SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC,	:	Index No. 653118/2014
	:	Hon. Jennifer Schecter
Plaintiffs,	:	Part 54
-against-	:	**Mot. Seq. No. __**
KESHA ROSE SEBERT p/k/a KESHA, PEBE SEBERT, VECTOR MANAGEMENT, LLC, and JACK ROVNER,	:	
Defendants.	:	
KESHA ROSE SEBERT p/k/a KESHA,	:	
Counterclaim-Plaintiff,	:	
-against-	:	
LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC.; PRESCRIPTION SONGS, LLC, and DOES 1-25, inclusive,	:	
Counterclaim-Defendants.	:	

DEFENDANT KESHA ROSE SEBERT'S MEMORANDUM OF LAW IN SUPPORT OF HER MOTION FOR A RULING THAT CIVIL RIGHTS LAW SECTION 76-a APPLIES TO PLAINTIFFS' DEFAMATION CLAIMS AND FOR LEAVE TO ASSERT A COUNTERCLAIM

O'MELVENY & MYERS LLP
Times Square Tower
7 Times Square
New York, New York 10036

Attorneys for Defendant Kesha Rose Sebert

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

INTRODUCTION[1]

New York's Legislature recently enacted a statute intended to ensure "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." Sponsor Mem. of Sen. Hoylman (July 22, 2020), *available at* https://www.nysenate.gov/legislation/bills/2019/s52. That statute applies retroactively, as three New York courts have already held. And it contains two provisions especially relevant here. *First*, under Civil Rights Law ("CRL") Section 76-a, a plaintiff seeking damages for statements concerning a matter of public interest or involving the right of petition must prove that the defendant acted with actual malice. *Second*, CRL Section 70-a permits a defamation defendant to assert a counterclaim to recover compensatory and punitive damages, attorneys' fees, and costs, if the defamation action is ultimately without a substantial basis in fact and law.

Kesha therefore seeks in advance of trial a ruling that CRL Section 76-a applies—consistent with the Legislature's intent and three courts' decisions to date—to Plaintiffs' two defamation claims, thus requiring Plaintiffs to prove that Kesha's statements were made with actual malice. With trial currently scheduled for fall 2021, a ruling on this issue now will streamline the drafting of jury instructions and assist the parties' preparation for trial. Kesha also seeks leave to assert a counterclaim against Dr. Luke for compensatory and punitive damages and recovery of the attorneys' fees and costs she has incurred defending his baseless and malicious claims.

[1] Unless otherwise noted, all emphasis is added and all internal quotation marks and citations are omitted.

CRL Section 76-a requires Dr. Luke to prove actual malice to prevail because, as this Court has already found, Kesha's statements that Dr. Luke sexually assaulted her (and another world-famous female artist) qualify as a matter of public concern. *See Gottwald v. Sebert*, 2020 WL 587348, at *5–6 (recognizing "the important public matters implicated by the defamatory statements" and the "public debate about sexual assault or abuse of artists in the entertainment industry"). There could be no serious debate to the contrary. Indeed, one of the three courts to have already applied Section 76-a underscored that "sexual impropriety and pressure in the music industry" "indisputably" constitutes an issue of public interest. *Coleman v. Grand*, 2021 WL 768167, at *1 (E.D.N.Y. Feb. 26, 2021).

The new law also empowers Kesha to assert a counterclaim against Dr. Luke for compensatory and punitive damages, attorneys' fees, and costs, on the ground that his defamation action is without a substantial basis in fact and law. Under New York's liberal pleading-amendment policy, leave to amend a party's pleading is denied only if (i) there is prejudice or surprise resulting from delay that could have been avoided, or (ii) the proposed amendment is palpably improper or clearly devoid of merit. *See McGhee v. Odell*, 96 A.D.3d 449, 450 (1st Dep't 2012). Neither basis for denial applies here. Kesha could not have included her proposed counterclaim in her operative 2018 answer, because it was filed more than two years before the New York Legislature amended the CRL. Nor is the proposed counterclaim "clearly devoid of merit." As detailed above, Plaintiffs' defamation claims obviously involve a matter of public concern, and if the jury finds that Kesha's reporting of Dr. Luke's sexual assault is truthful, it necessarily follows that Dr. Luke brought this lawsuit solely to harass and intimate Kesha.

