d Cir. 2006).

ated by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the legislature." *Munn v. Illinois*, 94 U.S. 113, 134 (1876); *accord Kim v. City of New York*, 90 N.Y.2d 1, 7 (1997). So long as "the party affected" has "a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue," "there is no ground for holding that due process of law has been denied him." *Mobile, Jackson & Kansas City R.R. Co. v. Turnipseed*, 219 U.S. 35, 43 (1910).

Indeed, the Supreme Court conclusively rejected a similar challenge more than a century ago in *Easterling Lumber Co. v. Pierce*, 235 U.S. 380 (1914). In that bedrock precedent, the Supreme Court held that a retroactively applied statute that imposed a prima facie presumption of negligence in a pending case posed no due process concern. The Court explained (*id.* at 382):

> [The] statute cut off no substantive defense, but simply provided a rule of evidence controlling the burden of proof. That as thus construed it does not violate the 14th Amendment to the Constitution of the United States is also so conclusively settled as to again require nothing but a reference to the decided cases.

Dr. Luke's contention here is even weaker: unlike the statute in *Easterling*, which effectively shifted the burden of proof from the plaintiff to the defendant, the amendment to § 76-a at most alters the standard of fault that Dr. Luke, as the plaintiff, already needed to satisfy. And before the Court of Appeals provides the

final word on whether Dr. Luke is a public figure, Dr. Luke cannot even say definitively that applying the anti-SLAPP amendments would change that standard at all.

Dr. Luke's contrary argument rests largely on *Regina*, which is inapposite. Retroactivity can raise due process concerns if it results in "changes to legal rules on which parties relied in shaping their primary conduct." *Republic of Austria v. Altmann*, 541 U.S. 677, 696 (2004). *Regina* is a good example. There, the Court considered amendments to the Rent Stabilization Law, including an amendment modifying the "lookback rule" governing records that could be used to calculate damages in rent-overcharge cases. While the statute originally held that defendant landlords could accordingly lawfully dispose of records older than four years, the amended statute lengthened the "lookback period" to six years—and provided that disposal of records within that additional two-year period, or even earlier, could incur liability. *See Regina*, 35 N.Y.3d at 368-69. The Court of Appeals thus found that retroactively applying the amended statute raised due process concerns because it "expand[ed] the scope of owner liability significantly based on conduct that was inoculated by the old law" and "impose[d] new duties with respect to transactions already completed." *Id.*

Retroactively applying § 76-a here raises no such concerns. Dr. Luke is the plaintiff in this defamation suit, not the defendant. As explained above, *see supra* at 33, § 76-a governs Kesha's conduct, not Dr. Luke's. If the law assured speakers

(like Kesha here) that certain speech was protected, it might raise due process concerns to retroactively impose liability for past speech that was "inoculated by the old law." *Regina*, 35 N.Y.3d at 368. But applying § 76-a retroactively does not punish Dr. Luke for any conduct the law assured him was permissible. The new law may affect how his pending claims are adjudicated in court, but that does not implicate his due process rights. *See, e.g.*, *Easterling*, 235 U.S. at 382; *Reitler v. Harris*, 223 U.S. 437, 442 (1912); *Turnipseed*, 219 U.S. at 43.[7]

2. In any event, Dr. Luke cannot possibly show that retroactive application would violate his due process rights. "To comport with the requirements of due process," when the Due Process Clause is implicated, "retroactive application of a newly enacted provision must be supported by a legitimate legislative purpose furthered by rational means." *Regina*, 35 N.Y.3d at 375. Retroactive legislation "carries a presumption of constitutionality," and the challenger "bears the burden of showing the absence of a rational basis." *Id.*

[7] For similar reasons, Dr. Luke is mistaken that *Regina* somehow strengthened the "presumption against retroactivity." Br. 18-19. Nothing in *Regina* overturned the longstanding rule that remedial legislation, like the anti-SLAPP amendments, is presumptively retroactive. *Regina* simply restated well-established principles: legislation that "increase[s] [] liability for past conduct" and "impose[s] new duties with respect to transactions already completed" is presumed to apply prospectively. 35 N.Y.3d at 369-70. As just explained, none of those "retroactivity criteria," *id.* at 369, is implicated here. Moreover, *Regina* re-affirmed that "a clear expression of ... legislative purpose" that the statute should apply retroactively—as plainly exists here, *see supra* at 13-28—overcomes any such presumption. 35 N.Y.3d at 370; *see Palin*, 510 F. Supp. 3d at 27-28.

