*To be Argued by:*
ANTON METLITSKY, ESQ.
*(Time Requested: 15 Minutes)*

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# New York Supreme Court
## Appellate Division – First Department

**Appellate Case No.: 2020-01908 2020-01910**

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.*

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KESHA ROSE SEBERT p/k/a Kesha,
*Counterclaim-Plaintiff-Appellant,*

– and –

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

# BRIEF FOR DEFENDANT/COUNTERCLAIM-PLAINTIFF-APPELLANT KESHA ROSE SEBERT

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## QUESTIONS PRESENTED[1]

1. Whether a music producer who actively sought and achieved—through intentional self-promotion—celebrity, influencer status, and fortune, including selection for the Hollywood "Walk of Fame," qualifies as a public figure.

The trial court erroneously answered "no."

2. Whether certain allegedly defamatory statements made in settlement communications and in litigation filings are privileged and thus cannot give rise to defamation liability.

The trial court erroneously answered "no."

3. Whether Kesha is liable as a matter of law for unapproved, allegedly defamatory statements made by her former attorney and the public-relations experts he hired, and whether a jury could hold Kesha liable for unauthorized statements by her mother and a young fan.

The trial court erroneously answered "yes."

4. Whether certain allegedly defamatory statements are non-actionable statements of opinion.

The trial court erroneously answered "no."

[1] This brief refers to Plaintiffs-Respondents together as "Dr. Luke." Unless otherwise noted, all emphasis is added and all internal citations are omitted.

5. Whether Kesha's repeating of an allegedly false statement in a private text message to Lady Gaga—a statement that both had already heard from a third party earlier that same day—constitutes a republication and defamation *per se* as a matter of law.

The trial court erroneously answered "yes."

6. Whether Kesha's implied-covenant affirmative defense could be dismissed *sua sponte*.

The trial court erroneously answered "yes."

## PRELIMINARY STATEMENT

In 2005, celebrity music producer Lukasz Sebastian Gottwald—known by his stage name, "Dr. Luke"—signed a teenage recording artist, Kesha Rose Sebert, to an exclusive contract with his record label. A few months later, Dr. Luke took Kesha to a star-studded Hollywood birthday party, where she became incapacitated from the interaction of two glasses of champagne and a supposed "sober" pill dispensed by Dr. Luke. Dr. Luke took Kesha to his hotel room and sexually assaulted her.

In the years following the assault, Dr. Luke's abuse continued. He tormented Kesha with unrelenting criticism of her weight, talent, and music. And he refused (and refuses to this day) to let Kesha produce music outside his control,

even when she offered him a continued financial interest in her work. Left with no options, Kesha filed suit in 2014 to escape working with her abuser.

Kesha's attempt to seek judicial intervention prompted quick retaliation. Dr. Luke immediately sued Kesha for defamation—in essence, he admits that he slept in a small hotel room with an incapacitated teenage artist in his portfolio but says nothing improper happened. And in the years since, Dr. Luke has added more claims and dozens of supposedly defamatory statements to this ever-expanding suit in an effort to entirely bankrupt Kesha.

Dr. Luke's scorched-earth litigation strategy is designed to humiliate and destroy Kesha. From victim shaming, to suing Kesha for millions for not using him as a producer (after promising a court he would not force her to record with him), to blaming Kesha for unauthorized statements made by third parties, Dr. Luke's goal has been to crush Kesha into retracting her reports of abuse. But Kesha has not retracted. To the contrary, her reports of Dr. Luke's crimes—to her family and friends the day after the assault, to medical providers years before any litigation, and now to the trial court—have remained unwavering.

Defamation law is designed to protect just such reports. Yet the trial court's summary-judgment ruling runs roughshod over basic limits on defamation liability. And still worse, it does so in the delicate context of a victim reporting a sexual

assault committed by a powerful industry executive, creating an untenable risk of chilling similarly situated victims from reporting like crimes.

Specifically, the First Amendment requires that public figures prove defamation with clear and convincing evidence of actual malice. Under any metric used by any court, Dr. Luke is a public figure. He spent the last decade orchestrating media coverage of all aspects of his life, exploiting his fame to generate influence and massive wealth reaching tens of millions of dollars, and using a deep bench of public-relations experts to tout his celebrity status. Someone who marketed himself as the most successful hitmaker since the Beatles, was selected to receive a star on the Hollywood Walk of Fame, was selected as an *American Idol* judge, hired multiple public-relations experts, and was featured in a lengthy puff piece in *The New Yorker*, is in no sense a private figure. Yet the trial court nonetheless held that he is, and that his defamation claims are unconstrained by the First Amendment.

The trial court did not err in just that single respect. It is well settled under New York law that statements made during settlement negotiations or in litigation cannot give rise to defamation liability. Yet the trial court refused to hold that 27 such statements for which Dr. Luke sued Kesha are privileged as a matter of law. No New York court has ever refused to apply the litigation privilege in like circumstances.

The trial court likewise ignored black-letter agency principles, allowing Dr. Luke to impose wide-ranging liability on Kesha for unapproved statements made by third parties outside her control. And although defamation liability cannot be based on expressions of opinion, the trial court held that Kesha could be held liable for statements that any reader would understand as clearly describing Kesha's *allegations*, not statements of fact. The trial court also held that a one-on-one private text merely restating information that the recipient had already heard could serve as an actionable republication and basis for defamation liability. Finally, the trial court granted Dr. Luke summary judgment as to one of Kesha's crucial affirmative defenses *even though no party sought summary judgment on that issue*.

Left uncorrected, these errors will render trial in this action fundamentally unfair and severely prejudice Kesha. And they risk silencing the next victim who would consider reporting sexual assault committed by a powerful person exploiting his influential position to commit abuse, making it ever more difficult to come forward.

## NATURE OF THE CASE

### A. Dr. Luke Sexually Assaults A Teenage Kesha

In 2005, Dr. Luke met Kesha, an 18-year-old aspiring singer-songwriter from Nashville, Tennessee. R-490-491; R-4424. Within months, Dr. Luke signed Kesha to an exclusive contract with his music-production company, Kasz Money,

Inc. (KMI). R-1816. The contract granted KMI exclusive rights to produce Kesha's music and required Kesha to use Dr. Luke to individually produce at least six songs on each of the first six albums she released. R-1823; R-1826-1827.[2]

In October of that year, Dr. Luke, then 32 years old, took Kesha to a birthday party in Hollywood. R-2198. Kesha quickly became incapacitated by the combination of champagne and a "roofie" given to her by Dr. Luke. R-2199-2200. Dr. Luke took Kesha to his nearby hotel room, R-530-531, where he sexually assaulted her while she was too incapacitated to consent or resist. R-2197; R-2214.

By the time Kesha woke up in Dr. Luke's hotel room the next morning, he was gone. R-2210. Kesha felt as though her vagina had been "ripped" and "something had been inserted … without proper lubrication." R-2197; R-2214. Her "body was aching and [she] was vomiting up green stomach acid." R-2210. Kesha immediately reported the assault to her best friend and her mom, as sworn third-party testimony and phone records corroborate. R-2215; R-4708-4710; R-5237-5238.

Like most victims of sexual assault, Kesha did not report the assault to law enforcement: she "recently had signed [her] life away to this man, and [she] was embarrassed and terrified and ashamed and sick." R-2216. More than 80% of

[2] The contract was subsequently amended to require Dr. Luke's individual production services on five albums. R-1834.

sexual assaults are never reported to law enforcement, and acquaintance-rape victims are even less likely to report. R-3633. Failures to report sexual misconduct are particularly common in the entertainment industry, which has long been infected by an entrenched "casting-couch culture" that preys on young, female aspiring artists, as the trial and conviction of Harvey Weinstein so painfully highlighted. R-5268-5272; R-5868-5870; R-5905-5929.

### B. Dr. Luke Goes To Great Lengths To Establish Himself As A Celebrity Music Producer, As Kesha's Professional Success Is Wrecked By His Continued Abuse

Dr. Luke's career as a music-industry power player exploded shortly thereafter. He produced chart-topping songs for female mega-celebrity recording artists, while actively seeking and garnering media coverage of all aspects of his life, exploiting his fame to generate influence and massive wealth, and using a deep bench of public-relations experts to tout his celebrity status. *See* Part I, *infra*.

Kesha likewise achieved significant professional success between 2010 and 2013 with her first two hit albums, *Animal* and *Warrior*. R-3615; R-3880-3881; R-3887. Dr. Luke's unrelenting campaign to shatter Kesha's self-worth, however, defined their relationship.

*2011 Deposition*. Kesha was deposed in a separate, unrelated case dealing with Dr. Luke's efforts to constrain Kesha from signing with another label. Knowing that Kesha had already reported the assault to those close to her, before

the deposition, Dr. Luke threatened to harm Kesha and her family's livelihood if she testified about the 2005 assault. *See, e.g.*, R-2149-2150. Kesha believed Dr. Luke's threat to be very real: "[h]is weapon was my life"; "that's what he was threatening to take away from me, my career, my life—the livelihood of my family. … [I]f I wasn't a good girl [who] answer[ed] exactly how he instructed me." R-2150. She therefore testified that Dr. Luke "never made sexual advances." R-106. This type of false testimony frequently occurs in matters of interpersonal victimization, particularly when victims fear retaliation. R-3645-3646.

*Recording Sessions*. In May 2012, Kesha's former manager, Monica Cornia, reported that Dr. Luke was "put[ting Kesha] through a lot of hell." R-3690. Kesha wouldn't "let [Cornia] leave any studio session," because Kesha was scared to be alone with Dr. Luke. *Id.* As work on *Warrior* continued, Kesha reiterated her never-left-alone directive, R-3693; *see also* R-2169, and Cornia told her boss that being around Dr. Luke every day was "insane": "I've seen a good deal of sh*t in my life but nothing like this ever!!" R-3695.

*Unrelenting Criticism Of Kesha's Appearance*. Dr. Luke told Kesha "[y]ou look disgusting" during "pretty much the entirety of 'Warrior.'" R-2169. He insisted that Kesha exercise while other team members ate, because she "didn't deserve to eat food." *Id.* Dr. Luke called her "[h]uge" and "fat," *id.*, and even knocked a fork out of her mouth at a public restaurant. R-2170.

