New York County Clerk's Index No. 653118/14

New York Supreme Court

Appellate Division—First Department

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.

Appellate Case No.: 2020-01908

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.

MOTION ON BEHALF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 23 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLANT FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

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New York State Supreme Court
Appellate Division – First Department

Supreme Court Index No. 2020-01908

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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.

NOTICE OF MOTION ON BEHALF OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 23 MEDIA ORGANIZATIONS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

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Counsel for Amici Curiae

Dated: June 17, 2021

PLEASE TAKE NOTICE that upon the annexed affirmation of Professor Eugene Volokh, dated June 17, 2021, and all exhibits attached thereto including a copy of the proposed brief of *amici curiae*, The Reporters Committee for Freedom of the Press and 23 media organizations, by their attorneys Holwell Shuster & Goldberg LLP, will move this Court, at the Supreme Court, Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010, on June 28, 2021 at 10:00 a.m. or as soon thereafter as counsel may be heard, for an order permitting the proposed *amici* to serve and file a brief as *amici curiae*. This motion is filed pursuant to CPLR §2214 and 22 NYCRR §600.4 and relates to the Appeal Motion filed by Appellant, and should be heard by the same motions panel assigned to hear Appellant's motion.

Dated: June 17, 2021

HOLWELL SHUSTER & GOLDBERG LLP

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**AFFIRMATION OF EUGENE VOLOKH
IN SUPPORT OF MOTION ON BEHALF OF
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 23
MEDIA ORGANIZATIONS FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE***

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Professor Eugene Volokh, an attorney duly admitted to practice before the courts of the State of California, and who has been admitted *pro hac vice* to practice before the courts of the State of New York in this case, affirms the following to be true under penalty of perjury pursuant to N.Y. C.P.L.R. §2106:

1. A copy of the brief is attached hereto as Exhibit A.

2. Lead *amicus*, the Reporters Committee for Freedom of the Press (the "Reporters Committee"), is an unincorporated nonprofit association. Founded by leading journalists and media lawyers in 1970 when the nation's news media faced an unprecedented wave of government subpoenas seeking to reveal the identities of confidential news sources, the Reporters Committee today works to protect First Amendment freedoms and the newsgathering rights of journalists. The Reporters Committee frequently serves as *amicus curiae* in cases that concern issues of importance to journalists and news media, including litigations involving claims for defamation. *See, e.g.*, Brief for the Reporters Committee for Freedom of the Press and 20 Media Organizations as Amici Curiae Supporting Defendants-Respondents, *Rainbow v. WPIX, Inc.*, 117 N.Y.S.3d 51 (N.Y. App. Div., 1st Dept. 2020) (Index No. 152477/15), *available at*

https://perma.cc/5S3H-SLT7; Brief for the Reporters Committee for Freedom of the Press and 30 Media Organizations as Amici Curiae Supporting Defendants-Appellants, *Desmond v. News & Observer Publ'n Co.*, 826 S.E.2d 454 (Mem) (N.C. May 1, 2019) (No. 132PA18-2), *available at* https://perma.cc/EN3R-4YQL.

3. Additional proposed *amici curiae*[1] are prominent news publishers,

- Advance Publications, Inc.,
- Buzzfeed,
- The Center for Investigative Reporting (d/b/a Reveal),
- The Daily Beast Co. LLC,
- Daily News, LP,
- Fox Television Stations, LLC,
- Gannett Co., Inc.,
- The NBCUniversal News Group,
- New York Public Radio,
- Newsday LLC,
- Nexstar Media Inc.,
- Penguin Random House LLC, and
- WNET,

and professional, trade, and academic groups,

- The International Documentary Association,
- The Media Institute,
- The Media Law Resource Center, Inc.,
- MPA—The Association of Magazine Media,
- The National Press Photographers Association,
- The News Leaders Association,
- The Online News Association,

[1] A comprehensive list of *amici* is annexed hereto as Appendix A.

- The Society of Environmental Journalists,
- Society of Professional Journalists, and
- The Tully Center for Free Speech.

As news organizations and entities that advocate for the First Amendment rights of the public and the press, *amici* seek to ensure that free speech is not chilled by powerful figures wielding libel suits.

4. Most of the *amici* filed a merits-stage amicus brief before this Court in this case.

5. *Amici* believe that this Court's narrow view of who is a public figure risks unduly burdening free speech; the publishers, coalitions and associations, and news media organizations that join together as *amici* are well-suited to provide a unique perspective on the issue of the public figure standard that is not currently reflected in Defendant-Appellant's briefing. *Amici* or their members frequently report on matters of serious and oftentimes despicable professional misconduct—including such timely and significant issues as those raised by the #MeToo movement. *Amici* have a strong interest in ensuring that their ability to publish these news stories on an important matter of public concern without fear of unjustified defamation liability is not diluted by this decision.

6. Appellant's and Respondents' counsel have been notified of this motion. Appellant consents to this motion; Respondents have not consented.

7. The notice of appeal invoking this Court's jurisdiction is attached hereto as Exhibit B.

8. The decision that Appellant seeks leave to appeal is attached hereto as Exhibit C.

WHEREFORE, I respectfully request that the Court grant the motion to participate in this appeal as *Amici Curiae.*

Dated: June 17, 2021

FIRST AMENDMENT CLINIC
UCLA SCHOOL OF LAW

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APPENDIX A: DESCRIPTION OF ADDITIONAL *AMICI CURIAE*

Advance Publications, Inc. is a diversified privately-held company that operates and invests in a broad range of media, communications and technology businesses. Its operating businesses include Conde Nast's global magazine and digital brand portfolio, including titles such as Vogue, Vanity Fair, The New Yorker, Wired, and GQ, local news media companies producing newspapers and digital properties in 10 different metro areas and states, and American City Business Journals, publisher of business journals in over 40 cities.

BuzzFeed is a social news and entertainment company that provides shareable breaking news, original reporting, entertainment, and video across the social web to its global audience of more than 200 million

The Center for Investigative Reporting (d/b/a Reveal), founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website https://www.revealnews.org/, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

The Daily Beast delivers award-winning original reporting and sharp opinion from big personalities in the arenas of politics, pop-culture, world news and more.

Daily News, LP publishes the New York Daily News, a daily newspaper that serves primarily the New York City metropolitan area and is one of the largest papers in the country by circulation. The Daily News' website, NYDailyNews.com, receives approximately 100 million page views each month.

Directly and through affiliated companies, **Fox Television Stations, LLC**, owns and operates 28 local television stations throughout the United States. The 28 stations have a collective market reach of 37 percent of U.S. households. Each of the 28 stations also operates Internet websites offering news and information for its local market.

Gannett is the largest local newspaper company in the United States. Its 260 local daily brands in 46 states and Guam — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

The International Documentary Association (IDA) is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

The Media Institute is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

The Media Law Resource Center, Inc. ("MLRC") is a non-profit professional association for content providers in all media, and for their defense lawyers, providing a wide range of resources on media and content law, as well as policy issues. These include news and analysis of legal, legislative and regulatory developments; litigation resources and practice guides; and national and international media law conferences and meetings. The MLRC also works with its membership to respond to legislative and policy proposals, and speaks to the press and public on media law and First Amendment issues. It counts as members over 125 media companies, including newspaper, magazine and book publishers, TV and radio broadcasters, and digital platforms, and over 200 law firms working in the media law field. The MLRC was founded in 1980 by leading American publishers and broadcasters to assist in defending and protecting free press rights under the First Amendment.

MPA – The Association of Magazine Media, ("MPA") is the industry association for magazine media publishers. The MPA, established in 1919, represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands. MPA's membership creates professionally researched and edited content across all print and digital media on topics that include news, culture, sports, lifestyle and virtually every other

interest, avocation or pastime enjoyed by Americans. The MPA has a long history of advocating on First Amendment issues.

The National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA's members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

The NBCUniversal News Group is a division of NBCUniversal Media, LLC. It includes NBC News, Telemundo News, MSNBC, CNBC, and an owned television-stations group that produces substantial amounts of local news and public affairs programming. NBC News produces, the "Today" show, "NBC Nightly News with Lester Holt," "Dateline NBC" and "Meet the Press" as well as digital and streaming news reporting, such as NBCNews.com and NBCNewsNow.

New York Public Radio, with its urban vibrancy and global perspective, produces innovative public radio programs, podcasts, and live events that touch a passionate community of 23.4 million people monthly on air, online and in person. From its state-of-the-art studios in New York City, NYPR is reshaping radio for a new generation of listeners with groundbreaking, award-winning programs including Radiolab, On the Media, The Takeaway, Nancy, and Carnegie Hall Live, among many others. New York Public Radio includes WNYC, WQXR, WNYC Studios, Gothamist, The Jerome L. Greene Performance Space, and New Jersey Public Radio. Further information about programs, podcasts, and stations may be found at www.nypublicradio.org.

The News Leaders Association was formed via the merger of the American Society of News Editors and the Associated Press Media Editors in September 2019. It aims to foster and develop the highest standards of trustworthy, truth-seeking journalism; to advocate for open, honest and transparent government; to fight for free speech and an independent press; and to nurture the next generation of news leaders committed to spreading knowledge that informs democracy.

Newsday LLC ("Newsday") is the publisher of the daily newspaper, Newsday, and related news websites. Newsday is one of the nation's largest daily newspapers, serving Long Island through its portfolio of print and digital products. Newsday has received 19 Pulitzer Prizes and other esteemed awards for outstanding journalism.

Nexstar Media Inc. ("Nexstar") is a leading diversified media company that leverages localism to bring new services and value to consumers and advertisers through its traditional media, digital and mobile media platforms. Nexstar owns, operates, programs or provides sales and other services to 199 television stations and related digital multicast signals reaching 116 markets or approximately 62% of all U.S. television households.

The Online News Association is the world's largest association of digital journalists. ONA's mission is to inspire innovation and excellence among journalists to better serve the public. Membership includes journalists, technologists, executives, academics and students who produce news for and support digital delivery systems. ONA also hosts the annual Online News Association conference and administers the Online Journalism Awards.

Penguin Random House LLC publishes adult and children's fiction and nonfiction in print and digital trade book form in the U.S. The Penguin Random House global family of companies employ more than 10,000 people across almost 250 editorially and creatively independent imprints and publishing houses that collectively publish more than 15,000 new titles annually. Its publishing lists include more than 60 Nobel Prize laureates and hundreds of the world's most widely read authors, among whom are many investigative journalists covering domestic politics, the justice system, business and international affairs.

The Society of Environmental Journalists is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

Society of Professional Journalists ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism

organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

The Tully Center for Free Speech began in Fall 2006 at Syracuse University's S.I. Newhouse School of Public Communications, one of the nation's premier schools of mass communications.

WNET is the parent company of THIRTEEN, WLIW21, NJTV, Interactive Engagement Group and Creative News Group and the producer of approximately one-third of all primetime programming seen on PBS nationwide. Locally, WNET serves the entire New York City metropolitan area with unique on-air and online productions and innovative educational and cultural projects. Over seven million viewers tune in to THIRTEEN, WLIW21 and NJTV each month, and the stations' websites reach another 480,000 people. The news programming produced by WNET affiliates includes *PBS NewsHour Weekend*, *NJTV News*, and *MetroFocus*.

EXHIBIT A

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BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND 23 MEDIA ORGANIZATIONS IN SUPPORT OF APPELLANT'S MOTION FOR LEAVE TO APPEAL

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TABLE OF AUTHORITIES

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Other Authorities

INTEREST OF THE *AMICI CURIAE*[1]

Lead *amicus curiae* is the Reporters Committee for Freedom of the Press, 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,

- Advance Publications, Inc.,
- Buzzfeed,
- The Center for Investigative Reporting (d/b/a Reveal),
- The Daily Beast Co. LLC,
- Daily News, LP,
- Fox Television Stations, LLC,
- Gannett Co., Inc.,
- The NBCUniversal News Group,
- New York Public Radio,
- Newsday LLC,
- Nexstar Media Inc.,

[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.

- Penguin Random House LLC, and
- WNET,

and professional, trade, and academic groups,

- The International Documentary Association,
- The Media Institute,
- The Media Law Resource Center, Inc.,
- MPA—The Association of Magazine Media,
- The National Press Photographers Association,
- The News Leaders Association,
- The Online News Association,
- The Society of Environmental Journalists,
- Society of Professional Journalists, and
- The Tully Center for Free Speech.

Misapplication of the public figure standard can help powerful figures silence free speech using libel suits, and thus undermine the public's ability to discuss and be informed of allegations of 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 brought to light

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 including The New York Times and The New Yorker. But this 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 such essential reporting.

SUMMARY OF ARGUMENT

The New York Court of Appeals, the Second Circuit, and this Court have all recognized that a professional who is prominent in a particular industry and who successfully seeks publicity for his professional achievements is a general purpose public figure. Dr. Luke eminently qualifies under that test, and the majority opinion is therefore in tension with this existing precedent.

Other cases from this Court have also recognized that, even when such people are not general purpose public figures, they are limited purpose public figures as to commentary related to their professions. Defendants' speech about Dr. Luke's alleged mistreatment of his professional colleagues should be, at a minimum, treated as speech about a public figure under that test. The majority opinion is in tension with those cases as well.

Because of this tension in the caselaw created by the majority opinion—and because the disagreement between the majority and dissent underscores both the difficulty and importance of these issues—this Court should grant Appellant's motion for leave to appeal to the Court of Appeals, which could then consider how New York law should consistently handle such cases.

ARGUMENT

I. The Majority Opinion Is in Tension with General Purpose Public Figure Cases from the Court of Appeals, the Second Circuit, and this Court

Prior to the majority opinion, New York courts have treated professionals who are famous in their field, and who successfully seek out publicity, as general purpose public figures. Instructive decisions include:

1. *Maule v. NYM Corp.*, 54 N.Y.2d 880 (1981), where 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 he "actively sought publicity for his views and professional writing and by his own purposeful activities thrust himself into the public eye." *Id.* at 883.
2. *Celle v. Filipino Reporter Enterprises Inc.*, 209 F.3d 163 (2d Cir. 2000), which 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. *Id.* at 177.

3. *Winklevoss v. Steinberg*, 170 A.D.3d 618 (1st Dep't 2019), which held that the investor plaintiffs were "general purpose public figures," "famous by virtue of their participation in the Olympics, their portrayal in the film 'The Social Network,' and routine coverage in popular media, coverage in which they willingly participate." *Id.* at 619.

4. *Wilsey v. Saratoga Harness Racing, Inc.*, 140 A.D.2d 857 (3d Dep't 1988), which held that plaintiff "harness [horse racing] track driver" was a public figure, since he was someone in whom the "public has a continuing interest," "who [had] taken steps to attract such interest," and who had "comment[ed] for newspaper articles and on television." *Id.* at 858.

The majority opinion in this case sought to distinguish *Maule*, but only while discussing "limited purpose public figure[s]," and only as an example of a case "where the plaintiffs sought publicity regarding the public controversies which were the subject of their litigation." Affirmation of Eugene Volokh dated June 17, 2021 ("Aff.") Ex. C at 9. Yet *Maule* does not speak about limited purpose public figures; it said that "plaintiff was a public figure," 54 N.Y.2d at 881, and "had become a public personality," *id.* at 883, with no "limited purpose" qualifier.

