FILED: APPELLATE DIVISION - 1ST DEPT 05/18/2020 05:25 PM 2020-01908
NYSCEF DOC. NO. 48 RECEIVED NYSCEF: 05/18/2020

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

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

New York Supreme Court

Appellate Division – First Department

Appellate Case Nos.: 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.

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.

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

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

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

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. DR. LUKE IS A PUBLIC FIGURE. 2

A. Dr. Luke Is A General-Purpose Public Figure. 2

B. Dr. Luke Is Also A Limited-Purpose Public Figure. 8

1. Dr. Luke's Deliberate Efforts To Attract Publicity As A Music Producer Render Him A Public Figure For The Allegedly Defamatory Statements At Issue Here. 8

2. Dr. Luke Injected Himself Into A Public Controversy At The Heart Of Kesha's Allegedly Defamatory Statements. 11

C. Dr. Luke Must At Least Demonstrate That Kesha Acted With Gross Irresponsibility. 13

II. THE LITIGATION PRIVILEGES APPLY AS A MATTER OF LAW. 14

A. Dr. Luke's Assertion That Kesha's California Litigation Was A "Sham" Fails As A Matter Of Law. 14

B. Dr. Luke Fails to Identify Any Other Grounds For Avoiding Summary Judgment. 20

C. No "Sham Litigation" Argument Applies To Statements Relating To The New York Litigation. 21

III. KESHA IS NOT LIABLE FOR UNAUTHORIZED THIRD-PARTY STATEMENTS. 22

A. No Reasonable Jury Could Conclude That Michael Eisele And Pebe Sebert Were Kesha's Agents. 22

B. Whether Sunshine Sachs And Mark Geragos Acted As Kesha's Authorized Agents Is At Least A Jury Question. 23

TABLE OF CONTENTS
(cont'd)

Page

IV. ATTORNEY OR PARTY STATEMENTS ABOUT LITIGATION ARE NON-ACTIONABLE STATEMENTS OF OPINION. 25

V. KESHA'S TEXT TO LADY GAGA DOES NOT CONSTITUTE A REPUBLICATION OR DEFAMATION PER SE. 27

VI. THE TRIAL COURT ERRED IN DISMISSING *SUA SPONTE* KESHA'S IMPLIED-COVENANT AFFIRMATIVE DEFENSE. 28

CONCLUSION 30

TABLE OF AUTHORITIES

Page(s)

Cases

511 W. 232nd Owners Corp. v. Jennifer Realty Co.,
98 N.Y.2d 144 (2002)....................30

Bertran Packing, Inc. v. Transworld Fabricators, Inc.,
50 A.D.2d 542 (1st Dep't 1975)....................24

Brewer v. Memphis Publ. Co., Inc.,
626 F.2d 1238 (5th Cir. 1980)....................9

Bridge C.A.T. Scan Assocs. v. Ohio-Nuclear Inc.,
608 F. Supp. 1187 (S.D.N.Y. 1985)....................21

Chapadeau v. Utica Observer-Dispatch,
38 N.Y.2d 196 (1975).................... 13, 14

Chateau D'If Corp. v. City of New York,
219 A.D.2d 205 (1st Dep't 1996)....................28

Crucey v. Jackall,
275 A.D.2d 258 (1st Dep't 2000)....................13

Curry v. Roman,
217 A.D.2d 314 (4th Dep't 1995) 9

Feist v. Paxfire, Inc.,
2017 WL 177652 (S.D.N.Y. Jan. 17, 2017)....................20

Firth v. New York,
98 N.Y.2d 365 (2002).................... 27, 28

Flaherty v. Miliken,
193 N.Y.564 (1908)....................24

Flomenhaft v. Finkelstein,
127 A.D.3d 634 (1st Dep't 2015).................... 16, 17, 21

Front, Inc. v. Khalil,
24 N.Y.3d 713 (2015).................... 20, 21

TABLE OF AUTHORITIES
(cont'd)

Page(s)

Gertz v. Robert Welch, Inc.,
418 U.S. 323 (1974) .... passim

Giuffre v. Maxwell,
2017 WL 1536009 (S.D.N.Y. Apr. 27, 2017) 21

Hallock v. State of N.Y.,
64 N.Y.2d 224 (1984) 25

Halperin v. Salvan,
117 A.D.2d 544 (1st Dep't 1986) 17

Hosp. for Joint Diseases Orthopaedic Inst. v. Katsikis Envtl. Contractors,
173 A.D.2d 210 (1st Dep't 1991) 15

Jacobus v. Trump,
51 N.Y.S.3d 330 (N.Y. Sup. Ct. 2017) 26

James v. Gannett Co.,
40 N.Y.2d 415 (1976) .... passim

Jankovic v. Int'l Crisis Grp.,
822 F.3d 576 (D.C. Cir. 2016) 11

Krauss v. Globe International, Inc.,
251 A.D.2d 191 (1998) 6

Lacher v. Engel,
33 A.D.3d 10 (1st Dep't 2006) 17, 18

Lucido v. Mancuso,
49 A.D.3d 220 (2d Dep't 2008) 15

Mahoney v. Adirondack Publ. Co.,
71 N.Y.2d 31 (1987) 14

Manhattan Sports Restaurants of America LLC v. Lieu,
146 A.D.3d 727 (1st Dep't 2017) 18

TABLE OF AUTHORITIES
(cont'd)

Page(s)

Maule v. NYM Corp.,
54 N.Y.2d 880 (1981) 9

Maurillo v. Park Slope U-Haul,
194 A.D.2d 142 (2d Dep't 1993) 25

McGill v. Parker,
179 A.D.2d 98 (1st Dep't 1992) 13

Murray v. Watervliet City Sch. Dist.,
130 A.D.2d 830 (3d Dep't 1987) 24

Park v. Capital Cities Commc'ns,
181 A.D.2d 192 (4th Dep't 1992) 9, 10

Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc.,
255 F. Supp. 2d 134 (W.D.N.Y. 2002) 7