### C. Kesha Seeks Medical Help Regarding The 2005 Rape And Abusive Dynamic

As Kesha entered her mid-twenties, she began seeing a licensed therapist, R-R-4820.5; R-4820.8, to whom she reported Dr. Luke's 2005 rape and subsequent abuse. On December 12, 2011, Kesha confided that she recalled "waking up in [a] hotel room naked … [where she felt] as though something sexual might have happened." R-3849. Kesha told her therapist that she never discussed the incident with Dr. Luke because she was "scared of him." *Id.* Therapy notes from Kesha's 2011-2012 sessions reflect extensive discussion of Dr. Luke's abuse.[3]

In early 2014, Kesha entered Timberline Knolls for eating-disorder treatment, caused at least in part by Dr. Luke's unconscionable shaming. R-2153. In rehab, Kesha reported (i) Dr. Luke's "[v]erbal/emotional abuse," R-5192; and (ii) that she was "date raped by business associate @ age 18," R-5193. According to the medical records, Kesha "present[ed] with many features of a battered woman

[3] *See, e.g.*, R-3849 (12/12/11: "Client stated she had memory of producer slipping drugs into her drink one night and waking up in hotel room naked. She called mother, but she did not know where she was. Client described feeling as though something sexual might have happened."); R-5197 (6/22/12: "Client reports producer has been sexually and verbally abusive, but she is scared of him and does not want him to lash out at her mother if she confronts him."); R-5198 (3/10/14: "[R]eports escalating anger toward producer whom she believes sexual[l]y abused her and tormented her about her body and her weight for years."; 3/11/14: "Client … reports that he drugged her, and that she woke up naked in a hotel room with no memory of getting there. She could tell she had had sex, but she had no memory of it."); *accord* R-5199; R-5200.

in her relationship with producer. Sexual violence and severe emotional abuse have been part of that relationship." R-5194.

### D. Kesha Attempts To Settle Her Claims Against Dr. Luke Outside The Public Eye

In fall 2013, Kesha engaged attorneys to represent her in negotiations aimed at eliminating her contractual obligation to work directly with Dr. Luke through a global settlement with Dr. Luke and Sony. R-1201; R-1208. (Sony-affiliate RCA obtained a financial interest in Kesha's music in 2009, *see* R-5097-5162). Kesha's transactions attorney Kenneth Meiselas approached Sony General Counsel Julie Swidler to explain that Kesha could no longer work with Dr. Luke because he was "abusive towards her verbally and physically." R-1211; *see* R-5170.

Swidler testified that she viewed her communications with Meiselas as "related to settlement," and believed they were "covered by a settlement privilege." R-2824. In February 2014, Swidler responded with a draft settlement agreement under which Kesha would release music with Dr. Luke "no longer [having] any obligation to produce," in exchange for a non-disparagement agreement. R-5177. The parties exchanged drafts in spring 2014, R-3713-3751, and Swidler asked in June 2014 to see a copy of the complaint that Kesha's litigation counsel, Mark Geragos, was prepared to file if there were no settlement ("the Draft Complaint"), R-1231; *see* R-3709.

The Draft Complaint was styled as a California state-court complaint, and named as defendants Dr. Luke and his companies, along with various other entities. R-3753-3780. It alleged that Dr. Luke had violated California's laws prohibiting sexual assault and battery, sexual harassment, and negligent infliction of emotional distress. R-3763-3779. After receiving and reviewing the Draft Complaint, Dr. Luke did not accuse Kesha of extortion or defamation. Nor did he terminate the settlement discussions. To the contrary, in early-September 2014, Dr. Luke's counsel circulated a detailed settlement agreement that would have relieved Kesha of her contractual obligation to work directly with Dr. Luke. R-3789-3805. The parties did not settle, however, because they were unable to agree on a liquidated-damages non-disparagement clause that Dr. Luke sought to enforce against not only Kesha but anyone who speaks in her defense. R-3795-3801.

### E. Litigation Ensues In California And New York

*Kesha's California Complaint*. On October 14, 2014, Kesha filed a California state-court complaint alleging that Dr. Luke had sexually, physically, and verbally abused her (the "California Complaint"). R-1939-1966. The California Complaint was substantively identical to the Draft Complaint, *compare* R-1939-1966, *with* R-3753-3780, asserting eight causes of action that reflected Kesha's claim that Dr. Luke committed sexual assault and battery, R-1950-1963. As is common in litigation involving celebrities, R-808, and as Dr. Luke himself

has done in other cases, R-3685; R-3678, an advance copy of the California Complaint was provided to TMZ under an express embargo, so that TMZ could publish immediate post-filing coverage, R-6132. Geragos also engaged public-relations experts at Sunshine Sachs to assist in managing press statements and responses in the midst of the high-profile litigation. R-746-751; R-894-895.

*Dr. Luke's New York Complaint*. Dr. Luke responded the same day by filing this retaliatory New York lawsuit alleging defamation and various contractual breaches. He simultaneously escalated a no-holds-barred public-relations strategy. R-46-56. Dr. Luke expanded his team of public-relations experts to include public-relations veteran Michael Sitrick, R-5202; R-5207, and immediately deployed a barrage of public statements disparaging Kesha and her claims—a strategy that continues to this day.[4]

*Stay of the California Litigation*. In fall 2014, Dr. Luke moved to dismiss or stay the California litigation, citing New York forum-selection clauses in Kesha's contracts. R-5652-5677. Kesha opposed those motions. R-5678-5696. On June 8, 2015, Kesha filed an amended complaint in an effort to overcome Dr.

[4] R-6032 (claims "spectacular and outrageous fiction"); R-6043 (declaring there is "no evidence, whether from doctors or anyone else, to support" Kesha's abuse allegations"); R-5272 (accusing "Kesha and her attorneys" of "deceiving the public"); R-6052 (accusing Kesha of "fil[ing] a baseless lawsuit" based on "fabricated claims for rape").

Luke's forum-selection argument. R-5722-5755. Nevertheless, on June 16, 2015, the California court stayed the litigation based on its finding that Kesha's "claims come within the scope of the [contracts'] forum selection clause." R-5765. The court made no determination regarding the merits of Kesha's claims, and set a status conference to discuss progress in New York. R-5769. Kesha thereafter appeared in at least five California conferences. R-5697-5699; R-5774-5776.

*Kesha's Preliminary-Injunction Motion*. In fall 2015, Kesha filed a motion in New York seeking a preliminary injunction allowing her to work during the litigation with producers and record labels unrelated to Dr. Luke. R-3915-3937. The trial court denied Kesha's motion based on representations from Dr. Luke and Sony that she would be free to record without any contact with Dr. Luke. R-3972; R-3975. Because she was able to secure this critical concession—and because of the California judge's then-recent stay decision (and comments by the California judge that Kesha "had her day in court" in New York), in addition to the tremendous resources drained by discovery here—Kesha decided to voluntarily dismiss her California complaint without prejudice and pursue amended counterclaims in New York. R-5777-5780. In New York, Kesha filed Counterclaims and First Amended Counterclaims based on the same rape and abuse allegations in her California complaint. R-162-198. The trial court

ultimately dismissed those claims as time-barred and for lack of subject-matter jurisdiction. R-1417-1444.

### F. Summary Judgment Proceedings Below

Dr. Luke's operative Third Amended Complaint ("TAC") asserts a host of defamation allegations. Dr. Luke seeks to hold Kesha liable for (i) her October 14, 2014 filing of the California complaint and public statements by Geragos describing Kesha's allegations, R-308-314; (ii) an array of other litigation filings, including the amended California complaint and the affidavit that Kesha filed in support of her New York preliminary-injunction motion, R-314; (iii) dozens of public statements by Kesha, Geragos, Sunshine Sachs, Kesha's mother, Pebe Sebert, and a young fan named Michael Eisele lamenting Dr. Luke's treatment of Kesha, R-307-308; R-314-321; and (iv) a 2016 private one-on-one text message from Kesha to Lady Gaga regarding a conversation where a music executive told the two friends that Dr. Luke had sexually assaulted recording artist Katy Perry, R-321-222.[5]

[5] Appendices A-E, originally filed with Kesha's summary judgment motion and available at R-4669-4692, list and categorize all the allegedly defamatory statements at issue here. Appendix A lists all the allegedly defamatory statements identified in the TAC. R-4669-4678. Appendices B and C list the statements attributed to Michael Eisele, R-4679-4680, and Pebe Sebert, R-4681, respectively. Appendix D lists the statements Kesha contends are protected by New York litigation-related privileges. R-4683-4687. Appendix E lists the statements Kesha contends are nonactionable opinion statements. R-4688-4692.

In 2018, the parties cross-moved for partial summary judgment. R-373; R-4569. On February 6, 2020, the trial court denied Kesha's motion in its entirety, R-42-45, and granted in part Dr. Luke's motion, R-5-38. As relevant to this appeal, the trial court ruled:

— Despite his extensive and successful efforts to attract public attention as a celebrity music producer, Dr. Luke is not a public figure. R-17-19.

— Dr. Luke is not required to show that Kesha acted with gross irresponsibility, because that standard, according to the trial court, does not apply to firsthand accounts of events not involving any media publication. R-19-20.

— A triable issue exists as to whether Kesha's California Complaint was a "sham," and thus whether New York's litigation privileges apply. R-20-21.

— Geragos and Sunshine Sachs are Kesha's agents as a matter of law, and Kesha is therefore liable for their allegedly defamatory statements—despite an explicit contractual restriction on Geragos's ability to make public statements and conduct press activities without Kesha's consent. R-20-22.

— A triable issue exists as to whether Kesha is liable for allegedly defamatory statements made by her mother and a young fan—notwithstanding the undisputed evidence showing that their statements were neither directed nor authorized by Kesha. R-22-23.

— None of the allegedly defamatory statements are protected statements of opinion. R-24-25.

— Kesha's text to Lady Gaga—a private one-on-one communication in which Kesha merely restated the same information she and Lady Gaga had learned together earlier that day, from the same source—was (i) false as a matter of law and (ii) actionable as a defamatory republication. R-27-28.

— Kesha's implied-covenant affirmative defense—on which no one moved for summary judgment—should be *sua sponte* dismissed. R-29 n.13, R-36.

This appeal followed.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN HOLDING THAT DR. LUKE IS NOT A PUBLIC FIGURE.