Likewise, *Maule* said nothing to suggest that Maule's public figure status was limited to allegations about the subjects on which he had sought publicity. Indeed, the *Maule* opinion saw no need to even discuss the subject of the allegedly libelous publication, presumably because it had found Maule to be a general purpose public figure.

The majority opinion likewise sought to distinguish *Winklevoss* as involving "plaintiffs [who] sought publicity regarding the public controversies which were the subject of their litigation." Aff. Ex. C at 9. But *Winklevoss* expressly held that the individual plaintiffs there were general purpose public figures, not only limited purpose public figures. 170 A.D.3d at 618. The majority opinion did not discuss *Celle* or *Wilsey*.

The majority opinion reasoned that:

> Gottwald's success in the music business is not enough to bring him into the realm of a general-purpose public figure, even if the music he produces is known to the general public or he is associated with famous or household word musicians, especially where he has used his efforts as a producer to obtain publicity not for himself, but for the artists that he represents. Although he is an acclaimed music producer and well known in the entertainment industry, he is not a household name. His success in a high-profile career, without more, does not warrant a finding that he is a general-purpose public figure.

Aff. Ex. C at 6. However, the same could have been said of sportswriter Maule, journalist Celle, the investors Winklevoss, and horse driver Wilsey. None of them appeared likely to be a "household name," except in

households that were particularly interested in their fields of endeavor. Yet none was treated by the appellate court as a limited purpose public figure, and the opinions did not limit their status to statements related to any particular class of controversies into which they had injected themselves. (The *Wilsey* court did mention that Wilsey had "generated some of the controversy and public attention surrounding his termination," which was the topic of the story about him, but only after noting his broader professional achievements, and saying he was "akin to a professional athlete or entertainer," 140 A.D.2d at 858.)

Likewise, Gottwald—Dr. Luke—even if not known to every American, is at the apex of his profession. He has himself stated that he has received "international acclaim and respect from his peers both in the music entertainment industries and from the public at large," Brief for Appellant dated Mar. 16, 2020 ("Appellant Br.") 23 (citing sources), and has sought

public attention, including by promoting himself on social media and hiring a deep bench of public relations specialists, Appellant Br. 21 (citing sources).

By his own description, Dr. Luke is "one of the most successful songwriters and sought-out producers in the entertainment industry today, having written or cowritten more number one hits than any other songwriter," working in the "highest echelons of the music industry" with such superstars as "Britney Spears, Katy Perry, and Pink." Defendant Lukasz Gottwald's Memorandum of Law in Opposition to Plaintiff's Motion to Dismiss His Counterclaims at 1, *DAS Commc'ns v. Sebert*, No. 650457/10 (N.Y. Sup. Ct. N.Y. Cnty. April 11, 2011). By 2013, he had more than 40 hit songs,[2] sixteen of which reached #1 on the Billboard Hot 100 chart—

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[2] *See* Shirley Halperin, *Dr. Luke: 'I'm Always Petrified That This Is My Last Good Song' (Q&A)*, HOLLYWOOD REPORTER (Feb. 6, 2013. 8:00 AM), https://www.hollywoodreporter.com/earshot/dr-luke-im-petrified-is-418709 .

tied for the third most among all producers and fifth among all songwriters behind Paul McCartney and John Lennon.[3] By 2014, he had been nominated for a Grammy four times,[4] had received seventeen ASCAP awards, and had been named the "ASCAP Songwriter of the Year" twice.[5] He was selected to be a judge on *American Idol* in 2013, but declined the position.[6] He was also chosen to be honored with a star on the Hollywood

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[3] *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].

[4] Recording Academy Grammy Awards, *Artist / Dr. Luke*, https://www.grammy.com/grammys/artists/dr-luke/3000 (data for 2010 and 2013).

[5] *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.

[6] *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, 8:21 AM), https://www.nydailynews.com/entertainment/tv-movies/dr-luke-not-joining-idol-due-conflict-interest-article-1.1437992?barcprox=true.

Walk of Fame in 2014, though the star has never actually been installed, for reasons that have not been made clear.[7]

He was the subject of a 2010 *Billboard* cover story,[8] and the subject of a 2010 *Rolling Stone* profile titled "Dr. Luke's Awesomely Trashy Pop Sound Is Ruling the Airwaves," which deemed him "the most reliable hit-maker in the music business today."[9] He also was the subject of a 2013 *Hollywood Reporter* story that called him the "new King of Pop."[10] Beyond the music and entertainment-related press, Dr. Luke has appeared

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[7] Roy Trakin, *Dr. Luke, Pitbull, Pharrell, Ken Ehrlich Top Music Picks for 2015 Hollywood Walk of Fame,* HOLLYWOOD REPORTER (Jun. 19, 2014, 1:04 PM), https://www.hollywoodreporter.com/news/dr-luke-pitbull-pharrell-ken-713228; *Browse Stars*, HOLLYWOOD WALK OF FAME, https://walkoffame.com/browse-stars/ (last visited May 23, 2021) (Searches for "Dr.," "Luke," "Gottwald," "Lukasz," and "Lukas" indicate that there is no star for Dr. Luke.).

[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] Gavin Edwards, *Dr. Luke's Awesomely Trashy Pop Sound Is Ruling the Airwaves*, ROLLING STONE (Apr. 29, 2010), at 88-89 (republished online at https://rulefortytwo.com/articles-essays/music/dr-luke/).

[10] Halperin, *supra* note 2.

- on ABC World News Tonight in a featured segment titled, "Dr. Luke: The Hitmaker";[11]

- in a *New York Magazine* profile labeling him "The Hit Whisperer";[12]

- in a *Guardian* article characterizing him as "the architect of pop's biggest . . . chart smashes";[13]

- in a 7,190-word *New Yorker* profile saying he "rank[s] with the greatest hitmakers in pop-music history";[14]

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[11] *See Dr. Luke: The Hitmaker*, ABC WORLD NEWS (Feb. 18, 2011), https://abcnews.go.com/Nightline/video/dr-luke-hitmaker-beat-master-music-producer-katy-kesha-britney-spears-12953677 (available at https://www.youtube.com/watch?v=uWW-KavfQKAM).

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

[13] Luke Lewis, *Meet Dr Luke, The Producer Behind Smash Hits for Katy Perry and Kesha*, GUARDIAN (Aug. 13, 2010, 7:06 PM), https://www.theguardian.com/music/2010/aug/14/dr-luke-katy-perry-gottwald.

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

- on NPR's *Morning Edition* in a segment about him as one of "pop's most bankable producers."[15]

This is just a small portion of the massive amounts of publicity that Dr. Luke had received prior to the filing of this lawsuit. And while he argues in this case that "Appellant's evidence establishes that [Dr. Luke's] work is done out of the public eye," Amended Brief for Respondents dated October 7, 2020, at 26, the relevant question is not whether his day-to-day work is directly heard or seen by the public. (After all, the work of the investors in *Winklevoss* also largely took place behind closed doors.[16]) Rather, the question is whether Dr. Luke has sought and received sufficient

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[15] *Dr. Luke: The Man Behind Pop's Biggest Hits*, NPR: MORNING EDITION (Sept. 20, 2010, 12:00 AM), https://www.npr.org/templates/story/story.php?storyId=129956645.

[16] The *Winklevoss* plaintiffs' Olympic performance in the relatively low-profile sport of pair rowing had been in 2008, nine years in the past by the time of the allegedly libelous statements in *Winklevoss*, and their appearance in the film the *Social Network* was comparable to Gottwald's appearance on ABC World News Tonight. *See 2008 Summer Olympics Results—Rowing,* ESPN BEIJING 2008, https://www.espn.

fame and access to the media as a result of his professional accomplishments. And in this respect, Dr. Luke is at least in the same league as the plaintiffs in *Maule*, *Celle*, *Winklevoss*, and *Wilsey*—plaintiffs who were all treated as public figures.

II. The Majority Opinion Is in Tension With the Limited-Purpose Public Figure Decisions of This Court

Even if Dr. Luke should be treated only as a limited purpose public figure, this Court's cases make clear that this status extends to all controversies related to his professional role, which would include controversies about his alleged sexual misconduct towards his close professional associates:

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com/olympics/summer08/results?eventId=360 (noting that the Winklevoss twins finished 6th in pairs rowing); Julia March, *Winklevoss Twins Sue Marijuana Startup Investor for Defamation*, N.Y. POST (Oct. 12, 2017, 5:43 PM), https://nypost.com/2017/10/12/winklevoss-twins-sue-marijuana-startup-for-defamation/ (noting that the alleged libelous statement was made in June 2017).

1. *Alcor Life Extension Found. v. Johnson*, 136 A.D.3d 464 (1st Dep't 2016), *aff'g* 43 Misc.3d 1225(A) (Sup. Ct. 2014), held that "the actual malice standard of proof" extends to all statements about limited-purpose public figures that are "related to plaintiff's cryogenic business, which plaintiff publicized." *Id.* at 464. (Alcor had "conceded it was a limited public figure," 43 Misc.3d 1225(A), *4, but the Supreme Court went beyond accepting that concession, stating that there "can be no disputing that Alcor has been at least a limited public figure for many years," *id.* at *7; more importantly, this Court concluded that "the actual malice standard of proof" used for limited purpose public figures applies to all statements "related to plaintiff's . . . business.")
2. *Winklevoss* concluded that all the plaintiffs were "limited purpose public figures" (only the individual plaintiffs were general purpose public figures) with regard to comments about their interactions

with a prospective business partner because of "their voluntary participation in numerous interviews, in widely-covered conferences and meetings with entrepreneurs, and . . . their own radio broadcasts." 170 A.D.3d at 618.

3. *Daniel Goldreyer, Ltd. v. Dow Jones & Co., Inc.*, 259 A.D.2d 353 (1st Dep't 1999), concluded that plaintiff was a limited purpose public figure as to his allegedly "questionable techniques" as a professional art restorer, even though he had never sought publicity as to that incident and was indeed "an involuntary limited purpose public figure." *Id.* at 353.

Courts have generally defined a public controversy "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 *Tavoulareas v. Piro*, 817 F.2d 762, 778-79 (D.C. Cir. 1987), and *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1290, 1300 n.5 (D.C. Cir.

1980)). 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 about the "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 Tavoulareas*, 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").

Here, the majority opinion stated:

> To determine whether a plaintiff is a limited purpose public figure the "defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media."

Aff. Ex. C at 7 (quoting *Lerman v. Flynt Distrib. Co., Inc.*, 745 F.2d 123, 136-37 (2d Cir. 1984)). But the "subject of the litigation" has to be understood broadly to be consistent with New York precedents. Nothing in *Winklevoss*, for instance, suggests that the plaintiffs had sought publicity as to the particular deal about which the defendant had been commenting—only that they had sought publicity for their investment business generally. 170 A.D.3d at 618; *Winklevoss v. Steinberg*, No. 159079/2017, 2018 WL 4491202 (N.Y. Sup. Sept. 19, 2018).

The treatment of artists by businesspeople and executives is a topic of public controversy, whether as to artists allegedly being abused by their management team financially like Rihanna,[17] or physically like Britney

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[17] *See* Christine Kearney, *Rihanna Sues Ex-Accountants, Says She Lost Millions*, REUTERS (July 5, 2012, 11:46 AM), https://www.reuters.com/article/entertainment-us-rihanna-lawsuit/rihanna-sues-ex-accountants-says-she-lost-millions-idUSBRE86410L20120705.

Spears.[18] In fact, Dr. Luke's professional relationship with Appellant 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.[19]

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. As the dissenting opinion correctly noted, "[t]he definition of limited purpose public figure is not so cramped as to only include individuals and entities that purposefully speak about the specific, narrow

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

[19] *See* Kelsea Stahler, *The Problem with 'Free Ke$ha'*, BUSTLE (Oct. 16, 2013), https://www.bustle.com/articles/7048-free-keha-is-a-very-problematic-movement.

topic (in this case a protégé's sexual assault) upon which the defamation claim is based." Aff. Ex. C at 18; *see also, e.g., Waldbaum*, 627 F.2d at 1298 (explaining that "[m]isstatements *wholly unrelated* to the controversy" are not protected, but statements about a plaintiff's "talents, education, experience, and motives" can be "germane" to the controversy) (emphasis added).

Dr. Luke promoted himself as a producer who has strong, symbiotic relationships with his female artists. He stressed that it is his job "to find great songs with the artists, for the artists, and have them shine."[20] 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."[21] He is known for having done "quite a bit to alter the course of

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[20] NPR: MORNING EDITION, *supra* n.15.

[21] Seabrook, *supra* n.14.

gender identity in pop music," specifically for female singers.[22] Modern pop music—"female-fronted, sexually frank, dalek-voiced, fizzing with 80s synths—is broadly Gottwald's creation."[23] The fact that his work is "primarily with spunky female solo artists"[24] is not an insignificant part of his prestige—to the contrary, it is what made "the Dr. Luke Moment."[25]

He has also promoted himself to the public as someone trustworthy, who has close relationships with his artists. 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

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[22] Sean Fennessy, *Surveying the Dr. Luke Moment: A Critical Look At Lazers, 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-lazers-glitter-and-the-un-sexing-of-americas-pop-stars/.

[23] Lewis, *supra* n.13. *See also* NPR: MORNING EDITION, *supra* n.15 ("[Katy] Perry is one among a large group of young, female pop artists whom Dr. Luke has worked with.").

[24] Sternbergh, *supra* n.12.

[25] Fennessy, *supra* n.22.

did. He commented in the video, "I'm so abused. You know. And I kinda like it, . . . I am Avril's bitch, basically."[26] He also publicized his bet with Miley Cyrus that her song "Wrecking Ball" would not top the Billboard Hot 100, a bet he lost.[27]

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.

> Professional athletes can hardly be permitted to hold themselves out as public figures, seeking a maximum amount of publicity for themselves and their teams with respect to their athletic achievements, while successfully claiming strictly private status when misconduct is charged or proved. "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."

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[26] AvrilLavigneIsMyDrug, *Making of The Best Damn Thing*, YOUTUBE (Jun. 19, 2012), https://youtu.be/KY2Rh-sxs5c?t=864 (at 13:50).

[27] Seabrook, *supra* n.14.

Bell v. Associated Press, 584 F. Supp. 128, 132 (D.D.C. 1984). The same reasoning applies to immensely successful professional producers who seek publicity, like Dr. Luke. Kesha's allegations of misconduct relate to the professional career that Dr. Luke has built for himself, and to the public controversy about producers' treatment of their artists.

The tide of sexual misconduct allegations in the entertainment industry has shown the importance of "prevent[ing] 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). Both the press and alleged victims must be able to freely discuss alleged professional misconduct, armed with the full protections that the First Amendment provides in libel cases. If courts apply public figure status too narrowly in libel suits related to sexual misconduct claims, the plaintiff's lower standard of proof "would unconstitutionally inhibit debate and comment concerning" this important

public controversy. *Rosanova v. Playboy Enterprises, Inc.*, 580 F.2d 859, 862 (5th Cir. 1978).

