

New York State Supreme Court
Appellate Division – First Department

Supreme Court Index No. 2020-01908

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

Plaintiffs-Respondents,

– against –

KESHA ROSE SEBERT p/k/a Kesha,

Defendant-Appellant,

– and –

PEBE SEBERT, VECTOR MANAGEMENT, LLC and JACK ROVNER,

Defendants.

KESHA ROSE SEBERT p/k/a Kesha,

Counterclaim-Plaintiff-Appellant,

– against –

LUKASZ GOTTWALD p/k/a Dr. Luke, KASZ MONEY, INC., PRESCRIPTION SONGS, LLC
and DOES 1-25, inclusive,

Counterclaim-Defendants-Respondents.

**REPLY AFFIRMATION OF EUGENE VOLOKH IN FURTHER SUPPORT OF
MOTION ON BEHALF OF THE REPORTERS COMMITTEE FOR FREEDOM OF
THE PRESS AND 16 MEDIA ORGANIZATIONS FOR LEAVE TO FILE BRIEF AS
*AMICI CURIAE***

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Dated: May 21, 2020

I, Eugene Volokh, submit this affirmation in further support of the motion for leave to file a brief as *amici curiae* in the above-captioned action, and affirm under penalty of perjury the following to be true and correct:

1. I regret to inform the Court that there are errors in the media article counts in Part I.A and the Summary of Argument sections of the Brief of *Amici Curiae* The Reporters Committee for Freedom of the Press and 16 Media Organizations in Support of Appellant annexed as Exhibit A to Dkt. No. 37 (the “*Amici* Brief”) that require correction. I offer my deep and sincere apologies to this Court and to the parties for this mistake on my part. Each of the errors is identified and corrected as set forth below. For the Court’s and the parties’ convenience, a corrected version of the *amici curiae*’s (“*Amici*”) proposed brief is annexed hereto as Exhibit A.

2. On pages 4 and 12 of the *Amici* Brief, the references to “727 nationally published articles” in “63 major publications” should be changed to “577 nationally published articles” in “over 50 major publications.” The dataset that I used as the basis for this calculation, described in footnote 5 of the *Amici* Brief, regrettably included some stories that did not reference Respondent Lukasz Gottwald (“Dr.

Luke”), some stories that are no longer available online, some duplicate stories (*e.g.*, an A.P. wire story published in several publications), some stories that mentioned Dr. Luke only in an attached but unrelated photograph array, and a few stories that were outside of the relevant time period. The dataset also inadvertently omitted some stories that did mention Dr. Luke, but because those sources were not cited in the *Amici* Brief, *Amici* respectfully request that the Court consider only the 577 remaining stories. Undersigned counsel for *Amici* has personally reviewed each one of those 577 stories, and each one appears to refer to Respondent, Lukasz Gottwald.

3. On pages 12-13 of the *Amici* Brief, “81 mentions in *Rolling Stone*, 61 mentions in the *L.A. Times*, and 84 mentions in the *Huffington Post*” should be changed to “more than 70 mentions in *Rolling Stone*, more than 50 mentions in the *L.A. Times*, and more than 35 mentions in the *Huffington Post*.”

4. On page 10 of the *Amici* Brief, “He has been named in headlines at least 40 times” should be changed to “He has been named in headlines at least 39 times.” All of the stories in that headline dataset were indeed referring to Respondent, and all of the headlines men-

tioned him as Lukasz Gottwald, as Dr. Luke, or, as to one major biographical article, just The Doctor; but one of them (“Report: Dr. Luke to be third judge on ‘American Idol’”) is no longer accessible online. Undersigned counsel for *Amici* has personally reviewed each one of those 39 stories, and each one appears to refer to Respondent.

5. On page 42 of the *Amici* brief, “at least 522,728 U.S. articles published referencing the #MeToo movement or Weinstein” (a statistic that draws on the same general MediaCloud source as the datasets discussed above and described in footnotes 5 and 64 of the *Amici* Brief) should instead read “apparently hundreds of thousands of U.S. articles published referencing the #MeToo movement or Weinstein.” Undersigned counsel has confirmed this approximation using a Lexis/Nexis query.

6. Some of the links in the spreadsheets cited in footnotes 5 and 11 of the *Amici* Brief proved to be incorrect and have since been corrected. Those corrected links are now available at the following locations:

- <http://www.law.ucla.edu/volokh/amicusclinic/gottwald/DrLuke-MentionedCorrected.csv>

- <http://www.law.ucla.edu/volokh/amicusclinic/gottwald/DrLukeFeaturedCorrected.csv>

7. Undersigned counsel for *Amici* has personally checked each of the other citations in the body of the *Amici* Brief and has found three other items that require correction:

- a. The citation to *Waldbaum v. Fairchild Publications, Inc.* on page 9 of the *Amici* Brief should instead read, “*Alcor*, 992 N.Y.S.2d at *5 (paraphrasing *Waldbaum*, 627 F.2d at 1295).”
- b. The URL in footnote 40 on page 25 of the *Amici* Brief should instead be <https://web.archive.org/web/20110219135748/https://twitter.com/TheDoctorLuke>.
- c. The pinpoint page citation to *Stolz v. KSFM 102 FM* on page 33 of the *Amici* Brief should be to page 205, not page 207.

8. Notwithstanding the revisions set forth above, the corrected data continues to provide strong support for the *Amici* Brief’s argument about Dr. Luke’s fame. Nevertheless, the errors should not have made their way into the brief and I again apologize to both the Court and the parties for the oversight.

WHEREFORE, the undersigned respectfully submits this reply affirmation in further support of the motion for leave to file a brief as *amici curiae* in the above-captioned action.

DATED: Los Angeles, California
May 21, 2020

By: Eugene Volokh
Eugene Volokh

EXHIBIT A

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Appellate Division — First Department

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PRESCRIPTION SONGS, LLC

Plaintiffs-Respondents,

— against —

KESHA ROSE SEBERT P/K/A Kesha,

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Defendants.

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**CORRECTED BRIEF OF *AMICI CURIAE*
THE REPORTERS COMMITTEE FOR FREEDOM OF THE
PRESS AND 16 MEDIA ORGANIZATIONS
IN SUPPORT OF APPELLANT**

—

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Dated: May 21, 2020 (correcting brief filed April 9, 2020)

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INTEREST OF THE *AMICI CURIAE*¹

Lead *amicus curiae* is the Reporters Committee for Freedom of the Press (the “Reporters Committee”), an unincorporated nonprofit association founded by leading journalists and media lawyers in 1970. Reporters Committee attorneys provide pro bono legal representation, *amicus curiae* support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists. Other *amici* are prominent news publishers,

- BuzzFeed,
- The Daily Beast Co. LLC,
- Daily News, LP,
- Dow Jones & Co., Inc.,
- The E.W. Scripps Co.,
- Gannett Co., Inc.,
- New York Public Radio, and
- Newsday LLC,

¹ No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amici* or their counsel, contribute money towards preparing or submitting this brief.

and professional, trade, and academic groups,

- The Media Institute,
- MPA—The Association of Magazine Media,
- National Press Photographers Association,
- The News Leaders Association,
- Radio Television Digital News Association,
- Society of Environmental Journalists,
- Society of Professional Journalists, and
- Tully Center for Free Speech.

