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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.

KESHA ROSE SEBERT p/k/a Kesha,

Counterclaim-Plaintiff-Appellant,

– against –

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

Counterclaim-Defendants-Respondents.

Appellate Case Nos.:
2020-01908
2020-01910

BRIEF FOR PLAINTIFFS-RESPONDENTS/ COUNTERCLAIM-DEFENDANTS-RESPONDENTS

CHRISTINE LEPERA, ESQ.
JEFFREY M. MOVIT, ESQ.
MITCHELL SILBERBERG & KNUPP LLP
Attorneys for Plaintiffs-Respondents/Counterclaim-Defendants-Respondents Lukasz Gottwald p/k/a Dr. Luke, Kasz Money, Inc. and Prescription Songs, LLC
437 Madison Avenue, 25th Floor
New York, New York 10022
(212) 509-3900
ctl@msk.com
jmm@msk.com

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COUNTERSTATEMENT OF QUESTIONS PRESENTED[1]

1. Was Gottwald, a record producer who, prior to the defamation, was unknown to the general public and never publicly commented on the issues of sexual assault or drugging, an "all purpose" or "limited purpose" public figure?

The trial court correctly answered "no."

2. Does New York's "gross irresponsibility" standard apply to a first-hand account of events in a defamation action not involving any media defendant, investigation, or newsgathering?

The trial court correctly answered "no."

3. Can Appellant resurrect her previously-rejected assertion that Gottwald breached the implied covenant of good faith and fair dealing?

The trial court correctly answered "no."

4. Could a jury find that Appellant's drugging and rape allegations were a "sham," precluding application of her privilege defenses?

The trial court correctly answered "yes."

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[1] Defendant-Appellant Kesha Sebert is "Appellant." Plaintiffs-Respondents Lukasz Gottwald p/k/a Dr. Luke ("Gottwald"), Kasz Money, Inc. ("KMI") and Prescription Songs, LLC ("Prescription") are "Respondents." Appellant's and the *Amici*'s briefs are "Br." and "AmBr.," respectively. Unless noted, all emphasis is added and all citations and quotation marks omitted.

5. Is Appellant liable for statements made by her attorney and public relations representatives after repeatedly representing that their press activities were conducted on her behalf?

The trial court correctly answered "yes."

6. Could a jury find Appellant liable for defamatory statements made by her mother Pebe Sebert and her friend Michael Eisele?

The trial court correctly answered "yes."

7. Could Appellant plausibly characterize her accusations of drugging and rape as non-actionable statements of opinion or rhetorical hyperbole?

The trial court correctly answered "no."

8. Are Respondents entitled to partial summary judgment as to certain elements of their defamation claim regarding Appellant's accusation that Gottwald raped Katy Perry?

The trial court correctly answered "yes."

PRELIMINARY STATEMENT

This Court previously ruled on three appeals by Appellant, and thus is familiar with this case. Briefly, Appellant is an artist, and Gottwald a record producer. Gottwald's companies KMI and Prescription are in recording and publishing contracts with Appellant. While the briefs in support of Appellant go to untoward lengths to baselessly vilify Gottwald, *he* is the only one seeking judicial

redress here. Appellant intentionally destroyed his reputation by falsely accusing him of the heinous acts of drugging and rape solely as leverage to get out of her contracts.

This is a rare case where smoking gun evidence demonstrates that Appellant improperly used court filings as a sham for an improper commercial motive, which, among other reasons, makes this case wholly unlike those that Appellant and her advocates despicably but unavailingly try to compare it to. Appellant's own documents (that she tried to conceal in her prior appeal to this Court) reveal she never intended to prove any claim of wrongdoing. Rather, she used the false accusations as a means to "ruin" Gottwald in the press to gain leverage in her contract negotiations. Reams of other evidence also establish Appellant's filings were a sham, including the powerful fact that Appellant voluntarily dismissed any judicial attempts to prove any assault.