CONCLUSION

The disagreement between the majority and the dissent in this case reflects the broader tension between the majority opinion and opinions from the Court of Appeals, the Second Circuit, and this Court. For these reasons, *amici* urge this Court to grant Appellant's motion for leave to appeal, so that the Court of Appeals can consider the matter.

Dated: JUNE 17, 2021
NEW YORK, NEW YORK

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EXHIBIT B

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, Plaintiffs, -against- KESHA ROSE SEBERT p/k/a KESHA; PEBE SEBERT; VECTOR MANAGEMENT, LLC; and JACK ROVNER, Defendants.	Index No. 653118/2014 Hon. Jennifer G. Schecter Part 54 **NOTICE OF APPEAL**
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.	

PLEASE TAKE NOTICE that Defendant and Counterclaim-Plaintiff Kesha Rose Sebert p/k/a Kesha hereby appeals to the Appellate Division of the Supreme Court of the State of New York, First Department, each and every part of the Order of the Honorable Jennifer Schecter, dated February 6, 2020 (Dkt. No. 2279), denying Kesha's motion for partial summary judgment (the "Appealed Order"), including the decision and order issued under motion sequence number 45 cited therein (Dkt. No. 2278) (the "Second Appealed Order"), except that Kesha does not appeal the Court's denial of her motion for partial summary judgment on the ground that 35 of

the allegedly defamatory statements are time barred.[1] The Appealed Order and the Second Appealed Order were entered in the above-entitled action in the Office of the Clerk of the Supreme Court of the State of New York, County of New York on February 6, 2020, and served with Notice of Entry on February 7, 2020, copies of which are attached as **Exhibit 1**.

Dated: March 9, 2020
New York, New York

Respectfully submitted,

By: /s/ Leah Godesky

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[1] The Court also entered two non-final judgments on specific claims by Gottwald and Kesha as part of its decision and order. (Dkt. Nos. 2284, 2289.) Kesha is not appealing those non-final judgments at this time, and expressly reserves the right to appeal all non-appealed aspects of the Appealed Order and non-final judgments after a final judgment has been entered in this case. *See* CPLR § 5501 ("An appeal from a final judgment brings up for review any non-final judgment or order which necessarily affects the final judgment . . ."); *accord* 10 Carmody-Wait 2d § 70:359 ("[A] party may refrain from taking a direct appeal from such a nonfinal judgment or order and bring it up for review upon an appeal from the final judgment or order.").

To: Clerk
New York County Supreme Court, Commercial Division

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Supreme Court of the State of New York
Appellate Division: First Judicial Department

Informational Statement (Pursuant to 22 NYCRR 1250.3 [a]) - Civil

Case Title: Set forth the title of the case as it appears on the summons, notice of petition or order to show cause by which the matter was or is to be commenced, or as amended.

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,

PEBE SEBERT, VECTOR MANAGEMENT, LLC , and JACK ROVNER

Defendants.

For Court of Original Instance

Date Notice of Appeal Filed

For Appellate Division

Case Type

- ☒ Civil Action
- ☐ CPLR article 75 Arbitration
- ☐ CPLR article 78 Proceeding
- ☐ Special Proceeding Other
- ☐ Habeas Corpus Proceeding

Filing Type

- ☒ Appeal
- ☐ Original Proceedings
  - ☐ CPLR Article 78
  - ☐ Eminent Domain
  - ☐ Labor Law 220 or 220-b
  - ☐ Public Officers Law § 36
  - ☐ Real Property Tax Law § 1278
- ☐ Transferred Proceeding
  - ☐ CPLR Article 78
  - ☐ Executive Law § 298
- ☐ CPLR 5704 Review

Nature of Suit: Check up to three of the following categories which best reflect the nature of the case.

☐ Administrative Review	☐ Business Relationships	☒ Commercial	☒ Contracts
☐ Declaratory Judgment	☐ Domestic Relations	☐ Election Law	☐ Estate Matters
☐ Family Court	☐ Mortgage Foreclosure	☐ Miscellaneous	☐ Prisoner Discipline & Parole
☐ Real Property (other than foreclosure)	☐ Statutory	☐ Taxation	☒ Torts

Appeal	
Paper Appealed From (Check one only):	If an appeal has been taken from more than one order or judgment by the filing of this notice of appeal, please indicate the below information for each such order or judgment appealed from on a separate sheet of paper.

☐ Amended Decree	☐ Determination	■ Order	☐ Resettled Order
☐ Amended Judgement	☐ Finding	☐ Order & Judgment	☐ Ruling
☐ Amended Order	☐ Interlocutory Decree	☐ Partial Decree	☐ Other (specify):
☐ Decision	☐ Interlocutory Judgment	☐ Resettled Decree	
☐ Decree	☐ Judgment	☐ Resettled Judgment	

Court: Supreme Court	County: New York
Dated: 02/06/2020	Entered: 02/07/2020
Judge (name in full): Hon. Jennifer G. Schecter	Index No.: 653118/2014
Stage: ■ Interlocutory ☐ Final ☐ Post-Final	Trial: ☐ Yes ■ No If Yes: ☐ Jury ☐ Non-Jury

Prior Unperfected Appeal and Related Case Information

Are any appeals arising in the same action or proceeding currently pending in the court? ☐ Yes ■ No
If Yes, please set forth the Appellate Division Case Number assigned to each such appeal.

Where appropriate, indicate whether there is any related action or proceeding now in any court of this or any other jurisdiction, and if so, the status of the case:

Original Proceeding

Commenced by: ☐ Order to Show Cause ☐ Notice of Petition ☐ Writ of Habeas Corpus	Date Filed:
Statute authorizing commencement of proceeding in the Appellate Division:	

Proceeding Transferred Pursuant to CPLR 7804(g)

Court: Choose Court	County: Choose County
Judge (name in full):	Order of Transfer Date:

CPLR 5704 Review of Ex Parte Order:

Court: Choose Court	County: Choose County
Judge (name in full):	Dated:

Description of Appeal, Proceeding or Application and Statement of Issues

Description: If an appeal, briefly describe the paper appealed from. If the appeal is from an order, specify the relief requested and whether the motion was granted or denied. If an original proceeding commenced in this court or transferred pursuant to CPLR 7804(g), briefly describe the object of proceeding. If an application under CPLR 5704, briefly describe the nature of the ex parte order to be reviewed.

Defendant and Counterclaim-Plaintiff Kesha Sebert seeks reversal of the Order of Supreme Court, New York County (Hon. Jennifer Schecter) denying Kesha's Motion for Partial Summary Judgment (Dkt. 2279), including the decision and order issued under motion sequence number 45 cited therein (Dkt. 2278).

Informational Statement - Civil

Issues: Specify the issues proposed to be raised on the appeal, proceeding, or application for CPLR 5704 review, the grounds for reversal, or modification to be advanced and the specific relief sought on appeal.

Kesha seeks reversal of the Order denying Kesha's Motion for Partial Summary Judgment on the ground that she is entitled to judgment as a matter of law that Gottwald is not a private figure and can only recover for defamation if the allegedly defamatory statements were made with actual malice or gross irresponsibility. Kesha further seeks reversal of the Order on the ground that (i) the alleged defamatory statements are privileged under New York law; (ii) Kesha is not liable as a matter of law for the statements of her mother and a fan; and (iii) the allegedly defamatory statements are non-actionable opinions.

Party Information

Instructions: Fill in the name of each party to the action or proceeding, one name per line. If this form is to be filed for an appeal, indicate the status of the party in the court of original instance and his, her, or its status in this court, if any. If this form is to be filed for a proceeding commenced in this court, fill in only the party's name and his, her, or its status in this court.

No.	Party Name	Original Status	Appellate Division Status
1	Kesha Rose Sebert p/k/a Kesha	Defendant	Appellant
2	Lukasz Gottwald p/k/a Dr. Luke	Plaintiff	Respondent
3	Kasz Money, Inc.	Plaintiff	Respondent
4	Prescription Songs, LLC	Plaintiff	Respondent
5	Pebe Sebert	Defendant	None
6	Vector Management, LLC	Defendant	None
7	Jack Rovner	Defendant	None
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Attorney Information

Instructions: Fill in the names of the attorneys or firms for the respective parties. If this form is to be filed with the notice of petition or order to show cause by which a special proceeding is to be commenced in the Appellate Division, only the name of the attorney for the petitioner need be provided. In the event that a litigant represents herself or himself, the box marked "Pro Se" must be checked and the appropriate information for that litigant must be supplied in the spaces provided.

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E-mail Address:			
Attorney Type: ☐ Retained ☐ Assigned ☐ Government ☐ Pro Se ☐ Pro Hac Vice			
Party or Parties Represented (set forth party number(s) from table above):			

EXHIBIT 1

SUPREME COURT FOR 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
Plaintiffs,	:	Justice Jennifer Schecter
-against-	:	IAS Part 54
KESHA ROSE SEBERT p/k/a KESHA,	:	**Motion Seq. No. 46**
Defendant.	:	
KESHA ROSE SEBERT p/k/a KESHA,	:	
Counterclaim-Plaintiff,	:	
-against-	:	
LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC, and DOES 1 – 25, inclusive,	:	
Counterclaim-Defendants.	:	

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the within is a true copy of a Decision and Order of Justice Jennifer Schecter entered in the office of the Clerk of the Supreme Court of the State of New York for the County of New York on February 6, 2020. The Decision and Order was filed as NYSCEF Nos. 2279 and 2278, which are enclosed herewith.

DATED: New York, New York
February 7, 2020

MITCHELL SILBERBERG & KNUPP LLP

By: /s/ Jeffrey M. Movit

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Attorneys for Lukasz Gottwald p/k/a Dr. Luke, Kasz Money, Inc., and Prescription Songs, LLC

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JENNIFER G. SCHECTER **PART** IAS MOTION 54EFM

Justice

----------X

LUKASZ GOTTWALD, KASZ MONEY, INC., PRESCRIPTION SONGS, LLC,

Plaintiffs,

- v -

KESHA SEBERT,

Defendant.

----------X

INDEX NO. 653118/2014

MOTION DATE

MOTION SEQ. NO. 046

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 045) 1693, 1694, 1695, 1696, 1697, 1698, 1699, 1700, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714, 1715, 1716, 1717, 1718, 1719, 1720, 1721, 1722, 1723, 1724, 1725, 1726, 1727, 1728, 1729, 1730, 1731, 1732, 1733, 1734, 1735, 1736, 1737, 1738, 1739, 1740, 1741, 1742, 1743, 1744, 1745, 1746, 1747, 1748, 1749, 1750, 1751, 1752, 1753, 1754, 1755, 1756, 1757, 1758, 1759, 1760, 1761, 1762, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, 1783, 1784, 1785, 1786, 1787, 1788, 1789, 1790, 1791, 1792, 1793, 1794, 1795, 1796, 1797, 1798, 1799, 1800, 1801, 1802, 1803, 1804, 1805, 1806, 1807, 1808, 1809, 1810, 1811, 1812, 1813, 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER .

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were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Decided in accordance with the decision and order issued under motion sequence number 045.

2/6/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JENNIFER G. SCHECTER** **PART** **IAS MOTION 54EFM**

Justice

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LUKASZ GOTTWALD, KASZ MONEY, INC., PRESCRIPTION SONGS, LLC,

Plaintiffs,

- v -

KESHA SEBERT,

Defendant.

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INDEX NO. 653118/2014

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were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

Upon the foregoing papers it is ordered that motion sequence numbers 045 and 046 are consolidated for disposition and are decided in accordance with the accompanying decision and order. It is further ordered that plaintiffs file a proposed judgment to the clerk as to the monetary relief awarded.

2/6/2020
DATE

JENNIFER G. SCHECTER, J.S.C.

CHECK ONE:	☐	CASE DISPOSED		☒	NON-FINAL DISPOSITION	
APPLICATION:	☐	GRANTED	☐ DENIED	☐	GRANTED IN PART	☐ OTHER
	☐	SETTLE ORDER		☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

----------X

LUKASZ GOTTWALD p/k/a DR. LUKE, KASZ MONEY, INC., and PRESCRIPTION SONGS, LLC,

Plaintiffs,

-against-

KESHA ROSE SEBERT p/k/a KESHA,

Defendant.

----------X

Index No.: 653118/2014

DECISION & ORDER

JENNIFER G. SCHECTER, J.:

In this defamation and breach-of-contract action, plaintiffs Lukasz Gottwald (Gottwald), Kasz Money, Inc. (KMI) and Prescription Songs, LLC (Prescription) move for partial summary judgment against defendant Kesha Rose Sebert (Kesha) (seq. 045). Kesha opposes and moves for partial summary judgment against plaintiffs, which they oppose (seq. 046). Plaintiffs' motion is granted in part and defendant's motion is denied.

BACKGROUND

Gottwald, known professionally as "Dr. Luke," is a songwriter and music producer. In 2005, he heard Kesha's demo tape and decided that he wanted to work with her. After meeting, Gottwald and Kesha each retained independent entertainment counsel to negotiate an agreement for KMI, a corporation controlled by Gottwald, to record and produce Kesha's music. Kesha and KMI executed a written agreement dated September 26, 2005 (Dkt. 1742 [the KMI Agreement]). The KMI Agreement obligates Kesha to provide exclusive recording services to KMI for a specified term, which at KMI's election could be extended through the release of her sixth album, and to engage

Gottwald as producer for at least six recordings on each album for which he would receive royalties (Dkt. 1694 at 10; *see* Dkt. 1742 at 3-6).

Shortly after entering into the KMI Agreement, on October 5, 2005, Gottwald and Kesha attended Nicky Hilton's birthday party at a Los Angeles nightclub. They both drank at the party. On the way out of the club, Kesha alleges that Gottwald gave her a "sober pill," which was really a roofie (Dkt. 252 at 22; Dkt. 1703 at 12). They proceeded to an afterparty at Paris Hilton's house where Kesha had more to drink. Kesha became very ill possibly because of food poisoning, alcohol or a roofie. After vomiting in a closet, Kesha was kicked out of the party. Kesha only has a vague recollection of what happened next. It is undisputed that Gottwald took Kesha to his hotel--he says they walked; she thinks they took a car--and that she slept in the bed. Gottwald insists that he slept, fully clothed, on the couch and that there was no sexual contact whatsoever between them.

The next morning, Gottwald got up before Kesha because he had to go to the recoding studio. Before leaving, Gottwald told Kesha, who was feeling very sick, that she could stay at the hotel for the rest of the day. Though she has no memory of Gottwald assaulting her, Kesha maintains that he raped her during the night because she felt ripped and sore and experienced the after effects of a roofie (*see* Dkt. 1839 at 61, 75).[1]

[1] Many facts related to the events of October 5 and 6, 2005 are disputed. The court does not know what transpired between the parties and is not tasked with fact finding. That is solely the job of the jury.

On Gottwald's recommendation, Kesha subsequently hired David Sonenberg of DAS Communications Ltd. as her manager. Sonenberg immediately tried to renegotiate the KMI Agreement because he secured a deal for Kesha with Warner Brothers. Gottwald objected to the Warner Brothers arrangement, asserting that it contravened the terms of the KMI contract. Kesha hired lawyers who challenged the validity of the KMI Agreement and threatened Gottwald with bad publicity if he refused to give in to Kesha's demands (*see* Dkt. 1764 at 3 ["Kesha has advised us that she has every intention of bringing all of your client's prior behavior to light in the event he continues to try and enforce what he believes, incorrectly, are his contractual rights"]). The KMI Agreement, however, was not renegotiated.