Here, there is an obviously legitimate legislative purpose for retroactive application: the Legislature has long held the view that SLAPP suits threaten free speech; it found that the original statute failed to adequately protect speech; and it enacted the amendments to effectuate its original intent. *See supra* at 15-17.

And requiring a heightened showing in all pending defamation suits involving an "issue of public interest," whether they were filed before or after the anti-SLAPP amendments, is a rational means of accomplishing the Legislature's goals. If anything, it would be irrational for the anti-SLAPP legislation to carve out pending suits. That Dr. Luke launched this vindictive suit years ago only makes it more concerning; applying the amendments to pending suits will deter meritless long-running suits like this one that bankrupt victims both financially and emotionally. Due process does not require the Court to imply a grandfather clause into the anti-SLAPP amendments to ensure that frivolous speech-chilling litigation can continue under standards the Legislature has emphatically rejected.[8]

[8] Dr. Luke notes that three other states' anti-SLAPP laws have been held non-retroactive. Br. 9. But that has no bearing on whether New York's anti-SLAPP law is retroactive. Moreover, Dr. Luke cherry-picks jurisdictions, failing to mention other states have echoed New York's retroactive framework. *See Nguyen v. County of Clark*, 732 F. Supp. 2d 1190 (W.D. Wash. 2010) (Washington); *Shoreline Towers Condo. Ass'n v. Gassman*, 936 N.E.2d 1198 (Ill. Ct. App. 2010) (Illinois); *N. Cal. Carpenters Reg'l Council v. Warmington Hercules Assocs.*, 124 Cal. App. 4th 296 (2004) (California).

B. Section 76-a, At A Minimum, Applies To Dr. Luke's Pending, Never-Tried Defamation Claims

In truth, this case is far easier than *Gleason*, *Regina*, and other cases dealing with difficult retroactivity questions. In *Gleason*, the Appellate Division had dismissed petitioners' application to confirm arbitration based on the prior version of the arbitration statute, before the Legislature amended the relevant law. 96 N.Y.2d at 122. So too in *Regina*: the relevant legislation was "enacted while these appeals were pending in this Court," 35 N.Y.3d at 363, meaning judgment had already issued under the prior law.

Here, however, no judgment would be disturbed by applying the current version of § 76-a to Dr. Luke's defamation claims. This case is pre-trial; Dr. Luke's defamation claims have never been adjudicated in the first instance, by any court, under any version of § 76-a. Accordingly, any retroactivity concerns are significantly lessened. *See Becker v. Huss Co.*, 43 N.Y.2d 527, 542 (1978) (explaining there are "different degrees of retroactivity" and no "unfair[ness]" results from applying amendments to judgments that post-date their effective dates).

That is particularly true here, because § 76-a, by its plain terms, makes recovery of damages the critical moment in time: "In an action involving public petition and participation, damages may only be recovered if the plaintiff" proves actual malice. CRL § 76-a(2). Recovery of damages has not yet occurred in this case. So the question is simply whether to apply current New York law to a future

stage of pending litigation expressly targeted by the amended law—namely, Dr. Luke's attempt to recover damages in the forthcoming jury trial.

By directing the 2020 Act take "immediate effect," the Legislature squarely answered that question—as of November 10, 2020, a plaintiff in an action involving an issue of public interest cannot recover damages absent proof of actual malice. It is black-letter law that a court "is to apply the law in effect at the time it renders its decision." *Bradley v. Sch. Bd. of City of Richmond*, 416 U.S. 696, 711 (1974). Thus, regardless whether § 76-a applies retroactively to post-judgment cases, it clearly applies to pre-judgment cases like this one.