Reszka v. Collins,
136 A.D.3d 1299 (4th Dep't 2016) 15, 16

Rosenberg v. MetLife, Inc.,
8 N.Y.3d 359 (2007) 19

Rosenbloom v. Metromedia, Inc.,
403 U.S. 29 (1971) 12

Sabharwal & Finkel, LLC v. Sorrell,
117 A.D.3d 437 (1st Dep't 2014) 26

Scott v. Beth Israel Med. Ctr., Inc.,
41 A.D.3d 222 (1st Dep't 2007) 29

Sprecher v. Thibodeau,
148 A.D.3d 654 (1st Dep't 2017) 26

Tacopina v. O'Keefe,
645 F. App'x 7 (2d Cir. 2016) 20

TABLE OF AUTHORITIES
(cont'd)

Page(s)

Thomas v. G2 FMV, LLC,
2016 WL 320622 (N.Y. Sup. Ct. Jan. 27, 2016) 17

Time, Inc. v. Johnston,
448 F.2d 378 (4th Cir. 1971) 5

Waldbaum v. Fairchild Publications, Inc.,
627 F.2d 1287 (D.C. Cir. 1980)..3

Winklevoss v. Steinberg,
170 A.D.3d 618 (1st Dep't 2019)... passim

Wolston v. Reader's Digest Ass'n, Inc.,
443 U.S. 157 (1979) 5

Other Authorities

The Responsibility of Vehicle Owners, 38 Harv. L. Rev. 513 (1925) 25

ARGUMENT[1]

Dr. Luke's arguments are all but self-refuting. He argues that a famous music producer who was chosen to receive a star on the Hollywood Walk of Fame and to be an *American Idol* judge, has been profiled in nationwide publications and television programs, and has multiple public-relations teams and hundreds of thousands of Twitter followers is just an anonymous "behind the scenes" operator, not a public figure. He argues that a lawsuit whose central allegations have been vigorously litigated in two courts over five years, have survived summary judgment, and are heading for trial is a "sham" that vitiates application of New York's broad litigation privileges. He argues that a *sua sponte* summary-judgment grant is permitted despite clear precedent rejecting exactly that procedure. These and other arguments are so outlandish because the trial court rulings Dr. Luke is attempting to defend fly in the face of well-established New York law. Dr. Luke's brief only further highlights those legal errors, and confirms that the decision below should be reversed.

[1] This brief refers to Kesha's opening brief as "Br." and Dr. Luke's response as "Opp." All emphasis is added and internal quotations and citations are omitted.

I. DR. LUKE IS A PUBLIC FIGURE.

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

Dr. Luke's brief characterizes him as an anonymous, "behind the scenes" operator. Opp. 25-26. In fact, before any legal dispute with Kesha, Dr. Luke was already a world-famous music producer. He was chosen to receive a star on the Hollywood Walk of Fame. He was selected as an *American Idol* judge. He was extensively profiled in nationwide publications such as *Billboard*, *New York Magazine*, and *The New Yorker*, including for his representation of young female artists generally and Kesha in particular. And his fame was no accident—he cultivated a public image, with the help of public-relations firms, in a concerted effort to build his brand. Br. 17-24. Behind-the-scenes operators do not have hundreds of thousands of Twitter followers, Br. 22, nor do they require stage names.

It is understandably difficult for a famous person to argue that no one has heard of him, so Dr. Luke's basic strategy is to shift the goalposts on the legal standard. He contends that to be a public figure, his name must be a "household word"—i.e., "known to a large percentage of the well-informed citizenry" as a "megacelebrity." Opp. 19. If that were the governing standard, Dr. Luke would satisfy it for the reasons detailed in Kesha's opening brief. But that standard is found nowhere in controlling precedent—it comes from a forty-year-old D.C.

Circuit opinion, *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), that has never been adopted by this Court, the New York Court of Appeals, or the U.S. Supreme Court.

The precedent that actually controls here rejects this "strict" (Opp. 18) standard. In *James v. Gannett Co.*, 40 N.Y.2d 415 (1976), for example, the Court of Appeals held that the "category of 'public figures' is of necessity quite broad," with its "essential element" being "that the publicized person has taken an affirmative step to attract public attention." *Id.* at 422. Where those efforts result in "especial prominence in society at large," *id.*, or "general fame or notoriety in the community," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974), the plaintiff is a general-purpose public figure.

This Court's decision last year in *Winklevoss v. Steinberg*, 170 A.D.3d 618 (1st Dep't 2019)—holding that Cameron and Tyler Winklevoss are general-purpose public figures—illustrates the point, and controls this case. Dr. Luke is no less famous than the Winklevosses, so Dr. Luke is a general-purpose public figure just like they are. Br. 18-19, 22-24.

The Winklevoss twins are not "household names" or "megacelebrities," Opp. 19-21, 25-26—and if they are, then Dr. Luke is too. Dr. Luke's efforts to distinguish the case on its facts only highlights the implausibility of his argument. He points out that the Winklevosses were "Olympic athletes," Opp. 25, but

neglects to mention they were rowers. Even the most ardent sports fan would struggle to name a famous rower (or curler, or rhythmic gymnast, or shot-putter), Olympian or otherwise. Dr. Luke correctly notes that the Winklevosses were depicted as supporting characters in a fictionalized account of Facebook's origins. Opp. 25-26. But while everyone has heard of Facebook—or even Mark Zuckerberg—that does not mean that supporting characters in a movie *about* Facebook or Zuckerberg become "megacelebrities." But whatever their level of celebrity, the kind of fame that warrants selection for a Hollywood Walk of Fame star or an *American Idol* judgeship[2]—or that results in repeated boasts to the press about making "more #1 hits than the Beatles" and a for-publicity adulatory bio in the *New Yorker*—cannot plausibly be considered of a constitutionally lesser magnitude than that of Olympic rowers whose business dispute is a subplot of a moderately successful film.