Although Dr. Luke's complaint was filed before the amended Civil Rights Law was enacted, it is clear that the amendment applies retroactively, and thus applies to Dr. Luke's claims. The Legislature acted with urgency in requiring the amendments "take effect immediately," and made clear the amendments are intended to remedy the predecessor statute's comparatively narrow scope to more adequately protect the exercise of free speech and petition. All three courts to consider this issue have concluded that because the amended statute is plainly remedial, it must be given retroactive effect to achieve its purpose. *See Sackler v. American Broadcasting Companies, Inc.*, 2021 WL 878910, at *2–3 (N.Y. Sup. Ct. Mar. 09, 2021); *Coleman*, 2021 WL 768167, at *7–8; *Palin v. New York Times Co.*, 2020 WL 7711593, at *3–5 (S.D.N.Y. Dec. 29, 2020).

New York's Legislature has taken clear and decisive action against lawsuits that are intended to chill the speech of individuals who muster the courage to speak up regarding matters of public concern. The Court should take the baton from the Legislature and issue a ruling that Section 76-a will apply to Plaintiffs' defamation claims, and permit Kesha to assert a counterclaim so that she may recover damages from Dr. Luke when she prevails in this lawsuit.

BACKGROUND

The Relevant Parties and Witnesses

Dr. Luke is the world-famous music producer and co-writer behind dozens of Billboard Top 10 songs, including more than twenty #1 songs (*see* Dkt. No. 1919 at 1) from top female artists like Katy Perry, Miley Cyrus, Britney Spears, Rihanna, Pink, Kelly Clarkson, and Kesha *(see, e.g.*, Dkt. No. 1896; Dkt. No. 1918 at 2). Most recently, Dr. Luke produced and co-wrote songs with female-artist Doja Cat, who was Grammy-nominated as 2020's Best New Artist.[2]

[2] *See* RECORDING ACADEMY GRAMMY AWARDS, https://www.grammy.com/grammys/artists/doja-cat/287205; *see also* Andrew Hampp, *Doja, Dua and Arizona: Inside Prescription Songs'*

Dr. Luke has claimed the cover of *Billboard* magazine, and was featured in lengthy profile pieces within *The New Yorker*, *New York Magazine*, *The Guardian*, and *LA Times*. *See* Dkt. Nos. 1920, 1924, 1927, 1928, 1929. Industry giant ASCAP named Dr. Luke its 2010 Songwriter of the Year, and *Billboard* named Dr. Luke the 30th most powerful person in the music industry in 2012. *See* Dkt. Nos. 1918, 1921. Dr. Luke has repeatedly flaunted his "continuous international, widespread success, and accomplishment [that] is unparalleled in [his] field" (Dkt. No. 1993 at ¶ 2); his "enviable status in the industry" (Dkt. No. 1992 at ¶ 4); and his "international acclaim and respect from his peers both in the music entertainment industries and from the public at large" (*id*. at ¶ 60).

Kesha has also achieved global fame and celebrity with chart-topping songs like *Tik-Tok* and *We R Who We R*.[3] She was named *Billboard*'s Artist of the Year in 2010,[4] has received multiple Grammy nominations (*see* Dkt. Nos. 2132, 2133), and has released four Gold or Platinum albums, including nine Platinum-selling singles (*see* Dkt. No. 2135).[5]

Procedural History of the Litigation and Pleadings

On October 14, 2014, Kesha filed a California state-court complaint alleging that Dr. Luke had drugged and raped her in 2005. *See* Dkt. No. 1978. That same day, Plaintiffs retaliated by suing Kesha for defamation, claiming that she fabricated her allegations simply

---

Hit Factory, VARIETY (Dec. 4, 2020, 3:15 PM), https://variety.com/2020/music/news/doja-cat-dua-lipa-arizona-zervas-inside-prescription-songs-1234846826/#respond).

[3] *See* BILLBOARD CHART HISTORY - KESHA, https://www.billboard.com/music/kesha/chart-history/hot-100/song/619788.

[4] *See* RIAA News, *Musicians On Call Announces Multi-Platinum Global Superstar Ke$ha As Headline Act For Its 2013 Presidential Inaugural Charity Benefit* (Jan. 8, 2013), https://www.riaa.com/musicians-on-call-announces-multi-platinum-global-superstar-keha-as-headline-act-for-its-2013-presidential-inaugural-charity-benefit/.