Becker is directly on point. There, unlike here, "the act and its history [we]re inconclusive," so the Court of Appeals declined to "infer[] that the amendment was intended to be as retroactive" as other remedial statutes—i.e., applicable "to prior judgments or settlements." 43 N.Y.2d at 541-42. But the Legislature had directed that the amended statute "be effective immediately," demonstrating its intent to "affect[] as many cases as possible." *Id.* And "because the amendment state[d] that the application for apportionment is to be upon 'recovery,'" the Court of Appeals reasoned, "it makes sense that the critical point be the date of judgment or settlement." *Id.* Accordingly, the Court ruled, "the amendment should apply to a judgment or settlement effected after June 10, 1975, even if the injury occurred or the third-party action was brought before that date." *Id.*

The 2020 Anti-SLAPP Act and its history conclusively establish the Legislature's retroactive intent, so fulsome retroactive application is appropriate. *See supra* at 13-28. But at a minimum, as in *Becker*, the combination of the "effective immediately" language and "recovery of damages" trigger mean that § 76-a at least applies to pending defamation cases like this one where no judgment has yet issued.

C. All The Allegedly Defamatory Statements Are Squarely Within § 76-a's Scope

Dr. Luke argues that § 76-a does not apply to Kesha's text messages to Lady Gaga based on their subject matter ("gossip" of "prurient interest") and medium (text messages). Br. 42-43. Both arguments are meritless.

1. Subject Matter. Dr. Luke suggests that these messages, which repeat a third-party's report that Dr. Luke had sexually assaulted Katy Perry (another young mega-pop star), involve a "matter of private, not public, concern." Br. 43. But Dr. Luke concedes that the dozens of other statements at issue here, all of which address Dr. Luke's sexual assault of Kesha, involve issues of public interest. Statements concerning an assault of Katy Perry are no different.

Indeed, § 76-a is expansive, directing that the term "public interest" "shall be construed broadly, and shall mean any subject other than a purely private matter." CRL § 76-a(1)(d). As another court applying § 76-a recently explained,

"sexual impropriety and power dynamics in the music industry. . . [a]re indisputably an issue of public interest" under § 76-a. *Coleman*, 2021 WL 768167, at *8. This is particularly true given the "rising tide of public concern over workplace sexual harassment known as the #MeToo movement," which has sparked "widespread and difficult conversations about … how to construe consent in sexual relationships between prominent industry players and those seeking opportunities within [the music] industry." *Id.*; *accord Doe v. Daily News, L.P.*, 632 N.Y.S.2d 750, 752 (N.Y. Sup. Ct. 1995); *Bensussen v. Tadros*, 2018 WL 2390162, at *3 (Cal. Super. Ct. Mar. 08, 2018); *Reddington*, 2021 WL 4099462, at *4. Public interest in this topic is further illustrated by the media's widespread reporting. *See, e.g.*, Dkt. 1915, 1997, 1998, 2000, 2001, 2002, 2003, 2004, 2005.

Here, Dr. Luke is "a prominent musician of interest" who has become wildly successful and powerful by cultivating young female artists in his portfolio. *Coleman*, 2021 WL 768167, at *8. Statements accusing Dr. Luke of assaulting any female music artist with whom he has worked thus plainly involve an issue of public interest. *See* R-344-46, *Gottwald v. Sebert*, 2020 WL 587348, at *5-6 (N.Y. Sup. Ct. Feb. 6, 2020) (emphasizing "important public matters implicated by the defamatory statements," which are part of the "debate about sexual assault or abuse of artists in the entertainment industry"); *Gottwald v. Geragos*, Index No.

162075/2014, Dkt. 789 at 3 (N.Y. Sup. Ct. Sept. 30, 2021) ("defamatory statements" relating to similar subject matter involve "public interest" because Dr. Luke "is a famous Grammy-nominated songwriter and record producer").

2. Medium. Insofar as Dr. Luke suggests that these statements fall beyond the statute's ambit because Kesha made them in "'private' text messages," Br. 43, his argument finds no support in the statute. Section 76-a is expansive: it applies to statements made "in a place open to the public or a public forum" and to "any other lawful conduct in furtherance of the exercise of the constitutional right of free speech." The statute is not limited to speech in any particular medium; § 76-a looks to the content of the statements—whether they were made "in connection with an issue of public interest"—rather than their audience. The court in *Coleman*, for instance, found that the anti-SLAPP amendments applied to statements contained in a private email to friends. 2021 WL 768167, at *2, *8.