Winklevoss also found significant the Winklevosses' "routine coverage in popular media." 170 A.D.3d at 619. Dr. Luke does not mention that aspect of the Court's opinion, presumably because his own popular-media coverage is

---

[2] Dr. Luke says his Walk of Fame selection is irrelevant because he ultimately did not "get a star." Opp. 24. True, he decided not to schedule the ceremony, R-4932, but the point is that he was *selected* for a Walk of *Fame* star. Dr. Luke's selection as an *American Idol* judge likewise reflects his fame, and the flurry of press reports (Opp. 22-23) discussing his selection only heightened his profile.

staggering in its breadth. Kesha's opening brief lays that out—the feature-length profiles in major media outlets; television, radio, print, and red-carpet interviews; glossy photoshoots for popular magazines; and a highly active social-media presence. Br. 19-21. And this prolific press coverage came about in large part because of Dr. Luke's own efforts (with the help of four different public-relations teams) to promote his public image. Br. 21.

Dr. Luke claims his (very successful) efforts to build his brand do not matter, Opp. 25 n.13, but they are crucial. *Winklevoss* highlighted (and Dr. Luke again ignores) that the twins "willingly participate[d]" in their media coverage, 170 A.D.3d at 619, because the public-figure inquiry turns in part on whether "the publicized person has taken an affirmative step to attract public attention," *James*, 40 N.Y.2d at 422, and thus "assumed the risk of publicity," *Time, Inc. v. Johnston*, 448 F.2d 378, 380 (4th Cir. 1971). Moreover, whether a person can "resort to effective self-help," *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157, 164 (1979), to "counteract false statements," *Gertz*, 418 U.S. at 344, is critical to the public-figure inquiry. Dr. Luke's public-relations army confirms he assumed the risk of public-figure status, Br. 21, and his use of his public-relations team (not to mention his Twitter feed) shows he not only can but has used his publicity to "counteract" Kesha's allegations, Br. 12.

Dr. Luke's press coverage and publicity obviously foreclose his implausible assertion (Opp. 24-25) that he is no better known than the local civics-group officer who published legal articles in *Gertz*, 418 U.S. at 323, or the celebrity's husband who never himself sought fame in *Krauss v. Globe International, Inc.*, 251 A.D.2d 191, 192 (1998). And his efforts to explain away that press coverage and publicity should be rejected out of hand. He asserts that Kesha "cobble[d] together various media mentions," Opp. 20, but it was not hard to "cobble together" significant media mentions that span mega household publications like *The New Yorker*, *Billboard*, *New York Magazine*, and *The Guardian.* R-5299-5308, 5322-5341, 5354-5362. He criticizes Kesha for failing to quantify the "readership" of each "specific article[]," Opp. 22, but no court has ever adopted that suggestion, and the *Winklevoss* plaintiff relied on exactly the same type of press coverage. *See* Resp. Br. 38, 41, *Winklevoss v. Steinberg*, No. 159079/17 (1st Dep't Jan. 8, 2019) (proffering articles from *Vanity Fair*, *The Wall Street Journal*, and *The New York Post*). Specific circulation numbers are irrelevant—what matters is that "[n]ewspapers and magazines of general circulation necessarily report on persons upon whom public interest has fastened," *James*, 40 N.Y.2d at 422, which is why they have reported on Dr. Luke.

Dr. Luke attempts to distract the Court from the dozens of articles in the summary-judgment record by challenging the "authenticity" of the 100+ articles

discussed in Professor North's expert report. Opp. 20 n.9. But that challenge is meritless; no authentication is required to show that "articles containing the relevant information were published rather than for the truth of the matter reported therein." *Pfohl Bros. Landfill Site Steering Comm. v. Allied Waste Sys., Inc.*, 255 F. Supp. 2d 134, 156 n.22 (W.D.N.Y. 2002). Dr. Luke also disputes the relevance of a handful of articles collected by a group of *amici*—including the Reporters Committee for the Freedom of the Press and numerous prominent media organizations such as Gannet, Newsday, and the Dow Jones & Company—but is forced to leave alone *at least* 500+ articles cited by *amici* and published by media outlets across the country that mention him. Opp. 21. His criticism that *amici* are "nothing more than advocates for" Kesha, Opp. 14, is both absurd and telling: The media-organization *amici* are not advocating for Kesha's interests but *their own*, and Dr. Luke's failure to grasp that basic point underscores the breezy disregard for fundamental First Amendment values reflected in his position and the trial court's ruling. That legally erroneous ruling should be reversed because Dr. Luke is a general-purpose public figure under clear, binding, and recent precedent.

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

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

Dr. Luke is also a public figure for purposes of statements relating to his work as a celebrity music producer—the area in which he sought and achieved publicity—including statements regarding his abuse of one of his most prominent artists. Br. 24-29.

Dr. Luke's main response is that an individual need either be so "pervasive[ly]" famous that he is a general-purpose public figure, or his efforts to attract publicity are wholly irrelevant. Opp. 16, 38-39. The Court of Appeals has expressly rejected that position, holding that "[t]he extent to which one becomes a public figure is a matter of degree" and depends on the extent to which the plaintiff sought publicity. *James*, 40 N.Y.2d at 422-23; *see* Br. 24-29. After all, the Rochester belly dancer in *James* was not "pervasively" famous—and orders of magnitude less famous than Dr. Luke—but she "welcomed publicity regarding her performances and, therefore, must be held to be a public figure with respect to newspaper accounts of those performances." 40 N.Y.2d at 423.