The misapplication of the public figure standard by the lower court will help powerful figures silence free speech using libel suits, and will undermine the public's ability to discuss possible professional misconduct. As news organizations and organizations that advocate for the First Amendment rights of the public and the press, *amici* seek to prevent such an outcome. In recent years, the #MeToo movement has revealed sexual assault and harassment in Hollywood, the music industry, business, and

beyond. Journalists have played an important part in uncovering wrongdoing, highlighted by award-winning investigative reporting from outlets such as The New York Times and The New Yorker. But the lower court's decision in this case—that even powerful and famous alleged abusers are private figures in the eyes of the law so long as they have not inserted themselves into the public debate about sexual assault—threatens to chill this essential reporting.

SUMMARY OF ARGUMENT

The lower court held that Dr. Luke—an extraordinarily successful music producer and songwriter—was not a public figure. This is not correct.

Known as “the most reliable hitmaker in the music business today,”² Dr. Luke cemented his status as an icon in music well before 2014, when the alleged defamation began. By hiring expert PR firms to promote himself and his work, producing 40 hit songs,³ and developing top talent, Dr. Luke “assumed [a] role[] of especial prominence” in the music industry.⁴ Splashed across 577 nationally published articles throughout over 50 major publications,⁵ and with over 200,000 followers on Twitter alone, Dr.

² Gavin Edwards, *Dr. Luke’s Awesomely Trashy Pop Sound Is Ruling the Airwaves*, ROLLING STONE (Apr. 29, 2010), <https://rulefortytwo.com/articles-essays/music/dr-luke/>.

³ See Shirley Halperin, *Dr. Luke: I’m Always Petrified That This Is My Last Good Song’ (Q&A)*, HOLLYWOOD REPORTER (Feb. 6, 2013), <https://www.hollywoodreporter.com/earshot/dr-luke-im-petrified-is-418709>.

⁴ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974).

⁵ The number was calculated using the program MediaCloud, created by the MIT Center for Civic Media and the Berkman Klein Center for Internet & Society at Harvard University, with search terms: [“Dr. Luke” OR “Luke Gottwald” OR “Lukasz

Luke was anything but “private.” Dr. Luke thus qualifies as a public figure in three ways—he is an “all-purpose public figure”; a “general public figure within a relevant community”; and a “limited purpose public figure.”

To find otherwise paves the way for a new class of well-known, well-connected, and wealthy people to stymie free speech with libel suits without the protections that the First Amendment requires in cases such as this. The U.S. Supreme Court has held that in order to recover for defamation, public figures must show actual malice—knowing falsity or reckless disregard of the truth. *See, e.g., Masson v. New Yorker Mag., Inc.,*

Gottwald”] within all National papers between January 1, 2005, and September 30, 2014. Data is compiled here: <http://www.law.ucla.edu/volokh/amicusclinic/gottwald/DrLukeMentionedCorrected.csv> [hereinafter National Media Data on Dr. Luke].

501 U.S. 496, 508 (1991). The actual malice standard provides the protection necessary for the press to cover matters of public concern. Allowing public figures like Dr. Luke to recover for mere negligence “leads to . . . self-censorship” that “dampens the vigor and limits the variety of public debate.” *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964).

ARGUMENT

I. Dr. Luke is an “all-purpose public figure”

“All-purpose public figures” are those who have “assumed roles of especial prominence in the affairs of society” and attained “positions of . . . pervasive power and influence.” *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 325 (1974). Public figures have voluntarily thrust themselves into the public eye and thus are not entitled to as much protection as private

figures. *Id.* at 345. Whether a person is an all-purpose public figure depends on (1) the person’s “notoriety in the press,” (2) the person’s “name recognition,” (3) “whether the person’s . . . prominence was voluntary,” *Alcor Life Extension Found. v. Johnson*, 992 N.Y.S.2d 157 (Sup. Ct. 2014), *aff’d*, 136 A.D.3d 464 (1st Dep’t 2016) (citing *Waldbaum v. Fairchild Publ’ns, Inc.*, 627 F.2d 1287, 1295 (D.C. Cir. 1980)), and (4) whether the person “enjoy[s] significantly greater access to the channels of effective communication and hence [has] a more realistic opportunity to counteract false statements than private individuals.” *Gertz*, 418 U.S. at 344.

Dr. Luke has “received international acclaim and respect from his peers in the music and entertainment industries and from the public at

large”⁶ as a music producer, songwriter, and music publishing company owner, and label owner. He is “the Skywalker of pop songcraft”;⁷ “the Tycoon of Teen”;⁸ and the innovator of “the Dr. Luke moment.”⁹ He sought this attention by hiring a deep bench of PR experts and by promoting himself on social media.¹⁰ Indeed, he even describes himself as “one of the most successful songwriters and sought-out producers in the entertainment industry today, having written or cowritten more number one hits

⁶ Appellant Br. 23.

⁷ John Seabrook, *The Doctor Is In*, NEW YORKER (Oct. 7, 2013), <https://www.newyorker.com/magazine/2013/10/14/the-doctor-is-in>.

⁸ Chris Wilman, *Dr. Luke: The Billboard Cover Story*, BILLBOARD (Sept. 3, 2010), <https://www.billboard.com/articles/news/956518/dr-luke-the-billboard-cover-story>.

⁹ Sean Fennessy, *Surveying the Dr. Luke Moment: A Critical Look At Lazars, Glitter, and the Un-Sexing of America’s Pop Stars*, VILLAGE VOICE (May 18, 2010), <https://www.villagevoice.com/2010/05/18/surveying-the-dr-luke-moment-a-critical-look-at-lazars-glitter-and-the-un-sexing-of-americas-pop-stars/>.

¹⁰ Appellant Br. 21.

than any other songwriter,” working in the “highest echelons of the music industry” with such superstars as “Britney Spears, Katy Perry, and Pink.” *Das Commc’ns v. Sebert*, Ind. No. 650457/2010 (Sup. Ct. N.Y. Cty. April 11, 2011), Dkt. 53 at 1. Given his clout and channels of communication, Dr. Luke is an all-purpose public figure.

A. Dr. Luke has achieved “notoriety in the press”

A person’s “notoriety in the press” helps a court determine whether someone is an all-purpose public figure. *Alcor*, 992 N.Y.S.2d at *5 (paraphrasing *Waldbaum*, 627 F.2d at 1295). “Previous coverage of the plaintiff in the press . . . is relevant.” *Id.* For instance, in *Rebozo v. Washington Post Co.*, the court held that the plaintiff’s extensive press coverage prior to the allegations—“The New York Times published 48 articles mentioning [the plaintiff], while The Miami Herald published 76”—helped make

the plaintiff a public figure. 637 F.2d 375, 379 (5th Cir. 1981). *See also* *Manzari v. Associated Newspapers Ltd.*, 830 F.3d 881, 888-89 (9th Cir. 2016) (finding plaintiff “undoubtedly qualifies as a public figure” because of plaintiff’s multiple news interviews, “news coverage related to her considerable success . . . [in] online soft-core porn[,] . . . Internet downloads, extensive publicity, and broad public exposure”).