A contrary interpretation would not only rewrite the statute; it would put the anti-SLAPP law—which is intended to secure "the utmost protection for the free exercise of speech," L. 1992, Ch. 767, § 1—at odds with longstanding First Amendment principles. The "First Amendment seeks to guarantee" the "open and vigorous expression of views in public and private conversation." *United States v. Alvarez*, 567 U.S. 709, 718 (2012); *accord, e.g.*, *Gifford v. McCarthy*, 137 A.D.3d 30, 42 (3d Dep't 2016) (similar). The anti-SLAPP law directly imports this body

of law by encompassing "any" "conduct in furtherance of the exercise of the constitutional right of free speech." CRL § 76-a(1)(a)(2). Obviously then, a conversation between two people qualifies.

It would be nonsensical for these texts to be public enough to make Kesha liable for defamation, but for the anti-SLAPP law to somehow not apply because the messages were "private." Dr. Luke cannot have it both ways.

II. THE TRIAL COURT CORRECTLY GRANTED KESHA LEAVE TO ASSERT HER PROPOSED COUNTERCLAIM UNDER CIVIL RIGHTS LAW § 70-a

In the court below, Dr. Luke affirmatively argued that § 70-a allows defamation defendants (like Kesha) against whom litigation was pending when the 2020 Act took effect to assert a counterclaim under the amended law. On appeal, Dr. Luke does an about-face, asserting that § 70-a is actually not applicable here either. Dr. Luke has waived that argument, and it is meritless in any event, as every court to consider this question has agreed.[9] And because Kesha's counterclaim is obviously not palpably devoid of merit, that objection fails as well.

A. Dr. Luke Has Waived His Argument That Kesha Cannot Rely On The Current Version Of § 70-a

In the court below, Dr. Luke argued—repeatedly and consistently—that § 70-a applies retroactively, as part of his unsuccessful effort to argue that § 76-a

[9] *See Geragos*, Index No. 162075/2014, Dkt. 789 at 3; *Reddington*, 2021 WL 4099462, at *3-5; *Cisneros*, 2021 WL 2889924, at *5; *Reus*, 148 N.Y.S.3d at 670.

does not. *See, e.g.*, Dkt. 2317 at 15 ("By contrast, … Section 70-a(1) of the Civil Rights Law … was clearly drafted to have retroactive effect."); R-26 at 18:2-9 (arguing the Legislature should have included "clear expression" of "retroactivity" in § 76-a as it did "for 70-a"). On appeal, Dr. Luke now argues the exact opposite: § 70-a is not retroactive. Br. 44-50.

New York courts "generally do not review issues raised for the first time on appeal." *Regina*, 35 N.Y.3d at 362-63; *Liddle, Robinson & Shoemaker v. Shoemaker*, 12 A.D.3d 282, 283 (1st Dep't 2004) ("We decline to consider this new legal theory, raised for the first time on appeal."). But Dr. Luke did not merely forfeit an argument by failing to raise it below. He affirmatively disavowed this very contention, taking exactly the opposite position and arguing it vigorously. He told the trial court that § 70-a is retroactive, and did so for the purpose of prevailing on his § 76-a contentions. Having lost that argument, he wants a do-over on appeal, advancing a new, directly contradictory argument. Dr. Luke fails to identify a single authority permitting such gamesmanship. To the contrary, on the rare occasion where a party has attempted such a blatant about-face, this Court has unequivocally rejected the maneuver. *See Wallace v. Env't Control Bd. of the City of N.Y.*, 8 A.D.3d 78, 78 (1st Dep't 2004) ("declin[ing] to consider" arguments "improperly raised for the first time on appeal" where appellant argued "opposite position" be-

low); *Leon v. Mendonca*, 7 A.D.3d 345, 346 (1st Dep't 2004) ("declin[ing] to consider" argument that plaintiff "expressly waived" in trial court). Dr. Luke's gambit is foreclosed by this Court's precedents.

Dr. Luke's deliberate waiver is exacerbated by his deficient notice of appeal, which entirely omitted this issue from the "Statement of Issues." *See* Dkt. 2348 at 5 (seeking reversal of trial court's order on ground that "§ 76-a cannot be applied retroactively," but omitting any such retroactivity argument for § 70-a). This omission further underscores that Dr. Luke's late-breaking submission is not properly before this Court. *See Poppe v. Poppek*, 183 A.D.3d 503, 504 (1st Dep't 2020) ("Plaintiff did not include the issue of counsel fees in her notice of appeal, which limited the appeal to other issues, and therefore is not properly before us."); *accord Gray v. Williams*, 108 A.D.3d 1085, 1087 (4th Dep't 2013); *Yu Ping Jin v. Chen Dun Kai*, 89 A.D.3d 1249, 1249 n.1 (3d Dep't 2011).