Dr. Luke next contends that *James* and its progeny include a "public controversy" requirement. Opp. 16-18. But again, *James* itself contradicts that assertion—that case concerns persons who "have *not* necessarily taken an active

part in debates on public issues, [but] remain, nevertheless, persons in whom the public has continuing interest." *James*, 40 N.Y.2d at 423. In every case in this line of precedent, the allegedly defamatory statement involved no "public controversy," but rather related to the public-figure plaintiff's professional activities, for which they had sought publicity. *See, e.g.*, *Maule v. NYM Corp.*, 54 N.Y.2d 880, 883 (1981) (plaintiff "actively sought publicity for his … professional writing"); *Park v. Capital Cities Commc'ns*, 181 A.D.2d 192, 194 (4th Dep't 1992) (ophthalmologist "invited favorable publicity for his practice"); *Winklevoss*, 170 A.D.3d at 619 ("Through their voluntary participation in numerous interviews … [plaintiffs] attracted public attention to themselves as investors in start-ups."); *Curry v. Roman*, 217 A.D.2d 314, 319 (4th Dep't 1995) (auctioneers "voluntarily thrust[] themselves into the limelight in seeking media attention for the auction").[3]

These cases thus do not involve plaintiffs who "previously commented on the precise topic raised in the defamation." Opp. 38-39. *Winklevoss* is again

---

[3] Dr. Luke suggests that *Gertz* compels his binary approach, and so *James* and its progeny must be re-conceptualized as applying a public-controversy requirement. Opp. 17-18 & n.7. But those cases have nothing to do with any public controversies. And *Gertz* does not compel a binary approach anyway—not only did *Gertz* "not define all subcategories of the public figure classification," *Brewer v. Memphis Publ. Co., Inc.*, 626 F.2d 1238, 1254 (5th Cir. 1980), but it expressly included within that category persons of "general fame or notoriety *in the community*," *Gertz*, 418 U.S. at 352—as opposed to "especial prominence in society at large," *id.*—which well describes plaintiffs like James.

instructive—this time for its independent holding that the Winklevoss brothers were not only general-purpose but also limited public figures. The twins did not comment on any public debate, but instead "attracted public attention to themselves as investors in start-ups" through "voluntary participation" in media efforts. *Winklevoss*, 170 A.D.3d at 619. They were thus limited public figures as to allegedly defamatory statements suggesting they were untrustworthy businessmen who do not "honor[] [their] commitments." Appellants' Br. 5-6, *Winklevoss v. Steinberg*, No. 159079/17 (1st Dep't Nov. 30, 2018). Or take *Park*, where Dr. Park did not speak about any controversy—rather, he sought favorable publicity for his practice in televised interviews discussing his surgical techniques. The court held that these efforts to "attract public attention" rendered Dr. Park a public figure for purposes of a statement suggesting that he was "unfit or unethical in his profession," 181 A.D.2d at 195-97—though Dr. Park had never commented on his ethics.

Dr. Luke, before any dispute with Kesha, went to extraordinary lengths to achieve positive publicity for his work as a celebrity music producer. The allegedly defamatory statements—that Dr. Luke drugged, raped, and abused a teenage artist whom he had just signed to a massive music-production contract, and now refuses to release her from that contract—are paradigmatic accusations of

being "unfit or unethical in his profession." These statements were not about Dr. Luke's "private" life; they directly "relate to the cause of [his] fame," Opp. 38.

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

There is no "public controversy" prerequisite for public-figure status, *see supra* at 8-10; Br. 24-20, but Dr. Luke satisfies that metric too. He thrust himself to the forefront of the debate about how young, female artists are treated by powerful industry executives. And the statements at the heart of this suit relate directly to this controversy. Br. 29-32.

Dr. Luke denies that he injected himself into this artist-treatment controversy. Opp. 33-34 & n.18. But Kesha's opening brief described in detail how he sought continuing media coverage to establish himself as the leading authority on developing top female talent, and to highlight his intimate relationships with the young mega-celebrities in his portfolio—including Kesha herself. Br. 31-32.

Dr. Luke's fallback argument is that he did not specifically inject himself "into the public discussion on drugging or sexual assault." Opp. 32. But a public controversy is "broader than the narrower discussion contained in the defamatory document," and "courts often define the public controversy in expansive terms." *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 586 (D.C. Cir. 2016).

Kesha's allegedly defamatory statements, moreover, were not only about drugging and sexual assault. Rather, she reported that Dr. Luke had abused his position of authority by drugging and raping her *and that she was now being forced to continue working closely with her abuser*, because Sony would not release her from her contracts. *See, e.g.*, R-3232 ("I would be willing to work with Sony if they do the right thing and break all ties that bind me to my abuser."); R-3226 (Kesha seeks "to regain control of her music career … after suffering for ten years as a victim of mental manipulation, emotional abuse and an instance of sexual assault at the hands of Dr. Luke."). Indeed, many of the allegedly defamatory statements include phrases like #SonySupportsRape and #KeshaDeservesFreedom, R-3230-3232—all of which refer to Kesha's continuing contractual obligations to work with her rapist. Dr. Luke is not a limited public figure because these statements are a matter of "public concern" under *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), *see* Opp. 18, 29, 32, 42, but because he himself has consistently commented on his own professional and personal relationships with young female artists. Myopically defining the relevant controversy as drugging and sexual assault—divorced from the professional and contractual context—improperly circumscribes the legal scope of the controversy while ignoring the breadth of the allegedly defamatory statements.

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

Though seemingly conceding that Kesha's reports fall within the sphere of public concern, Dr. Luke argues that he need not establish "gross irresponsibility" under *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196 (1975), because Kesha is not a media defendant. Opp. 39-41. That is wrong—New York courts apply the gross-irresponsibility standard to non-media defendants, including, *e.g.*, activists, *McGill v. Parker*, 179 A.D.2d 98 (1st Dep't 1992), and professors, *Crucey v. Jackall*, 275 A.D.2d 258 (1st Dep't 2000). *See* Br. 33-34.

Dr. Luke also contends that *Chapadeau* is categorically inapplicable because Kesha's statements concern her personal experience. That contention is premised on dicta in *McGill* that the gross-irresponsibility standard "may not always be apt" for defendants "reporting their own observations," rather than "rely[ing] on the information provided by others." 179 A.D.2d at 108. This *dicta* is irreconcilable with *Chapadeau* itself, which turned on the fact that matters of public concern "warrant[] public exposition." 38 N.Y.2d at 199; *see* Br. 34-35.