In 2008, Kesha changed representation and began working with Gottwald. She hired a new lawyer, who helped her negotiate and execute amendments to the KMI Agreement, including a letter agreement that capped KMI's ability to extend its exclusive arrangement with Kesha to the release of her fifth album instead of her sixth (Dkt. 1743 [2008 amendment]; Dkt. 1744 [2009 amendment]). Kesha also later agreed to two additional contracts with plaintiffs: a Co-Publishing and Exclusive Administration Agreement, dated November 26, 2008 (Dkt. 1496 [the Prescription Agreement]), governing the rights of Prescription, an LLC controlled by Gottwald, to publish her music and an agreement dated January 27, 2009 (the RCA Agreement), between KMI and RCA, a Sony Music label (Dkt. 1733 at 64 [the Assent]).

In 2010, after releasing her fist album, *Animal*, which included hit songs such as "Tik Tok," Kesha achieved tremendous success. It is undisputed that Gottwald and

Kesha worked together closely on the album. They were still, however, dealing with the fallout from disputes involving Sonenberg, who had sued Gottwald (*see DAS Communications, Ltd. v Sebert*, Index No. 650457/2010 [Sup Ct, NY County]). It was alleged that Kesha, through her mother Pebe, told Sonenberg that, on the night of October 5, 2005, Gottwald drugged and raped her. On June 16, 2011, at her deposition in that action, Kesha testified under oath that (1) Gottwald never gave her a roofie, (2) she did not remember telling Pebe that she woke up in Gottwald's bed without memory of what had occurred the night before and (3) she never had "an intimate relationship with Gottwald" (Dkt. 1539 at 57-58, 61). She further testified that Gottwald "never made sexual advances" at her (*id.* at 62). Pebe testified at her deposition, on October 18, 2011, that before meeting Sonenberg she was unaware of Kesha having had "any kind of sexual relationship" with Gottwald or that Gottwald had given Kesha drugs of any kind, including a date-rape drug (*see id.* at 67-68).[2]

In late 2011 and early 2012, Kesha again sought to renegotiate her contracts with Gottwald. She hired counsel and did not show up for her recording sessions. Kesha's management team described their efforts as a "jihad" against Gottwald who was "no friend of an artist" (*see* Dkt. 1781). In an April 2, 2012 email, they wrote that they should "battle [Gottwald] in the press" and take "down his business" (Dkt. 1783). In a May 25, 2012 email, her management wrote that Kesha despised Gottwald and that, after completion of the album that was underway, they wanted to "ruin" him (*see* Dkt. 1782).

[2] At their depositions in this action, Kesha and Pebe explained their prior testimony. It is up to the jury to decide what testimony is true.

In 2013, after Gottwald did not accede to Kesha's demands, she stopped working with him. She refused to deliver new compositions pursuant to the Prescription Agreement and stopped paying royalties owed under the KMI Agreement. Kesha hired two new lawyers, Mark Geragos and Kenneth Meiselas.

On October 30, 2013, Pebe indicated that, unless Gottwald released Kesha from all legal contracts and returned all of Pebe's publishing, she was going to "tell the truth" and make "really public" that Gottwald drugged and date raped Kesha (*see* Dkt. 1784). On December 30, 2013, Pebe emailed Gottwald's business partners that "Dr. Luke abused Kesha both physically and mentally" (*see* Dkt. 1725 [the December 2013 Email]). She then sent the email to Michael Eisele "the blogger who . . . started the whole 'Free Kesha' thing" (*see* Dkt. 1786; Dkt. 1798). Thereafter, Pebe and Eisele discussed edits to a message that he planned to send Gottwald, RCA and Sony on behalf of the Free Kesha movement, urging them to "take the necessary action" to end Kesha's "horrendous contract" that was "signed by an 18 year old girl, who . . . already suffered . . . for her mistake" (Dkt. 1799).

During the summer of 2014, Meiselas met with Sony's general counsel and provided her with a draft complaint alleging that Gottwald had drugged and raped Kesha in 2005. Meiselas informed Sony that the complaint would be filed if Sony did not let Kesha out of her contract. Kesha's team, including her lawyers and the public relations firm SS KS LLC (Sunshine Sachs), prepared a press plan related to their impending litigation with Gottwald (*see* Dkt. 1712 [Press Plan]). The Press Plan stated: "Our goal is to help extricate CLIENT K from her current professional relationship with PERSON L

by inciting a deluge of negative media attention and public pressure on the basis of the horrific personal abuses presented in the lawsuit" (*id.* at 2). The press announcements were timed "to achieve the maximum level of negative publicity" (*id.*).

On October 14, 2014, the parties sued each other in separate actions in separate states (*see* Dkt. 1). Kesha sued Gottwald in California (the California Action), alleging, among other things, sexual assault, sexual harassment, gender violence and unfair competition in violation of California law (Dkt. 1978). Gottwald commenced this case. After the California judge determined that the governing contracts' forum-selection clauses mandated proceeding in New York, Kesha withdrew the California Action. Plaintiffs filed their first amended complaint in December 2014 (Dkt. 39) and in July 2015, Kesha filed counterclaims against plaintiffs and Sony (Dkt. 252), which plaintiffs and Sony moved to dismiss.

In September 2015, Kesha moved for a preliminary injunction, seeking an order permitting her to make music without plaintiffs and releasing her from her agreements with them. About a month later, Kesha amended her counterclaims to include, among other causes of actions, claims that she had previously brought in the California Action (Dkt. 336), which plaintiffs and Sony then moved to dismiss. In February 2016, after oral argument, the court denied Kesha's preliminary-injunction motion and reserved on the dismissal motions (*see* Dkt. 496 [2/19/16 Tr.]).

By order dated April 6, 2016, the court dismissed all but one of Kesha's counterclaims and denied leave to amend because even if the sexual assault occurred, the counterclaims could not be maintained. Some claims were time barred and there was no

subject matter jurisdiction over others (Dkt. 504 [the April 2016 Decision] at 16-23). Kesha appealed denial of the injunction and dismissal of her counterclaims but later withdrew both appeals (*see* Dkt. 1154; Dkt. 1155).[3]

In January 2017, plaintiffs moved for leave to file a second amended complaint and Kesha moved for leave to file amended counterclaims. The court granted plaintiffs' motion without opposition (Dkt. 794). By order dated March 20, 2017, the court denied Kesha's motion, holding that her proposed amended counterclaims lacked merit (Dkt. 809 [the March 2017 Decision]). The court held that Kesha had failed to perform under the KMI Agreement (*id.* at 5-7) and that it was not legally impossible for her to perform under the KMI and Prescription Agreements (*id.* at 8). The Appellate Division affirmed (161 AD3d 679 [1st Dept 2018]).

By order dated August 31, 2018, the court granted plaintiffs' motion to file a third amended complaint (TAC), holding that a reasonable finder of fact could conclude that "the California complaint was a sham maliciously filed solely to defame plaintiffs" (Dkt. 1537 [the August 2018 Decision] at 9, *affd* 172 AD3d 445 [1st Dept 2019]). The TAC contains four causes of action: (1) defamation related to Kesha's assertions that Gottwald sexually assaulted her, (2) defamation related to a statement that Kesha made to Lady Gaga that Gottwald raped Katy Perry, (3) breach of the KMI Agreement and (4) breach of the Prescription Agreement (Dkt. 1539). Kesha answered the TAC and asserted 39

[3] Abandonment of her appeals is a fact that a jury could reasonably consider in assessing whether the California complaint was a sham or whether its contents are privileged.

affirmative defenses in addition to her remaining counterclaim (Dkt. 1540). Plaintiffs filed a note of issue in September 2018, requesting a jury trial (Dkt. 1541).

The parties now move for partial summary judgment.

DISCUSSION

Summary judgment may only be granted if there are no material disputed facts (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]). The moving party bears the burden of making a prima-facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Failure to make such a showing requires denial of the motion regardless of the sufficiency of the opposing papers (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993]). If a prima-facie showing has been made, then the burden shifts to the opposing party to produce evidence sufficient to establish the existence of a material question of fact (*Alvarez,* 68 NY2d at 324; *Zuckerman,* 49 NY2d at 562). The evidence must be construed in the light most favorable to the opposing party and the motion must be denied if there is any doubt as to the existence of a triable issue (*Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]; *Martin v Briggs*, 235 AD2d 192, 196 [1st Dept 1997]). Mere conclusions, unsubstantiated allegations or expressions of hope, however, are insufficient to defeat summary judgment (*Zuckerman,* 49 NY2d at 562).

DEFAMATION

Defamation is publication of a false statement about a person tending "to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion" of the plaintiff "in the minds of right-thinking persons" and deprive that individual of

"friendly intercourse in society" (*Frechtman v Gutterman*, 115 AD3d 102, 104 [1st Dept 2014]). A defamation plaintiff must establish that a false statement was published to a third party without privilege or authorization and that it caused harm, unless the statement is defamatory per se in which case it is actionable regardless of harm (*Stepanov v Dow Jones & Co.*, 120 AD3d 28, 34 [1st Dept 2014])

A false accusation of rape, a serious crime, is defamation per se (*see Thomas H. v Paul B.*, 18 NY3d 580, 584 [2012]; *Liberman v Gelstein*, 80 NY2d 429, 435 [1992]; *see also Sprewell v NYP Holdings, Inc.*, 1 Misc 3d 847, 852 [Sup Ct, NY County 2003]; *Goldman v Reddington*, 2019 WL 4736803 [EDNY Sep. 27, 2019]; *Franco v Diaz*, 51 F Supp 3d 235, 244 [EDNY 2014]; Restatement (Second) of Torts § 571 cmt g [1977]).

Statements that Gottwald Drugged, Raped and Sexually Assaulted Kesha

Both parties move for partial summary judgment on legal issues that will narrow the scope of the trial. In seeking only partial summary judgment, they acknowledge the obvious: that this case cannot be finally resolved without an assessment of credibility. It will be incumbent on a jury to decide what has been sufficiently proven. If the jury ultimately finds that statements Kesha and her agents made are not false, she cannot be liable for defamation under any circumstances and the defamation-related issues that follow would be academic.

Proof of Fault: Actual Malice and Gross Irresponsibility

Defamation jurisprudence has evolved from the tension between balancing the First Amendment's right of freedom of speech with protecting an individual from harm caused by dissemination of damaging, false information (*Gertz v Robert Welch, Inc.*, 418

US 323, 325 [1974]). To ensure robust discourse about certain matters without fear and prior restraint, courts have adopted certain safeguards applicable under certain circumstances. Not all false statements are actionable (*id.* at 341).

Though some proof of fault is required, states are generally free to define the appropriate standard of liability for defamatory falsehoods related to private individuals even if the statements relate to a matter of public interest (*Gertz,* 418 US at 347). The United States Constitution, however, mandates more latitude for false statements related to public figures who are less vulnerable because they "usually enjoy significantly greater access to the channels of communication" and "have a more realistic opportunity to counteract false statements than private individuals normally enjoy" (*id.* at 344; *see Kipper v NYP Holdings Co., Inc.*, 12 NY3d 348, 355 [2009] [falsehoods related to public figures are "inevitable in free debate" so publishers must have "breathing space"]). To recover for defamation, 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 (*Kipper*, 12 NY3d at 353, citing *New York Times Co. v Sullivan*, 376 US 254, 279-80 [1964]).

Public figures are those who have "assumed roles of especial prominence in the affairs of society" (*Gertz*, 418 US at 345). Few people attain "positions of such pervasive power and influence that they are deemed public figures for all purposes" (*id.*; *see Waldbaum v Fairchild Publications, Inc.*, 627 F2d 1287, 1292 [DC Cir 1980], *cert. denied* 449 US 898 [1980]). More commonly "those classed as public figures have thrust

themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" (*Gertz*, 418 US at 345).

Kesha urges that Gottwald is a public figure and can only recover for defamation if statements asserting that he drugged, raped and sexually assaulted her were made with actual malice. Gottwald certainly is not a "general public figure." Although he may be well known in music-industry circles, he has never been a household name or achieved general pervasive fame and notoriety in the community (*Gertz*, 418 US at 351-52; *Waldbaum*, 627 F2d at 306).

Nor is he a limited-purpose public figure. A person is a limited-purpose public figure "regarding a particular issue or subject when he or she voluntarily injects him or herself into a public controversy with a view toward influencing it" (*Krauss v Globe Intl., Inc.*, 251 AD2d 191, 192 [1st Dept 1998]). Gottwald did not thrust himself into the vortex of the public issues or engage the public's attention on the important public matters implicated by the defamatory statements (*see Time, Inc. v Firestone*, 424 US 448, 454-55 [1976] [public controversy alone insufficient; plaintiff must assume "special prominence" in resolution of "public questions"]; *see also Gubarev v Buzzfeed, Inc.*, 354 F Supp 3d 1317, 1328 [SD Fla 2018] ["Plaintiffs must be more than 'tangential participants' in the controversy; they must have achieved 'special prominence' in it" and "either '(1) must purposely try to influence the outcome of the public controversy, or (2) could realistically have been expected, because of (their) position in the controversy, to have an impact on its resolution'"], citing *Waldbaum*, 627 F2d 1297; *contrast Kipper*, 12 NY3d at 353 n 3 [in action related to statements about his medical license, plaintiff was a

public figure due to, among other things, "his more than 100 television appearances as a medical expert"]; *Maule v NYM Corp.*, 54 NY2d 880, 882-83 [1981] [plaintiff, who projected his name and personality before millions of readers and viewers "to establish his reputation as a leading authority on professional football," was a public-figure defamation plaintiff as to statements denigrating his professional abilities]; *James v Gannett Co.*, 40 NY2d 415, 423 [1976] ["plaintiff welcomed publicity regarding her performances, and therefore, must be held to be a public figure with respect to newspaper accounts of those performances"]; *Farber v Jefferys*, 103 AD3d 514, 515 [1st Dept 2013] [plaintiff, through publication of "countless articles" on whether HIV causes AIDS, projected her name and personality to establish herself as a "leading authority" and was a limited public figure with respect to statements discrediting her research]; *Park v Capital Cities Communications*, 181 AD2d 192 [4th Dept 1992] [physician who invited favorable publicity for practice by appearing on television to discuss medical procedures was a public-figure plaintiff in defamation action related to broadcast about whether he performed unnecessary surgery]; *Waldbaum*, 627 F2d at 313-14 [status as "an executive within a prominent and influential company does not by itself make one a public figure;" plaintiff's role as an activist in public controversy "concerning unit pricing, open dating, the cooperative form of business and other issues" rendered him a limited public figure in action related to statement about whether his business lost money and was retrenching]).