[5] *See also* RIAA GOLD & PLATINUM CHART HISTORY, https://www.riaa.com/gold-platinum/?tab_active=default-award&se=kesha#search_section.

because she was unhappy with a business deal. *See* Dkt. No. 1. Over the next four years, Plaintiffs amended their complaint three times. *See* Dkt. Nos. 39, 624, 1539. Plaintiffs filed the operative Third Amended Complaint (the "TAC") on September 5, 2018. *See* Dkt. No. 1539.

The TAC seeks to hold Kesha liable for a series of statements relating to her allegation that Dr. Luke raped and drugged her (Count I):

- draft, filed, and subsequently amended versions of Kesha's California complaint;
- Kesha's counterclaims, amended counterclaims, and an affidavit filed in this Court;
- two social-media posts by Kesha;
- 17 statements made by Kesha's attorneys to the press regarding this litigation;
- 12 Twitter posts by Kesha's mother and one of Kesha's fans;
- three e-mails by Kesha's mother; and
- two letters by Kesha to fans that mentioned abuse.[6]

Dr. Luke also sued Kesha for a private text message that she sent Lady Gaga recounting a conversation where a music executive told the two friends that Dr. Luke had sexually assaulted Katy Perry (Count II). *See* Dkt. No. 1539. 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. No. 1540 at 40.

Under constitutional and New York law, a defamation plaintiff who is "a public figure must not only establish that false statements were made, but must also prove, by clear and convincing evidence, that they were communicated with 'actual malice'—that is knowledge or reckless disregard of their falsity." *Gottwald v. Sebert*, 2020 WL 587348, at *5. Presumably

[6] *See* Dkt. No. 1828 (appendix listing all alleged defamatory statements).

anticipating that he may be deemed a "public figure," Dr. Luke has litigated the actual-malice issue since the pleading stage of this case:

- Plaintiffs alleged in their initial, 2014 complaint that Kesha "acted with malice" (Dkt. No. 1 ¶ 31).
- Plaintiffs took extensive discovery on malice, including by successfully moving to compel on at least three separate occasions for documents that they characterized as malice-related discovery. *See* Dkt. No. 850 at 7–8 (arguing that discovery from third parties 42 West, Superfly Productions LLC, and Sunshine Sachs was appropriate because it relates to topics the Court's former law secretary said "can go to motive or malice"); Dkt. No. 868 at 6–7, 9, 11 (arguing that discovery from Mark Geragos was appropriate for same reason, and claiming "substantial need for th[e] information, in connection with establishing Kesha's motive and malice"); Dkt. No. 1091 at 3–4, 8, 10 (arguing that documents withheld on privilege grounds should be produced because they "demonstrate the improper malice and motive behind Sebert's smear campaign").
- 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," and cited a variety of documents produced during discovery that he claims support that conclusion. (*See* Dkt. No. 1322 at 16–18.) Dr. Luke has since included several of those documents on his trial exhibit list.[7]
- Plaintiffs' August 31, 2018 TAC alleges that discovery yielded facts demonstrating that "Kesha's assertions were made with common-law and Constitutional malice and wanton dishonesty." TAC ¶ 122; *see also* TAC ¶ 114 ("Kesha also acted with common-law and Constitutional malice"); Dkt. No. 1325 at 23 (arguing that "Plaintiffs' allegations [in the TAC] reveal a series of action designed to destroy someone with a false rape claim, never pursued, based on malice").

In October 2018, Kesha moved for partial summary judgment. *See* Dkt. No. 1824 at 2 ("Kesha is entitled to judgment as a matter of law that Dr. Luke is a public figure who must prove actual malice to prevail"); *see also* Dkt. No. 2050 ("as a matter of law, there should be an adjudication that Gottwald was a private figure at the time of Defendant's defamation, and thus need not prove actual malice."). On February 6, 2020, this Court decided that Dr. Luke is not a public figure. *See Gottwald v. Sebert*, 2020 WL 587348, at *5 (N.Y. Sup. Ct. Feb. 06, 2020) (Schecter, J.). Kesha immediately appealed that decision, and her appeal was argued on

[7] Godesky Aff. ¶ 2.