Even the *McGill* dicta, moreover, does not suggest a categorical bar against applying *Chapadeau* to first-hand accounts. At most, *McGill* recognized that *Chapadeau* has little relevance where a defendant directly observed an unambiguous event and so necessarily "acted in a grossly irresponsible manner" in falsely describing that event. *Chapadeau*, 38 N.Y.2d at 199; *cf. Mahoney v.*

Adirondack Publ. Co., 71 N.Y.2d 31, 39-40 (1987) (malice can be inferred from false first-hand account only where "the setting was such that the observer could not have misperceived those events"). Here, Kesha testified that Dr. Luke drugged her prior to the rape, and that she therefore has an incomplete memory of that night. R-8308-8309. A jury might decide it cannot determine years later if Kesha was actually raped but it could still conclude that Kesha gave "due consideration" to the "standards of information gathering and disseminations" in describing these events. *Chapadeau*, 38 N.Y.2d at 199.

II. THE LITIGATION PRIVILEGES APPLY AS A MATTER OF LAW.

A. Dr. Luke's Assertion That Kesha's California Litigation Was A "Sham" Fails As A Matter Of Law.

The trial court erred in declining to apply the pre-litigation and litigation privileges to 25 allegedly defamatory statements,[4] because the "sham" exception on which the court based its ruling is inapplicable as a matter of law. Br. 40-43. Contrary to Dr. Luke's assertion, Opp. Br. 45, Kesha is not "relitigating" these privilege arguments. It is true that the trial court in 2018 allowed Dr. Luke to amend his *pleadings* over Kesha's claim of litigation privilege because Dr. Luke *alleged* that Kesha's suit against him was a "sham." R-1982. But amendment is

[4] Kesha's opening brief inadvertently stated that 27 statements are privileged. Br. 35. The correct number is 25. *See* R-4683-4687 (listing statements covered by litigation privilege).

permitted so long as the allegations are not "patently devoid of merit," *Lucido v. Mancuso*, 49 A.D.3d 220, 229 (2d Dep't 2008), even when (as here) the defendant raises a "rebuttal that might provide the ground for a subsequent motion for summary judgment," *Hosp. for Joint Diseases Orthopaedic Inst. v. Katsikis Envtl. Contractors*, 173 A.D.2d 210, 210 (1st Dep't 1991).

Because the case is now at summary judgment, Kesha's claim of privilege (and Dr. Luke's "sham" defense) must be evaluated in light of the factual record. That is presumably why Dr. Luke never argued below that this issue was already decided, and why the trial court addressed the issue on the merits and held that whether Kesha's lawsuit was a "sham" should be resolved by the jury. R-26-27. The question here is whether the trial court's failure to reject this "sham" defense and apply the privilege *based on the summary judgment record* was legal error. The answer is yes, for at least three reasons.

First, the trial court's own findings require rejecting the "sham" exception. Br. 40-42. The trial court concluded that it could not "decide, as a matter of law … whether Kesha commenced the California action … in good faith or as a sham," because of the "very different accounts about what happened on the night at issue." R-26-27. But the "sham" exception applies only when the underlying suit lacks "*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 Flomenhaft v. Finkelstein*,

127 A.D.3d 634, 638 (1st Dep't 2015) (underlying action allegedly based on "false representations" and "brought solely to defame"). Here, the trial court's conclusion that there is a fact dispute "about what happened on the night at issue"—i.e., whether Kesha's allegations of rape are true or false—means that a reasonable jury could believe the allegations. If, as the trial court properly determined—and as Dr. Luke does not dispute—a reasonable jury could credit the allegations in Kesha's California action, that action cannot be a "sham" under New York law. That is especially so in light of the voluminous contemporaneous evidence—reports to Kesha's mother, her therapists, and many others, as well as hotel, phone, and medical records over many years prior to any purported defamation—supporting Kesha's description of events. Br. 6-10. Indeed, Dr. Luke does not cite a single case upholding the "sham" exception when there was enough evidence supporting the veracity of the allegations in the underlying lawsuit to survive summary judgment. Notably, unlike the Katy Perry text message, Dr. Luke does not challenge whether there is a triable issue of fact as to the truth of Kesha's rape allegation. Such a suit by definition does not lack "any basis in fact," *Reszka*, 136 A.D.3d at 1301, and is thus as a matter of law not a "sham."

Dr. Luke misses the point when he insists that "there *can* … be questions of fact on the 'sham' issue." Opp. 47 (emphasis in original). Of course there can,

see, e.g., *Flomenhaft*, 127 A.D.3d at 638, but such a factual dispute has to be about whether the underlying suit lacked any factual basis and was brought solely to defame. When the allegations in the underlying lawsuit suffice to survive summary judgment, the answer to that question is necessarily no. *See Lacher v. Engel*, 33 A.D.3d 10 (1st Dep't 2006) (reversing denial of summary judgment because facts could not permit conclusion that suit was a sham).

Second, Dr. Luke's "sham" assertion fails for the independent reason that *no* precedent even remotely suggests that the "sham" exception applies where a plaintiff diligently pursues the underlying lawsuit. To the contrary, that exception applies only where "litigation" is "filed but never prosecuted." *Flomenhaft*, 127 A.D.3d at 638; *see id.* (allowing "sham" claim to proceed because "there is little in the record before us by which we can gauge to what extent the lawsuit was litigated," including "even court conferences"). Dr. Luke's cited authorities (Opp. 46) only underscore the point—in one, the litigant "quickly withdrew" claims and *conceded liability*, *Thomas v. G2 FMV, LLC*, 2016 WL 320622, at *6, *8 (N.Y. Sup. Ct. Jan. 27, 2016), and in the other, the party sat on its rights and sought neither discovery nor class certification, even though no dismissal motion was filed, *Halperin v. Salvan*, 117 A.D.2d 544, 547-48 (1st Dep't 1986). This rule makes sense—no one would expend the time, energy, and money to actually

litigate a lawsuit that lacked any basis in fact and whose *sole* purpose was to defame.