B. Section § 70-a's Plain Language Entitles Kesha To Assert Her Proposed Counterclaim

Dr. Luke was right the first time: the plain language of § 70-a makes clear it encompasses this continuing litigation.

As the Court of Appeals has "repeatedly explained, courts should construe unambiguous language to give effect to its plain meaning." *Kuzmich v. 50 Murray St. Acquisition LLC*, 34 N.Y.3d 84, 91 (2019). That includes applying statutes to pending cases when, as here, "the language expressly or by necessary implication

requires it." *Majewski*, 91 N.Y.2d at 584.

Section 70-a, by its unambiguous text, applies here. Each of its provisions expressly allows recovery from a person who has "commenced or continued" a SLAPP suit. Specifically, § 70-a(1) allows a defendant "to recover damages, including costs and attorney's fees, from any person who commenced or continued such action; provided that (a) costs and attorney's fees shall be recovered upon a demonstration … that the action involving public petition and participation was commenced or continued without a substantial basis in fact and law …." CRL § 70-a. Subsections (b) and (c), which provide for compensatory and punitive damages, use identical "commenced or continued" language. CRL § 70-a(1)(b)-(c).

Dr. Luke has undoubtedly "continued" this action long after § 70-a became effective on November 10, 2020—including by filing and contesting dozens of motions *in limine*, litigating the public-figure question in the First Department and the Court of Appeals, and, of course, pursuing this appeal.

To avoid this straightforward conclusion, Dr. Luke suggests that the "continued" language refers only to cases "where something occurs after a plaintiff files suit … that eliminates a substantial basis for the suit." Br. 46-47. Dr. Luke's crabbed reading has no basis in the statute. To be sure, that is one application of

the "continued" language but nothing in the text suggests that is the only application; rather § 70-a applies to "any" suit the plaintiff "commenced or continued without a substantial basis in fact and law"—including suits, like Dr. Luke's, that were pending when the anti-SLAPP amendments were enacted and continued since then.[10]

Dr. Luke also suggests that because § 70-a incorporates § 76-a's definition of an "action involving public petition and participation," if § 76-a is not retroactive, then § 70-a must be read to incorporate the pre-November 10, 2020 definition of that phrase. Br. 44-45. That argument fails for two reasons. First, § 76-a is retroactive for the reasons discussed above. But second, that is simply not how statutory references work. The relevant question is whether the current version of § 70-a applies to this action. It does—because its plain text applies to any person who "continued" a SLAPP suit, and Dr. Luke continued this action after the effective date of the current version of § 70-a. *See supra* at 47. Once that temporal question has been answered, a court simply applies § 70-a like any other statute—which necessarily incorporates the contemporaneously amended version of any statutory

[10] Below, Dr. Luke incorrectly asserted that this language was added to the statute in 2020. R-59 at 51:11-23. After Kesha's counsel corrected him, Dr. Luke now argues that this language's longstanding presence in the statute makes it irrelevant. Br. 46-47 & n.18. But that just means the Legislature drafted § 70-a so the current version always applies to "continued" actions—and here, that is the version made effective on November 10, 2020.

definition incorporated by reference. *See, e.g.*, *New York ex rel. N.Y. State Office of Children & Fam. Servs. v. U.S. Dep't of Health & Human Servs.*, 556 F.3d 90, 99 (2d Cir. 2009). There is no basis to apply the current version of § 70-a, but the definition of an "action involving public petition and participation" from an outdated version of § 76-a—and Dr. Luke cites no authority for his strained method of statutory construction.

Dr. Luke's position also lacks common sense. Kesha chose to file a "counterclaim" in this action, but the statute also would have allowed her to file a separate "action" instead. CRL § 70-a. Dr. Luke cannot seriously dispute that a new action would be governed by current law. There is no reason for a different result when the claim is asserted as a counterclaim.

C. Section 70-a Applies Retroactively For The Same Reasons As § 76-a

Even beyond § 70-a's plain text, § 70-a would apply retroactively for the same reasons as § 76-a—and more.