By October 2014, Dr. Luke had already enjoyed broad and extensive press coverage. He had been named in headlines at least 39 times,¹¹ and

¹¹ Number calculated using MediaCloud, with search terms: [title:“Dr. Luke” OR “Luke Gottwald”] within all National and state-wide papers (e.g. *Huffington Post*, Minnesota’s *Star Tribune*) between January 1, 2005 to October 14, 2014. Data is compiled at <http://www.law.ucla.edu/volokh/amicusclinic/gottwald/DrLukeFeaturedCorrected.csv> [hereinafter National and State Media Data on Dr. Luke].

his persona and role in the music industry were discussed at length in feature stories in renowned publications:

- on ABC World News Tonight in a featured segment titled, “Dr. Luke: The Hitmaker”;¹²
- in a *New York Magazine* profile labeling him “The Hit Whisperer”;¹³

¹² See *Dr. Luke: The Hitmaker*, ABC WORLD NEWS (Feb. 19, 2011), <https://abcnews.go.com/Nightline/video/dr-luke-hitmaker-beat-master-music-producer-katy-kesha-britney-spears-12953677>.

¹³ Adam Sternbergh, *The Hit Whisperer*, N.Y. MAG. (Jun. 16, 2010), <https://ny-mag.com/guides/summer/2010/66784/>.

- in a *Guardian* article characterizing Dr. Luke as “the architect of pop’s biggest . . . chart smashes”;¹⁴
- in a 7,190-word *New Yorker* profile placing Dr. Luke “to rank with the greatest hitmakers in pop-music history”;¹⁵
- on NPR’s *Morning Edition* in a segment about him as one of “pop’s most bankable producers.”¹⁶

He had been mentioned in 577 nationally published articles across over 50 major publications.¹⁷ This includes Dr. Luke’s more than 70 mentions

¹⁴ Luke Lewis, *Meet Dr Luke, The Producer Behind Smash Hits for Katy Perry and Kesha*, GUARDIAN (Aug. 13, 2010), <https://www.theguardian.com/music/2010/aug/14/dr-luke-katy-perry-gottwald>.

¹⁵ Seabrook, *supra* n.7.

¹⁶ *See Dr. Luke: The Man Behind Pop’s Biggest Hits*, NPR: MORNING EDITION (Sept. 20, 2010), <https://www.npr.org/templates/story/story.php?storyId=129956645>.

¹⁷ *National Media Data on Dr. Luke*, *supra* n.5.

in *Rolling Stone*, more than 50 mentions in the *L.A. Times*, and more than 35 mentions in the *Huffington Post*,¹⁸ as well as feature-length stories on sites garnering at least 9 million unique visitors a month, such as:¹⁹

¹⁸ *Id.*

¹⁹ For example, *New York Magazine* had 9 million unique visitors a month in 2013. See David Carr, *Long on Cutting Edge of Print, New York Magazine Cuts Back*, N.Y. TIMES (Dec. 2, 2013), <https://www.nytimes.com/2013/12/02/business/media/long-on-cutting-edge-of-print-new-york-magazine-cuts-back.html>. *Billboard* had 13 million unique visitors in August 2014. See *Billboard.com Breaks Traffic Record*, BILLBOARD (Oct. 6, 2014), <https://www.billboard.com/articles/news/6274149/billboard-website-traffic-record-comscore>. ABC World News, in 2011, had an average viewership of 7.8 million per night. See Emily Guskin and Tom Rosenstiel, *Network by the Numbers*, PEW RESEARCH CENTER: THE STATE OF THE NEWS MEDIA (2012), <https://assets.pewresearch.org/wp-content/uploads/sites/13/2017/05/24141622/State-of-the-News-Media-Report-2012-FINAL.pdf>. And NPR's *Morning Edition* had a weekly listenership of 13.3 million. See Ben Robins, *The Latest NPR Program Audience Estimates*, NPR (Apr. 27, 2010), <https://www.npr.org/sections/gofigure/2010/04/27/126303646/how-the-audience-for-npr-programs-compare-against-the-top-shows-on-commercial-radio>.

- in his 2010 *Billboard* cover story;²⁰
- in his *Rolling Stone* profile titled “Dr. Luke’s Awesomely Trashy Pop Sound Is Ruling the Airwaves”;²¹
- in a *Village Voice* feature defining this era in music as “the Dr. Luke Moment.”²²

²⁰ Wilman, *supra* n.8.

²¹ Edwards, *supra* n.2.

²² Fennessy, *supra* n.9.

And many people who have not read about Dr. Luke have likely seen him on the cover of *Billboard* magazine,²³ in his *New Yorker* profile,²⁴ or in a video interview with *Billboard* about his role on Kesha's EP.²⁵

Dr. Luke has been covered in the media far more often, and more deeply, than the plaintiff in *Rebozo*. Through Dr. Luke's extensive media mentions, profiles in renowned publications, and broad public exposure on magazine covers, news, and national radio programs, Dr. Luke's

²³ BILLBOARD (last visited Mar. 3, 2020), <https://shop.billboard.com/products/billboard-back-issue-volume-122-issue-36>.

²⁴ Seabrook, *supra* n.7.

²⁵ See Wilman, *supra* n.8; Seabrook, *supra* n.7; *Dr. Luke on Recording Ke\$ha's New EP "Cannibal"*, BILLBOARD (Oct. 10, 2014), <https://www.billboard.com/video/dr-luke-on-recording-kehas-new-ep-cannibal-468598>.

name, face, and voice has been seen or heard by tens of millions of Americans.²⁶

B. Dr. Luke has achieved significant “name recognition”

The trial court held that Dr. Luke is not a public figure in part because it found that he “has never been a household name.” R. 17. “Name recognition,” however, depends on whether the community knows of the person’s persona or accomplishments, rather than the person’s legal name. *See Manzari v. Associated Newspapers Ltd.*, 830 F.3d 881, 888 (9th Cir. 2016). And “general fame or notoriety means being known to a large percentage of the well-informed citizenry,” not a majority of the overall public. *Waldbaum*, 627 F.2d at 1295 n.20.

²⁶ *See supra* n.19.

For instance, in *Manzari*, a porn star was deemed an all-purpose public figure because of “interviews with Manzari (in her persona as ‘Danni Ashe’) and news coverage related to her considerable success performing in and marketing online soft-core porn,” even though her birth name was not well-known. 830 F.3d at 888. And in *Curtis v. Butts*, the athletic director of the University of Georgia was an all-purpose public figure because his “position alone” created a substantial amount of public interest. 388 U.S. 130, 155 (1967).

Similarly, Dr. Luke is a public figure because, like “artists, athletes, business people, dilettantes,” he is “famous or infamous because of *who he is* or *what he has done*.” *Manzari*, 830 F.3d at 888 (quoting *Cepeda v. Cowles Magazines & Broad., Inc.*, 392 F.2d 417, 419 (9th Cir. 1968)) (emphasis added). By 2013, Dr. Luke had produced and written 40 hit

songs,²⁷ sixteen of which reached #1 on the Billboard Hot 100 chart—tied for the third-most among all producers and fifth among all songwriters behind Paul McCartney and John Lennon.²⁸ By 2014, Dr. Luke had been nominated four times for the Grammys,²⁹ had received seventeen ASCAP

²⁷ See Halperin, *supra* n.3.