Though Gottwald has sought publicity for his label, his music and his artists--none of which are the subject of the defamation here--he never injected himself into the public

debate about sexual assault or abuse of artists in the entertainment industry.[4] The only reason Gottwald has any public connection to the issues raised in this lawsuit is because they were raised in this lawsuit. That cannot convert him into a limited public figure (*see Krauss*, 251 AD2d at 192-193; *Waldbaum*, 627 F2d at 1295 n 19 [public figure inquiry focuses on plaintiff before defamation was published otherwise "press could convert a private individual into a general public figure simply by publicizing the defamation itself and creating a controversy surrounding it"]; *Hutchinson v Proxmire*, 443 US 111, 135 [1979] [defamation defendants "cannot, by their own conduct, create their own defense by making the claimant a public figure"]). Because Gottwald is not a public figure for purposes of determining the constitutional protection afforded to statements by Kesha that he drugged, raped and sexually assaulted her (*Time, Inc.*, 424 US at 455), the actual-malice standard is inapplicable.

Plaintiffs need not prove gross irresponsibility under these circumstances either. The grossly-irresponsible standard, by its terms, does not apply to a first-hand account of events not involving any media publication, investigation or newsgathering (*see*

[4] Defendant's reliance on *Maule*, for example, is misplaced because, in that case, there was a close nexus between the defamatory statements and the purposeful activity undertaken by the plaintiff to "thrust himself into the public eye" (*Maule,* 54 NY2d at 883). The alleged defamation in *Maule* denigrated the plaintiff's writing abilities and the product of his craft--"his books, articles and personal appearances--were obviously designed to project his name and personality before millions of readers" and television viewers "and to establish his reputation as a leading authority on professional football;" he not only "welcomed but actively sought publicity for his views and professional writing" (*id.* at 882-83). The same is true of the other cases defendant cites (*see* Dkt. 2200 at 10-11, citing *Kipper*, 12 NY3d at 351 [actual-malice standard applied for physician who sought fame in profession where defamation related to medical license]; *Roche v Mulvihill*, 214 AD2d 376 [1st Dept 1995] [actual-malice standard applied as defamatory statements related to Roche's comedic ability]). The defamatory statements at issue here, by contrast, are wholly unrelated to any purposeful activity undertaken by plaintiffs.

Chapadeau v Utica Observer-Dispatch, Inc., 38 NY2d 196, 199 [1975] [where the content of an article is a matter of public concern a party may only recover after establishing "by a preponderance of the evidence, that the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties"]).[5]

Liability for Statements by Alleged Agents

Kesha pleads that she did not "authorize, direct, or have knowledge" of statements made by others and therefore cannot be liable for them (Dkt. 1540, 34th affirmative defense). A party authorizing others to speak on its behalf can be held vicariously liable for defamatory statements made by its agents (*National Puerto Rican Day Parade, Inc. v Casa Publs. Inc.*, 79 AD3d 592, 594-95 [1st Dept 2010]; *see also Geraci v Probst*, 15 NY3d 336, 342 [2010]; *Levy v Smith*, 132 AD3d 961, 962-63 [2d Dept 2015] [facts permitted reasonable inference that "appellant intended and authorized the republication"]; *Hoffman v Landers*, 146 AD2d 744, 747 [2d Dept 1989] [maker of defamatory statement "is not responsible for its recommunication without . . . authority or request by another over whom he has no control"]). At issue is whether, as a matter of law, Kesha should be held liable for statements that her press agent, lawyer, mother and Michael Eisele--organizer of the Free Kesha campaign--made.

[5] Cases applying gross irresponsibility focus on information gathering and procedure or media publication (*see e.g. Huggins v Moore*, 94 NY2d 296, 303 [1999] ["*Chapadeau* standard is deferential to professional journalistic judgments"]; *Rainbow v WPIX, Inc.*, 2020 WL 369548, at *1 [1st Dept Jan. 23, 2020] [analyzing responsibility in relying on sources of information]; *see also Konikoff v Prudential Ins. Co. of Am.*, 234 F3d 92, 101 [2d Cir 2000] [*Chapadeau* applies "where the communication at issue admits of measurement by the *Chapadeau* standard"]; *McGill v Parker*, 179 AD2d 98, 108 [1st Dept 1992] ["gross irresponsibility standard may not always be apt in the case of a non-media defendant" reporting observations]).

Press Agent

A week before the California Action was commenced, Mark Geragos retained Sunshine Sachs to provide public-relations services "for the exclusive benefit" of Kesha (Dkt. 1705). Sunshine Sachs' very job was to speak on Kesha's behalf. Indeed, the only reason Sunshine Sachs made any of the statements or formulated the Press Plan was because Kesha paid it to do so. As a matter of law, if plaintiffs prove that Sunshine Sachs' statements were defamatory and a privilege does not apply, then Kesha will be held vicariously liable.

Kesha's Lawyer

The same is true for Geragos' statements. As Kesha's lawyer, Geragos was her agent with speaking authority. He filed the California complaint that is alleged to be a sham and the catalyst for Kesha's publicity campaign on Kesha's behalf. He spoke to the media on Kesha's behalf.

To avoid liability based on Geragos' statements, Kesha invokes her retainer agreement, which sets forth that "Attorney will not engage in any publicity . . . (including, without limitation, making any public statements, issuing any press releases or engaging in any interviews with members of the press) without [her] prior approval" (Dkt. 1702 ¶ 9). She swears that she did not "review or receive" the Press Plan itself or know that "the strategy memorandum was prepared" and that she "did not authorize, direct, approve of, or have advance knowledge of" Geragos' particular public statements that are the subject of this suit (Dkt. 2177 ¶¶ 7-8).

Kesha does not, however, deny that Geragos was authorized to hire Sunshine Sachs as a press agent on her behalf or that she gave him approval generally to handle publicity, make public statements, issue press releases and conduct interviews with members of the press, all of which he did regularly and starting from very early on. Lack of prior knowledge and individualized approval of the particular details or specific contents of the statements does not make them unauthorized.[6] Significantly, there is no evidence that Kesha ever stopped Geragos from engaging in these usual activities to further her cause. There can be no doubt that Geragos' media communications were "generally foreseeable" and undertaken for her benefit, not for "personal motives unrelated to the furtherance" of her interests (*Murray*, 130 AD2d at 831; *see Gorman v Sachem Cent. Sch. Dist.*, 262 AD2d 355 [2d Dept 1999] [defamation defendants failed to demonstrate that they did not know about, acquiesce in, or ratify the complained-of acts . . . (and that the) conduct was wholly personal in nature and outside the scope" of the employment]).

Pebe Sebert and Michael Eisele

In contrast, there can be no matter of law determination that either Pebe Sebert or Michael Eisele were Kesha's agents when they made statements about Gottwald.

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[6] Even if Geragos breached the retainer agreement, and there is no evidence that he did, it would not alter the analysis because a principal is liable for its agent's acts when the conduct is generally within the scope of the agent's authority (*see Murray v Watervliet City Sch. Dist.*, 130 AD2d 830, 831 [3d Dept 1987] ["An act falls within the scope of an (agent's) duties when the (agent) is doing his master's work, no matter how irregularly, or with what disregard of instructions"]; *see Maurillo v Park Slope U-Haul*, 194 AD2d 142, 147 [2d Dept 1993] ["Agency liability exists even though the principal does not specifically ratify, participate in, or know of such 'misconduct'" or even if act was forbidden; mere "deviation from the ordinary route or from that selected by the master, even for a purpose conceived by the servant, does not relieve the master from liability if his business, generally speaking, is still being carried on"]).

It is unclear whether Kesha's mother Pebe was acting as her daughter's agent when she sent the December 2013 Email (Dkt. 1725). Although Kesha's attorney asserted that Pebe sent the email as Kesha's agent (*see* Dkt. 1724 at 22), that informal judicial admission is not dispositive (*MPEG LA, LLC v Samsung Elecs. Co.*, 166 AD3d 13, 21 [1st Dept 2018]).[7] Indeed, Kesha adduces evidence that her manager asked her mother to "stop" and that Pebe may have had her own independent motives for her statements (Dkt. 2208). She sufficiently raises issues of fact as to whether her mother was acting on her behalf and whether she was authorized to speak for her.

Similarly, there are questions of fact about whether Eisele was Kesha's authorized agent. Kesha and Eisele were in direct communication concerning Kesha's claims about Gottwald. Eisele disseminated these allegations in public and online as part of the Free Kesha movement, often using Kesha's own words. Kesha--who gave Eisele gifts and paid for his hotel rooms so that he could protest her treatment--requested that Eisele post information (the exact contours of which are unclear) online and Eisele eagerly complied (*see* Dkt. 2050 at 46-48; Dkts. 1805-1806). Kesha even told Eisele to delete their text messages because "it just can't seem we are as close as we are" (*see* Dkt. 1804). This evidence could support a reasonable conclusion that Eisele was part of Kesha's public-relations strategy and served as her agent. Whether Eisele took direction from Kesha when he communicated the allegedly defamatory statements or whether he was independently inspired by her is a question for the jury.

[7] The admission was made during Meiselas' deposition for the express purpose of invoking the attorney-client privilege so that plaintiffs' counsel could not ask Meiselas about his communications with Pebe–who was not his client (*see* Dkt. 1724 at 22). Kesha is now walking back that admission; thus, her privilege objection is no longer viable.

Affirmative Defenses to Defamation

The parties move for summary judgment on several of Kesha's defamation-related affirmative defenses.[8]

Protected Opinion & Rhetorical Hyperbole

Both parties move for judgment on whether, as a matter of law, 18 statements constitute protected opinion or hyperbole that cannot be actionable (Dkt. 1540, 21st and 36th affirmative defenses); Kesha contends they are and plaintiffs maintain they are not (*see* Dkt. 1832).

Defamation claims may only be predicated on false factual statements. Because opinions cannot be proven false, they do not give rise to liability (*Thomas H.*, 18 NY3d at 584; *see Martin v Daily News L.P.*, 121 AD3d 90, 100 [1st Dept 2014]; *Sandals Resorts Intl. Ltd. v Google, Inc.*, 86 AD3d 32, 38 [1st Dept 2011]). Whether a statement is one of opinion or objective fact is a question of law (*Mann v Abel*, 10 NY3d 271, 276 [2008]).

The statements at issue assert, as a matter of fact, that Gottwald drugged and raped Kesha (*see Thomas H.*, 18 NY3d at 585-586; *Mann*, 10 NY3d at 276; *Gross v New York Times Co.*, 82 NY2d 146, 152-53 [1993]).[9] They are undoubtedly factual because their

[8] Only contested affirmative defenses that have not already been addressed are analyzed in this decision. Kesha's affirmative defenses that the claims are barred by the statute of limitations and have been pled insufficiently are rejected for the reasons set forth in the August 2018 Decision (*see* August 2018 Decision at 3-6, 9). Amendment would not have been allowed had the claims been beyond the statute of limitations or inadequately pleaded. Kesha does not oppose dismissal of her libel-proof-plaintiff affirmative defense.

[9] Almost each and every statement that is the subject of Kesha's summary-judgment motion explicitly refers to Gottwald drugging, raping or sexually assaulting her (*see* Dkts. 1832-1833). To the extent that a few of these statements do not contain express references to rape or sexual assault, summary judgment still cannot be awarded on this record because the statements, which refer to or imply physical "abuse" (*see e.g.* Dkt. 1832 at 4 [#15]; Dkt. 1833 at 1 [#2-4], 4 [#14 &

precise meaning is clear and unequivocal: Gottwald drugged and raped Kesha.[10] The statements can be proven true or false because Gottwald either drugged and raped Kesha or he didn't. The overall context of the statements, moreover, is unmistakably indicative of factual assertions. After all, Kesha sued Gottwald for, in fact, drugging and raping her. She wanted to be released from her contracts with plaintiffs because she maintains that Gottwald did drug and rape her. She hired Geragos to pursue justice on her behalf because she asserts that Gottwald drugged and raped her not simply because those events may or may not have happened in her opinion.

For the same reasons, none of the statements qualify as rhetorical hyperbole. Each statement conveys exactly what its speaker intended to convey: that Gottwald drugged, raped and sexually assaulted Kesha and is a criminal for doing so like Bill Cosby. In the context of this litigation and of her very serious assertions, Kesha cannot be suggesting that the statements are not factual or are exaggerations. Kesha's belief that a litigation privilege applies to allegations in her California complaint and to statements related to litigation does not render the statements nonfactual opinions.

17]) are still potentially susceptible to a defamatory meaning if a jury were to find that the speaker was referring to the alleged rape. It is questionable whether these particular statements matter to Gottwald considering that the explicit statements and allegations alone were likely enough to have caused all of the alleged damage to his reputation. On this record, the court cannot rule out liability as a matter of law.

[10] Even equivocal accusations, unlike the ones here, can be deemed statements of facts (*see Thomas H.*, 18 NY3d at 585 ["a reasonable listener would have understood that defendants intended to label plaintiff as a child rapist. Hence, the statements would be actionable even if they were couched in the form of an opinion ('I think plaintiff sexually assaulted my child'), rather than fact ('plaintiff sexually assaulted my child')"]).

Litigation Privileges

Kesha moves for summary judgment dismissal of the defamation claim as to certain statements, arguing that there can be no liability because "it is undisputed that they were made (i) during settlement discussions as pertinent to good-faith anticipated litigation (2 statements); (ii) by Kesha in litigation filings (6 statements); or (iii) by Kesha or her attorneys to contextualize litigation developments (19 statements)" (Dkt. 1824 at 40).

Ordinarily, statements made during or in connection with good-faith anticipated litigation are privileged and cannot give rise to defamation liability. Here, however, there are sharply disputed questions of fact going to the heart of the case about whether Kesha's California complaint was brought in good faith, as Kesha asserts, or whether it was a "sham" intended to defame and pressure plaintiffs, as plaintiffs assert (*see* August 2018 Decision at 8-9 [collecting cases];[11] *see also Williams v Williams*, 23 NY2d 592, 599 [1969] ["it was never the intention of the Legislature in enacting section 74 to allow 'any person' to maliciously institute a judicial proceeding alleging false and defamatory charges, and to then circulate a press release or other communication based thereon and escape liability by invoking the statute"]).

Kesha and Gottwald have very different accounts about what happened on the night at issue. This court cannot decide, as a matter of law on papers and without any assessment of credibility, who should be believed and whether Kesha commenced the

[11] As discussed in the August 2018 Decision, Kesha's attempts to distinguish *Thomas v G2 FMV LLC* (2016 WL 320622 [Sup Ct, NY County 2016], *affd* 147 AD3d 700 [1st Dept 2017]) are unavailing.

California Action, which she would not have done if she had been released from her contracts, in good faith or as a sham to defame Gottwald and obtain business leverage. That decision is for the jury.