1. Remedial Legislation. The entire 2020 Act was designed as remedial legislation—whether the amendments are evaluated together or individually. *See supra* at 14-19. As Assemblywoman Weinstein explained, "[t]ogether, the two amendments protect citizens against the threat—and financial reality—of abusive litigation." Weinstein Sponsor Mem., *supra*. And § 70-a, like § 76-a, was amended specifically because of a defect in the prior law. "By an award of costs

and fees, the Legislature had originally intended to address 'threat of personal damages and litigation costs … as a means of harassing, intimidating, or punishing individuals.'" Sponsor Memoranda, *supra* (quoting L. 1992, Ch. 767, § 1). But in practice, "the principal remedy … provided to victims of SLAPP suits in New York" was "almost never actually imposed." *Id.* The Legislature's revision of § 70-a to make costs and fees mandatory is thus classic remedial legislation.

2. Drafting History. The prospective-only language that the Legislature eliminated would have applied to the entire 2020 Act: "This act … shall apply to actions commenced on or after such date." *Supra* at 19-22. In eliminating that language—and rejecting post-deletion requests to resurrect it—the Legislature evinced its retroactive intent for both § 70-a and § 76-a.

3. Other *Gleason* Factors. All the remaining *Gleason* factors counsel in favor of retroactivity for § 70-a too. The Legislature directed that the entire Act "shall take effect immediately." *Supra* at 22-23. Both sponsors noted that the amendment to § 70-a was necessary because of judicial error: "The courts have failed to use their discretionary power to award costs and attorney's fees to a defendant found to have been victimized by a frivolous lawsuit intended only to chill free speech." Sponsor Memoranda, *supra*; *see also* Weinstein Letter, *supra* (Second Department imposed too-high "abuse of discretion" standard in reviewing "failure to award attorney's fees"). And both sponsors specifically emphasized

that the § 70-a amendment, like the § 76-a amendment, was designed to effectuate the Legislature's "original[] inten[t]"—i.e., what the law was "always meant to do," *Gleason*, 96 N.Y.2d at 122.

4. Vested Rights And Due Process. The § 76-a analysis applies with full force here: contra Dr. Luke (Br. 48-50), there is no vested rights or due process concern in retroactively applying any portion of the 2020 Act. *See supra* at 28-38.

But that is especially true for § 70-a: there can be no conceivable due process or "vested rights" concern because after the Legislature amended the anti-SLAPP law, Dr. Luke continued this action anyway, with full knowledge of the potential consequences of his conduct. The Supreme Court has made clear that any retroactivity concerns are wholly misplaced in the context of this sort of "continuing violation." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 44-45 (2006). There, the Court held that a new immigration law imposing an unfavorable unlawful-reentry regime had no "retroactive effect" when applied to an alien who re-entered the country before the Act's effective date and remained thereafter. When an individual makes the "choice to continue" unlawful conduct, the Court reasoned, there is no "new burden[] imposed on completed acts." *Id.* at 44, 46. A person cannot "complain[] of … the application of new law to continuously illegal action within his control both before and after the new law took effect." *Id.* at 46. So too here: by making the "choice to continue" this SLAPP litigation after the effective

date of the new anti-SLAPP statute, Dr. Luke lost any right to "complain" of that law's application "to continuous[] … action within his control both before and after the new law took effect."

Equally fundamentally, any retroactivity concerns necessarily rest on the principle "that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Regina*, 35 N.Y.3d at 370. Such concerns arise when new legislation "expands the scope of … liability significantly based on conduct that was inoculated by the old law." *Id.* at 368. Here, § 70-a imposes liability only for actions "commenced or continued without a substantial basis in fact and law." CRL § 70-a. No one has a vested right or legally cognizable interest in pursuing litigation to punish speech; the law has never "inoculated" such insubstantial litigation.

Just the opposite—New York has long provided that meritless litigation could be deterred and punished. *See, e.g.*, CPLR § 8303-a (person who "commenced or continued … frivolous" litigation "shall" be responsible for "costs and reasonable attorney's fees"); 22 NYCRR § 130-1.1 (allowing "reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct"); *Gottlieb v. Colonel*, 180 A.D.3d 877, 881 (2d Dep't 2020) (approving fee award and possible further sanctions for frivolous appeal); *Morse v. Schwartz*, 683 N.Y.S.2d 733, 735 (N.Y. Sup. Ct. 1998) ("The Court has inherent