The First Amendment imposes a higher burden on a "public figure" who asserts a defamation claim than on his private counterpart. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335-36, 349 (1974). By "invit[ing] attention and comment," the public figure has "voluntarily expose[d] [himself]," *id*. at 345, and thus "assumed the risk of publicity, good or bad, as the case might be," *Time, Inc. v. Johnston*, 448 F.2d 378, 380 (4th Cir. 1971). Moreover, due to his increased media access and often accompanying wealth, a public figure is less vulnerable because he can "resort to effective 'self-help'" to counteract false statements. *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164 (1979). Accordingly, a public-figure plaintiff must prove—by clear and convincing evidence—that allegedly defamatory statements were both false and made with "actual malice." *Gertz*, 418 U.S. at 334-35.[6]

The "essential element underlying the category of public figures is that the publicized person has taken an affirmative step to attract public attention." *James*

[6] Because "the question of a plaintiff's status as a public figure is one of 'federal constitutional law,'" *Lee v. City of Rochester*, 663 N.Y.S.2d 738, 743 (N.Y. Sup. Ct. 1997), *aff'd*, 254 A.D.2d 790 (4th Dep't 1998), "'states are entitled to provide a broader, though no more constricted, meaning to public figures' than federal law provides," *Cummins v. Suntrust Capital Mkts., Inc.*, 649 F. Supp. 2d 224, 240 (S.D.N.Y. 2009), *aff'd*, 416 F. App'x 101 (2d Cir. 2011).

*v. Gannett Co.*, 40 N.Y.2d 415, 422 (1976). There are two categories of public figures. A "general-purpose" public figure has achieved "general fame or notoriety in the community" such that "he becomes a public figure for all purposes and in all contexts." *Gertz*, 418 U.S. at 351-52. Other public figures have not achieved such general fame, yet have nonetheless "strived to achieve a measure of public acclaim." *James*, 40 N.Y.2d at 422. Some have done so by seeking fame and publicity in a particular field, industry, or subject matter, others by injecting themselves into a particular public controversy. *Id.* at 422-23. Such individuals—known as "limited-purpose" public figures—are likewise subject to the actual-malice standard for alleged defamation relating to the activities for which they sought publicity. *Id*.

Dr. Luke falls into both categories. The trial court legally erred in concluding that he falls into neither. R-17-19.

### A. Dr. Luke Is A General-Purpose Public Figure.

#### *1. The Trial Court Applied The Wrong Legal Standard In Determining Whether Dr. Luke Is A General-Purpose Public Figure.*

The trial court concluded that to be a general-purpose public figure, a plaintiff must be a "household name." R-17. But that is not how the Supreme Court or any New York appellate court has *ever* articulated the applicable legal standard.

In fact, contrary to the trial court's invented conception, the Court of Appeals has stated the opposite. In the seminal New York case on public-figure status, the court made clear that the "category of 'public figures' is of necessity quite broad." *James*, 40 N.Y.2d at 422. A person becomes a general-purpose public figure by reason of the "vigor and success with which they seek the public's attention." *Gertz*, 418 U.S. at 342. "[I]ncluded, without doubt, are many types of public performers such as professional athletes, nightclub and concert singers, television and movie actors, and recording artists." *James*, 40 N.Y.2d at 422.

This Court's recent decision in *Winklevoss v. Steinberg*, 170 A.D.3d 618 (1st Dep't 2019), is also irreconcilable with the trial court's holding below. There, private-equity investors Cameron and Tyler Winklevoss sued an individual for allegedly telling the New York Post that they had defaulted on a share-purchase agreement. *Id.* at 618-19. This Court held that they are most certainly "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. The subject of the libel—their alleged default on an agreement—had nothing to do with the Olympics or "The Social Network," yet this Court held that the Winkelvosses' successful efforts to achieve public attention sufficed to categorize them as general-purpose public figures.

There was no "household-name" requirement, as the plaintiffs in *Winklevoss* are, by no means, household names. The point was simply that they sought and achieved a level of fame sufficient to render them public figures for all purposes.

*2. Dr. Luke Is A General-Purpose Public Figure Under The Applicable Legal Standard.*

The question, then, is whether Dr. Luke has sought and achieved comparable levels of fame. The answer is yes. Based in large part on his own efforts to seek publicity, Dr. Luke has achieved not only success but tremendous fame. He is a quintessential general-purpose public figure.

a. Dr. Luke is an enormously successful music producer who became famous by producing hit songs for female pop-music artists, including Kesha, Katy Perry, Miley Cyrus, Britney Spears, and Rihanna. R-3542; R-3615; R-5000; R-5210-5215; R-5354. More than 150 songs produced or co-written by Dr. Luke were released between 2007 and 2014, including more than 15 #1 hits. R-5273-5289. Dr. Luke received numerous accolades: Industry giant ASCAP named him Songwriter of the Year, R-5297-5298, and Billboard dedicated its September 2010 cover story to Dr. Luke, declaring him the "New Tycoon of Teen," R-5299-5308, and naming him to its 2012 list of powerful persons in the music industry, R-5309-5310. By 2014, *hundreds* of news articles had mentioned Dr. Luke, including in Billboard and Rolling Stone, R-4924; R-4959-4964. Three separate books highlight his music-industry contributions—including a four-chapter feature in a

*New York Times*-reviewed book. R-4927; R-5311-5319. Contemporaries compared him to the Beatles. R-5322; R-5336-5337.

Indeed, Dr. Luke was so successful within the music industry that he was able to capitalize on that fame in an array of commercial and civic engagements spanning distinct spheres of influence:

— *Congressional public-policy briefing*. In the political arena, Dr. Luke represented the music industry during a congressional roundtable. R-5395. *See Carto v. Buckley*, 649 F. Supp. 502, 507 n.3 (S.D.N.Y. 1986) (lobbyist organization public figure).

— *Core Water*. In the marketing space, Dr. Luke monetized his connections to other celebrity artists to fuel his involvement in Core Water. By year-end 2014, Dr. Luke had used his substantial influence to secure A-List celebrities like Katy Perry and DJ Khaled as brand ambassadors. R-4940-4941; 5471-5472; 5478-5479.

— *Hollywood Walk of Fame*. Within the tourism industry, the Hollywood Chamber of Commerce selected Dr. Luke for a star on the Hollywood Walk of Fame. R-5457; R-5458; R-5466. The selection committee targets individuals sure to draw tourist foot traffic. R-5466.

— *American Idol.* Within the broader entertainment industry, Fox announced in 2012 that it had selected Dr. Luke as an "American Idol" judge, reflecting a judgment that Dr. Luke would be good for ratings. R-5403-5448; R-5813-5816; R-5991-5998. Dr. Luke's selection was widely covered by the press. *Id.*

Dr. Luke's fame and celebrity status, moreover, was not accidental; his deliberate and concerted efforts at self-promotion drove his fame. Dr. Luke took "affirmative step[s] to attract public attention," *James*, 40 N.Y.2d at 422, and "voluntarily thrust[] [himself] into the limelight in seeking media attention," *Curry v. Roman*, 217 A.D.2d 314, 319 (4th Dep't 1995).

Beginning in the mid-2000s, Dr. Luke hired at least *four* different public-relations teams—including a team headed by Michael Sitrick, a prominent public-relations expert with a long roster of celebrity clients. R-3677; R-5202; R-5707; R-5342-5343; R-5344; R-5969. Having adopted a stage name, and armed with a deep bench of publicists, Dr. Luke sought to cement his status as a celebrity by pursuing a full-court-press media effort, consistently making himself available for public appearances, interviews, and general publicity:

— *Feature-length interviews with mainstream press outlets*. In June 2010, *New York Magazine* ran a four-page feature that covered Dr. Luke's music-industry success and personal life. R-5354-5359. Also in 2010, Dr. Luke gave a lengthy interview to *The Guardian*, sharing personal anecdotes about dealing drugs and getting expelled. R-5360-5362. In fall 2013, *The New Yorker* declared "The Doctor Is In," publishing an eight-page spread containing lengthy interviews in Dr. Luke's beach house. R-5322-5341. The profile's illustration depicted Dr. Luke surrounded by Britney Spears, Katy Perry, Miley Cyrus, and Kesha. R-4921.

— *Photography Shoots.* In connection with an August 2010 *LA Times* article declaring the "Hits Keep Coming For Dr. Luke," Dr. Luke sat for a Getty Images-archived photoshoot. R-4916; R-5363-5365. Dr. Luke made himself available for a similar photography shoot for the September 2010 *Billboard* cover story lauding his arrival on the music scene. R-5299.

— *Prime-time television.* In February 2011, Dr. Luke opened his studio for extensive interviews and video footage that played in a *seven-minute* feature on ABC World News Tonight and Nightline. R-5366. The narrator referred to him as "the man everyone calls Dr. Luke." *Id.*

— *Red-carpet interviews*. Dr. Luke agreed to participate in red-carpet interviews, including at the 2011 Grammys and ASCAP Pop Music Awards. R-3722; R-5357; R-5378.

— *Radio and podcast interviews*. In fall 2010, Dr. Luke appeared on NPR's Morning Edition podcast. R-5381-5384; R-4923. In 2012, KIISFM introduced him as "the man, the myth, the legend, Dr. Luke." R-5392-5393.

Dr. Luke likewise cultivated a social-media profile to complement his media-relations effort. Dr. Luke claimed the @TheDoctorLuke Twitter handle in 2009 and has since tweeted more than *7,500* times, R-5252—comparable to superstar Lady Gaga's approximately 8,600 tweets, and dwarfing celebrity-producer Simon Cowell's approximately 2,000 tweets. R-5259-5260; R-4930. Dr. Luke tweeted about both his personal and professional life to his hundreds of thousands of followers. R-5252-5258; R-5250; R-5251.

b. If the Winklevoss brothers are general-purpose public figures because of the fame they invited and achieved, then Dr. Luke is an easy case. After all, the Winklevoss brothers were never selected to receive a star on the Hollywood Walk of Fame, and no one ever invited them to be judges on *American Idol*. The trial court believed that Dr. Luke was only "well known in music-industry circles," R-17, but mere industry insiders do not get their own stars. Indeed, while the trial court erred in holding that a general-purpose public figure must be a "household name," the undisputed evidence detailed above establishes that Dr. Luke was Hollywood Walk of Star famous and known to almost the entire music world, the readers of the New Yorker, and hundreds of thousands of other followers whom he

cultivated. His successful efforts at self-promotion and image cultivation far exceeded any efforts or results of Cameron and Tyler Winklevoss.

Just as with the Winklevoss brothers, moreover, Dr. Luke is the subject of "routine coverage in popular media, coverage in which [he] willingly participate[s]." *Winklevoss*, 170 A.D.3d at 619; *see also James*, 40 N.Y.2d at 422 ("Newspapers and magazines of general circulation necessarily report on persons upon whom public interest has fastened."). That is crucial because Dr. Luke's unfettered access to and exploitation of the media confirms that he (i) voluntarily assumed the risk of "adverse as well as favorable comment" by stepping into the spotlight, *Bell v. A.P.*, 584 F. Supp. 128, 132 n.10 (D.D.C. 1984), *and* (ii) his vast wealth and notoriety ensured that he can "resort to effective 'self-help,'" *Wolston*, 443 U.S. at 164. Indeed, Dr. Luke routinely turned to his army of publicists to alert the media and shape their reports. *See supra* at 12, 21-22.