Statement that Gottwald Raped Katy Perry

Plaintiffs' motion for partial summary judgment on elements of their defamation claim related to Kesha's statement to Lady Gaga that Gottwald raped Katy Perry is granted.[12] Plaintiffs met their heavy burden of establishing entitlement to judgment that Kesha published a false statement about Gottwald to a third party that was defamatory per se. Kesha admits that, on February 26, 2016, she texted Lady Gaga that Katy Perry was raped by "the same man," referring to Gottwald (Dkt. 2090 at 24; Dkt. 1698 at 14-23). Plaintiffs submitted evidence that Gottwald did not rape Katy Perry. Perry unequivocally testified that Gottwald did not do so (*see* Dkt. 1701 at 3). In response, Kesha has not raised a triable issue. There is no evidence whatsoever that Gottwald raped Katy Perry or that Katy Perry, whose sworn testimony is unrefuted, must not be believed. Kesha cannot defeat summary judgment with mere speculation (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014] [once movant meets burden "it is insufficient to merely set forth averments of factual or legal conclusions" and evidence must be proffered in opposition]; *see Red Zone LLC v Cadwalader, Wickersham & Taft*

[12] Kesha's argument that plaintiffs cannot obtain partial summary judgment on certain elements of a claim is rejected. Kesha herself seeks partial summary judgment on certain elements of plaintiffs' claims. In any event, CPLR 3212(e) expressly permits summary judgment on a cause of action "or part thereof" (*see e.g. Basis PAC-Rim Opportunity Fund [Master] v TCW Asset Mgt. Co.*, 149 AD3d 146, 151 [1st Dept 2017] [granting summary judgment to defendant on loss causation element of fraud claim]). Plaintiffs do not seek summary judgment on the "without privilege or authorization" element (*see* Dkt. 1694 at 23).

LLP, 27 NY3d 1048, 1049 [2016]). Moreover, publication of a false statement to even one person, here Lady Gaga, is sufficient to impose liability (*see Lentlie v Egan*, 61 NY2d 874, 876 [1984] ["defamation requires but one communication to a single person"]; *Torati v Hodak*, 147 AD3d 502, 504 [1st Dept 2017] [that the defamatory statement was only shared with three people who were plaintiff's family members is not a basis for dismissal; communication "to even one person other than the defamed is sufficient"]).

BREACH OF CONTRACT

Courts are not free to after-the-fact alter agreements that the parties reach to reflect personal notions of fairness and equity (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 570 [2002]). To "ensure stability in the law and provide guidance to parties weighing the risks and advantages of entering a binding agreement," settled rules must be neutrally applied (*id.* at 573). Absent extraordinary circumstances, parties are held to the agreements that they make. Plaintiffs move for summary judgment on Kesha's counterclaim, which seeks declaratory judgments that (1) the KMI Agreement has been terminated and (2) Kesha has replaced KMI as a party to the RCA Agreement. Their motion is granted.

Termination Based on Election of Remedies

Kesha seeks a declaration that the KMI Agreement has been terminated based on KMI's "election to sue . . . for damages rather than specific performance and its failure to

perform" (Dkt. 2241 ¶ 72).[13] She maintains that by suing her for breach and seeking damages, KMI elected its remedy and waived the right to further enforce the agreement. That argument was already rejected in the April 2016 Decision because nothing precludes a party from affirming the existence of an ongoing contract and suing for damages owed while the agreement remains in full force and effect (Dkt. 504 at 24-26). A breaching party, for example, cannot escape its future contractual obligations by deeming the contract terminated after it has violated provisions of the agreement and the nonbreaching party has sought redress through the courts.

Replacement of KMI as a Party to the RCA Agreement

Paragraph 3 of the Assent provides:

> If, during the term of the [RCA] Agreement, [KMI] for any reason ceases to be entitled to [Kesha's] services or the results of [Kesha's] services as the Artist in accordance with the terms of the [RCA] Agreement or [KMI] for any reason fails or refuses to furnish to RCA [Kesha's] services or the results of [Kesha's] services . . . in accordance with the terms of the [RCA] Agreement: (i) [Kesha] will be deemed substituted for [KMI] as party to the [RCA] Agreement, and (ii) she will render such services and perform such acts as will give RCA the same rights, privileges and benefits it would have received under the [RCA] Agreement had [KMI] continued to be entitled to [Kesha's] services and the results of [Kesha's] services as the Artist in accordance with the terms of the [RCA] Agreement. Such rights, privileges,

[13] Kesha also maintains that by refusing to renegotiate her contract and "verbally and emotionally abusing" her, Gottwald breached the KMI Agreement's implied covenant of good faith and fair dealing and terminated the contractual relationship. The court, however, has already rejected this argument (March 2017 Decision at 7-8; *see* Dkts. 570-571). Additionally, the implied covenant cannot be used as a vehicle to add terms to the parties' contract that they did not expressly adopt particularly where, as here, the parties agreed that no additional representations were made (Dkt. 1742 ¶ 10[c]; *see LDIR, LLC v DB Structured Products, Inc.*, 172 AD3d 1, 6 [1st Dept 2019]; *National Union Fire Ins. Co. of Pittsburgh, Pa v Xerox Corp.*, 25 AD3d 309, 310 [1st Dept 2006] [implied covenant of good faith and fair dealing cannot "create independent contractual rights"], *lv dismissed* 7 NY3d 886 [2006]). Nothing in the parties' agreement legally obligated renegotiation of the existing contract.

> and benefits will be enforceable in RCA's behalf against [Kesha] (Dkt. 1733 at 65).

Kesha maintains that because there are triable issues of fact as to "whether KMI has 'cease[d] to be entitled to [her] services,' given [Gottwald's] implied-covenant breach" and as to whether KMI "for any reason failed to furnish . . . [Kesha's services . . . in accordance with the terms of the Agreement]" (Dkt. 2090 at 38), summary judgment must be denied. She maintains that KMI's failure to meet delivery requirements under the RCA Agreement was not because of her failure to perform but rather because of Gottwald's "unreasonable refusal to renegotiate and pattern of abuse" (*id.* at 39).

There are no questions of fact as to whether Kesha was actually "deemed substituted" for KMI or whether she is entitled to be "deemed substituted" for it under the Assent. KMI did not cease to be entitled to Kesha's services as a matter of law and, subsequent to interposition of her counterclaim, Kesha delivered two albums. RCA, moreover, has not complained of any breach of the agreement and has deemed the relationship a "success" (Dkt. 1739). There is no basis for Kesha to invoke a breach of the RCA Agreement that would allow her to be deemed KMI's replacement. Her counterclaim thus fails.

Pre-Judgment Interest on Late Royalty Payments

In their third claim (Dkt. 1539 ¶¶ 125-130), plaintiffs allege that the KMI Agreement entitles them to unpaid royalties due within 45 days of Kesha's receipt of certain ancillary income and unpaid tour receipts payable within 30 days of the end of the applicable tour cycle. They allege that Kesha must pay damages "plus interest" for her breach (*id.* ¶ 130; Prayer for Relief ¶ 3; *see also* Dkt. 1694 at 33, citing Dkt. 1744 at 2).

Kesha does not dispute that she did not pay any royalties to KMI between January 1, 2012 and December 31, 2016. It is further undisputed that on August 7, 2017--well beyond the deadlines set forth in the parties' contract and after this action had been commenced--Kesha finally paid KMI $1,302,043.41 in royalties for this period. Plaintiffs accepted the payment but expressly reserved "the right to seek an award of prejudgment interest on the entire amount Kesha withheld for years" (Dkt. 1750).

Plaintiffs now seek summary judgment on the interest due for the belatedly paid $1,302,043.41. They propose an intermediate date for assessing the interest owed each year and, based on CPLR 5001, calculate the interest due as $373,671.88.

Kesha does not dispute the terms of the contract or calculation of the interest. She urges that because there has been no finding of breach, there is no predicate for an interest award (Dkt. 2090 at 40). She maintains that the payments of over $1.3 million with checks endorsed "DR LUKE COMMISSION PAYABLE as of 12.31.16" (*see e.g.* Dkt. 1749 at 1) were simply a "good-faith gesture to resolve a dispute without troubling the Court" (*id.* n 173). She also contends that there remain triable issues of fact for the jury to resolve that the parties altered or waived the timeframes for payment and that there should be an offset for monies owed to her. Those arguments are rejected.[14]

By making the August 2017 payments for commissions "as of 12.31.16," Kesha conceded that she owed those amounts. In fact, even now, she does not dispute that the KMI Agreement entitles plaintiffs to those sums and that she paid late. Nor does she

[14] Kesha again asserts that plaintiffs cannot maintain a breach of contract claim against her because Gottwald breached the parties' agreement. That argument, however, has been rejected (*see supra* n 13).

show that plaintiffs' timeframes and interest calculations are incorrect or otherwise challenge them. Her arguments that the parties modified the time for payment despite the absence of any written agreement and that there was an ongoing waiver of timely payment by plaintiffs is not countenanced by the KMI Agreement, which contains no-oral-modification and no-waiver provisions (Dkt. 1742 ¶ 10[c]). Plaintiffs have proven that they were entitled to the over $1.3 million that Kesha paid belatedly after this lawsuit was commenced and there is no legal basis for absolving her of paying statutory prejudgment interest on that amount (*cf. Kagan v HMC-New York, Inc.*, 100 AD3d 468, 469 [1st Dept 2012] [plaintiff "entitled to prejudgment interest on the withheld compensation (defendants) admittedly owed and in fact paid"]; *Matter of Hoffman*, 275 AD2d 372, 372-73 [1st Dept 2000] ["respondents' tender of payment after the commencement of litigation did not defeat the petitioner's statutory rights under CPLR 5001 because she accepted the tender without prejudice to her claim for interest"]).

Because plaintiffs demonstrated that Kesha breached the KMI Agreement by not timely making payment, prejudgment interest on the delinquency is mandatory (CPLR 5001[a] [mandating that interest "shall" be recovered upon a sum awarded for breach of contract]; *see also Eighteen Holding Corp. v Drizin*, 268 AD2d 371, 372 [1st Dept 2000]). As Kesha has not raised any issue related to the reasonability of the proposed dates of accrual of prejudgment interest or its calculation, judgment is awarded to plaintiffs in the amount of $373,671.88 (*see* Dkt. 1694 at 35; *Arany v Arany*, 282 AD2d 389, 390 [1st Dept 2001] [reasonable intermediate date authorized]).

Affirmative Defenses to Breach of Contract

Plaintiffs move for summary judgment on several of Kesha's breach-of-contract related affirmative defenses. The only two that have not already been addressed that Kesha contests are unconscionability and fraudulent inducement.[15] Those defenses fail as a matter of law.

Unconscionability

"A determination of unconscionability generally requires a showing that the contract was both procedurally and substantively unconscionable when made" (*Gillman v Chase Manhattan Bank, N.A.*, 73 NY2d 1, 10 [1988]). There must be an "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party" (*id.*). Neither factor is present here. At the time of contracting, Kesha was represented by counsel and nothing compelled her to enter into the agreements (*Cash4Cases, Inc. v Brunetti*, 167 AD3d 448, 449 [1st Dept 2018]). The contractual terms, moreover, as acknowledged by Kesha's expert (Dkt. 1737 at 5, 7) are typical in the music industry between producers and fledgling artists and nothing authorizes invalidating the bargain that the parties struck after weighing their options and making informed, counselled choices (*see Gillman*, 73 NY2d at 10 [contract's terms must be viewed "in the light of the mores and business practices of the

[15] Plaintiffs move for judgment on five affirmative defenses: (1) statute of limitations, (2) impossibility, (3) California's "seven-year rule," (4) unconscionability and (5) fraudulent inducement. Kesha concedes dismissal of the first and third of these defenses by failing to address them in opposition. To be sure, Kesha is alleged to have begun breaching the KMI and Prescription Agreements in 2013 and this action was commenced in 2014, well within the applicable six-year statute of limitations (CPLR 213[2]). The impossibility and "seven-year-rule" affirmative defenses were previously rejected (161 AD3d at 680).

time and place" of execution]; *see also Reznor v J. Artist Mgmt., Inc.*, 365 F Supp 2d 565, 577 [SDNY 2005] ["there is no admissible evidence that the objected-to provisions in the management agreement were unusual for the industry"]).[16]

Fraudulent Inducement

Kesha's claim that she was fraudulently induced to enter into the KMI Agreement based on Gottwald's promise to renegotiate the contract if her first album was successful is not viable because a fraud claim cannot be predicated on a promise of future performance (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 318 [1995]; *Wyle Inc. v ITT Corp.*, 130 AD3d 438, 439 [1st Dept 2015]). Kesha does not claim that Gottwald misrepresented any then-present facts (*see TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 87 [1st Dept 2015]). To the extent the fraud is based on Gottwald's future promise being insincere, the lack of proof of scienter is fatal (*see Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54, 72 [1st Dept 2017] ["where a fraud claim is based upon an alleged false promise, the plaintiff is required to plead specific facts from which it may be reasonably inferred that the defendant did not intend to keep the promise when it was made"]). In opposition to plaintiffs' motion, Kesha does not cite any evidence of Gottwald's insincerity in 2005 (*see Tanzman v La Pietra*, 8 AD3d 706, 708 [3d Dept 2004] ["mere fact that the expected performance was not realized is insufficient to demonstrate . . . defendant falsely stated its intentions"]).

[16] California's seven-year rule, which does not apply because New York law governs (161 AD3d at 680), does not render the agreements unconscionable. Unconscionability, moreover, is analyzed as of the time the contract is made. There is no authority that an agreement can become unconscionable due to subsequent events.

Additionally, the KMI Agreement sets forth that no one "made any promise, representation or warranty whatsoever, express or implied, oral or written, not contained" in the contract itself and that "all understandings and agreements" between the parties were merged into the contract "which fully and completely expresses their agreement" (Dkt. 1742 ¶ 10[c]). Kesha therefore could not reasonably rely on any promise of future performance that was made before the agreement was signed but not included in the final contract (*see Schron v Troutman Sanders LLP*, 20 NY3d 430, 436 [2013]; *see also Matter of Primex Intl. Corp. v Wal-Mart Stores, Inc.*, 89 NY2d 594, 599-600 [1997] [a "completely integrated contract precludes extrinsic proof to add to or vary its terms"]; *see also Pate v BNY Mellon-Alcentra Mezzanine III, LP*, 163 AD3d 429, 430 [1st Dept 2018] [general-merger and no-additional-representation clauses rendered fraud claim not viable]).

Accordingly, it is

ORDERED that plaintiffs' motion for partial summary judgment is granted to the following extent: (1) Geragos and Sunshine Sachs were Kesha's agents when they made the subject statements; (2) Kesha's sole remaining counterclaim for a declaratory judgment is denied; (3) KMI is entitled to pre-judgment interest of $373,671.88 from Kesha due to her breach of the KMI Agreement by making late royalty payments; (4) Kesha's affirmative defenses that: (a) the subject defamatory statements are not pleaded with sufficient specificity; (b) Gottwald is libel-proof; (c) the subject statements are opinions; or hyperbole; and (d) the defamation claims are time-barred – are dismissed; (5) Kesha made a false statement to Lady Gaga about Gottwald that was defamatory per

se and (6) Kesha's breach of contract affirmative defenses based on (a) the statute of limitations; (b) impossibility; (c) California's "seven-year rule"; (d) unconscionability; and (e) fraudulent inducement are dismissed; plaintiffs' motion is otherwise denied; and it is further

ORDERED that the Clerk is directed to separately enter (1) judgment in favor of KMI, and against Kesha, in the amount of $373,671.88; and (2) judgment on Kesha's counterclaim; plaintiffs' remaining claims are hereby severed and shall continue; and it is further

ORDERED that Kesha's motion for summary judgment is denied; and it is further

ORDERED that, upon denial of Kesha's motion for summary judgment related to whether plaintiffs must establish actual malice and gross irresponsibility, pursuant to CPLR 3212(b), the court grants partial summary judgment to plaintiffs on this issue and plaintiffs need not prove actual malice or gross irresponsibility at trial; and it is further

ORDERED that because the viability of Kesha's affirmative defenses based on the implied covenant of good faith and fair dealing were raised by the parties and addressed, pursuant to CPLR 3212(b), summary judgment is granted to plaintiffs on those defenses, which are dismissed.