²⁸ See Keith Caulfield, *Max Martin Scores 20th No. 1 on Hot 100 With Taylor Swift's 'Bad Blood'*, BILLBOARD (Mar. 27, 2015), <https://www.billboard.com/articles/columns/chart-beat/6576210/taylor-swift-bad-blood-max-martin-20th-number-1-hot-100> [<https://web.archive.org/web/20150702150309/http://www.billboard.com/articles/columns/chart-beat/6576210/taylor-swift-bad-blood-max-martin-20th-number-1-hot-100>].

²⁹ See *Grammys 2014: The Complete List of Nominees and Winners*, L.A. TIMES (Jan. 26, 2014), <https://web.archive.org/web/20150304121852/http://www.latimes.com:80/entertainment/music/la-et-ms-grammy-nominations-winners-list-story.html>; *Grammy Awards 2011: Winners and Nominees for 53rd Grammy Awards*, L.A. TIMES (Mar. 12, 2014), <https://web.archive.org/web/20200101043209/https://www.latimes.com/la-et-env-grammys-nominees-2010-list.htmlstory.html>.

awards, and had been named the “ASCAP Songwriter of the Year” twice.³⁰

Furthermore, he was selected to be a judge on *American Idol* in 2013, but declined the position.³¹ He was also chosen to be honored with a star on the Hollywood Walk of Fame in 2014.³² He has been called a “force in

³⁰ See Ed Christman, *Dr. Luke, Max Martin Win Songwriters of the Year at ASCAP Pop Music Awards*, BILLBOARD (Apr. 28, 2011), <https://www.billboard.com/articles/news/471839/dr-luke-max-martin-win-songwriters-of-the-year-at-ascap-pop-music-awards>.

³¹ See Chiderah Monde, *Dr. Luke Pulls Out of ‘American Idol’ Gig Due to Record Label Conflict of Interest: Report*, N.Y. DAILY NEWS (Aug. 27, 2013), <https://www.nydailynews.com/entertainment/tv-movies/dr-luke-not-joining-idol-due-conflict-interest-article-1.1437992?barcprox=true>.

³² Roy Trakin, *Dr. Luke, Pitbull, Pharrell, Ken Ehrlich Top Music Picks for 2015 Hollywood Walk of Fame*, HOLLYWOOD REPORTER (Jun. 19, 2014), <https://www.hollywoodreporter.com/news/dr-luke-pitbull-pharrell-ken-713228>. The star has never actually been installed, for reasons that have not been made clear. See HOLLYWOOD WALK OF FAME, <https://www.walkoffame.com/starfinder/list> (last visited Mar. 25, 2020).

pop music for a decade” by *Billboard*³³ and “the most reliable hitmaker in the music business today” by *Rolling Stone*.³⁴ Such publicized honors, along with his public appearances, bring him into the public spotlight. *See Michel v. NYP Holdings, Inc.*, 816 F.3d 686, 702 (11th Cir. 2016) (Pras Michel, two-time Grammy winner, was a public figure); *Pauling v. Nat’l Review, Inc.*, 269 N.Y.S.2d 11, 12 (Sup. Ct. 1966), *aff’d*, 27 A.D.2d 903 (1st Dep’t 1967), *aff’d*, 22 N.Y.2d 818 (1968) (Dr. Linus Pauling, “winner of a Nobel Prize for chemistry and of a Nobel Peace Prize,” was a public figure); *San Antonio Exp. News v. Dracos*, 922 S.W.2d 242, 255

³³ Amaya Mendizabal, *Becky G, Dr. Luke Land First Latin No. 1 With ‘Can’t Get Enough’*, BILLBOARD (May 29, 2014), <https://www.billboard.com/articles/columns/latin/6106212/becky-g-dr-luke-land-first-latin-no-1-with-cant-get-enough>.

³⁴ Edwards, *supra* n.2.

(Tex. App. 1996) (Ted Dracos, who had “received many awards, and developed highly popular and innovative news segments,” was a public figure).

Dr. Luke’s associations with high-profile public figures also helped bring his name to prominence. *Rebozo*, 637 F.2d at 379 (holding that plaintiff’s close relationship with President Nixon had “considerable significance” in the court’s public figure analysis because it enhanced his access to effective communication). Dr. Luke’s close relationships with celebrities in the music industry earned him recognition as “a pop star’s

best friend.”³⁵ These celebrities include Britney Spears, Katy Perry, Miley Cyrus, Pink, Kelly Clarkson, Juicy J, and Kesha.³⁶ For example, Katy Perry described a time where Dr. Luke and producer Max Martin came to Santa Barbara with Perry to “hang out, go to the ocean, have nice dinners” and go in the recording studio to “listen to music,” “do a lot of YouTubing,” and “drink some Chablis.”³⁷ *See Brewer v. Memphis Pub. Co.*, 626 F.2d 1238, 1255 (5th Cir. 1980) (Elvis Presley’s girlfriend was a public figure); *Carson v. Allied News Co.*, 529 F.2d 206, 210 (7th Cir. 1976) (Johnny Carson’s wife was a public figure).

³⁵ Matt Popkin, *Dr. Luke: A Pop Star’s Best Friend*, AMERICAN SONGWRITER (May 2, 2011), <https://americansongwriter.com/songwriter-u-dr-luke-a-pop-stars-best-friend/>.

³⁶ *See* Seabrook, *supra* n.7.

³⁷ *Id.*

C. Dr. Luke promoted himself to public prominence and welcomed it

“[S]omeone [who] steps into the public spotlight . . . must take the bad with the good.” *Waldbaum*, 627 F.2d at 1294-95. People who have “vigorously sought and achieved publicity” and therefore “enjoy[] access to the media—and the self-remedy of rebuttal” can become all-purpose public figures. *San Antonio Exp. News v. Dracos*, 922 S.W.2d 242, 253 (Tex. App. 1996). For instance, the court in *Carafano v. Metrosplash.com Inc.* held that the fact plaintiff promoted herself on her website, “which detail[ed] the plaintiff’s achievements, [and] tout[ed] her upcoming appearances and activities,” supported finding her an all-purpose public figure. 207 F. Supp. 2d 1055, 1062 (C.D. Cal. 2002), *aff’d on other grounds*, 339 F.3d 1119 (9th Cir. 2003), *and holding modified by Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157 (9th Cir. 2008).

Dr. Luke capitalized on media attention for his own success. He hired a PR firm “[k]nown throughout the media and entertainment industry,” which has represented artists like Duran Duran, Daryl Hall, and Arctic Monkeys,³⁸ to promote himself and his career in the media.³⁹ *See* Part I.A, D. *See also San Antonio Exp. News*, 922 S.W.2d at 255 (“[Plaintiff] cannot . . . have it both ways—stepping into the limelight as a public commentator, yet avoiding it for purposes of defamation law and the First Amendment”).

Dr. Luke also used his public platform to promote his artists (and by extension, his brand) in the press. He has tweeted to his over 200,000

³⁸ *About Press Here*, PRESS HERE, <http://www.pressherenow.com/> (last visited Mar. 18, 2020).