Finally, if there were any doubt about Dr. Luke's status as a general public figure, Dr. Luke's proclamations of his own fame resolve them. In two 2011 federal-court complaints, he crowed about his "continuous international, widespread success, and accomplishment [that] is unparalleled in [his] field"; his "enviable status in the industry"; and his "international acclaim and respect from his peers both in the music entertainment industries *and from the public at large*." R-5783; R-5799; R-5805. Dr. Luke further blamed his "*fame* and success" for his

being a "visible public target[]." R-5785. Dr. Luke even wondered if some of his successes were due to his general celebrity rather than talent, confiding to a reporter in 2010 that he "often think[s] about secretly producing under a different name…to see how it's perceived." R-5359. Far more modest concessions of fame are often deemed dispositive of the public-figure inquiry. *See Maule v. NYM Corp.*, 54 N.Y.2d 880, 882 (1981) (writer public figure in part because "[b]y his own estimation he was one of the best known writers at *Sports Illustrated*"); *Celle v. Filipino Reporters Enters. Inc.*, 209 F.3d 163, 177 (2d Cir. 2000) (radio commentator who characterized himself as "well known" public figure); *see also San Antonio Exp. News v. Dracos*, 922 S.W.2d 242, 254-55 (Tex. App. 1996) (reporter public figure based in part on concession of fame in prior litigation).

As with the Winklevosses, Dr. Luke's tremendous success and fame render him a general-purpose public figure and require him to prove falsity and actual malice by clear and convincing evidence as to any alleged defamation.

### B. Dr. Luke Is Also A Limited-Purpose Public Figure.

#### *1. Dr. Luke's Deliberate Efforts To Attract Publicity Render Him A Public Figure For The Allegedly Defamatory Statements At Issue Here.*

Even the trial court did not dispute that Dr. Luke actively sought and achieved extraordinary fame within the music industry. R-17. And controlling New York precedent requires application of the actual-malice standard at least

when it comes to allegedly defamatory statements (like the statements here) related to the area in which Dr. Luke is famous. Specifically, the Court of Appeals has explained that some "public figures may invite publicity only with respect to a narrow area of interest"—and so become public figures *for alleged defamation relating to that area*. *James*, 40 N.Y.2d at 423; *see also* Bruce W. Sanford, *Libel and Privacy* § 7.4 (2d ed.) ("[C]ourts generally conclude that sports figures, entertainers and the like are 'public figures'—at least for the purpose of publications relating to the cause of their fame or notoriety, basis for achievement or fitness for position.").[7]

Take, for example, *James* itself. There, Samantha James, a belly dancer who took "an affirmative step to attract public attention" by agreeing to an interview for the "obvious purpose" of "attract[ing] customers to the club" was a public figure—at least "with respect to accounts of her stage performances." 40 N.Y.2d at 422-23. Likewise, in *Park v. Capital Cities Communications*, 181 A.D.2d 192, 197 (4th Dep't 1992), the Fourth Department determined that John Park, an ophthalmologist who "actively s[ought] media attention" and "invited favorable

[7] Such figures could also be conceptualized as "general-purpose" public figures who have sought fame limited to a particular field and thus are public figures only with respect to that field. But the nomenclature is immaterial. What matters is that such fame-seeking individuals are plainly subject to the actual malice standard for defamation relating to the activities for which they sought publicity.

publicity for his practice" was a public figure—at least "for purposes of" an investigation into his practice.

Indeed, New York courts routinely apply the actual-malice standard to individuals who are famous *in a particular field* for alleged defamation *relating to that field*, including individuals far less famous than Dr. Luke:

— Joseph Parlato and Wilson Curry, art auctioneers who "voluntarily thrust[] themselves into the limelight in seeking media attention for the auction," *Curry*, 217 A.D.2d at 319;

— Cathy Davis, a "very public and well-known" boxer "within the context of female boxing," *Davis v. High Soc'y Magazine*, 90 A.D.2d 374, 384 (2d Dep't 1982);

— Daniel Wilsey, a licensed harness-track driver who was an "expert[]" in the field of harness racing, *Wilsey v. Saratoga Harness Racing*, 140 A.D.2d 857, 858-59 (3d Dep't 1988);

— Hal Roche, a "well known Irish comedian," *Roche v. Mulvihill*, 214 A.D.2d 376, 377 (1st Dep't 1995);

— Tex Maule, a Sports Illustrated writer who sought publicity for his work covering sports events, including by making numerous public appearances, *Maule*, 54 N.Y.2d at 883;

— David Kipper, Ozzy Osbourne's former doctor, in light of media coverage of his practice, television appearances, and roles as a doctor in several films, *Kipper v. NYP Holdings Co., Inc.*, 12 N.Y.3d 348, 353 n.3 (2009); and

— Robert Atkins, a diet founder, whose books sold nearly four million copies, *Atkins v. Friedman*, 49 A.D.2d 852, 852 (1st Dep't 1975).

Contrary to the trial court's passing suggestion, R-17-18, none of these cases involved "public-controversy"-based limited public figures: the courts never

defined pre-existing public controversies related to the defamation at issue, let alone analyzed the plaintiffs' roles in such controversies. Rather, the actual-malice standard applied because the plaintiffs "had taken affirmative steps to attract personal attention or had strived to achieve a measure of public acclaim" in the field to which the defamatory statement related. *Maule*, 54 N.Y.2d at 881-82.

Again, this Court's recent decision in *Winklevoss* is telling. The Court held that the Winklevoss brothers are not only general-purpose but also limited-purpose public figures. They are limited-purpose public figures, as the defendant there argued, in the context of "the subject matter on which [the defendant] allegedly commented: their business practices," due to their efforts to "invite public attention concerning their business." Brief of Respondent at 44, *Winklevoss v. Steinberg*, No. 159079/17 (1st Dep't Jan. 8, 2019). The Winklevosses (like the trial court here) countered that the defendant had failed to identify a specific "public controversy" in which they had injected themselves. Reply Brief of Appellants at 21-23, *Winklevoss v. Steinberg*, No. 159079/17 (1st Dep't Jan. 28, 2019). This Court deemed that irrelevant, holding that the Winklevosses are "limited public figures" due to their efforts to attract publicity as investors, with no reference to any "public controversy": "Through their voluntary participation in numerous interviews, in widely-covered conferences and meetings with entrepreneurs, and in

their own radio broadcasts, they have attracted public attention to themselves as investors in start-ups." 170 A.D.3d at 619.

The same, obviously, is true of Dr. Luke. His fame in the music industry far exceeds that of a Rochester belly dancer, *James*, 40 N.Y.2d at 423, a Buffalo ophthalmologist, *Park*, 181 A.D.2d at 197, or a local art auctioneer, *Curry*, 217 A.D.2d at 319—if they are public figures with respect to statements relating to the cause of their fame, *see supra* at 25-26, then Dr. Luke obviously is, too.

And the allegedly defamatory statements—concerning Dr. Luke's abuse of a mega-star recording artist in his portfolio—relate directly to Dr. Luke's conduct as a celebrity music producer. Indeed, he achieved fame in large part based on the fact that he cultivated and produced talented, young, female artists—again, for example, the *New Yorker* spread featured a photograph of him with a string of young female artists, including Kesha. *See supra* at 21. Statements that he raped one of the clients who made him famous are quite obviously related to the cause of his fame or notoriety, and require him to prove actual malice before prevailing on a defamation claim.

A contrary conclusion would have unconscionable consequences. Should Harvey Weinstein circa 2015, before the entire country knew his name, have been considered a private figure for purposes of accusations relating to his abuse of female actors? Weinstein may not have had universal name-recognition or

"injected himself into the public debate" about workplace harassment, so he would (wrongly) not have been a limited-purpose public figure according to the trial court, R-17-19—but he had most certainly sought and achieved celebrity within the film industry. What about USA Gymnastics national team doctor Larry Nassar—well known within the Olympic community, but virtually unknown in households across the United States? Under the trial court's ruling, he would not be a public figure for purposes of the hundreds of sexual-assault accusations levied against him by young female gymnasts because he never "injected himself into a public debate" about sexual assault of gymnasts. So too with Chef Mario Batali. Chase Finlay, former principal dancer for the New York City Ballet. Metropolitan Opera conductor and pianist James Levine. Before their more-recent notoriety, none were household names (many still aren't), and none previously injected themselves into a public controversy concerning sexual assault—and yet it would have been wildly inappropriate to treat them as private figures for purposes of the sexual-assault allegations levied against them, which relate directly to the industries in which they sought publicity. The trial court's ruling—which would lead to just that result—should be reversed.

*2. Dr. Luke Injected Himself Into A Public Controversy At The Heart Of Kesha's Allegedly Defamatory Statements.*

While injecting oneself into a public controversy is not a prerequisite for public-figure status, Dr. Like did, in fact, inject himself into a clear public

controversy related to the allegedly defamatory statements at issue, making him a public figure under that metric as well.

A public controversy is one that "has received public attention because its ramifications will be felt by persons who are not direct participants." *Waldbaum v. Fairchild Publ'ns*, 627 F.2d 1287, 1296, 1299 (D.C. Cir. 1980) (defining "viability of [supermarket] cooperatives" and company's "innovative" policies as "overlapping" public controversies). A serious public controversy exists over abusive artist contracts and the treatment of artists by powerful industry executives—particularly where, as here, abusive treatment prevents an artist from producing valuable public works. *Cf. Foster v. Svenson*, 128 A.D.3d 150, 156-57 (1st Dep't 2015) ("artistic expression" matter of "public concern"); *Bensussen v. Tadros*, 2018 WL 2390162, at *3 (Cal. Super. Ct. Mar. 8, 2018) (allegations of rape and drugging by music producer "involve issues of widespread public interest"). This artist-treatment controversy has been a consistent focus of national reporting, R-5966; R-6112; R-5811; R-6005, and is especially acute with respect to the mistreatment of young, female artists by male executives who wield enormous power over their careers. The entertainment and music industries have struggled for decades with a "casting couch" culture problem, and intense public interest in this topic is illustrated by the media's long reporting on this controversy. *See* R-

5268; R-5817; R-5887; R-5905; R-5910; R-5912; R-5915; R-5923 (illustrative reports).