November 25, 2020. Thus, the question of whether Plaintiffs must prove actual malice at trial under the First Amendment remains in dispute.[8]

New York Amends Its Anti-"SLAPP" Legislation

In November 2020, New York amended its anti-"SLAPP" (strategic lawsuits against public participation) laws. The New York Legislature significantly expanded the scope of CRL Section 76-a, which requires that a plaintiff in "an action involving public petition and participation" establish "by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false"—i.e., actual malice. N.Y. Civ. Rights Law § 76-a(2) (McKinney 2020) (hereinafter "CRL § 76-a"); *see also Sackler*, 2021 WL 878910, at *2 (explaining that CRL Section 76-a(2) imposes an "actual malice" standard).

The amended statute broadly defines "an action involving public petition and participation" as any claim 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). To leave no doubt as to the broad meaning of the reference to "public interest," the statute explains that the phrase "shall be construed broadly, and shall mean ***any subject other than a purely private matter***." CRL § 76-a(1)(d).

[8] If the First Department reverses this Court's summary-judgment-stage ruling that Dr. Luke is not a public figure, it would be an independent basis on which to require Dr. Luke to prove Kesha's actual malice by clear and convincing evidence.

The prior version of the statute was narrowly limited to actions "involving public petition and participation … 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." *Palin*, 2020 WL 7711593, at *2. The bill's "sponsor memo" explained that "as drafted, and as narrowly interpreted by the courts, the [predecessor version] of Section 76-a has failed to accomplish [its] objective" of providing "the utmost protection for the free exercise or speech, petition, and association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern." Sponsor Mem. of Sen. Hoylman (July 22, 2020), *available at* https://www.nysenate.gov/legislation/bills/2019/s52. By "revising the definition of an 'action involving public petition and participation,'" the Legislature intended to remedy this shortcoming and "better advance the purposes that the Legislature originally identified in enacting New York's anti-SLAPP law." *Id.* The Legislature thus "broadly widen[ed] the ambit of the law to include matters of 'public interest,' which is to be broadly construed, e.g., ***anything other than a 'purely private matter***.'" *Id.*

The Legislature further noted that "the principal remedy currently provided to victims of SLAPP suits in New York is almost never actually imposed," because "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 actions intended only to chill free speech." Sponsor Mem. of Sen. Hoylman (July 22, 2020), *available at* https://www.nysenate.gov/legislation/bills/2019/s52. To remedy this failure, the Legislature amended CRL Section 70-a to "make[s] clear that a court '***shall***' impose an award of costs and fees," if the "case has been initiated or pursued in bad faith." *Id.* The amended CRL Section 70-a therefore provides that "a defendant in an action involving public petition and participation" may "maintain an action, claim, cross claim or counterclaim to

recover damages, including costs and attorney's fees, from any person who commenced or continued such action . . . upon a demonstration . . . that the action . . . was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law." N.Y. Civ. Rights Law § 70-a(1) (McKinney 2020) (hereinafter "CRL § 70-a"). The defendant can also recover compensatory and punitive damages by showing that the plaintiff commenced or continued the action "for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights." *Id*.

The Legislature, recognizing that there was no time to waste in remedying the too-narrow SLAPP statute, stated that the amendment "shall take effect immediately." *See* A.B. 5991-A § 4 2019-2020 Leg., Reg. Sess. (N.Y. 2020). On November 10, 2020, New York Governor Andrew Cuomo signed the bill into law, and it immediately took effect.[9]

Kesha's Proposed Counterclaim

Kesha's proposed Second Amended Counterclaim is enclosed as **Exhibit A** to the accompanying affirmation of Leah Godesky. As the redline enclosed as **Exhibit B** shows, Kesha seeks compensatory and punitive damages, attorneys' fees, and costs, because this action involving public petition and participation was commenced and continued without a substantial basis in fact and law and for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting Kesha's free exercise of speech, petition, or association rights.

[9] *See* ASSEMBLY BILL A5991A, https://www.nysenate.gov/legislation/bills/2019/a5991.