³⁹ Def. Mem. of Law in Further Supp. of Her Mot. Partial Summ. J. 6.

followers whenever his work was praised.⁴⁰ When he was promoting young pop singer Bonnie McKee, Dr. Luke “called in a lot of favors” and got “[Katy] Perry, Kesha, Taio Cruz, and Adam Lambert, among others, [to] appear in [McKee’s music] video.”⁴¹ Dr. Luke “has not shunned or shied from the spotlight”; instead, he took center stage, and such self-

⁴⁰ See, e.g., @TheDoctorLuke, TWITTER (Dec. 20, 2012, 10:14 PM), <https://twitter.com/TheDoctorLuke> [<http://web.archive.org/web/20121220142329/http://twitter.com/TheDoctorLuke/>] (tweeting a *New York Times* link calling Kesha’s album one of the Top 10 Albums of 2012); @TheDoctorLuke, TWITTER (Jan. 15, 2011, 6:55 AM), <https://twitter.com/TheDoctorLuke> [<http://web.archive.org/web/20110219135748/https://twitter.com/TheDoctorLuke>] (@jewboogs: “Big day baby, routing for @TheDoctorLuke for Producer of the Year! And of course my lil bro @ItsBennyBlanco nominated for 4 awards #proud!!!”).

⁴¹ Seabrook, *supra* n.7.

promotion is further evidence that he is a public figure. *Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081, 1093 (D. Haw. 2007), *aff'd on other grounds*, 401 F. App'x 243 (9th Cir. 2010).

D. Dr. Luke's large social media following enhanced his "access to the press"

Figures who have greater access to the press than private individuals are more likely to be public figures because they "have a more realistic opportunity to counteract false statements." *Gertz*, 418 U.S. at 344. And a person's large online presence provides that very opportunity. In *Cara-fano v. Metrosplash.com Inc.*, the court held that the plaintiff was an all-purpose public figure because her "personal website [had] 200,000 to 300,000 'hits'" a month and her fan club "had 3,000 'hits'" a month. 207 F. Supp. 2d at 1071. *See also Manzari*, 830 F.3d at 888-89 (holding plain-

tiff a public figure because she had “more than 27,000 paying subscribers” for her website, “millions of Internet downloads, extensive publicity, and broad public exposure”). The court’s determination in *Carafano* was further supported by the fact that the plaintiff’s large online presence led to “media attention” about her lawsuit. 207 F. Supp. 2d at 1071.

This logic equally applies to social media, especially to celebrity users with large followings.⁴² In *United States v. Sargentakis*, the court concluded that someone with “17,221 Twitter followers” and “dozens of online, publicly accessible videos that were viewed over 143,000 times” is “easily identifiable [as a] public figure.” 2015 WL 3763988, at *5

⁴² See David Lat & Zach Shemtob, *Public Figurehood in the Digital Age*, 9 J. TEL. ECOMM. & HIGH TECH. L. 403, 410 (2011) (noting how social media has given citizens and celebrities unprecedented access to communication channels).

(S.D.N.Y. June 15, 2015), (citing *United States v. Cassidy*, 814 F. Supp. 2d 574, 586 n.14 (D. Md. 2011), *aff'd*, 787 F. App'x 51 (2d Cir. 2019)).

Dr. Luke's audience reach exceeded the plaintiffs' in *Carafano* and *Sergentakis*. Dr. Luke's status of having 211,863 followers on his verified Twitter account in 2013⁴³ empowered him to effectively rebut allegedly false claims against him. *See also* Part I.A. In fact, Dr. Luke took the opportunity to do so to his 239,979 followers, in 2016, by tweeting about Kesha's allegations.⁴⁴

⁴³ @TheDoctorLuke, TWITTER (Aug. 22, 2013, 10:16 PM), <https://twitter.com/TheDoctorLuke> [<https://web.archive.org/web/20130822221621/https://twitter.com/TheDoctorLuke>].

⁴⁴ @TheDoctorLuke, TWITTER (Feb. 22, 2016, 10:24 PM), <https://twitter.com/TheDoctorLuke> [<http://web.archive.org/web/20160222222408/https://twitter.com/TheDoctorLuke>].

Dr. Luke's "calculated" "Twitter rant" was reported within a day by news publications including *Hollywood Reporter*,⁴⁵ *Huffington Post*,⁴⁶ *CBS News*,⁴⁷ *Page Six*,⁴⁸ and *E! News*,⁴⁹ and was even the trending story

⁴⁵ See Ashley Cullins, *Dr. Luke Breaks Silence Over Kesha's Sexual Assault Claims*, HOLLYWOOD REPORTER (Feb. 22, 2016), <https://www.hollywoodreporter.com/thr-esq/dr-luke-breaks-silence-keshas-868437>.

⁴⁶ See Julia Brucculleri, *Dr. Luke Tweets He 'Didn't Rape Kesha' Amid Ongoing Legal Battle With Singer*, HUFFINGTON POST (Feb. 22, 2016), https://www.huffpost.com/entry/dr-luke-kesha-tweets_n_56cb87c7e4b0ec6725e39ce0.

⁴⁷ See Ned Ehrbar, *Dr. Luke Responds to Kesha Claims, Tweets that He "Didn't Rape" Her*, CBS NEWS (Feb. 22, 2016), <https://www.cbsnews.com/news/dr-luke-responds-to-kesha-claims/>.

⁴⁸ See Julia Marsh, Joe Tacopino, & Sophia Rosenbum, *Dr. Luke in Twitter Rant: I Didn't Rape Kesha*, PAGE SIX (Feb. 22, 2016), <https://pagesix.com/2016/02/22/dr-luke-in-twitter-rant-i-didnt-rape-kesha/>.

⁴⁹ See Mike Vulpo, *Dr. Luke Says He "Didn't Rape Kesha" in Twitter Spree, Says "Lies Will Be Exposed" as Legal Battle Continues*, E! NEWS (Feb. 22, 2016), <https://www.eonline.com/fr/news/742307/dr-luke-says-he-didnt-rape-kesha-in-new-twitter-rant-says-lies-will-be-exposed-as-legal-battle-continues>.

on *Entertainment Tonight*.⁵⁰ Dr. Luke had the “availability of self-help through press coverage of [his] responses.” *Waldbaum*, 627 F.2d at 1295. *See Rebozo*, 637 F.2d at 379 (holding plaintiff a public figure because both a major newspaper and television network both published his response, giving him greater access to the channels of effective communication). After all, *Billboard* did name Dr. Luke the 30th most powerful person in the music industry.⁵¹

⁵⁰ See Entertainment Tonight, *Dr. Luke Speaks Out in Lengthy Twitter Rant: ‘I Didn’t Rape Kesha’*, YOUTUBE (Feb. 22, 2016), <https://www.youtube.com/watch?v=QSmpAvN66eg> (segment featured on *Entertainment Tonight*’s ‘Trending’ stories).

⁵¹ See *Billboard’s 2012 Power 100 Index*, BILLBOARD (Jan. 26, 2012), <https://www.billboard.com/articles/business/1099292/billboards-2012-power-100-index>.