power to impose sanctions for unethical, frivolous or vexatious litigation practices, including advancing a meritless claim for defamation."). One court even noted that when the 1992 anti-SLAPP law took effect, it would offer "additional footing" for requests for costs and fees "in relation to a SLAPP suit." *Ent. Partners Grp. v. Davis*, 590 N.Y.S.2d 979, 983 (N.Y. Sup. Ct. 1992).[11] Dr. Luke's repeated suggestion that he would not have brought this lawsuit had he known he may ultimately have to pay for it, *see* Br. 4, 39, 48, is thus truly remarkable. And again, his concession—which should profoundly trouble this Court—serves only to underscore that § 70-a was amended specifically to address suits, like this one, where a party initiates and continues protracted litigation to financially devastate and humiliate a victim for exercising her free-speech rights—secure in the knowledge he'll never pay.

D. The Trial Court Properly Granted Kesha Leave To Amend

Finally, Dr. Luke argues that the trial court erred in granting Kesha leave to amend. But leave to amend "shall be freely given," CPLR § 3025(b); a party must "simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit,'" *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 500 (1st Dep't 2010). Moreover, the trial court's decision is reviewed only for "abuse

[11] *Majewski* (cited at Br. 49) does not help Dr. Luke. Neither the Court of Appeals nor the Appellate Division even referred to "vested rights" or "due process."

[of] discretion." *Edenwald Contracting Co. v. City of N.Y.*, 60 N.Y.2d 957, 959 (1983). That standard is easily satisfied here.

Dr. Luke does not dispute this lenient standard, but contends that Kesha cannot possibly "demonstrate merit to her counterclaim." Br. 51. His core argument is that because his defamation claims survived summary judgment, he necessarily has a "substantial basis" for his suit under § 70-a. Br. 51-56. That assertion is frivolous. As the trial court correctly recognized, this is a "he-said-she-said" dispute about an alleged sexual assault in a hotel room where only two people were present. R-55 at 47:15-16. Neither party sought summary judgment on the merits of Dr. Luke's defamation claim because both "acknowledge[d] the obvious: that this case cannot be finally resolved without an assessment of credibility." R-342; *see also Plattsburgh Hous. Auth. v. Cantwell*, 2015 WL 8831252, at *8 (N.Y. Sup. Ct. Sept. 23, 2015) ("[A] classic case of he said/she said … cannot be resolved on summary judgment."); *Art Cap. Grp., LLC v. Rose*, 149 A.D.3d 447, 448 (1st Dep't 2017) ("[A] credibility issue may not be resolved on a motion for summary judgment."). A frivolous suit is still frivolous even if it survives a procedural stage where a court's power to evaluate credibility is limited. *See, e.g.*, *Lee v. Glessing*, 2006 WL 2524185, at *3-4 (N.D.N.Y. Aug. 30, 2006) (imposing sanctions after "trial on Plaintiff's claims exposed their frivolity"); *Greenberg v. Hilton Int'l Co.*, 870 F.2d 926, 940 (2d Cir. 1989) ("Cases that are ultimately viewed as frivolous

may well survive motions to dismiss.").

Dr. Luke also contends (Br. 55-56) that "raising a disputed factual issue" must be sufficient to show a "substantial basis" under § 70-a because it can be "sufficient to establish a 'substantial basis' under" CPLR § 3211(g) (anti-SLAPP motion to dismiss) or CPLR § 3212(h) (anti-SLAPP motion for summary judgment). But that argument rests on the same mistaken premise. That disputed facts may preclude dismissal at a procedural stage where credibility determinations cannot be made does not mean that a party cannot recover fees once a factfinder resolves the central dispute and finds that one party was lying. Litigation where one party is lying always lacks a "substantial basis"—the opposing party simply cannot prove as much until the jury so finds.

In this case, the jury will be asked to determine who is telling the truth, Dr. Luke or Kesha. If the jury concludes that Kesha is telling the truth and Dr. Luke is lying but filed suit anyway, then the lawsuit would be without any substantial basis. Unsurprisingly, three other courts have already rejected Dr. Luke's precise argument in the exact same context—including when presented by Dr. Luke. *See Reddington*, 2021 WL 4099462, at *4 ("Ms. Reddington alleges in her counterclaim that Mr. Goldman did sexually assault her, and that her account is corroborated by various evidence. The counterclaim therefore adequately pleads that Mr.