ARGUMENT

I. THE COURT SHOULD ISSUE A RULING THAT CIVIL RIGHTS LAW SECTION 70-a APPLIES TO PLAINTIFFS' DEFAMATION CLAIMS.

A. The Allegedly Defamatory Statements Involve An Issue Of Public Interest And Kesha's Right of Petition.

CRL Section 76-a provides that a plaintiff in a defamation action involving public statements of "public interest" or the right of petition must establish actual malice by clear and convincing evidence. CRL § 76-a(1)(a), (2). Kesha's allegedly defamatory statements—that Dr. Luke drugged and sexually assaulted her (Count I) and another world-famous music artist (Count II)—fall squarely within the statute's scope. *See also id.* at § 76-a(1)(d) (stating "'[p]ublic interest' shall be construed broadly, and shall mean any subject other than a purely private matter.").

Indeed, this Court already found at the summary-judgment stage that there are "important public matters implicated by the defamatory statements," with extensive "public debate about sexual assault or abuse of artists in the entertainment industry." *Gottwald v. Sebert*, 2020 WL 587348, at *5–6. This was recently reiterated by the Honorable Eric N. Vitaliano of the United States District Court for the Eastern District of New York. In applying the new CRL Section 76-a protections to libel and intentional-infliction-of-emotional-distress claims, Judge Vitaliano held that "sexual impropriety and power dynamics in the music industry. . . [a]re ***indisputably*** an issue of public interest." *Coleman*, 2021 WL 768167, at *8. This is particularly true, he explained, given the "rising tide of public concern over workplace sexual harassment known as the #MeToo movement," which sparked "widespread and difficult conversations about what constitutes inappropriate behavior in professional settings and how to construe consent in sexual relationships between prominent industry players and those seeking opportunities within [the music] industry." *Id.* Intense public interest in this topic is further illustrated by the media's

widespread reporting on this controversy. *See, e.g.*, Dkt. Nos. 1915, 1997, 1998, 2000, 2001, 2002, 2003, 2004, 2005 (articles concerning casting-couch culture in entertainment and music industries); *see also Doe v. Daily News, L.P.*, 632 N.Y.S.2d 750, 752 (N.Y. Sup. Ct. 1995) ("There is no question that violence towards women and rape in particular is a matter of paramount public concern."); *Bensussen v. Tadros*, 2018 WL 2390162, at *3 (Cal. Super. Ct. Mar. 08, 2018) ("allegations of sexual assault and violence against women" against music producers are "issues of widespread public interest").

In addition, 25 of Kesha's allegedly defamatory statements were made in litigation filings or otherwise in connection with Kesha's litigation against Dr. Luke. *See supra* p. 5; *see also* Dkt. No. 1831 (list of 25 statements over which Kesha asserted litigation privilege). Those statements also separately qualify for Section 76-a protection as actions in furtherance of the constitutional right of petition. *See* CRL § 76-a(1) (an "action involving public petition and participation" includes "any [] lawful conduct . . . in furtherance of the exercise of the constitutional right of petition"); *see also Kashian v. Harriman*, 120 Cal. Rptr. 2d 576, 588 (Cal. Ct. App. 2002) ("Filing a lawsuit is an exercise of one's constitutional right of petition," and holding "statements made in connection with or in preparation of litigation are subject to" California's anti-SLAPP statute).

B. The CRL Amendments Apply Retroactively to Plaintiffs' Defamation Claims.

The CRL amendments apply to Dr. Luke's claims because those amendments are retroactive.

In determining whether a statute should be given retroactive effect, the Court of Appeals has instructed that "remedial legislation should be given retroactive effect in order to effectuate its beneficial purpose." *In re Gleason (Michael Vee, Ltd.)*, 96 N.Y.2d 117, 122 (2001). Relevant

factors in the retroactivity analysis also include "whether the Legislature has made a specific pronouncement about retroactive effect or conveyed a sense of urgency; whether the statute was designed to rewrite an unintended judicial interpretation; and whether the enactment itself reaffirms a legislative judgment about what the law in question should be." *Id.*