After acknowledging the existence of this public controversy, the trial court nevertheless concluded that the actual-malice standard is inapplicable here because Dr. Luke, according to the trial court, never specifically "injected himself into the public debate about sexual assault or abuse of artists." R-18-19. But Dr. Luke did far more than seek "publicity for his label, his music and his artists," R-18: he thrust himself to the forefront of the artist-treatment controversy by making public statements and seeking continued media coverage highlighting his own relationships with the young, female mega-celebrity artists in his portfolio, R-5301; *see supra* at 19-22.

For instance, in 2012, Dr. Luke was featured prominently in a 40-minute video about the making of an Avril Lavigne song. Touting his studio relationship with Lavigne, Dr. Luke brags that they "drank three-quarters of a bottle of Jägermeister within … a couple of hours. [Avril] drank … a bottle of Limoncello. And we were just, you know, doing shots, and drinking. …We were shitfaced, fucking drunk. … I am Avril's bitch, basically." R-5369-5370. Bragging to the press about getting blackout drunk with a young artist in his portfolio certainly demonstrates that Dr. Luke's *modus operandi* was something of

which he was proud. Kesha's allegation is that Dr. Luke groomed her with alcohol and a pill, she blacked out, and he then raped her.

More broadly, Dr. Luke had a type: Young female artists whom he promised to make stars. The fall 2013 *New Yorker* profile quotes Dr. Luke discussing his artists' twitter followers, and his control over their tweets. R-5331-5333. The profile highlights Dr. Luke's self-described relationships with his artists. R-5332. By proactively boasting to the media about his relationships (and drinking) with young female artists, Dr. Luke opened those relationships to scrutiny.

And as the trial court recognized, *see* R-17-19, the statements at the heart of this suit relate directly to this public controversy about how young, female artists are treated. The press immediately linked Kesha's statements to this controversy, R-6030, and Dr. Luke's own expert characterizes Kesha's statements as fitting a "preexisting narrative" about entertainment-industry abuse, R-4831. At the very least then, Dr. Luke is necessarily a public figure for purposes of this suit.

### C. Dr. Luke Must At Least Demonstrate That Kesha Acted With Gross Irresponsibility.

Under New York law, when the content of a false and defamatory publication is "arguably within the sphere of legitimate public concern which is reasonably related to matters warranting public exposition," a plaintiff must show

the defendant acted with "gross irresponsibility." *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199-200 (1975).

All the allegedly defamatory statements fall squarely within the sphere of legitimate public concern. *See Huggins v. Moore*, 94 N.Y.2d 296, 304-05 (1999) (applying "gross irresponsibility" standard to allegedly defamatory article relating to "allegedly pervasive modern phenomenon of economic spousal abuse"); *see also Chalpin v. Amordian Press*, 128 A.D.2d 81, 88 (1st Dep't 1987) (commentary on Jimmi Hendrix's production contracts "certainly…within the sphere of legitimate public concern"). Indeed, the trial court recognized "the important public matters implicated by the defamatory statements." R-17. But it then erroneously imposed a categorical bar on application of the gross-irresponsibility standard, suggesting that "it does not apply to a first-hand account of events not involving any media publication, investigation or newsgathering." R-19.

To start, "[c]ourts applying New York law have … uniformly applied *Chapadeau* to cases involving non-media defendants." *Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 101-02 (2d Cir. 2000) (applying *Chapadeau* to investment company's property appraisals). In *McGill v. Parker*, 179 A.D.2d 98 (1st Dep't 1992), for instance, New York City carriage-horse owners sued animal-rights activists and the state agency that enforced animal-protection laws for statements advocating better treatment of carriage horses. *See id.* at 101-104. This

Court reasoned that the public-figure doctrine and the gross-irresponsibility standard apply in defamation suits against non-media defendants, finding "no reason … why the Constitution should be construed to provide greater protection to the media in defamation suits than to others exercising their freedom of speech." *Id.* at 108; *see Crucey v. Jackall*, 275 A.D.2d 258, 263-64 (1st Dep't 2000) (Saxe, J., concurring) (applying standard to statements by sociology-professor author); *Farber v. Jefferys*, 2011 WL 5248207, at *10-11 (N.Y. Sup. Ct. 2011), *aff'd,* 103 A.D.3d 514 (1st Dep't 2013) (applying standard to statements by AIDS activist); *Sheridan v. Carter*, 48 A.D.3d 444, 446 (2d Dep't 2008) (applying standard to statement by union defendant); *Colon v. City of Rochester*, 307 A.D.2d 742, 743 (4th Dep't 2003) (applying standard to statement by municipal defendant); *see also Konikoff*, 234 F.3d at 102 n.8 (collecting cases). As the Third Department has explained, there is "no reasonable basis" to limit the doctrine to statements made by the media, in light of its "underlying principles of encouraging debate, and the free flow of information, with respect to issues of public concern." *Mahoney v. State*, 236 A.D.2d 37, 38 n.1 (3d Dep't 1997).

Nor does the first-hand nature of the allegedly defamatory statements preclude application of the gross-irresponsibility standard. The *Chapadeau* standard turns on the fact that matters of public concern by their very definition "warrant[] public exposition." 38 N.Y.2d at 199. Whether one is reporting

personal observations or discussing others' experiences is irrelevant to *Chapadeau*'s interest in encouraging the "free flow of information." *Mahoney*, 236 A.D.2d at 38 n.1. On the contrary, first-hand accounts by those who have been directly affected improve debates over matters of public concern.

And that is particularly true in the sexual-assault context, where social and economic pressures independently chill reporting. *See* Rachel E. Morgan et al., U.S. Dep't of Justice Bureau of Criminal Justice Statistics, Criminal Victimization, 2018 at 8 (estimating 24.9% reporting rate for rape/sexual assault in 2018). This Court should not accord greater First Amendment protection to those who opine on sexual assault without any personal experience, while holding survivors' stories to a higher standard. *Cf.* Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1094 (1986) (noting the "longstanding suspicion of rape victims" and historic legal evidentiary rules that "placed the [rape] victim as much on trial as the defendant").

## II. THE TRIAL COURT ERRED IN DECLINING TO APPLY THE PRE-LITIGATION AND LITIGATION PRIVILEGES TO 27 STATEMENTS.

As the trial court recognized, "statements made during or in connection with good-faith anticipated litigation are privileged and cannot give rise to defamation liability." R-26. Here, it is undisputed that 27 statements for which Dr. Luke sued Kesha were made (i) during settlement discussions as pertinent to anticipated litigation (2 statements); (ii) by Kesha in litigation filings (6 statements); or (iii) by

Kesha or her attorneys to summarize litigation developments (19 statements). R-4683-4687. Thus, so long as the underlying litigation was not a "sham"—an extraordinarily high bar, given New York's protection of the right of litigants to speak freely and seek justice in court—these 27 statements are not actionable as a matter of law and should be dismissed. *Flomenhaft v. Finkelstein*, 127 A.D.3d 634, 637 (1st Dept. 2015). Yet the trial court denied summary judgment on that very basis. That decision was legally erroneous and should be reversed.

### A. It Is Undisputed That, Absent The "Sham" Exception, 27 Statements Would Be Covered By The Litigation Privilege.

#### *1. The Qualified Pre-Litigation Privilege Protects Kesha From Liability For Pre-Filing Transmittal Of Her Complaint.*

"[N]o cause of action for defamation can be based on" pre-litigation statements, "[i]f the statements are pertinent to a good faith anticipated litigation." *Front, Inc. v. Khalil*, 24 N.Y.3d 713, 715 (2015). This privilege serves to "encourage[] potential defendants to negotiate with potential plaintiffs in order to prevent costly and time-consuming judicial intervention," *id.* at 719, and extends to an attorney's pre-litigation communications with the press, *see Tacopina v. O'Keeffe*, 645 F. App'x 7, 8 (2d Cir. 2016) (applying privilege to affidavit shared with Daily News before court filing); *Feist v. Paxfire, Inc.*, 2017 WL 177652, at *5 (S.D.N.Y Jan. 17, 2017) (applying privilege to attorney's statements before complaint filed).

Here, the qualified privilege precludes liability for two statements: (i) Meiselas's 2014 pre-litigation publication of the Draft Complaint; and (ii) the pre-filing transmittal to TMZ of the complaint Kesha filed to commence her 2014 California state-court case. Indeed, given that a filed complaint is subject to absolute privilege under New York law, *see* Part II.A.2, *infra*, Kesha cannot possibly be held liable for confidentially sharing in settlement negotiations a draft complaint *substantively identical* to the one she would ultimately file in state court, R-6078-6111, or for sharing with the press an embargoed-until-filing copy of the very complaint she filed.

a. By June 2014, Kesha indisputably had a "good faith basis to anticipate litigation" regarding Dr. Luke's rape and abuse. *Front*, 24 N.Y.3d at 719. By that point, Kesha had engaged in year-long settlement negotiations with Dr. Luke and Sony regarding Kesha's request for a contract that required no direct contact with Dr. Luke. *See supra* at 10-11. As part of those confidential settlement negotiations, Kesha's counsel shared a draft complaint naming Dr. Luke (the act of alleged defamation). *See id.* Dr. Luke and Sony took Kesha's claims seriously: no one contemporarily accused Kesha of seeking to defame or extort Dr. Luke. To the contrary, after reviewing the draft complaint, Dr. Luke's counsel drafted long-form settlement agreements. Although no settlement was reached, sharing the

draft complaint helped encourage settlement negotiations—the whole purpose of the pre-litigation privilege. *Front*, 24 N.Y.3d at 719.

What is more, the litigation that Kesha "anticipated" came to fruition—and was hard fought. *See Feist*, 2017 WL 177652, at *6 (applying privilege because it was "not a case where plaintiff failed to move forward"). Kesha expended substantial resources over two years to pursue her California claims, including by amending her complaint to buttress her California-is-the-proper-forum argument, opposing a motion to dismiss, and participating in at least seven court hearings. *See supra* at 11-14; *see also Feist*, 2017 WL 177652 at *6 (noting parties "submitted multiple expert reports and voluminous submissions in support of and opposition to the merits of [the alleged defamer's] claims"). And then she brought two complaints in New York based on the same allegations. She has spent millions of dollars both prosecuting and defending her claims of rape. She has never retracted nor backed down. Calling such prolonged efforts a sham is gutting the litigation privilege in its entirety.

b. The alleged publications were also pertinent to the litigation. "Pertinenc[e] is" likewise "a question of law for the court to decide," *Mosesson v. Jacob D. Fuchsberg Law Firm*, 257 A.D.2d 381, 382 (1st Dep't 1999), using an "extremely liberal" standard, *Flomenhaft*, 127 A.D.3d at 637. The privilege is lost "only when the language used goes beyond the bounds of reason and is so clearly

impertinent and needlessly defamatory." *Feist*, 2017 WL 177652, at *4. Here, the complaints provided to Sony's General Counsel and TMZ were plainly pertinent to the California litigation, because they "substantively track[ed] the version that was filed." *Id.* at *5; *see also Liberty v. Coursey*, 2016 WL 5944468, at *15-16 (N.Y. Sup. Ct. Oct. 7, 2016) (draft-complaint statements related to proposed claims); R-6078-6111. And the complaint that TMZ received was provided under an embargo "for the express purpose of permitting the reporter to write the story and have it ready for publication as soon as the Complaint was filed." *Feist*, 2017 WL 177652, at *6; *see also Tacopina*, 645 F. App'x at 8 (extending privilege to distribution of draft pleading to press).