Dr. Luke's relationships with other public figures also expanded his already-powerful social media influence. For example, Dr. Luke benefited from his relationships with singers Kim Petras and Azealia Banks when they rebutted Kesha's allegations. Petras said, "I would like my fans to know that I wouldn't work with somebody I believe to be an abuser of women."⁵² And Banks told a reporter that Kesha "lied about being sexually assaulted because 'she didn't want to fulfill contractual obligations.'"⁵³ Banks also said she would never collaborate with a rapist and that she's "tired of being expected to support white womens [sic] lies on

⁵² Hannah Mylrea, *Kim Petras: "I Want to Become One of the Songwriting Greats. That's My Number One Goal"*, NME (Apr. 23, 2018), <https://www.nme.com/music-interviews/kim-petras-interview-2300441-2300441>.

⁵³ Taylor Bryant, *Azealia Banks Calls Out Lana Del Rey for Criticizing Kanye*, NYLON (Oct. 1, 2018), <https://nylon.com/articles/azealia-banks-lana-del-rey-kanye>.

the basis of being scared to seem like EYE [sic] have a character flaw for working with someone who is NOT A RAPIST[.]”⁵⁴

II. Dr. Luke is a “general public figure within a relevant community”

Courts also recognize a person can be a general public figure within a relevant community—a category under which Dr. Luke qualifies with respect to the music industry. Contrary to the trial court’s suggestion that Dr. Luke must be a “household name” to attain public figure status, R. 17, “nationwide fame is not required”; instead “the question is whether the individual has achieved the necessary degree of notoriety *where he was defamed.*” *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1295 n.22 (D.C. Cir. 1980) (emphasis added).

⁵⁴ *Id.*

This category applies with respect to statements about “persons whose fame is pervasive in a particular field or profession and who are public figures with respect to that field,” “without regard to whether there is a particular existing controversy.” *Barry v. Time, Inc.*, 584 F. Supp. 1110, 1120 n. 13 (N.D. Cal. 1984) (analyzing *Chuy v. Philadelphia Eagles Football Club*, 595 F.2d 1265 (3d Cir. 1979)). *See also Adler v. Conde Nast Publications, Inc.*, 643 F. Supp. 1558, 1564 (S.D.N.Y. 1986) (general public figure within “the literary and journalistic community”); *Kaplansky v. Rockaway Press, Inc.*, 203 A.D.2d 425, 426 (2d Dep’t 1994) (general public figure “within the framework of the Rockaways”); *Stolz v. KSFM 102 FM*, 30 Cal. App. 4th 195, 205 (1994) (general public figure within Sacramento); *Steere v. Cupp*, 602 P.2d 1267, 1273 (Kan. 1979) (general public figure within a county); *DeCarvalho v. daSilva*, 414 A.2d 806, 813 (R.I.

1980) (“pervasive public figure” within the Portuguese community); *Chapman v. Journal Concepts, Inc.*, 528 F. Supp. 2d 1081, 1092 (D. Haw. 2007) (general public figure within the surfing community), *aff’d on other grounds*, 401 F. App’x 243 (9th Cir. 2010).

Indeed, New York law recognizes that one can be a “public personality” and therefore a “public figure” simply for accomplishments in a particular field—coupled with attempts to attract public interest in that field—even when one is not likely to be known outside that field. In *Wilsey v. Saratoga Harness Racing, Inc.*, 140 A.D.2d 857 (3d Dep’t 1988), for instance, plaintiff “harness [horse racing] track driver” was found to be a public figure, since he was someone in whom the “public has a continuing interest” and “who [has] taken steps to attract such interest,” and who had “comment[ed] for newspaper articles and on television,” *id.* at 858; but

there was no indication that he was famous outside horse racing and its fans.

Likewise, in *Maule v. NYM Corp.*, 54 N.Y.2d 880 (1981), the Court of Appeals held that a sportswriter was a “public personality” and thus a “public figure” because “his books, articles and personal appearances were obviously designed to project his name and personality before millions,” and “plaintiff not only welcomed but actively sought publicity for his views and professional writing and by his own purposeful activities thrust himself into the public eye.” *Id.* at 883. There too there was no indication that plaintiff was well-known (especially by name) outside serious football fans, but his deliberately cultivated prominence within that professional field was sufficient to make him a public figure.

“The category of ‘public figures’ is of necessity quite broad. Included, without doubt, are many types of public performers such as professional athletes, nightclub and concert singers, television and movie actors, and recording artists.” *James v. Gannett Co.*, 40 N.Y.2d 415, 422 (1976). *Maule*, which cites *James*, shows that the category also includes writers about sports or entertainment who seek and achieve prominence within their fields—and its logic likewise applies to top producers of entertainment, who have sought and acquired fame within their fields, as Dr. Luke has, *see* Part I.

Courts also consider a person’s self-characterization within a particular community. For instance, in *Celle*, the court held that a plaintiff’s self-characterization “as a ‘well known radio commentator’ within the Metropolitan Filipino-American community” made him a public figure within

that community. *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163, 177 (2d Cir. 2000).

Similarly, Dr. Luke described himself as famous in court documents, claiming to have “received international acclaim and respect from his peers in the music entertainment industries and from the public at large.” Appellant Br. 23. He even contemplated whether his success was due to his celebrity, rather than his talent, and said he “often think[s] about secretly producing under a different name . . . to see how it’s perceived.” *Id.*

Dr. Luke is especially well known in the pop music community for working closely with female artists. His fame derives from developing female pop stars like Kesha, Katy Perry, Bonnie McKee, and Becky G by

“participat[ing] in every aspect of their career.”⁵⁵ As emphasized by an article’s title in the *Village Voice*, Dr. Luke is known for “Un-Sexing of America’s Pop Stars,” doing “quite a bit to alter the course of gender identity in pop music” specifically for female singers.⁵⁶ Modern female pop music—“female-fronted, sexually frank, dalek-voiced, fizzing with 80s synths—is broadly Gottwald’s creation.”⁵⁷ “[H]e could almost be considered an avatar of girls, or girl-lovers, everywhere.”⁵⁸ The fact that his

⁵⁵ Seabrook, *supra* n.7.

⁵⁶ Fennessy, *supra* n.9.

⁵⁷ Lewis, *supra* n.14. *See also* NPR: MORNING EDITION, *supra* n.16 (“[Katy] Perry is one among a large group of young, female pop artists whom Dr. Luke has worked with.”).

⁵⁸ Wilman, *supra* n.8.

work is “primarily with spunky female solo artists”⁵⁹ is not an insignificant part of his prestige—it is what made “the Dr. Luke Moment[.]”⁶⁰

Dr. Luke is thus a general public figure within the music industry—and Kesha’s statements are of especial interest to those involved with and interested in that industry, because they concern his interactions with artists as a music producer and songwriter. Given Dr. Luke’s power and influence in the music industry, Kesha’s allegations that he raped her and Katy Perry (two prominent female artists) are of great concern to artists and their fans. Her allegations “occur[red] within the limits of the particular community” in which Dr. Luke is a general public figure.

⁵⁹ Sternbergh, *supra* n.13.

⁶⁰ Fennessy, *supra* n.9.