Dated: February 6, 2020

ENTER:

Jennifer G. Schecter, J.S.C.

EXHIBIT C

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Acosta, P.J., Oing, Kennedy, Scarpulla, Mendez, JJ.

12716-
12716A

LUKASZ GOTTWALD professionally known as DR. LUKE et al.,
Plaintiffs-Respondents,

-against-

KESHA ROSE SEBERT professionally known as KESHA,
Defendant-Appellant,

PEBE SEBERT et al.,
Defendants.

Index No. 653118/14
Case No. 2020-01908
2020-01910

KESHA ROSE SEBERT professionally known as KESHA,
Counterclaim-Plaintiff-Appellant,

-against-

LUKASZ GOTTWALD professionally known as DR. LUKE, et al.,
Counterclaim-Defendants-Respondents.

SAMUEL D. ISALY,
Amicus Curiae.

THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS and 16 MEDIA ORGANIZATIONS, 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, NEWSDAY LLC, 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,

Amici Curiae.

O'Melveny & Myers LLP, New York, (Anton Metlitsky, Leah Godesky, Yaira Dubin and Daniel M. Petrocelli and James M. Pearl of the bar of the State of California, admitted pro hac vice, of counsel), for appellant.

Mitchell Silberberg & Knupp LLP, New York (Jeffrey M. Movit and Christine Lepera and David A. Steinberg of the bar of the State of California, admitted pro hac vice, of counsel), for respondents.

Carter Ledyard & Milburn LLP, New York (Alan S. Lewis and John J. Walsh of counsel), for Samuel D. Isaly, amicus curiae.

Holwell Shuster & Goldberg LLP, New York (Eileen Monaghan DeLucia, Brian T. Goldman and Prishika Raj and Eugene Volokh of th bar of the State of California, admitted pro hac vice of counsel), for The Reporters Committee for Freedom of the Press and 16 Media Organizations, amici curiae.

Orders, Supreme Court, New York County (Jennifer G. Schecter, J.), entered February 6, 2020, which, to the extent appealed from, upon plaintiffs' and defendant Kesha Rose Sebert's (Kesha) motions for partial summary judgment, determined, in connection with the defamation claims, that plaintiff Gottwald is not a general or limited public figure and that plaintiffs need not prove by clear and convincing evidence actual malice or "gross irresponsibility" on Kesha's part, that Kesha's lawyer and press agent acted as her agents for the purposes of this action, that none of the alleged defamatory statements constitutes hyperbole or nonactionable opinion, and that Kesha's text message to Lady Gaga was defamatory per se, and, upon a search of the record, dismissed Kesha's breach-of-contract affirmative defense based on the implied covenant of good faith and fair dealing, affirmed, without costs.

The third amended complaint alleges that in 2005, plaintiff Gottwald, an established music producer at the time -known for his music, business acumen and the artists he represents- expressed interest in working with Kesha who was then unknown. Kesha agreed to work with Gottwald, and in September 2005, she entered into an exclusive recording agreement with Gottwald's music production company KMI. The KMI agreement obligated Kesha to provide exclusive recording services to KMI, that could be extended by KMI through the release of her sixth album and gave Gottwald the right to produce and receive royalties on at least six songs per album.

The complaint further alleges that shortly after entering into the KMI agreement, Kesha was frustrated that her recording career was not progressing quickly. In late 2005 she retained representatives who, in order to pressure plaintiffs to release her from the KMI agreement, "threatened" to make public a false story that in October 2005, after attending a party together where Kesha had too much to drink, Gottwald had drugged her, took her back to his hotel room and sexually abused her. Gottwald would not accede to the demands or compromise his contractual rights. Subsequently, Kesha and KMI executed multiple amendments to the KMI agreement. In November 2008 Kesha entered into a separate agreement with Prescription, agreeing to be bound by an agreement KMI entered into in 2009 with the RCA/JIVE record label to release and promote her recordings.[1] Plaintiffs produced and promoted Kesha's very successful 2010 debut and follow-up albums, which featured songwriting and production contributions from Gottwald.

[1] The RCA/JIVE agreement was subsequently assigned to a subsidiary of Sony Music Entertainment (Sony) whose General Counsel Kesha's attorney is alleged to have threatened with a similar lawsuit.

The complaint alleges that in a 2010 action brought by Kesha's former managers against her and Gottwald, Kesha and her mother Pebe Sebert testified at their depositions that, contrary to their earlier accusations about Gottwald in 2005, he had never drugged Kesha, never made any sexual advances towards her and never had a sexual relationship with her.

The complaint alleges that in 2012 and 2013 Kesha and her agents (Pebe, nonparties Mark Geragos and Kenneth Meiselas – her then attorneys- and Sunshine Sachs, her newly retained public relations firm) sought to end her agreement with Gottwald so she could derive a larger share of profits from any future records. She stopped delivering sound recordings to Gottwald and refused to allow him to produce her work. Pebe and the rest of Kesha's agents orchestrated a "press plan," that included a campaign of publishing **"**false and shocking**"** accusations against Gottwald in order to pressure him to release Kesha from the agreements and "blacklist" Gottwald from the music industry. The complaint cites several emails and letters published by Pebe and Kesha in 2013 and 2014 referring to Gottwald's abuse, which, plaintiffs allege were knowingly false. It is also alleged that they also forwarded false information to a social media blogger, Michael Eisele (with whom Kesha was in direct communication), who ran a campaign entitled "Free Kesha," to spread false allegations against Gottwald- insinuating he abused Kesha- across social media to garner support.

The complaint further alleges that on February 26, 2016, after this action was commenced, Kesha initiated a text message conversation with the recording artist professionally known as "Lady Gaga" in which Kesha falsely asserted that she had been raped by Gottwald and that another famous female recording artist (which Kesha named)

"was raped by the same man." After the text message conversation, Lady Gaga also spread negative messages about Gottwald in the press.[2]

After completion of discovery and filing of a note of issue, plaintiffs' moved for partial summary judgment arguing that: (1) Kesha's text to Lady Gaga was defamation per se, (2) the statements made by Pebe, Geragos, Meiselas, Sunshine Sachs and Eisele were made in their capacity as Kesha's agents, and (3) Kesha's affirmative defenses to the defamation claims fail as a matter of law. Kesha opposed plaintiffs' motion and moved for partial summary judgment arguing that: (1) Gottwald is a public figure and can only recover for defamation if the statements asserting that he drugged, raped and sexually assaulted her were made with actual malice, (2) 27 of the statements were made either during settlement discussions as pertinent to good-faith anticipated litigation (by Kesha in litigation filings, or by her or her attorneys to contextualize litigation developments), (3) 18 of the statements constituted protected opinion or hyperbole that cannot be actionable, and (4) Gottwald breached the KMI agreement's implied covenant of good faith and fair dealing.

Supreme Court granted, in part, Gottwald's motion for partial summary judgment and denied Kesha's motion for partial summary judgment. On this record, we now affirm.

The record demonstrates that, while Gottwald is an acclaimed and influential music producer, he does not occupy a position of "such pervasive fame or notoriety that he [has] become[] a public figure for all purposes and in all contexts" and that he did not "become[] a public figure for a limited range of issues" by "voluntarily inject[ing] himself"

[2] That famous female recording artist testified unequivocally that Gottwald never raped her.

into the public debate about sexual assault, or abuse of artists in the entertainment industry (*Gertz v Robert Welch, Inc.*, 418 US 323, 351 [1974]).

A person can only be a general-purpose public figure if "he [or she] is a 'celebrity'; his [or her] name a 'household word' whose ideas and actions the public in fact follows with great interest "and 'invite[s] attention and comment'"(*Waldbaum v Fairchild Publs, Inc.*, 627 F2d 1287,1292 [DC Cir 1980], *cert denied* 449 US 898 [1980], quoting *Gertz* at 345).

"Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life" (*Gertz* at 352). Contrary to the dissent, Gottwald's success in the music business is not enough to bring him into the realm of a general-purpose public figure, even if the music he produces is known to the general public or he is associated with famous or household word musicians, especially where he has used his efforts as a producer to obtain publicity not for himself, but for the artists that he represents (*Krauss v Globe Intl.*, 251 AD2d 191 [1st Dept 1998]). Although he is an acclaimed music producer and well known in the entertainment industry, he is not a household name.[3] His success in a high-profile career, without more, does not warrant a finding that he is a general-purpose public figure (*see Waldbaum* at 1299).

A limited-purpose public figure, more commonly, is an individual who has voluntarily injected himself or is drawn into a particular public controversy with a view toward influencing it. "[T]he [individual becomes] a public figure by virtue of his

[3] Gottwald was named one of a hundred most creative people in business but was not selected as a judge in American Idol and did not receive a star in Hollywood's walk of fame.

purposeful activity amounting to a thrusting of his personality into the 'vortex' of an important public controversy" (*Naantaanbuu v Abernathy*, 816 F Supp 218, 222 [SD NY 1993] [internal quotation marks omitted]). The individual must attempt to have, or can be expected to have, a major impact on the resolution of a specific public dispute that has foreseeable and substantial ramifications for persons beyond its immediate participants (*Waldbaum* at 1300). Here, contrary to the dissent's view, the specific public dispute as framed by Kesha is sexual assault and the abuse of artists in the entertainment industry.

To determine whether a plaintiff is a limited purpose public figure the "defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media" (*Lerman v Flynt Distrib. Co., Inc.*, 745 F2d 123, 136-137 [2d Cir 1984], *cert denied* 471 US 1054 [1985]). "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention" (*Wolston v Reader's Digest Assn. Inc.*, 443 US 157, 167 [1979]). "In order to be considered a public controversy. . . the subject matter must be more than simply newsworthy. . . it must be a real dispute, the outcome of which affects the general public or some segment of it in an appreciable way" (*Krauss v Globe Intl.*, 251 AD2d at 192 [internal quotation marks and citations omitted]).

A person may generally not be made a public figure through the unilateral acts of another (*United States v Sergentakis*, 2015 WL 3763988, *6, 2015 US Dist Lexis 77719, *14 [SD NY 2015], *affd* 787 Fed Appx 51 [2d Cir 2019], citing *Chandok v Klessig*, 648 F Supp 2d 449, 458 [ND NY 2009]). "[A]n individual can become a limited purpose public

figure only through his own actions." The degree of voluntary involvement in the public controversy is important (*Biro v Condé Nast*, 963 F Supp 2d 255, 274 [SD NY 2013], *affd* 622 Fed Appx 69 [2d Cir 2015], *cert denied* -US-, 136 SCt 2015 [2016]).

To be considered a limited purpose public figure Gottwald must have: (1) successfully invited public attention to his views in an effort to influence others prior to the incident in question, (2) voluntarily injected himself into a public controversy related to the subject of the current litigation, (3) assumed a position of prominence in the public controversy, and (4) maintained a regular and continuing access to the media to influence the outcome of the public controversy.

Gottwald cannot be found to be a limited-purpose public figure because he has not done any of these things.

Although Gottwald has sought publicity for his label, his music and his artists – none of which are subject of the defamation here- he never injected himself into the public debate about sexual assault or abuse of artists in the entertainment industry. Gottwald has only spoken out once regarding this litigation, on Twitter in 2016, and has limited his involvement to what was necessary to defend himself (*Wolston*, 443 US at 167).

The dissent argues that "[t]he definition of limited purpose public figure is not so cramped as to only include individuals and entities that purposefully speak about the specific, narrow topic (in this case a protégé's sexual assault) upon which the defamation action is based," but fails to acknowledge that a limited purpose public figure only holds that status with regards to the particular public controversy they thrust themselves into.

Gottwald, a successful music producer, has not attracted media attention for his relationship with his clients or his treatment of artists in the entertainment industry but for his work as a music producer on behalf of, and the fame of, the artists he represents.

Unlike the cases cited by the dissent, where the plaintiffs sought publicity regarding the public controversies which were the subject of their litigation (*Winklevoss v Steinberg*, 170 AD3d 618, 619 [1st Dept 2019], *appeal dismissed* 33 NY3d 1043 [2019] [the plaintiffs attracted public attention to themselves as investors in start-ups, voluntarily injected themselves into the world of investing through conferences, interviews and a radio broadcast, and sought to establish their reputation as authorities in the field]; *Maule v NYM Corp.*, 54 NY2d 880, 883 [1981] [where the plaintiff's books, articles and personal appearances were designed to project his name and personality to establish his reputation as a leading authority on professional football, and actively sought publicity for his views and professional writings, which were the subject of the litigation]; *Park v Capital Cities Communications*, 181 AD2d 192, 197 [4th Dept 1992], *appeal dismissed* 80 NY2d 1022 [1992], *lv dismissed in part, denied in part* 81 NY2d 879 [1993] [where Dr. Park stepped outside the private realm of his practice, actively sought publicity regarding his performance of eye surgery by appearing on television shows, found to be a public figure for purposes of the "Park Probe," an expose on unnecessary eye surgery]), Gottwald has not.

Gottwald has appeared in articles in mainstream media for his contributions to pop music, his discovery and development of talent, his rise in the music industry and his talent as both a businessman and music producer.[4] However, he has not injected himself

[4] John Seabrook, *The Doctor Is In: A Technique for Producing No. 1 Songs*, The New Yorker [Oct. 7, 2013] https://www.newyorker.com/magazine/2013/10/14/the-doctor-is-in [last accessed Feb. 14 2021]; Adam Sternbergh, *The Hit Whisperer*, New York Mag [June 16, 2010] https://nymag.com/guides/summer/2010/66784/[last accessed Feb. 14, 2021]; Chris Willman, *Dr. Luke: The Billboard Cover Story,* Billboard [Sept. 3, 2010] https://www.billboard.com/articles/news/956518/dr-luke-the-billboard-cover-story [last accessed Feb. 14, 2021]; *Dr. Luke: The Man Behind Pop's Biggest Hits,* NPR: Moring Edition [Sept. 20, 2010] https://www.npr.org/templates/story/story.php?storyId=129956645 [last accessed Feb. 14, 2021]; Luke Lewis, *The Producer Behind Smash Hits for Katy Perry and Kesha*, The Guardian [Aug. 13, 2010]

into the debate about sexual assault or abuse of artists in the entertainment industry, which is the subject of the defamation. That fact distinguishes this case from those cited by the dissent.