*2. New York's Absolute Judicial-Proceeding-Related Privileges Preclude Liability For 25 Statements.*

Under New York common law, "statements made during the course of a judicial or quasi-judicial proceeding are clearly protected by an absolute privilege as long as such statements are material and pertinent to the questions involved." *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 365 (2007). New York Civil Rights Law § 74 similarly protects any "fair and true report of any judicial proceeding." "Comments that essentially summarize or restate the allegations of a pleading filed in an action … fall within [§ 74's] privilege," *Lacher v. Engel*, 33 A.D.3d 10, 17 (1st Dep't 2006), as does "the release of background material with regard to the case." *Biro v. Conde Nast*, 883 F. Supp. 2d 441, 478 (S.D.N.Y. 2012).

New York's absolute, common-law privilege protects six statements because they were material and pertinent to the underlying litigations in which they were made. R-4683-4687. Pleadings, court documents, and public statements about Kesha's sexual-assault allegations are material and pertinent to (i) the California suit, where Kesha pleaded numerous torts based on Dr. Luke's alleged sexual assault; and (ii) this litigation, where Kesha's primary defense is the truth of her rape allegation.

Similarly, 19 of the public statements are protected under Civil Rights Law § 74, because they reflect Kesha's or her attorneys' fair and true report of case background and litigation developments. R-4683-4687. For example, Geragos made seven statements in the immediate aftermath of the 2014 California and New York filings, explaining that Kesha's claims were based on her "years as a victim of mental manipulation, emotional abuse, and sexual assault at the hands of Dr. Luke." R-4683-4687.

### B. The Trial Court Erred In Concluding That The Jury Should Decide If Kesha's California Litigation Was A "Sham."

The trial court did not disagree with any of the above privileges analyses. But the court nonetheless refused to designate the relevant statements as privileged: Given the parties' "very different accounts about what happened on the night at issue," the court explained, it could not "decide … who should be

believed" and thus whether Kesha commenced "the California Action … in good faith or as a sham." R-26-27. "That decision is for a jury." R-27.

The trial court applied a legally erroneous standard in reaching that conclusion. The question whether litigation is a "sham," thus defeating application of the judicial-proceedings privileges, does not turn on whether reasonable jurors could disagree about the underlying merits of that action. Instead, "an offending statement pertinent to the proceeding in which it is made" is privileged "*regardless of its truth or falsity*." *Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163, 172-73 (1st Dep't 2007) (*abrogated on other grounds*) (absolute privilege); *see Front*, 24 N.Y.3d at 720 (deeming pre-litigation statement subject to qualified privileged without *ever* interrogating truth of statements themselves); *Grasso v. Mathew,* 164 A.D.2d 476, 480 (3d Dep't 1991) ("[*W*]*hether true or not*, the challenged statement" is protected).

The question thus is not whether a reasonable jury could conclude that the litigation in question was a "sham." Rather, it is whether that litigation "was without *any basis* in fact and was commenced *solely* to defame defendant." *Reszka v. Collins*, 136 A.D.3d 1299, 1301 (4th Dep't 2016); *see also Flomenhaft*, 127 A.D.3d at 638. And under that legal standard, the trial court's own finding that there is a reasonable dispute as to this question means that the trial court was obligated as a matter of law to *reject* application of the "sham litigation" exception.

Said differently, the sham exception applies only where there is *zero basis* for the underlying claim, so the trial court's own conclusion that a reasonable juror could accept or reject the claim necessarily defeats the "sham litigation" exception, and the trial court's basis for adopting it.

Indeed, it is beyond dispute that there is at the very least a factual basis for Kesha's suit. The veracity of the facts underlying Kesha's California and New York tort claims are long documented in Kesha's contemporaneous reports (confirmed under oath by her mom, her therapists, and multiple third parties) over the course of seven years, and hotel, phone, and medical records, and supported by uncontroverted empirical data. *See supra* at 6-10. Indeed, *Dr. Luke's* own pre-litigation recognition of the claims' veracity is reflected in his good-faith settlement negotiations. *See supra* at 10-11. There is no precedent—none—even remotely suggesting that the litigation privilege would not apply in these circumstances. For good reason: it would untenably chill litigation and reporting of judicial proceedings, directly contrary to New York public policy. If the test is whether a jury believes the claims, every single suit where factual allegations are contested could serve as the basis for a separate defamation suit. Every single person who sues regarding a sexual assault would be subject to an automatic counterclaim for defamation that would go to a jury. The trial court's decision to the contrary is incorrect as a matter of law and should be reversed.

### C. No "Sham Litigation" Argument Applies To Statements Relating To The New York Litigation.

The trial court's holding with respect to the *California* action also has no bearing on the 12 protected statements relating to this *New York* action, as to which Dr. Luke also seeks recovery. R-4685-4687. After all, the purpose of the sham-litigation exception is to preclude parties from filing a lawsuit for no purpose other than to cloak defamatory statements in privilege. *See Lacher*, 33 A.D.3d at 13; *see also Flomenhaft*, 127 A.D.3d at 636 (sham litigation "contrived by [defamation] defendant[] as a vehicle for defaming"). It is undisputed that Kesha did not initiate, but is instead defending, this case. There can be no possible "sham litigation" claim associated with the statements made during and about this litigation to overcome application of the privileges.

## III. THE TRIAL COURT ERRED IN HOLDING KESHA LIABLE FOR UNAUTHORIZED STATEMENTS MADE BY THIRD PARTIES.

A principal can be held vicariously liable for a third party's statements only if that third party is her agent, who is acting within the scope of his authority. The trial court here misapplied that uncontroversial standard several times over. Whether Kesha is liable for public statements by her lawyer, Mark Geragos, and the public-relations firm he hired, Sunshine Sachs, is, at most, a triable issue of fact, contingent on the scope of Geragos's authority. And the undisputed evidence establishes as a matter of law that Kesha cannot be held liable for statements made

by her mother, Pebe Sebert, and a young fan, Michael Eisele, because neither had an agent-principal relationship with Kesha, and their statements were unauthorized.

### A. Dr. Luke Was Not Entitled To Judgment That Mark Geragos And Sunshine Sachs Acted As Kesha's Authorized Agents.

The trial court concluded as a matter of law that Mark Geragos and Sunshine Sachs acted as Kesha's agents. "[A] principal is only liable for the conduct of an agent acting within the scope of one's authority." *McGarry v. Miller*, 158 A.D.2d 327, 328 (1st Dep't 1990). "[T]he extent of the agent's actual authority is interpreted in the light of all the circumstances," including the "formal agreement between the parties, and the facts of which both parties are aware." *New York Cmty. Bank v. Woodhaven Assocs., LLC*, 137 A.D.3d 1231, 1233 (2d Dep't 2016). "[A]n agent constituted for a particular purpose, and under a limited and circumscribed power, cannot bind his principal by an act beyond his authority." *Bank of New York v. Alderazi*, 900 N.Y.S.2d 821, 823 (N.Y. Sup. Ct. 2010). That limitation "applies to the attorney-client relationship as to third parties injured by an attorney's torts." *Carolco Pictures Inc. v. Sirota*, 700 F. Supp. 169, 172 (S.D.N.Y. 1988). And it applies to defamation, like any other tort: "A principal is subject to liability for a defamatory statement by a servant or other agent if the agent was authorized … to make it." Restatement (Second) of Agency § 254; *see Seymour v. New York State Elec. & Gas Corp.*, 215 A.D.2d 971, 973 (3d Dep't 1995).

*Mark Geragos*. The trial court held that Kesha is liable as a matter of law for 13 public statements made by Mark Geragos to CNN, Access Hollywood, and the digital press because he was her "lawyer," and thus her "agent with speaking authority." R-3235-3237; R-21. But the contract between Kesha and Geragos—*i.e.*, the "formal agreement between the parties," *New York Cmty. Bank*, 137 A.D.3d at 1233, precludes that finding. That contract specifically prohibited Geragos from "engag[ing] in any publicity regarding the matter or any lawsuit resulting therefrom (including, without limitation, making any public statements, issuing any press releases or engaging in any interviews with members of the press) *without [Kesha's] prior approval*." R-664. Despite extensive document and deposition discovery of both Kesha and Geragos, Dr. Luke presented no evidence that Kesha had advance knowledge of—let alone approved, directed, or authorized—*any* of the 13 statements before they were made. To the contrary, Kesha has stated that she pre-approved *none* of the statements at issue. R-4425.[8] Dr. Luke likewise failed to identify any evidence that Kesha was aware of the statements when or after they were made. The trial court's conclusion (R-22) that Kesha gave Geragos "approval generally to handle publicity" and "make public statements" about her sexual assault or any other topic is not only unsupported by

[8] Geragos specifically disclaimed Kesha's involvement in certain statements for which Dr. Luke seeks to now hold her liable. R-3445.

any evidence, but is expressly contradicted by the parties' contract.

The trial court's suggestion that Geragos's media communications were at least "generally foreseeable" by Kesha, R-22, is both irrelevant and wrong. New York law is straightforward: A principal's liability turns on the scope of the agent's authority, not "foreseeability."[9] But even if foreseeability were relevant, a reasonable jury could readily conclude that Geragos's unauthorized statements were *not* foreseeable to Kesha precisely because Kesha made clear in her contract that Geragos may not make such statements absent her prior approval.

The question of Kesha's liability for Geragos's statements should, at the very least, be decided by a jury.