Kesha, of course, expended substantial resources over two years to pursue her California claims, including amending her complaint, opposing a motion to dismiss, and participating in at least seven court hearings. Br. 11-14.[5] And Kesha has never abandoned her core allegations or her account of Dr. Luke's assault. Those allegations have been litigated for years: not only in her affirmative California tort claims, but then again in the original New York action, where she filed counterclaims with the same allegations as her California action and not only defended those counterclaims against dismissal but sought to amend them, not to mention her lengthy and expensive defense of the claims at issue here. Again, no case rejects application of the litigation privilege in these circumstances. *See Manhattan Sports Restaurants of America LLC v. Lieu*, 146 A.D.3d 727, 727 (1st Dep't 2017) ("no facts alleged support[]" sham exception where party "diligently

---

[5] Dr. Luke's claim that Kesha "voluntarily dismissed" her "rape-related" claims in New York, Opp. 9, blatantly mischaracterizes the record. Kesha merely elected to not appeal the trial court's dismissal of her claims, which were dismissed largely on statute of limitations grounds rather than on the allegations' merits. That is a reasonable litigation-strategy decision given the date of the rape, not a basis to conclude her claims were a sham. *See Lacher*, 33 A.D.3d at 40 (privilege would be eviscerated if it applied "only in cases that were ultimately sustained").

prosecuted its claims" by "filing an amended complaint and vigorously opposing defendant's prior motion to dismiss").

For good reason. The whole point of the privilege is to prevent the "fear of a civil action, whether successful or otherwise," from dissuading individuals from engaging in protected public activity such as litigation. *Rosenberg v. MetLife, Inc.*, 8 N.Y.3d 359, 365 (2007). While the "sham" exception ensures that this privilege is not abused, the privilege can only serve its purpose if the "sham" exception is limited to outlier cases—certainly excluding lawsuits that are actually prosecuted, whose allegations are sufficiently supported to proceed to trial. If, as the trial court believed, a dispute over the veracity of allegedly defamatory statements is itself enough to leave the "sham" exception to a jury, then nearly every case based on statements related to previous litigation would be a potential "sham," substantially narrowing New York's broad litigation privileges and creating the very disincentives to engaging in protected activity that those privileges are intended to prevent.

These legal principles preclude application of the "sham" exception, but Dr. Luke provides a third reason to reject that exception. His only factual argument for why Kesha's California lawsuit was a "sham" is that she supposedly would not have filed it "if she had been released from her contracts." Opp. 46. But even if that were true, there is nothing nefarious about Kesha's desire to be released from

contracts that forced her to work with her abuser. That Kesha would have gladly avoided the long, distracting, and costly ordeal of this litigation—public litigation centered around her own rape—had Dr. Luke freed her from that obligation does not undermine the credibility of her California action. Quite the opposite: it reinforces the obvious conclusion that Kesha did not bring suit to defame Dr. Luke, but because it was the only path available to achieve the space to work free from her abuser.

B. Dr. Luke Fails to Identify Any Other Grounds For Avoiding Summary Judgment.

Because the "sham" exception does not apply as a matter of law, the litigation privilege applies. Dr. Luke half-heartedly attempts to argue that two of the 25 statements protected by the litigation privilege—(i) the 2014 pre-litigation publication of the Draft Complaint in settlement negotiations; and (ii) the pre-filing transmittal to TMZ of the complaint Kesha filed to commence her 2014 California case—are not privileged, but that is wrong: they are covered by New York's qualified pre-litigation privilege because they are "pertinent to a good faith anticipated litigation." *Front, Inc. v. Khalil*, 24 N.Y.3d 713, 715 (2015). Br. 36-39. Dr. Luke's contention that the privilege does not apply to sharing the Draft Complaint in settlement negotiations because Kesha did not name Sony as a defendant in the California case (Opp. 50) ignores the undisputed fact that Kesha named Sony record label Kemosabe Records, LLC, and Sony General Counsel

Julie Swidler represented Sony and Kemosabe in the parties' 2013-2014 settlement negotiations. R-5170-5179, 9053-9061. Nor can Dr. Luke seriously dispute (Opp. 50-51) that the privilege covers transmittal of the draft complaint to the press. *See Tacopina v. O'Keefe*, 645 F. App'x 7, 8 (2d Cir. 2016); *Feist v. Paxfire, Inc.*, 2017 WL 177652, at *2, *5 (S.D.N.Y. Jan. 17, 2017). Dr. Luke's sole contrary authority—*Bridge C.A.T. Scan Assocs. v. Ohio-Nuclear Inc.*, 608 F. Supp. 1187, 1195 (S.D.N.Y. 1985)—is irrelevant because it predates (by 30 years) New York's adoption of the pre-litigation privilege in *Front*. And *Giuffre v. Maxwell*, 2017 WL 1536009, at *7 (S.D.N.Y. Apr. 27, 2017), recognized that the pre-litigation privilege "is not limited to statements between parties and their lawyers." Nor can Dr. Luke dispute that when the complaint was shared, Kesha had a "good faith basis to anticipate litigation," *Front*, 24 N.Y.3d at 720, that not only materialized but was hard-fought. Br. 37-38.

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

Dr. Luke has no plausible argument that the trial court's "sham" ruling about the *California* action has any bearing on the 12 of the 25 protected statements that relate to this *New York* action—a suit Kesha is *defending*, and thus cannot possibly be accused of *initiating* "solely to defame." *Flomenhaft*, 127 A.D. at 638. It is little surprise, then, that Dr. Luke cannot cite a single case applying the sham

exception to a counterclaim, *see* Opp. 52—much less counterclaims vigorously litigated through a motion to dismiss, R-1417-1444; *see supra* at 17-18.

III. KESHA IS NOT LIABLE FOR UNAUTHORIZED THIRD-PARTY STATEMENTS.

A. No Reasonable Jury Could Conclude That Michael Eisele And Pebe Sebert Were Kesha's Agents.

The undisputed facts confirm that Eisele and Pebe were not Kesha's agents. The trial court erred in declining to grant Kesha summary judgment.

Eisele. Dr. Luke offers nothing more than a vague, footnoted allegation of unspecified "coordination" between Kesha and Eisele. Opp. 53 n.35. His failure to identify any facts showing Kesha's involvement in any of the seven Eisele statements at issue is dispositive of his agency allegations. Br. 50-51.