Plaintiffs are not required and, even assuming this were a matter of public concern would not be required, to show that Kesha acted in a "grossly irresponsible" manner, since Kesha is not a media publication, broadcaster or journalist responsible for observing "the standards of information gathering and dissemination ordinarily followed by responsible parties" (*Chapadeau v Utica Observer–Dispatch*, 38 NY2d 196, 199 [1975]; *see Huggins v Moore*, 94 NY2d 296, 302 [1999]). The gross irresponsibility standard focuses on the journalist's satisfaction of objective professional standards (*Kahn v New York Times Co.*, 269 AD2d 74, 76 [1st Dept 2000]). *Chapadeau* dealt with news media publishing and is applicable to media publications and journalists. The court looks to see if the media defendant "has met the standards of basic reporting. . . in the context of the medium's limitations and the topic's continuous newsworthiness. Pressures of time, staff, and budget, self-created or otherwise, are some of the factors which must be considered" (*Greenberg v CBS, Inc.*, 69 AD2d 693, 710-711 [2d Dept 1979]; *see McGill v Parker*, 179 AD2d 98, 108 [1st Dept 1992]). None of these factors apply to Kesha.

Issues of fact exist as to the applicability of the litigation privilege to statements made in Kesha's California action, since a jury could find that Kesha commenced that action, in which she alleged that Gottwald drugged and raped her, to pressure Gottwald into renegotiating her contracts or to release her from her contracts with plaintiffs (*see*

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https://www.theguardian.com/music/2010/aug/14/dr-luke-katy-perry-gottwald [last accessed Feb. 14, 2021]; Matt Popkin, *Dr. Luke: A Pop Star's Best Friend*, American Songwriter [2010] https://americansongwriter.com/songwriter-u-dr-luke-a-pop-stars-best-friend/#comments-section [last accessed Feb. 14, 2021].

Flomenhaft v Finkelstein, 127 AD3d 634, 637 [1st Dept 2015]). The litigation privilege provides that a statement that is pertinent to litigation is privileged and cannot be the basis of a defamation action. To determine if a statement is pertinent to litigation or can be the basis for a defamation action, the offending statement must have been "outrageously out of context" (*id*. [internal quotation marks omitted]). The litigation privilege "will not be conferred where the underlying lawsuit was a sham action brought solely to defame the defendant" (*id*. at 638, citing *Lacher v Engel*, 33 AD3d 10 [1st Dept 2006]). Here, Kesha argues that she commenced her California action in good faith and not to defame or pressure plaintiffs into renegotiating her contracts. The record shows that there are factual issues as to whether Kesha's public relations team, Sunshine Sachs, created a press plan to pressure plaintiffs into renegotiating or releasing Kesha from her contracts. That record supports plaintiffs' allegation and creates an issue of fact as to whether the California complaint was a "sham" precluding the grant of summary judgment.

Kesha can be held liable for any defamatory statements made by her lawyer and her press agent, since they acted as her agents in making the statements. However, issues of fact exist whether Kesha's mother and Michael Eisele, the blogger, were her agents.

A person authorizing others to speak on their behalf can be held vicariously liable for defamatory statements made by its agents (*National Puerto Rican Day Parade, Inc. v Casa Publs. Inc.,* 79 AD3d 592, 594-595 [1st Dept 2010]). However, a person is not responsible for the recommunication of their original defamatory statement if the recommunication was done without the person's authority or request over another whom the person has no control (*Hoffman v Landers*, 146 AD2d 744, 747 [2d Dept 1989]).

Geragos and Sunshine Sachs were acting as Kesha's agents. Geragos was Kesha's lawyer who held authority to speak on her behalf. He filed the complaint in California and hired Sunshine Sachs as the public relations agency responsible for the publicity surrounding the California complaint. Sunshine Sachs was hired for the sole purpose of managing Kesha's publicity and to formulate a press plan on how to interact and disseminate information, with the press.

While Geragos and Sunshine Sachs were acting as Kesha's agents, there are issues of fact as to whether Pebe and Eisele's statements about Gottwald were made as Kesha's agents. It is unclear if Pebe's statements about Gottwald were made as Kesha's agent or as her mother, with an independent purpose, and if Eisele's statements were made as Kesha's fan, or under Kesha's direction in order to help the publicity around her California complaint.

Kesha's statements that Gottwald drugged her, that he raped her, and that he abused her do not constitute hyperbole or nonactionable opinions (*see Thomas H. v Paul B.*, 18 NY3d 580, 585-586 [2012]). The determination whether a statement is opinion or objective fact is a question of law (*Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]). An opinion cannot be proven false and therefore does not give rise to liability for defamation purposes (*Thomas H.* at 585-586). Kesha's statements assert that Gottwald drugged and raped her. These statements are not opinion or hyperbole because they can be found to be factual as a matter of law. They are not exaggerations, assert a literal event that is alleged to have occurred, are not protected opinion or hyperbole and can be actionable for defamation.

Kesha's text message to Lady Gaga, that Gottwald had raped another singer, was defamatory per se (*see e.g. Torati v Hodak*, 147 AD3d 502 [1st Dept 2017]).

Supreme Court correctly dismissed Kesha's affirmative defense to the breach of contract claim, upon a search of the record (CPLR 3212[b]). All contracts contain an implied covenant of good faith and fair dealing (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002]). In New York, the implied covenant of good faith and fair dealing "cannot be construed so broadly as effectively to nullify other express terms of a contract, or to create independent contractual rights" (*Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 268 [1st Dept 2003]).

Supreme Court properly determined that Gottwald had no contractual duty to renegotiate any of his agreements with Kesha. Kesha's music industry expert claims that it is the custom and practice of the music industry to renegotiate initial contracts with new artists if the artists achieve some degree of commercial success. The duty of good faith and fair dealing does not imply obligations inconsistent with contractual provisions (*Chase Equip. Leasing Inc. v Architectural Air, LLC*, 84 AD3d 439 [1st Dept 2011], citing *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d at 153). Therefore, Supreme Court properly dismissed Kesha's affirmative defense sua sponte because plaintiffs were under no obligation to renegotiate any of the agreements they had with her. The implied covenant of good faith and fair dealing could not impose upon plaintiffs an obligation to renegotiate Kesha's contracts that is not found in the contracts (*see Fesseha* at 268).

We have considered Kesha's remaining arguments and find them unavailing.

All concur except Oing and Scarpulla, JJ.
who dissent in part in a memorandum by
Scarpulla, J. as follows:

SCARPULLA, J. (dissenting in part)

I respectfully dissent from the portion of the majority's decision which determines that plaintiff Lukasz Gottwald is not a general purpose public figure or, at a minimum, a limited purpose public figure, in connection with analyzing his defamation claims.

This action concerns the claim of a well-known music producer that one of his protégés falsely accused him of sexual assault to be released from an exclusive recording contract with his label. In October 2005, defendant Kesha Rose Sebert (Kesha) a teenage recording artist, signed an agreement which, among other things, granted plaintiff, known professionally and world-wide as "Dr. Luke" (Dr. Luke), exclusive rights to produce her music. Shortly thereafter Dr. Luke and Kesha attended a party at a night club. There, they both drank, and Kesha alleges that Dr. Luke gave her a roofie. Thereafter, Dr. Luke and Kesha went to an afterparty, where Kesha continued drinking, became ill, and was ultimately removed from premises. Dr. Luke then took Kesha to his hotel, where she spent the night. Kesha alleges that Dr. Luke sexually assaulted her that night. Dr. Luke's defamation claims in this action relate to Kesha's allegation that Dr. Luke sexually assaulted her.

Despite the fact that Dr. Luke has had a well-documented, successful musical career for more than two decades and Kesha is one of his famous protégés, Dr. Luke has maintained throughout this litigation that he is a private figure, and that Kesha's sexual assault allegations against him should not be subject to a heightened standard of defamation review. However, as the Court of Appeals stated in *James v. Gannett Co.*, the "category of 'public figures' is of necessity quite broad" and that performing artists,

like Dr. Luke "have not necessarily taken an active part in debates on public issues, they remain, nevertheless, persons in whom the public has continuing interest" (40 NY2d 415, 422 [1976]).

The record here amply demonstrates that Dr. Luke was, at the relevant time, a "public figure" for purposes of reviewing Kesha's allegedly defamatory statements that he sexually assaulted her. Dr. Luke was (and is) a widely acclaimed and influential music producer who actively sought publicity for himself, his label, his music, and the artists that he represents (*see Gertz v Robert Welch, Inc.*, 418 US 323 [1974]; *James,* 40 NY2d at 421-22 ["[P]ublic figures . . . . invite attention and comment"] [internal quotation marks omitted]; *see also Garfinkel v Twenty-First Century Publ. Co.*, 30 AD2d 787, 788 [1st Dept 1968] ["owner and publisher of a high school basketball scouting report" considered public figure because "[b]asketball and basketball scouting are matters of general public interest, particularly in light of the great attraction the game has for the public"]).

Throughout his career, Dr. Luke has promoted and publicized his contributions to the success of the recording artists contractually attached to his label, and, in particular, up and coming female artists. Dr. Luke has co-written and/or co-produced numerous hit songs for various prominent female artists, for which he is also well known. Dr. Luke has received numerous accolades: he was named one of the top music producers of the 2000's by Billboard; the American Society of Composers, Authors, and Publishers named him Producer of the Year from 2009-2011; he has been nominated for the Grammy award, Producer of the Year; and, in 2010, he was named #33 in Fast Company's "100 Most Creative People in Business" list. In 2010, Dr. Luke was selected by the Grammy and Recording Academy, and participated in, in a congressional

roundtable. In 2013, Dr. Luke was selected to be an *American Idol* judge, and in 2014, Dr. Luke was selected to receive a star on the Hollywood Walk of Fame.

Moreover, Dr. Luke has actively sought out publicity. He has hired public relations agents, and he has been interviewed, profiled, photographed, and mentioned by numerous periodicals, including the New Yorker, New York Magazine, The Guardian, Rolling Stone, and Billboard. He participated in interviews on prime-time television and on the red carpet at several awards shows. Dr. Luke has also been active on social media. For example, he has more than 200,000 followers on his verified Twitter account,[5] which he uses to talk about his professional and personal life to his followers, including his relationships with the artists whom he represents.

In sum, over many years Dr. Luke has received broad and extensive press coverage as a music producer and, in particular, as a discoverer and developer of female music talent. He has pervasively sought out this publicity. Dr. Luke's protestations that he was not well known at the time of the alleged defamatory statements is thoroughly belied by the record. Under these circumstances, Dr. Luke must prove actual malice in order to prevail on his defamation and defamation-dependent claims.

The majority acknowledges that Dr. Luke is an acclaimed music producer but posits that he is not a general purpose public figure because he is not a "household name." Dr. Luke, however, has achieved a level of fame and notoriety sufficient to be considered a general purpose public figure. He is a household name to those that matter. For this reason, he should be considered a general purpose public figure in

[5] Verified twitter accounts "let[] people know that an account of public interest is authentic," and to be verified, a user's "account must be notable and active" (Verification FAQ, https://help.twitter.com/en/managing-your-account/twitter-verified-accounts) (last accessed Feb. 19, 2021).

connection with analyzing the alleged defamatory statements at issue (*see Winklevoss v Steinberg*, 170 AD3d 618, 619 [1st Dept 2019], *appeal dismissed*, 33 NY3d 1043 [2019] ["The individual plaintiffs are also general purpose public figures, famous by virtue of their participation in the Olympics, their portrayal in [a] film . . . , and routine coverage in popular media coverage in which they willingly participate"]).

The majority's assertion – that Dr. Luke "used his efforts as a producer to obtain publicity not for himself, but for the artists that he represents" is belied by the record. Moreover, the majority's reliance on *Krauss v Globe Intl.* (251 AD2d 191 [1st Dept 1998]) is misplaced. There, the "plaintiff used his efforts as producer and ghost-writer to obtain publicity for his wife's career as a television personality, including publicity about her life as wife and mother. However, there is no basis to find that he ever sought, or achieved, a meaningful level of public attention for himself" (*Krauss*, 251 AD2d at 193). Unlike the plaintiff in *Krauss*, who "was not famous by his own right" (*id.* at 192), the record contains numerous evidentiary bases to find that Dr. Luke sought and achieved a meaningful level of public attention for himself, not simply for his protégés.

Even assuming that Dr. Luke is not a general purpose public figure, at a minimum, Dr. Luke should be treated as a limited purpose public figure in connection with the dynamics of his relationship to the artists with whom he works and upon which he has built his well-known professional reputation (*see Daniel Goldreyer, Ltd. v Dow Jones & Co.*, 259 AD2d 353, 353 [1st Dept 1999] ["Plaintiff is an art restorer, controversial and well-known in the profession, but not outside of it."]). Limited purpose public figures are "those who 'have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues

involved'" (*Huggins v Moore*, 94 NY2d 296, 301-302 [1999], quoting *Gertz,* 418 US at 345*; accord Krauss*, 251 AD2d at 192-193).

Dr. Luke argues, and the majority accepts, that Dr. Luke is not a limited purpose public figure because he never sought out publicity or spoke publicity about Kesha's allegations of sexual assault or on the issue of sexual assault. That Dr. Luke has not spoken publicly about Kesha's allegations of sexual assault is not surprising, is not relevant, and does not preclude a finding that he is a limited purpose public figure. The definition of limited purpose public figure is not so cramped as to only include individuals and entities that purposefully speak about the specific, narrow topic (in this case a protégé's sexual assault) upon which the defamation claim is based.

The public controversy at issue here is a self-promoting, powerful music industry person's use of his financial leverage over a person whose career he controls to allegedly commit an unpunished sexual assault *(see generally Daniel Goldreyer, Ltd.,* 259 AD2d at 353). Dr. Luke is a limited purpose public figure because he has purposefully and continuously publicized and promoted his business relationships with young, female music artists, like Kesha, to continue to attract publicity for himself and new talent for his label (*see generally James*, 40 NY2d at 421-422). The allegedly defamatory statements at issue – that Dr. Luke drugged and sexually assaulted Kesha when she was a teenage artist, who was signed to an exclusive contract with his record label – directly relate to Dr. Luke's self-publicized professional and personal relationships with his clients, his integrity in business practices, and in attracting new talent (*Winklevoss*, 170 AD3d at 619; *see also Maule v NYM Corp.*, 54 NY2d 880, 883 [1981] ["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"]; *Park v Capital Cities*

Communications, Inc., 181 AD2d 192, 197 [4th Dept 1992], *appeal dismissed* 80 NY2d 1022 [1992], *lv dismissed in part, denied in part* 81 NY2d 879 [1993] [plaintiff "was not involuntarily thrust into an unwanted limelight, but rather, invited favorable publicity for his practice"]).

Because Dr. Luke is, at a minimum, a limited purpose public figure, Dr. Luke was "required to show by clear and convincing evidence that defendant[] published the statements at issue with actual malice" (*Perez v Violence Intervention Program*, 116 AD3d 601, 601 [1st Dept 2014], *lv denied* 25 NY3d915 [20150), and the "grossly irresponsible" standard – set forth in *Chapadeau v Utica Observer–Dispatch* (38 NY2d 196, 199 [1975]) and upon which the majority relies – is inapplicable (*see Khan v New York Times Co., Inc.*, 269 AD2d 74, 76 [1st Dept 2000] ["[T]he court mistakenly applied an objective standard of gross irresponsibility, which is only applicable to private figures, rather than applying the subjective actual malice standard applicable to a 'limited-purpose public figure' such as plaintiff."]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: April 22, 2021

Susanna Molina Rojas
Clerk of the Court