Sunshine Sachs. The trial court's conclusion that Kesha is liable as a matter of law for statements made by Sunshine Sachs is likewise flawed. As a threshold matter, the TAC does not clearly attribute any allegedly defamatory statements to Sunshine Sachs, other than a strategy memorandum reflecting the (self-evident) goal of assuring Kesha favorable press coverage (the "SS Strategy Memorandum) and advance-transmittal to TMZ of Kesha's California Complaint. *See* R-293. It

[9] In support of a "foreseeability" standard, the trial court cited only *Murray v. Watervliet City Sch. Dist.*, 130 A.D.2d 830 (3d Dep't 1987). But *Murray* addressed foreseeability in the distinct context of respondeat-superior liability, *see id.* at 832, and did not involve a contract that—like the Kesha-Geragos retainer agreement—specifically foreclosed the possibility of unauthorized agent activity.

is undisputed that the SS Strategy Memorandum was never publicly disseminated, and Kesha's California Complaint—which was embargoed until filed in court—is privileged under New York law, *see* Part II, *supra*.

Nevertheless, to the extent Dr. Luke is alleging defamation based on Sunshine Sachs statements, the trial court erred in finding that Sunshine Sachs was Kesha's agent as a matter of law. *Geragos*, not Kesha, retained Sunshine Sachs. R-894-895. Geragos and Sunshine Sachs executed an engagement letter to which Kesha was not a party, and which Kesha never reviewed. R-746-747; R-4425. "The relation of principal and agent does not exist between the principal and a subagent" whose appointment by the agent was unauthorized. *O.A. Skutt, Inc., v. J. & H. Goodwin*, 251 A.D. 84, 86 (4th Dep't 1937); *People v. Betillo*, 279 N.Y.S.2d 444, 452 (N.Y. Sup. Ct. 1967). Given the express contractual prohibition on unauthorized public statements and press activities by Geragos, *see supra* at 45-46, *Geragos's use of Sunshine Sachs* (in connection with public statements that Kesha never approved) cannot as a matter of law be imputed to Kesha.

### B. Kesha Cannot Be Held Liable For Statements Made By Her Mother Or A Young Fan.

The trial court ignored these same controlling principles in denying Kesha's motion for summary judgment as to Kesha's liability for statements made by Pebe Sebert and Michael Eisele: no reasonable jury could conclude that Pebe and Eisele were Kesha's agents, authorized to speak on her behalf. And there can be no

vicarious liability for defamation "without [] authority or request, by others over whom [Kesha] has no control." *Geraci v. Probst*, 15 N.Y.3d 336, 342 (2010).

Pebe Sebert. Only rarely can an "agency relationship" be premised on "intrafamilial activity." *Struebel v. Fladd*, 75 A.D.3d 1164, 1165-66 (4th Dep't 2010). Here, Dr. Luke offered—and the trial court cited—no evidence that Kesha authorized or directed her mother to make the seven allegedly defamatory statements attributed to Pebe. *See* R-4681-4682. In fact, it is undisputed that Kesha did not even know about the statements before they were made, R-5634-5636; R-5615-5616, and there is no record evidence that Kesha ever asked Pebe to make the alleged defamatory statements, or discuss Gottwald's abuse publicly at all. *See Art. Fin. Partners, LLC v. Christie's, Inc.*, 58 A.D.3d 469, 471 (1st Dep't 2009) (principal-agent relationship only if "consent of one person to allow another to act on his or her behalf and subject to his or her control"); *Geraci*, 15 N.Y.3d at 342 (no liability if republication occurred "without [] authority or request, by others over whom [defendant] has no control"). Kesha lacks the "control" over Pebe's actions that is the hallmark of an agency relationship. *Ciaravino v. Bulldog Nat. Logistics, LLC*, 146 A.D.3d 928, 929-30 (2d Dep't 2017).

Indeed, there is voluminous evidence that Kesha and her agents expressly asked Pebe to *stop* making public statements on the topic. *See* R-7115 (Vector: "Please stop this. We have this under control. Threats aren't going to do

anything!"); R-7114 (Vector: "[W]e would recommend that you don't tweet or publicize this as it will only serve to upset Luke and encourage him to get revenge however possible."); R-7116 (Vector: "I[]…saw a twitter conversation with you and fans about Luke. Please Pebe we all need to be quiet at this time and not stir anything up. You promised me, right? … Pebe: I'll be quiet now."); R-7117 (Lagan Sebert: "stay off twitter").

This clear and unrebutted evidence is not undermined by an erroneous mid-deposition statement by Raquel Bellamy, a junior attorney associated with Kesha's former firm, that Pebe acted as Kesha's agent in sending a single December 30, 2013 e-mail ("December E-mail"). R-4446; R-7144. While the trial court suggested that Bellamy's statement, made years after the alleged defamation, "is not dispositive," R-23, it is in fact completely irrelevant. Attorney statements can be held against a client only where the statements are made with the client's "consent," *In re Doe*, 38 N.Y.S.3d 874, 877 (N.Y. Cty. Ct. 2016), and the attorney is "acting in his capacity," *Tai Wing Hong Imps., Inc. v. King Realty Corp.*, 208 A.D.2d 710, 711 (2d Dep't 1994). Bellamy confirmed that neither Kesha nor Pebe directed, authorized, or approved her statement. R-4446. And Kesha has consistently maintained that Pebe was *not* acting as her agent with respect to any of Pebe's allegedly defamatory statements. R-5634-5636. *See Miller v. Lewis*, 2013

WL 1735131, at *4 (N.Y. Sup. Ct. 2013) (considering whether client was "the source of the information contained" in the relevant statement).

Even if there were a triable issue of fact as to whether Pebe was authorized to send the December E-mail, that would not create a triable issue as to authorization for the other six statements. *See* Restatement (Second) of Agency § 43 ("Approval of a single authorized act does not, of itself, justify an inference of authority to repeat it."); *accord Harlem River Consumers Coop., Inc. v. Associated Grocers of Harlem, Inc.*, 408 F. Supp. 1251, 1272 (S.D.N.Y. 1976). In finding a triable issue with regard to all of Pebe's allegedly defamatory statements, the trial court did not even attempt to identify a link between any supposed authorization for the December 2013 E-mail and any of the other allegedly defamatory statements Pebe made. R-23.

*Michael Eisele*. It is undisputed that Kesha neither authorized nor directed, and did not even know about, the seven allegedly defamatory tweets supporting Kesha attributed to Eisele, a 17-year-old Kesha fan. But the court erroneously found that he was Kesha's agent based on Kesha's general friendship and communications with Eisele—who repeated some of Kesha's other statements online (two at her request)—and Kesha's support for a rally Eisele attended in support of Kesha. R-23. Mere friendship, however, cannot give rise to agency; if anything, their friendship increases the likelihood that Eisele was "independently

inspired" by Kesha's plight. *Id.* And while Kesha asked Eisele to amplify two of her social-media posts, those requests were made *after* Eisele made the statements for which Dr. Luke seeks to hold Kesha liable. *Compare* R-4679-4680, *with* R-2914 *and* R-2919. Kesha cannot be held liable for Eisele's statements in the absence of *any* evidence connecting her to *any* of his allegedly defamatory statements.

## IV. THE TRIAL COURT ERRED IN DECLINING TO HOLD THAT 18 STATEMENTS ARE NON-ACTIONABLE STATEMENTS OF OPINION.

Defamation liability cannot be based on expressions of opinion. *See Mann v. Abel*, 10 N.Y.3d 271, 276 (2008). Whether a particular statement constitutes an opinion is a question of law. *See id*. A statement's context "is often the key consideration in categorizing a statement as fact or opinion." *Thomas H. v. Paul B.*, 18 N.Y.3d 580, 585 (2012). And it is well-settled in New York that the average listener will understand a statement made by an interested party or her counsel in the context of a lawsuit to reflect the speaker's opinion, rather than a factual assertion. *See, e.g.*, *Sabharwal & Finkel, LLC v. Sorrell*, 117 A.D.3d 437, 437 (1st Dep't 2014) (no defamation because defendant's interview statements "constitute hyperbole and convey non-actionable opinions about the merits of the lawsuit"); *Sprecher v. Thibodeau*, 148 A.D.3d 654, 656 (3d Dep't 2017) ("[C]omments made to the media by a party's attorney regarding an ongoing lawsuit constitute

nonactionable opinions.”). That is especially true where the nature of the lawsuit is “by its nature contentious and an average reader would recognize that statements made by the alleged wrongdoer…are likely to be the product of passionate advocacy.” *Gentile v. Grand Street Med. Assoc*., 79 A.D.3d 1351, 1353 (3d Dep’t 2010) (affirming summary-judgment dismissal regarding sexual-harassment-lawsuit statements).

18 of the statements here were made by Kesha or her attorneys in the context of indisputably contentious, high-profile litigation arising from Kesha’s report that Dr. Luke raped and drugged her. *See* R-4688-4692. Those statements—seven of which were made in press releases from Kesha’s counsel—were clearly identified as statements regarding an ongoing lawsuit, and featured in articles or television programs discussing the litigation. *See id.* Any reasonable listener or reader would understand that these statements reflected Kesha’s *allegations*, which Dr. Luke vigorously denied.

What is more, Geragos made eight of the statements on unscripted entertainment-news programs, cable talk shows, and podcasts in which the parties’ claims were discussed and debated. *See* R-4688-4692. These statements were the type of hyperbole courts have found opinion (*e.g.*, Geragos characterized Dr. Luke as “pathetic vermin,” R-3237), or references to the allegations in Kesha’s California Complaint that the audience would have understood as such (*e.g.*,

Geragos told Access Hollywood that Dr. Luke "led [Kesha] to believe she was taking a quote-unquote 'sober pill,'" and Kesha "woke up the next day naked in his bed, sore, and knew he had raped her," R-3235). And it is well established that certain statements made in the context of media appearances are "nonactionable opinion." *Jacobus v. Trump*, 51 N.Y.S.3d 330, 340 (N.Y. Sup. Ct. 2017); *see also Gisel v. Clear Channel Commc'ns, Inc*., 94 A.D.3d 1525, 1526-27 (4th Dep't 2012) (affirming summary judgment because "reasonable listener would not have thought that [the defendant] was stating facts" in calling plaintiff "cold-blooded murderer" when radio talk show "generally provided a forum for public debate on newsworthy topics").

In concluding that these 18 statements were nevertheless expressions of fact, the trial court ignored this critical context altogether. R-24-25. That was reversible error.

## V. THE TRIAL COURT ERRED IN HOLDING THAT KESHA'S TEXT TO LADY GAGA CONSTITUTES A REPUBLICATION AND DEFAMATION *PER SE*.