Pebe. Dr. Luke's argument rests entirely on a mid-deposition statement by a junior attorney that Pebe acted as Kesha's agent in sending one December 30, 2013 e-mail *not at issue in this case*. Opp. n.35. That attorney statement was wrong, but even if it were right, it neither binds Kesha (Br. 49-50) nor shows that Pebe acted as Kesha's agent in making the seven statements actually at issue. "Approval of a single authorized act does not, of itself, justify an inference of authority to repeat it," and that is especially so when there is no link between Pebe's December 30, 2013 e-mail and the allegedly defamatory statements for which Dr. Luke seeks to hold Kesha liable. Br. 50.

B. Whether Sunshine Sachs And Mark Geragos Acted As Kesha's Authorized Agents Is At Least A Jury Question.

The trial court erred on both the facts and the law in granting Dr. Luke summary judgment as to Sunshine Sachs's and Geragos's agency.

Sunshine Sachs. Dr. Luke cannot identify *any* allegedly defamatory Sunshine Sachs statement. Opp. 55-56. His defamation claim fails as a matter of law. Br. 46. Certainly, a reasonable jury could so conclude. That is doubly true because Dr. Luke does not dispute that Kesha cannot be liable for unauthorized acts of an alleged subagent—here, a third-party consultant hired by Kesha's attorney—like Sunshine Sachs. Br. 47.

Geragos. On the facts, Dr. Luke incorrectly insists that Kesha—while litigating a privilege claim—offered a blanket concession that Geragos is her agent, and that Geragos "swore [the same] under oath." Opp. 11, 52. Both claims are false, as Dr. Luke's own record citations show: Kesha claimed privilege over only Geragos's "confidential internal communications, *not* ... [the] outward-facing media communications" that Kesha did not know about or approve but for which Dr. Luke now seeks to hold her liable, R-1119; *see* R-1135, R-1143-44, R-1146, R-1149-50, R-1157-60 (same); *see also* R-1097-98, R-1161 n.9 (same with respect to internal communications between Vector and Kesha). And Geragos swore only that *internal* strategy documents were privileged. R-898; *see* R-904-07; R-1119-1122. Those internal documents are not alleged to be defamatory. Br. 53.

Nor does evidence of Kesha's music managers at Vector purportedly "endors[ing]" allegedly defamatory "press activities" show that Kesha ratified those activities. Opp. 55 n.39. Vector is nowhere alleged to even know of the 13 Geragos statements at issue, so it cannot have endorsed them, nor can Kesha have ratified any endorsement. In fact, the one piece of Vector's advice that Dr. Luke identifies and that Kesha *did* ratify was advice *not* to issue a statement. R-804. At the very least, ratification—which the trial court never addressed—is a fact-intensive issue that should be submitted to a jury. *See Bertran Packing, Inc. v. Transworld Fabricators, Inc.*, 50 A.D.2d 542, 543 (1st Dep't 1975).

On the law, Dr. Luke asks this Court to ignore the black-letter rule (Br. 46) that a principal's liability turns on the scope of the agent's authority, contending instead that Kesha is liable if Geragos's conduct was "generally foreseeable." Opp. 53 (quoting *Murray v. Watervliet City Sch. Dist.*, 130 A.D.2d 830, 831 (3d Dep't 1987)). But *Murray* expressly limits itself "to the employment context," Opp. 53 n.36: It applied "the doctrine of respondeat superior," *Murray*, 130 A.D.2d at 830-31, which is different from the relationship "of principal and agent," *Flaherty v. Miliken*, 193 N.Y.564, 569 (1908).

Dr. Luke tries to brush off the Geragos-Kesha contract's clear prohibition on Geragos "engag[ing] in any publicity ... without [Kesha's] prior approval" (R-664) by saying that Kesha's "approval generally" of Geragos acting as her agent means

she necessarily approved *all* his actions. Opp. 54. That is wrong: attorneys' "authority to manage the conduct of litigation on behalf of a client ... is hardly unbounded," and an attorney does not act as an agent "without a grant of authority from the client." *Hallock v. State of N.Y.*, 64 N.Y.2d 224, 230 (1984). Moreover, Geragos specifically disclaimed Kesha's involvement in several statements for which Dr. Luke now seeks to hold her liable. R-3445.

Dr. Luke's fallback argument is even more extreme. He says Kesha should be liable even for acts that she "forbade or disapproved." Opp. 53. For this proposition, Dr. Luke cites the irrelevant "family automobile doctrine" announced in *Maurillo v. Park Slope U-Haul*, 194 A.D.2d 142 (2d Dep't 1993), where a parent is liable for a child's automobile use, notwithstanding "the general rule that a parent is not liable for the torts of a child." *Id.* at 146. That rule is "an exception in the law of agency." Note, *The Responsibility of Vehicle Owners*, 38 Harv. L. Rev. 513, 513 (1925). Under the usual agency rules, whether Geragos was acting as Kesha's agent in publishing certain statements is a factual question that "must be submitted to the jury." 194 A.D.2d at 147.

IV. ATTORNEY OR PARTY STATEMENTS ABOUT LITIGATION ARE NON-ACTIONABLE STATEMENTS OF OPINION.

Dr. Luke concedes that "a party or lawyer … commenting on the legal merits of an ongoing lawsuit" is nonactionable opinion. Opp. 57. But he argues that 18 statements made by Kesha or her attorneys about this litigation are

actionable because this general rule does not apply when a statement relates to a "specific, factual allegation." Opp. 57. The whole point of the rule, however, is that certain statements *that would otherwise count as factual assertions* are understood, when made by a lawyer or plaintiff, to be nonactionable opinions, even when relating to a suit's specific factual allegations. *See, e.g.*, *Sprecher v. Thibodeau*, 148 A.D.3d 654, 655-56 (1st Dep't 2017) (statement that plaintiff fraudulently "invent[ed] fictitious investors" nonactionable because "comments made to the media by a party's attorney regarding an ongoing lawsuit constitute nonactionable opinions"); *Sabharwal & Finkel, LLC v. Sorrell*, 117 A.D.3d 437, 437 (1st Dep't 2014) (similar). Here, the 18 statements at issue are just that: restatement of the specific factual allegations in the suit, R-4688-4692, as Dr. Luke freely acknowledges, *see, e.g.*, R-310 ("The press statement … repeated Kesha's defamatory allegations.").