Chapman, 528 F. Supp. 2d at 1091. Since Kesha was communicating to Lady Gaga (over text) and members of the female pop community (through litigation) about possible misconduct by a major producer against female singers, they were thus of interest to those in the music field. This is evident from the day-of reporting of the lawsuit in industry magazines such as *Rolling Stone*,⁶¹ *Billboard*,⁶² and *The Hollywood Reporter*.⁶³ See *DeCarvalho*, 414 A.2d at 813 (holding that statements

⁶¹ See Kory Grow, *Kesha Sues Producer Dr. Luke for Sexual Assault and Battery*, ROLLING STONE (Oct. 14, 2014), <https://www.rollingstone.com/music/music-news/kesha-sues-producer-dr-luke-for-sexual-assault-and-battery-238171/>.

⁶² See Joe Lynch, *Kesha Suing Dr. Luke for Alleged Sexual Assault & Emotional Abuse*, BILLBOARD (Oct. 14, 2014), <https://www.billboard.com/articles/news/6281709/kesha-suing-dr-luke>.

⁶³ See Eriq Gardner, *Read Full Details About Kesha's Disturbing Lawsuit Against Dr. Luke*, HOLLYWOOD REPORTER (Oct. 14, 2014), <https://www.hollywoodreporter.com/thr-esq/read-full-details-keshas-disturbing-740699>.

“aimed at a community of Portuguese-Americans” were of interest to the community in which the plaintiff was a public figure). And music fans would also want to know about how he treats female performers, in deciding whether they wanted to support him.

Given the growing tide of sexual misconduct allegations in the entertainment industry, it has become increasingly important to “prevent a chilling effect upon the media’s investigation of public events” in this field. *Wells v. Liddy*, 186 F.3d 505, 541 (4th Cir. 1999). In recent years, many people—both alleged victims and journalists investigating their stories—have been speaking out about prominent businesspeople (especially in entertainment) allegedly mistreating young, up-and-coming women with whom they have business relations. Since the reporting of such allegations about the movie producer Harvey Weinstein, there have

been apparently hundreds of thousands of U.S. articles published referencing the #MeToo movement or Weinstein.⁶⁴ Since April 2017, at least 262 celebrities, politicians, CEOs, and other high-profile persons have been covered in the media as having been accused of sexual misconduct.⁶⁵

This is a subject that eminently merits media coverage. Both the press and alleged victims must be able to freely discuss alleged professional misconduct in a given community, armed with the full protections that the First Amendment provides in libel cases. If courts apply the public figure status too narrowly in libel suits related to sexual misconduct

⁶⁴ This was calculated using MediaCloud, with search terms “#MeToo” OR “#MeToo Movement” OR “Harvey Weinstein” within all national and state papers between October 10, 2017 to March 10, 2020.

⁶⁵ See Anna North, Constance Grady, Laura McGann, & Aja Romano, *Sexual Harassment Assault Allegations List*, VOX, <https://www.vox.com/a/sexual-harassment-assault-allegations-list/> (last visited Mar. 18, 2020).

claims, the plaintiff's lower standard of proof "would unconstitutionally inhibit debate and comment concerning public controversies." *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 862 (5th Cir. 1978).

III. Dr. Luke is a "limited purpose public figure"

A "limited purpose public figure" is one who "voluntarily injects himself . . . into a particular public controversy and thereby becomes a public figure for a limited range of issues." *Gertz*, 418 U.S. at 352. This analysis focuses on "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Id.*

A. The public controversy at issue is the topic of artist-business relations

A public controversy can be "any topic on which sizable elements of society have different, strongly held views." *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 137 (2d Cir. 1984). And in defining a public controversy,

the courts have tended to define it “as being broader than the narrower discussion contained in the defamatory document.” *Jankovic v. Int’l Crisis Grp.*, 822 F.3d 576, 587 (D.C. Cir. 2016) (citing *Tavoulaareas v. Piro*, 817 F.2d 762, 778-79 (D.C. Cir. 1987) and *Waldbaum*, 627 F.2d at 1290, 1299 n.5). Thus, for instance, in *Fine v. ESPN, Inc.*, statements about sexual molestation of a men’s basketball team were found to relate to the public controversy topic of “integrity of the Syracuse University men’s basketball team and efforts to address at-risk youth,” and not the molestation itself. 2016 WL 6605107 at *9 (N.D.N.Y. Mar. 25, 2016); *see also Tavoulaareas*, 817 F.2d at 773 (public controversy was “state of the oil industry”); *Foretich v. Advance Magazine Publishers, Inc.*, 765 F. Supp. 1099, 1108 (D.D.C. 1991) (public controversy was “child abuse, women’s rights, [and] the intrusion of the state into private affairs”).

The treatment of artists by businesspeople and executives is a topic of public controversy, and has been covered in a variety of scenarios: from artists being allegedly subjected to unfair contracts like Prince⁶⁶ and JoJo,⁶⁷ to artists fighting companies for fair song rates like Lily Allen,⁶⁸

⁶⁶ See Eamonn Forde, *Record Breaker: A Brief History of Prince's Contractual Controversies*, GUARDIAN (Aug. 10, 2015), <https://www.theguardian.com/music/2015/aug/10/history-prince-contractual-controversy-warner-paisley-park>.

⁶⁷ See JoJo & Dee Lockett, *JoJo Spent Nearly a Decade Fighting Her Label and Won. Here's What She Learned, in Her Own Words*, VULTURE (Nov. 2, 2015), <https://www.vulture.com/2015/10/jojo-fighting-the-major-label-man-in-her-own-words.html>.

⁶⁸ See Anita Singh, *Lily Allen: Making Millions? The John Lewis Ad Only Earned Me £8k*, TELEGRAPH (May 5, 2014), <https://www.telegraph.co.uk/news/celebritynews/10809014/Lily-Allen-Making-millions-The-John-Lewis-ad-only-earned-me-8k.html>.

to artists being abused by their management team financially like Rihanna,⁶⁹ or physically like Britney Spears.⁷⁰ In fact, Dr. Luke's abusive relationship with Kesha was already a public controversy by late 2013, when the "Free Ke\$ha" movement began publicly advocating the release of Kesha from her contract with Dr. Luke, which sparked public support and criticism.⁷¹

⁶⁹ See Christine Kearney, *Rihanna Sues Ex-Accountants, Says She Lost Millions*, REUTERS (July 5, 2012), <https://www.reuters.com/article/entertainment-us-rihanna-lawsuit/rihanna-sues-ex-accountants-says-she-lost-millions-idUSBRE86410L20120705>.

⁷⁰ See Jennifer Vineyard, *Britney Spears was Drugged, Controlled by Sam Lutfi, Parents Allege*, MTV (Feb. 5, 2008), <http://www.mtv.com/news/1580991/britney-spears-was-drugged-controlled-by-sam-lutfi-parents-allege/>.

⁷¹ See Kelsea Stahler, *'Free Ke\$ha' Is a Very Problematic Movement*, BUSTLE (Oct. 13, 2013), <https://www.bustle.com/articles/7048-free-keha-is-a-very-problematic-movement>.