As relevant background: both Kesha and Lady Gaga testified that during a meeting with Interscope Records CEO John Janick, the executive stated that he had heard that Dr. Luke raped Katy Perry. R-1599-1600; R-3659. Later that same day, Kesha and Lady Gaga exchanged one-on-one, private text messages regarding the stress of this litigation. Kesha vented that she was "really upset with Katy Perry":

"she could bring the whole thing to a head," given that "she was raped by the same man." R-451; R-455; R-460. Lady Gaga responded, "[s]he is probably really afraid to lose everything; U are really strong standing up to him, she's not as strong as u yet." R-462-463. After Lady Gaga offered to "talk to" Perry, Kesha said she "know[s] why [Perry's] not coming forward," noting that Lady Gaga was "right and very insightful." R-466; R-472. Dr. Luke has presented no evidence whatsoever that the text or the information relayed by Janick was ever communicated beyond this one-on-one text message; to the contrary, both women kept it confidential. Dr. Luke obtained the message through discovery during this lawsuit and it was publicized only when *he* added it to this litigation. R-150. This is a prime example of the extent to which Dr. Luke is using this lawsuit to bankrupt Kesha. If he believed this private one-on-one text message (restating what an industry executive had relayed) was so ruinously harmful, why would he and his lawyers choose to publish it to millions of people?

Whatever the motive for Dr. Luke expanding this suit and allegedly tarnishing his own reputation, Kesha's text to Lady Gaga is, as a matter of law, not actionable as defamation. Because Kesha's text was a private communication that merely restated information that the recipient had already heard—from the very same source, at the very same time—it cannot form the basis for a claim of defamation. The ordinary rule is the republication of information constitutes a

separate act of defamation only if it "is intended to and actually reaches *a new audience*." *Firth v. State of New York*, 98 N.Y.2d 365, 371 (2002). But it is undisputed that Kesha's text was intended to, and only did, reach a person who had already heard the very same claim—as Lady Gaga testified.

This Court's decision in *Hoesten v. Best*, 34 A.D.3d 143 (1st Dep't 2006), is particularly instructive. In *Hoesten*, the court determined that a statement made at a meeting was not actionable defamation because those present at the meeting "were already intimately familiar with" the information conveyed and thus could not "reasonably be seen as a new audience." *Id.* at 151. The facts are even more extreme here: the only recipient of the text was not only familiar with the statement, she knew precisely under what circumstances it was first conveyed. If Dr. Luke has any basis to recover, it is against Janick, who first published the statement—not against Kesha, who merely repeated it, shortly after hearing it, to the very same audience that heard Janick in the first place.

Nowhere did the Court acknowledge this authority. Instead, it noted that "publication of a false statement to even one person, here Lady Gaga, is sufficient to impose liability." R-28. But even if a statement to one person can suffice, that person cannot be "the same audience" that heard the "identical subject matter." *Hoeston*, 34 A.D.3d at 151; *see Gelbard v. Bodary*, 270 A.D.2d 866, 867 (4th Dep't 2000) (restating to a committee the contents of a letter already sent is not

actionable). If the rule were otherwise, each repetition of the exact same statement to the exact same audience could give rise to separate liability, even if the statements were virtually instantaneous. Worse, as this case illustrates, such a rule would prevent parties who hear an allegedly false statement from privately discussing it themselves, even if they never repeat the statement to a new audience. The law has no interest in chilling private communications that do nothing to spread to new audiences allegedly defamatory information.

## VI. THE TRIAL COURT ERRED IN *SUA SPONTE* DISMISSING KESHA'S IMPLIED-COVENANT AFFIRMATIVE DEFENSE.

Dr. Luke asserts not only defamation but also various breaches of Kesha's music-production and publishing contracts, including Kesha's alleged failure to use him as a producer, and promptly deliver compositions. R-3324-326. One of Kesha's primary defenses is excuse, R-367, which, in part, provides that she cannot be liable for any purported breach, because Dr. Luke *first* breached the covenants of good faith and fair dealing that New York law "implie[s] in[to] every contract." *Ellison v. Island Def Jam Music Grp.*, 79 A.D.3d 458, 459 (1st Dep't 2010). As Kesha's music-industry expert will explain, the custom and practice of the music industry is to renegotiate an initial, oppressive "baby-artist" contract if the artist achieves some degree of commercial success. R-3617. Yet after Kesha's first two albums went platinum and gold in 2010 and 2011, R-3880-3881; R-3884; R-3887, and Kesha-generated revenue poured in to Dr. Luke's companies, Dr.

Luke vindictively refused to renegotiate the contracts to reflect Kesha's commercial success (as he originally promised to induce her to sign), R-2175; R-2178; R-1880.

Dr. Luke understandably did not move for summary judgment on this obvious jury question. Yet the trial court entered judgment *sua sponte* that Kesha cannot assert an excuse defense based on Dr. Luke's implied-covenant breach. R-29 n.13, R-36. That ruling is procedurally improper and substantively baseless.

The trial court contravened black-letter New York law in granting judgment on a defense on which no party moved. As this Court has made clear, a court can grant summary judgment only "with respect to a cause of action that is the subject of the motion before the court"; causes of action or defenses "not raised in the motion" cannot be dismissed. *Scott v. Beth Israel Med. Ctr., Inc*., 41 A.D.3d 222, 223-4 (1st Dep't 2007) (reversing grant of summary judgment on cause of action not subject of motion). Indeed, Kesha is unaware of *any* New York authority permitting a trial court to grant summary judgment on a cause of action or defense on which no party moved. *See Detaime v. Finger Lakes Fire & Cas. Co.*, 23 A.D.3d 1143, 1144 (4th Dep't 2005) ("The court has the power to search the record and grant partial summary judgment …, but only with respect to an affirmative defense or issue that is the subject of the motions before the court.").

This case proves the wisdom of that rule; the trial court's *sua sponte* ruling, issued without the aid of briefing and a complete record on this point, is wrong on both the facts and the law.

*First*, the trial court erroneously stated that it previously rejected Kesha's implied-covenant defense in March 2017. R-29 n.13. But the March 2017 decision addressed a wholly distinct implied-covenant breach, based on Dr. Luke's 2016-2017 refusal to allow Kesha to record music during the pendency of this litigation. R-2104-2105. Kesha has since recorded and released her third album, *Rainbow*, and no longer asserts that specific defense. What matters here is that the implied-covenant breach defense that Kesha *does* intend to press at trial has nothing to do with the one the trial court dismissed three years ago. The trial court has never previously addressed the merits of Kesha's argument that Dr. Luke separately breached the implied covenant by refusing in 2011-2012 to renegotiate Kesha's contracts.

*Second*, the trial court's footnoted assertion that Kesha's defense has no legal merit because the implied covenant cannot be used to add terms to a contract (R-29 n.13) misapplies New York law. "While the duties of good faith and fair dealing do not imply obligations inconsistent with other terms of the contractual relationship, they *do* encompass any promises which a reasonable person in the position of the promise would be justified in understanding were included." *511*

*West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002). And because no party moved for judgment on this defense, Kesha had no opportunity to show that a jury could reasonably determine that the bargained-for fruits of her music contracts include a renegotiation opportunity if commercial success is achieved. *See Novick v. AXA Network, LLC*, 2015 WL 13686755, at *4 (S.D.N.Y. July 1, 2015) (denying summary judgment where plaintiff "presented sufficient evidence for a reasonable jury to find such a term existed based on industry custom … or an implied covenant of good faith and fair dealing"); *Don King Productions, Inc. v. Douglas*, 742 F. Supp. 741, 768 (S.D.N.Y. 1990) (triable issue regarding whether plaintiff breached implied covenant that may involve "evidence of prevailing industry practices or standards"). Dr. Luke implicitly acknowledged as much in his failure to seek judgment on this defense as a matter of law. There is no legal basis for the trial court's decision.[10]

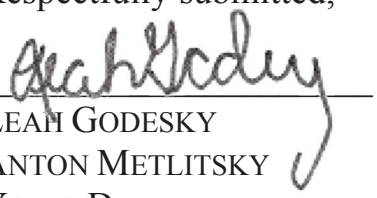
[10] The trial court also ordered the entry of two non-final judgments on specific claims by Dr. Luke and Kesha. R-36. As explained in her notices of appeal (R-3; R-40), Kesha is not appealing those non-final judgments at this time, and expressly reserves the right to appeal all non-appealed aspects of the orders that she is appealing 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...."); 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.").

## CONCLUSION

For the foregoing reasons, the trial court's ruling should be reversed.

Dated: March 16, 2020
New York, New York

Respectfully submitted,



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STATEMENT PURSUANT TO CPLR 5531

# 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.*

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KESHA ROSE SEBERT p/k/a Kesha,

*Counterclaim-Plaintiff-Appellant,*

– and –

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

*Counterclaim-Defendants-Respondents.*

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1. The index number of the case in the court below is 653118/14.

2. The full names of the current parties are set forth in the caption. All of those parties are also the original parties to the action except as follows:

   (a) Plaintiff-Respondent Prescription Songs, LLC joined the action as a plaintiff on December 22, 2014.

   (b) Kemosabe Entertainment, LLC; Kemosabe Records, LLC; and Sony Music Entertainment were added as Counterclaim-Defendants on July 7, 2015. The trial court dismissed Ms. Sebert's counterclaims against Kemosabe Entertainment, LLC, and all of her counterclaims except one against Kemosabe Records, LLC and Sony Music Entertainment in an April 6, 2016 order. Under an April 13, 2017 Order, the trial court granted Ms. Sebert leave to discontinue her remaining claim against Sony Music Entertainment, and re-captioned the case to exclude

Kemosabe Entertainment, LLC and Sony Music Entertainment. The trial court's April 13, 2017 Order was entered on April 13, 2017, and served on the New York County Clerk and the Clerk of the Trial Support Office under CPLR § 8019(c) on April 20, 2017. Under a June 5, 2017 Order, the trial court granted Ms. Sebert leave to discontinue her remaining claims against Kemosabe Records, LLC, and the caption was amended to remove Kemosabe Records, LLC. The trial court's June 5, 2017 Order was entered on June 6, 2017, and served on the New York County Clerk and the Clerk of the Trial Support Office under CPLR § 8019(c) on June 12, 2017.

3. The action was commenced in Supreme Court, New York County.

4. The action was commenced on or about October 14, 2014, by the filing of a Summons and Complaint. The Answer was served thereafter.

5. The nature and object of the action is as follows: Defamation / Breach of Contract.

6. The appeal is from two Decisions and Orders of the Honorable Jennifer G. Schecter, entered on February 6, 2020 (Dkt. Nos. 2278, 2279).

7. This appeal is being perfected on a full reproduced record.