In this fourth appeal, Appellant seeks reversal of the trial court's thorough, legally sound decision on the parties' partial summary judgment motions. The trial court properly ruled that Gottwald was a private figure, as he was not known to the public prior to the defamation and had no prior role in any public controversy involving drugging or rape. In their zeal to make him one, Appellant and the *Amici* ignore key facts, and the *Amici* submit articles about other "Dr. Lukes," falsely claiming they "mention" Gottwald. The *Amici* have either committed a fraud on

the Court or have acted with reckless disregard for the truth. In either event, it is inexcusable.

Appellant makes numerous other baseless arguments, including reversing her prior representation to this Court that her lawyer and publicity representatives were her agents, now absurdly claiming they were not. Appellant outrageously tries to keep alive a question of fact as to her libel that Gottwald raped Katy Perry, when both Ms. Perry and Gottwald swore it untrue. These and other machinations, including Appellant's argument that her rape claim is an "opinion," were properly rejected.

COUNTERSTATEMENT OF NATURE OF THE CASE

I. Gottwald Helps Build Appellant's Music Career

Gottwald p/k/a "Dr. Luke" is a songwriter and music producer, who owns KMI and Prescription. R8514-8518, at 31:8-38:11. In 2005, KMI and Appellant executed an exclusive recording agreement, amended in 2008 and 2009 (the "KMI Agreement"). R9003-9022; R1836-1838. In 2008, Appellant executed a publishing agreement with Prescription. R2109-2136. In 2009, KMI executed an agreement with RCA/JIVE for Appellant's recordings, with Appellant's written consent. R8936-9000.

In 2010, Gottwald and KMI produced Appellant's debut album *Animal* and EP *Cannibal*, which sold millions of copies with Number 1 singles. R7902.

During this time, Gottwald and Appellant maintained a pleasant relationship. *See, e.g.*, R9788, at 124:7-125:6; R7336-7337, at 16:7-17:1, 19:4-24.

In 2011, Appellant and her mother, Pebe, were deposed in a lawsuit brought by her prior manager. R94-113. Appellant swore under oath that she never had an intimate relationship with Gottwald, that he had never given her a "date rape drug," and that he had never made a sexual advance toward her—let alone raped her. R94-106. Appellant's current managers at Vector Management ("Vector") were present. R96. Pebe testified that neither Appellant, nor anyone else, ever told her that Gottwald had given Appellant a date rape drug and that she didn't believe that Gottwald and Appellant ever had any sexual relationship. R107-113.

II. Appellant's Defamatory Campaign

In late 2011/early 2012, when Appellant wanted more money and creative control, she began an aggressive campaign to renegotiate her contracts. R8289, at 154:9-155:8. When Appellant's demands were not met, she and her representatives embarked on a malicious campaign against Respondents. As revealed in written documents, in 2012, Appellant and her representatives planned a "Jihad" and "public execution" designed to "ruin" Gottwald: "*Lets [sic] battle this guy in the press. Take down his business*." R7502; R7509; R2534.

Appellant and her representatives then pressured Gottwald using extortionist threats of a public release of a lurid and false claim that he had drugged and raped

Appellant in October 2005—despite knowing that Appellant had sworn under oath to the exact opposite. Appellant used her star power to maximize the threat, knowing publication of her (false) claim of rape would get wide coverage and be devastating to Gottwald. She hired a litigator, Mark Geragos, and a new entertainment lawyer, Kenneth Meiselas, to assist with her plans. R1201, at 32:3-18; R1215, at 86:2-8.[2]

Tellingly, Appellant and her team made it clear that if their contract demands were met, the "rape claim" would disappear. To that end, in mid-2014, Meiselas showed the general counsel of Sony Music, with whom Gottwald did business, a purported draft complaint containing the false accusations against Gottwald. R1230, at 148:7-149:6. Meiselas threatened to file the "draft complaint" if Gottwald did not terminate his contracts with Appellant, and refused to let the general counsel retain a copy of the "draft complaint," or allow Gottwald or his representatives to even look at it. R8106, at 67:12-24, 68:6-10.