Kesha’s allegations regarding Dr. Luke’s conduct, as a music producer and songwriter, towards artists with whom he worked fit squarely within the public controversy about artist-business relations, given that these allegations bear on Dr. Luke’s trustworthiness in his dealings with young female artists. *Waldbaum*, 627 F.2d at 1298 (“Misstatements *wholly unrelated* to the controversy” are not protected, but statements . . . [of] a plaintiff’s ‘talents, education, experience, and motives,’ can be germane.”); *see also Bell v. Associated Press*, 584 F. Supp. 128, 132 (D.D.C. 1984) (holding that allegations of illicit drug use against the plaintiff, even as a private person, were still connected to the plaintiff’s public persona and controversy of off-the-field conduct for professional athletes).

B. Dr. Luke “voluntarily injected himself into the public controversy”

Limited purpose public figures have “injected themselves in the public controversy” when “their voluntary participation . . . [has] attracted public attention” and they seek “to establish their reputation as authorities in the field.” *Winklevoss v. Steinberg*, 170 A.D.3d 618, 619 (1st Dep’t 2019), *appeal dismissed*, 33 N.Y.3d 1043 (2019).

For instance, in *Alcor Life Extension Foundation v. Johnson*, the court held that the plaintiff corporation was a limited purpose public figure in “all matters relating to its business.” 992 N.Y.S.2d 157 (Sup. Ct. 2014), *aff’d*, 136 A.D.3d 464 (1st Dep’t 2016). The court concluded the plaintiff “injected” itself “into the public controversy” because it “maintain[ed] a website, publish[ed] a magazine, g[a]ve interviews to the press, [and] invit[ed] film crews into its facilities.” 992 N.Y.S.2d 157. Likewise, in

Grishin v. Sulkess, the court held the plaintiff was a limited purpose public figure “regarding his marital dispute and legal proceedings” because he “reveal[ed] aspects of his personal life to a widespread public social media following.” 2019 WL 4418543, at *6 (C.D. Cal. May 31, 2019).

Compared to the plaintiffs in *Alcor* and *Grishin*, Dr. Luke expended greater efforts to inject himself into the public controversy. He took affirmative steps on social media and in the press to publicly establish himself as the leading authority in creating pop music and in developing top female talent. *See* Part I.C. And because Dr. Luke voluntarily promoted his close, professional relationships with many female artists—Britney Spears, Katy Perry, Miley Cyrus, Pink, Kelly Clarkson, Juicy J, and

Kesha⁷²—he assumed the risk of public scrutiny regarding his interactions with artists. *See Jankovic*, 822 F.3d at 587 (holding plaintiff’s close relationship with a prime minister “carried a risk of public scrutiny”).

First, Dr. Luke promoted himself as a producer who has great relations with his female artists. He shared how hard he works with his artists—“my babies”⁷³ as he calls them—in his studio in his *New Yorker* profile,⁷⁴ and talked about how he “keeps the atmosphere loose” (in the sense of maintaining friendly, casual interactions with artists) in his *Rolling Stone* profile.⁷⁵ His *Billboard* profile bluntly described him as “an avatar

⁷² *See* Seabrook, *supra* n.7.

⁷³ Halperin, *supra* n.3.

⁷⁴ *See* Seabrook, *supra* n.7.

⁷⁵ Edwards, *supra* n.2.

of girls, or girl-lovers, everywhere.”⁷⁶ He stressed that it is his job “to find great songs with the artists, for the artists, and have them shine.”⁷⁷ Moreover, Dr. Luke also regularly used Twitter to promote his artists—and implicitly promote himself as someone who backs his artists.

Second, Dr. Luke promoted himself as someone trustworthy—having such close friendships with his artists that they would even joke about intimate things. For example, in a behind-the-scenes video of Avril Lavigne’s “The Best Damn Thing” album, Dr. Luke took his shirt off and asked Lavigne to pepper spray him, which she did. He commented in the video, “I’m really abused. I’m so abused. And I kinda like it,” “I am Avril’s

⁷⁶ Wilman, *supra* n.8.

⁷⁷ NPR: MORNING EDITION, *supra* n.16.

bitch.”⁷⁸ He also publicized his bet with Miley Cyrus that her song “Wrecking Ball” would not top the Billboard Hot 100, a bet he lost.⁷⁹

Likewise, his *Rolling Stone* profile described a moment with him and Katy Perry, where she “borrowed Luke’s laptop and tweeted as him, asking if it was normal to find himself attracted to boys. Luke retaliated by tweeting as Perry, and her 2 million followers read, ‘Is it normal to have the recurrent rash with blisters on my vagina?’”⁸⁰ Their Twitter prank became so public that at one point, “Katy Perry’s Vagina” was the number

⁷⁸ AvrilLavigneIsMyDrug, *Making of The Best Damn Thing*, YOUTUBE (Jun. 19, 2012), <https://youtu.be/KY2Rh-sxs5c?t=864>.

⁷⁹ Seabrook, *supra* n.7.

⁸⁰ Edwards, *supra* n.2. Dr. Luke continued the prank by tweeting, “@katyperry Katy I’m so sorry to hear that about ur vagina.... u should really see somebody about that.. ew.. don’t show it to me.. a real dr.” @TheDoctorLuke, TWITTER (Jan. 27, 2010, 9:50 PM), <https://twitter.com/TheDoctorLuke/status/8311919548>.

one trending topic on Twitter.⁸¹ Finally, he also publicized his personal relationship with Kesha on Twitter. He tweeted a photo of Kesha sleeping, stating, “I’m worried about what THEY gonna do!!!! From me you just your usual spanking for being bad!!!! :-P” and “Damn my artists work hard!!!!!!!!!! [http://twitpic.com/lcs40\[.\]](http://twitpic.com/lcs40[.])”⁸² The message to the public was clear: Dr. Luke is such a close friend to the young female artists he works with that they can joke about the most personal matters with each other.

⁸¹ See Kyle Anderson, *Katy Perry’s Naughty Bits Top Twitter Trends*, MTV (Jan. 28, 2010), <http://www.mtv.com/news/2577709/katy-perry-twitter-hack/>.

⁸² Jen Yamato, *Inside Kesha’s Battle Against Dr. Luke: Allegations of Rape, Sketchy Deleted Photos, and More*, DAILYBEAST (Apr. 13, 2017), <https://www.thedailybeast.com/inside-keshas-battle-against-dr-luke-allegations-of-rape-sketchy-deleted-photos-and-more>.

Given Dr. Luke’s efforts to promote himself in the press and on social media as a powerful advocate for his artists—and as their intimate, personal friend—he has injected himself into the controversy of treatment of artists by businesspeople and executives. *See Bell*, 584 F. Supp. at 132 (holding that “professional careers and those of other entertainers who seek the public spotlight are so intimately tied to their personal conduct that such a distinction would be entirely unrealistic”). Kesha’s allegations of misconduct relate to that controversy.

CONCLUSION

Dr. Luke carefully crafted his persona and rise to the apex of the music industry while developing some of the most celebrated artists and music of our time. Dr. Luke qualifies as a public figure in four ways—he is an “all-purpose public figure”; a “general public figure within a relevant

community”; a “limited purpose public figure”; and a “public personality.”

This Court should therefore reverse the Supreme Court’s conclusion that “the actual-malice standard is inapplicable,” R. 19.

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