All three courts that have considered the question have concluded that the amended CRL applies retroactively. In *Palin v. New York Times Co.*, the defamation defendants moved post-summary judgment and in anticipation of a June 2021 trial for a ruling that Section 76-a applies retroactively to "inform the drafting of jury instructions at trial [and] simplify future proceedings including on appeal." 2020 WL 7711593, at *2 (S.D.N.Y. Dec. 29, 2020). Judge Jed Rakoff held that "it is clear that § 76-a is a remedial statute that should be given retroactive effect." *Id.* at *3. Judge Rakoff noted that the "Legislature conveyed a sense of urgency by directing that the amendment was to 'take effect immediately,'" and that "the legislative history demonstrates that the amendments to § 76-a were intended to correct the narrow scope of New York's prior anti-SLAPP law." *Id.* He concluded that "[t]hese factors together persuade [the Court] that the remedial purpose of the amendment should be effectuated through retroactive application." *Id.* Judge Rakoff also specifically rejected the notion that retroactive application would implicate due-process concerns, because the plaintiff in that case was already subject to the actual-malice standard "as a matter of federal law." *Id.* at 4–5.

Two months later, Judge Vitaliano of the Eastern District of New York agreed. *See Coleman*, 2021 WL 768167, at *7. Judge Vitaliano highlighted the "memorandum accompanying the bill's introduction," which stated that "as drafted, and as narrowly interpreted by the courts, the application of Section 76-a has failed to accomplish [its] objective," and that the amendments would "better advance the purposes that the Legislature originally identified in

enacting New York's anti-SLAPP law: to protect the free exercise of speech, particularly in public fora on matters of public interest." *Id.* at *8. He concluded that "these clear legislative expressions of remedial purpose and urgency give the amendments retroactive effect." *Id.* Judge Vitaliano noted that retroactive application would not offend due process in that case because the plaintiff already claimed to satisfy the actual-malice standard. *Id.*

Ten days later, Justice W. Franc Perry of the New York Supreme Court reached the same conclusion. *See Sackler*, 2021 WL 878910. Citing *Palin* and *Coleman*, Justice Perry held that "the anti-SLAPP amendments are intended to apply retroactively in order to effectuate the remedial and beneficial purpose of the statute." *Id.* at *2–3. He also explained that "Plaintiff suffers no undue prejudice from retroactive application, as Plaintiff has attempted to couch his claim against the Post in terms of actual malice from the filing of the complaint . . . and had ample opportunity to argue the issue at oral argument." *Id.* Justice Perry ultimately found that the plaintiff could not establish actual malice, and dismissed the claims with prejudice. *See id.*

This Court should reach the same result regarding the statute's retroactivity. The other courts' reasoning is borne out by the facts and consistent with long-standing New York law. The Legislature made clear that the amended CRL Sections 70-a and 76-a are remedial. It expressly stated that the amendments were necessary because the statute's predecessor "failed to accomplish [its] objective," and the new version would "better advance the purposes that the Legislature originally identified in enacting New York's anti-SLAPP law." Sponsor Mem. of Sen. Hoylman (July 22, 2020), *available at* https://www.nysenate.gov/legislation/bills/2019/s52. The amended statute "was [also] designed to rewrite an unintended judicial interpretation," *Gleason*, 96 N.Y.2d at 122: the Legislature specifically noted that the prior version of CRL Section 76-a was "narrowly interpreted by the courts," which had "failed to use their

discretionary power to award costs and attorney's fees" under the prior CRL Section 70-a (*see supra* p. 8). In revising the statutes, the Legislature "conveyed a sense of urgency," *Gleason*, 96 N.Y.2d at 122, by providing that the amended statute would take immediate effect (*see supra* pp. 3, 9). Each of these factors points squarely in favor of retroactive application. *See Gleason*, 96 N.Y.2d at 122.

Nor does retroactivity give rise to any "potentially harsh impacts." *Regina Metropolitan Co., LLC v. N.Y. State Div. of Housing and Community Renewal*, 35 N.Y.3d 332, 375 (N.Y. 2020). Plaintiffs have litigated this entire case with the actual-malice standard in mind and have long claimed to satisfy it. *See supra* pp. 5-7; *see also Coleman*, 2021 WL 768167, at *8 (plaintiff "will face no 'harsh impacts' from retroactive application" because he "claims to satisfy" actual-malice standard); *Sackler*, 2021 WL 969809, at *3 (no undue prejudice where plaintiff "attempted to couch his claim . . . in terms of actual malice from the filing of the complaint"). In fact, when this Court permitted ***Plaintiffs*** to amend their complaint at the end of discovery, it emphasized that Kesha was not prejudiced because, according to the Court, Kesha long knew that certain newly pleaded allegations "were relevant because they bear on the issue of malice," which Kesha "had the incentive to fully explore . . . in discovery." *Gottwald v. Sebert*, 2018 WL 4181723, at *4 (N.Y. Sup. Ct. Aug. 31, 2018) (Schecter, J.).