The trial court's holding as to eight of these eighteen statements was even more egregiously wrong because those statements were made on unscripted entertainment-news programs—a setting that courts recognize leads to "spirited verbal exchanges" that listeners understand as "opinion." *See, e.g. Jacobus v. Trump*, 51 N.Y.S.3d 330, 340 (N.Y. Sup. Ct. 2017) (collecting cases); Br. 51-53. Dr. Luke's response—that courts have found liability for statements made in a "press release," an "Opinion" piece, and a newspaper article, Opp. 57-58—ignores

the difference between those settings and the unbridled context of television talk shows like "Access Hollywood," where the pertinent statements here were made. *See* R. 4688-4692.

V. KESHA'S TEXT TO LADY GAGA DOES NOT CONSTITUTE A REPUBLICATION OR DEFAMATION PER SE.

Kesha's private text to Lady Gaga is not actionable because when a party merely restates allegedly defamatory information, that act of "republication" constitutes a new, actionable defamation only if it "is intended to and actually reaches a *new audience*." *Firth v. New York*, 98 N.Y.2d 365, 371 (2002); Br. 53-56. Here, though, Kesha merely repeated an allegation *to Lady Gaga that they both had heard earlier that day*, at the same time, from John Janick. Br. 53-54. Kesha did not disclose any new information. Dr. Luke's assertion to the contrary (Opp. 59) is contradicted by the record: both Kesha and Lady Gaga testified that Janick told them that Dr. Luke raped Katy Perry. R-1599-1600; R-7701.

Nor can Dr. Luke cite a single case in which a private statement repeated to a person who already heard it constitutes actionable defamation. Opp. 59. Dr. Luke argues that the rule that republication to the same audience is not actionable concerns only the narrow issue of whether republication "reset[s] the statute of limitations." *Id.* But the reason that time bars do not reset in these circumstances is precisely because mere "repetition of a defamatory statement" to the same

person that heard the first statement does not "give rise to a new cause of action." *Firth*, 98 N.Y.2d at 371.

Contrary to Dr. Luke's assertion, Opp. 59, Kesha expressly argued the issue of publication below: "Dr. Luke has presented no evidence whatsoever that the text or the information from Mr. Janick was ever communicated beyond the one-on-one text message, other than through Dr. Luke's publication in adding it to this lawsuit." R-3183. When a party "does not allege new facts but, rather, raises a legal argument which appeared on the face of the record," there is neither prejudice nor waiver. *Chateau D'If Corp. v. City of New York*, 219 A.D.2d 205, 209 (1st Dep't 1996).

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

Dr. Luke does not dispute that neither he nor Kesha moved for summary judgment on Kesha's implied-covenant affirmative defense. Opp. 43. Under black-letter New York law, the trial court's *sua sponte* entry of judgment on this defense was improper. Br. 57 (collecting cases). Dr. Luke cites no case to the contrary.

He nonetheless defends the trial court's judgment on the ground that this defense was "extensive[ly]" "raised" in the summary-judgment briefing. Opp. 43. Even if true, that would not matter: a claim or defense must be "the subject of the motion before the court" or a court cannot grant summary judgment. *Scott v. Beth*

Israel Med. Ctr., Inc., 41 A.D.3d 222, 223-24 (1st Dep't 2007). Dr. Luke does not argue that the implied-covenant issue was the subject of his motion.

Dr. Luke, moreover, seriously mischaracterizes the briefing below. In opposing Dr. Luke's summary-judgment motion, Kesha merely reminded the trial court (where relevant) of her outstanding implied-covenant defense, R-7676, R-7680—a factual issue for the jury on which Dr. Luke *had not moved for summary judgment*. Kesha did not ask the court to resolve the defense's merits; to the contrary, she flagged the continuing existence of a dispute. *See* R-7676. In reply, Dr. Luke argued that Kesha's implied-covenant defense was unmeritorious as a matter of law, but still failed to seek entry of judgment on this defense. Because Dr. Luke raised this argument for the first time in his reply brief, and because there was no summary judgment hearing, Kesha had no opportunity to respond.

The trial court also erred on the substance. Indeed, Dr. Luke does not defend the primary basis of the trial court's ruling—namely, that it previously had rejected this defense. R-29 n.13. For good reason: that assertion was wrong. Br. 58.

Dr. Luke does defend the trial court's footnoted alternative conclusion—that Kesha's defense has no legal merit, R-29 n.13—but that holding, made without adversarial briefing, misapplied New York law. While an implied covenant cannot "imply obligations inconsistent with other terms of the contractual relationship,"

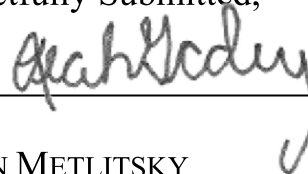
Opp. 44; Br. 58-59, nothing in Kesha's contracts precludes a good-faith duty to renegotiate upon commercial success. That some of the original-contractual details could change upon a potential renegotiation is not an "inconsisten[cy]"—or else no duty to renegotiate could ever exist. New York courts have never articulated that categorical bar. The question is instead a factual one—whether a "reasonable person" would be "justified in understanding," based on industry custom and practice, that the bargained-for fruits of Kesha's music contracts included a renegotiation opportunity. *511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 153 (2002); Br. 58-59 (collecting cases). The trial court erred in taking this question from the jury—and worse, doing so *sua sponte*.

CONCLUSION

The trial court's ruling should be reversed.

Dated: New York, New York
May 18, 2020

Respectfully Submitted,



ANTON METLITSKY
LEAH GODESKY
YAIRA DUBIN
O'MELVENY & MYERS LLP
Times Square Tower
Seven Times Square
New York, New York 10036
(212) 326-2000

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

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

PRINTING SPECIFICATION STATEMENT

Pursuant to 22 NYCRR § 1250.8(f) and (j)

This computer-generated brief was prepared using a proportionally spaced typeface.

Name of typeface: Times New Roman

Point size: 14

Line spacing: Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, Printing Specification Statement, or any authorized addendum is 7,000.