Goldman lacked a substantial basis in fact and law for raising legal claims that depend on Ms. Reddington's accusations being false."); *Geragos*, Index No. 162075/2014, Dkt. 789 at 3 ("[T]he proposed counterclaim is not patently without merit, nor is it futile" because Dr. Luke "misconstrues the burden placed on Defendants *at this juncture*"; before trial, "Defendants are not required to demonstrate that their proposed counterclaim will prevail.") (emphasis in original); *RSR Corp. v. Leg Q LLC*, Index No. 650342/2019, Dkt. 232 at 8-9 (N.Y. Sup. Ct. Oct. 4, 2021) (rejecting plaintiff's argument that "the court [] impose as a condition precedent to bringing an anti-SLAPP claim a judicial finding that the claim has merit").

Dr. Luke falls back to arguing that this is not a "he-said/she-said" dispute because Kesha testified in 2011 that he did not rape her. Br. 8, 52. But Dr. Luke fails to mention that Kesha also testified that Dr. Luke threatened to destroy her career if she did not lie about the assault at that deposition. Dkt. 1762 at 14-15. Similarly, Dr. Luke emphasizes that Kesha does not remember all of the night in question, but again omits that Kesha woke up in Dr. Luke's hotel room with vaginal pain, vomiting, after he gave her a pill that incapacitated her. *Supra* at 6. If the facts were as clear as Dr. Luke pretends, there would be no need for a trial and this case would be over. Yet Dr. Luke did not move for summary judgment. In any event, and most importantly, Dr. Luke has never contended that his memory is lacking. If the jury finds that Kesha is telling the truth, that means Dr. Luke has

been lying and this is exactly the sort of defamation case that lacks a "substantial basis."[12]

Dr. Luke also suggests that a jury could rule in Kesha's favor and still not think he was lying. Br. 53. That is possible—the jury could decide, for example, that the alleged defamation is nonactionable because Dr. Luke failed to establish malice. But the jury could also believe that Dr. Luke assaulted Kesha and was deliberately lying, and thus brought this defamation suit knowing all along that Kesha was telling the truth. If so, his claim would lack any substantial basis. The jury will get to decide that question, which is precisely why Kesha's counterclaim should be allowed.

Dr. Luke's argument to the contrary would eviscerate the Legislature's stated purpose of deterring retaliatory SLAPP suits against "survivors of sexual abuse" in particular. Legislature Press Release, *supra*. Such suits will almost always be "he-said/she-said" and thus will almost never be resolved at summary judgment. Yet the Legislature unmistakably wanted such suits to be included, and

[12] For similar reasons, this case is readily distinguishable from cases like *Nichols v. Lewis*, 2008 WL 2253192 (Del. Ch. May 29, 2008) (cited at Br. 54). There, the court denied a fee request because the plaintiff had "justifiable suspicion" to pursue litigation. *Id*. at *8. Here, Dr. Luke knows and has always known whether he is telling the truth—and if he knows he raped Kesha, his claims lack a substantial basis in law and fact. Dr. Luke's other cases construing similar language, Br. 53-54, suggest only that "plausible" claims do not lack "substantial bas[e]s." But if the jury finds that Dr. Luke is lying—about an assault he always knew he committed—his defamation claims were never "plausible."

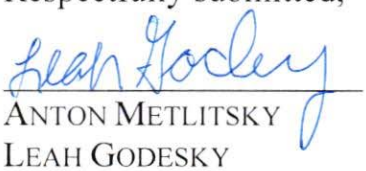
Dr. Luke's floundering position should be rejected out of hand.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Dated: New York, New York
October 6, 2021

Respectfully submitted,



ANTON METLITSKY
LEAH GODESKY
YAIRA DUBIN
O'MELVENY & MYERS LLP
Times Square Tower
Seven Times Square
New York, New York 10036
(212) 326-2000
ametlitsky@omm.com
lgodesky@omm.com
ydubin@omm.com

DANIEL M. PETROCELLI (of the bar of the State of California) by permission of the Court
O'MELVENY & MYERS LLP
1999 Avenue of the Stars, 8th Floor
Los Angeles, California 90067
(310) 553-6700
dpetrocelli@omm.com

Attorneys for Defendant/Counterclaim-Plaintiff-Respondent Kesha Rose Sebert

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Leah Godesky