There is no reasonable basis on which to reach a different conclusion with regard to Plaintiffs. They have had every opportunity to take any "measure in support of [their] position" that Kesha acted with actual malice. *Kocourek v. Booz Allen Hamilton Inc.*, 85 A.D.3d 502, 504 (1st Dep't 2011). Plaintiffs cannot now claim to be surprised or prejudiced by a requirement that they prove Kesha's actual malice at trial. *See Janssen v. Inc. Vill. of Rockville Centre*, 59 A.D.3d 15, 27 (2d Dep't 2008) (party "cannot legitimately claim surprise or prejudice, where the

proposed amendments were premised on the same facts, transactions or occurrences [as] . . . in the original" pleading).

II. THE COURT SHOULD GRANT KESHA LEAVE TO ASSERT HER PROPOSED COUNTERCLAIM.

Under New York law, a "party may amend his or her pleading . . . at any time by leave of court," and such leave to amend pleadings shall be "freely given." CPLR § 3025(b) (McKinney 2021). In light of New York's liberal amendment policy, a party seeking to amend a pleading enjoys "a heavy presumption of validity": leave to amend is "denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient as a matter of law." *McGhee v. Odell*, 96 A.D.3d 449, 450 (1st Dep't 2012). Courts applying this standard routinely permit defendants to amend an answer to add a defense or counterclaim, including after discovery has closed. *See Whalen v. Kawasaki Motors Corp.*, 92 N.Y.2d 288, 293 (1998) (permitting defendant to amend answer to include additional defense after jury returned verdict); *Battery Bldg. Maint. Co. v. 888 Seventh Ave. Assocs.*, 157 A.D.2d 556, 557 (1st Dep't 1990) (granting leave to amend answer after close of discovery to add counterclaim); *Kaye 1969 Assocs. v. Lese*, 72 A.D.2d 728, 729 (1st Dep't 1979) (granting leave to amend answer after close of discovery to include additional defense); *Vargas v. Crown Container Co.*, 155 A.D.3d 989, 993–94 (2d Dep't 2017) (granting leave to amend answer to include defense after judgment was entered); *McFarland v. Michel*, 2 A.D.3d 1297, 1299 (4th Dep't 2003) (granting leave to amend to add counterclaim after plaintiffs filed note of issue and certificate of readiness); *Suitor v. Boivin*, 219 A.D.2d 799, 799 (4th Dep't 1995) (granting leave to amend to add defense post-discovery); *Ward v. City of Schenectady*, 204 A.D.2d 779, 781 (3d Dep't 1994) (granting leave to amend to add defense after close of proof at trial); *Dransfield v.*

E. Seaboard Warehouse Corp., 43 A.D.2d 569, 570 (2d Dep't 1973) (granting leave to amend answer to include defense on eve of trial).

The Court should permit Kesha to assert her proposed counterclaim because, as detailed below, (i) Plaintiffs will suffer no prejudice, and (ii) the proposed counterclaim is legally sound.

A. The Proposed Counterclaim Will Not Prejudice Plaintiffs.

The non-moving party bears the burden of demonstrating that it would suffer "significant prejudice" as a result of an amendment. *Edenwald Contracting Co. v. City of N.Y.*, 60 N.Y.2d 957, 959 (1983); *A.J. Pegno Constr. Corp. v. City of N.Y.*, 95 A.D.2d 655, 656 (1st Dep't 1983). Doing so is a tall order: "[m]ere delay is insufficient to defeat a motion for leave to amend." *Kocourek*, 85 A.D.3d at 504. Rather, establishing prejudice requires that the nonmoving party show it "incurred some change in position or hindrance in the preparation of its case which could have been avoided had the original pleading contained the proposed amendment." *Whalen*, 92 N.Y.2d at 293; *see also Kocourek*, 85 A.D.3d at 504 ("Prejudice requires some indication that the [nonmoving party] has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.").

Plaintiffs will suffer no prejudice from Kesha's proposed amended pleadings. Kesha's operative pleadings could not have "contained the proposed amendment," because the new versions of CRL Sections 70-a and 76-a were not effective until November 2020, more than two years after she served her August 2018 Answer. *See* CRL § 76-a (identifying effective date of November 10, 2020). Kesha timely moved for leave to amend after learning of the new statutory protection available to defendants like her. This alone is sufficient to justify granting Kesha's motion. *See Whalen*, 92 N.Y.2d at 291 (granting leave to amend to add defense that could not have been asserted in prior answer); *Thome v. Benchmark Main Transit Assocs., LLC*, 125 A.D.3d 1283, 1284-85 (4th Dep't 2015) (granting leave to amend to add settlement-related

defense because "settlement had not occurred when the . . . initial and amended third-party answers were served" and thus "defense [could not] have been raised in" prior answers).

Nor could Plaintiffs claim with a straight face that they did not realize until now that they should not have brought a lawsuit solely to harass and intimidate Kesha. Plaintiffs surely have known since the beginning of the case that their claims need to have a substantial basis in fact and law. Indeed, a party and its attorneys can always be sanctioned for advancing claims that they know are without legal merit or rely on false statements of fact. *See* 22 NYCRR § 130-1.1. And litigants who unsuccessfully litigate baseless actions may subsequently face, for example, a malicious-prosecution action. *E.g.*, *Teller v. Galak*, 80 N.Y.S. 3d 106, 107 (2d Dep't 2018) (listing elements of malicious-prosecution claim). The new statute merely permits Kesha to pursue those remedies on a parallel track to Plaintiffs' defamation litigation.

B. The Proposed Amended Counterclaim Is Not Palpably Insufficient.

A party seeking leave to amend "need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit." *MBIA Ins. Corp. v. Greystone & Co.*, 74 A.D.3d 499, 500 (1st Dep't 2010); *see also NM IQ LLC v. OmniSky Corp.*, 31 A.D.3d 315, 317 (1st Dep't 2006) ("merit of a proposed amended pleading must be sustained . . . unless the alleged insufficiency or lack of merit is clear and free from doubt").

Because this is "an action involving public petition and participation," Kesha is entitled under Section 70-a to (i) costs and fees, if she can demonstrate that Plaintiffs' claims were "commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law," and (ii) compensatory and punitive damages, if she can also show that Plaintiffs brought the action "for the sole purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting

[Kesha's] free exercise of speech, petition or association rights." CRL § 70-a(1). When Kesha defeats Plaintiffs' Count I defamation claim at trial on the ground that her statements about the sexual assault are true, it means the fact finder has concluded that Dr. Luke knew he sexually assaulted Kesha in 2005, and nevertheless brought this meritless suit to punish and hope to silence her—i.e., that he asserted his defamation claims without a substantial basis in fact or law and for the sole purpose of harassing and intimidating Kesha. There is no reasonable alternative, because Dr. Luke has never claimed that he and Kesha had consensual sexual contact; rather, he claims to remember the evening's events and denies any sexual contact at all. *See* Dkt. No. 1700 at 202:15–22.

CONCLUSION

For the foregoing reasons, Kesha respectfully requests a ruling that CRL Section 76-a applies to Plaintiffs' defamation claims, and an order granting her leave under CPLR § 3025(b) to assert the proposed counterclaim reflected in **Exhibit A** to the accompanying affirmation of Leah Godesky.

Dated: April 6, 2021
New York, New York

Respectfully submitted,

/s/ Leah Godesky

O'MELVENY & MYERS LLP
Leah Godesky
Moshe Mandel
Times Square Tower
7 Times Square
New York, NY 10036
Phone: (212) 326-2000

Daniel M. Petrocelli (admitted *pro hac vice*)
1999 Avenue of the Stars, 8th Floor
Los Angeles, CA 90067
Phone: (310) 553-6700

Attorneys for Defendant Kesha Rose Sebert

RULE 17 WORD COUNT CERTIFICATION

Word Count: Under 22 NYCRR § 202.70(g) Rule 17, all memoranda of law are limited to 7,000 words. I certify that this memorandum of law is compliant because it is less than 7,000 words.

Dated: April 6, 2021
Los Angeles, California

By: */s/ Leah Godesky*
Leah Godesky