III. Appellant's Sham Complaint

When her initial extortion attempts failed, Appellant proceeded with the "Jihad" by filing the defamatory sham complaint in California Superior Court

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[2] Pebe also threatened to "start making public" these (false) accusations unless Gottwald "releases [Appellant] from all legal contracts, and gives me back all my publishing …" (R2537), including by "sending all of this to the blogger who has started the whole 'Free Kesha' thing …" R2677.

("Sham Complaint") on October 14, 2014 ("California Action").[3] R1939. Including other baseless allegations, the Sham Complaint published Appellant's false statement that Gottwald drugged and raped her. R1944, ¶ 23. Prior to its filing, Appellant's managers and lawyers wrote a "Press Plan" with Appellant's public relations agency Sunshine Sachs ("Sunshine") designed to "*extricate [Appellant] from her current professional relationship with [Gottwald] by inciting a deluge of negative media attention and public pressure*" through the dissemination of the Sham Complaint. R919. The Press Plan revealed Appellant's goal—harming Gottwald with the lurid rape and drugging allegations and achieving the "maximum level of negative publicity" against him. *Id.*

As plotted in the Press Plan, Sunshine delivered a pre-filing copy of the Sham Complaint to and coordinated with TMZ to disseminate Appellant's false rape allegations. R923; R2849-2879. Armed with the allegations, TMZ publicized them moments after the Sham Complaint was filed. R1967-1968. As intended by the Press Plan, countless media outlets published Appellant's false assertions: "[o]ther tabloid and celebrity outlets, as well as mainstream media, follow TMZ closely for their breaking news so the story will quickly spread from there and onto

[3] Respondents filed this action later that day. R46.

other online outlets." R919. Appellant and her representatives also directly distributed them to numerous other outlets. R2880-2894.

Abundant evidence underscores this sham, including:

— Appellant alleged Gottwald "rape[d]" Appellant "while she was unconscious." R1944, ¶ 23. Appellant swore under oath that this never happened (R94-106), has no memory of Gottwald in the hotel room that night (R8331, at 322:5-11), and told a medical professional days later she was "doing well" (R7629, at 71:2-25; R7639). Gottwald testified unequivocally that he did not drug or rape Appellant; rather, he slept on the couch that night. R8554-8557, at 190:6-191:17, 201:1-202:25.

— Despite swearing that Gottwald never gave her drugs, Appellant alleged he gave her "sober pills" that she "later learned … were actually a form of … GHB[.]" R1944, ¶ 23. Geragos testified that this classification as GHB was merely his opinion (R679-680, at 498:17-501:23). Appellant's expert admitted there was no way Appellant could have determined that the alleged "sober pill" was GHB. R9210, at 272:3-273:18. To the contrary, reliable expert testimony established it was nearly impossible for GHB to be given in pill form. R7552, at 40:1-41:22.

— Appellant alleged she "immediately called her mother and made a 'fresh complaint.'" R1944, ¶ 23; R7245, at 382:18-383:4. Pebe denied this under oath in a prior action (R107-113), and in this case, testified that Appellant did not tell her about the purported drugging until years later. R8133, at 92:20-22; R8155, at 178:7-9.

After filing the Sham Complaint, Appellant and her representatives encouraged the public and celebrities to condemn Gottwald (*see, e.g.*, R2931-

2934), and secretly[4] had Michael Eisele, the organizer of the so-called "Free Kesha" campaign, spread Appellant's defamatory statements on social media and in the press. R2895-2930; R2775-2776, at 333:15-334:18. In late 2013, Eisele was in contact with Pebe, coordinating the publication of negative information regarding Gottwald and creating bogus Internet "petitions." R2895-2904. Appellant and her representatives provided directions and material support to Eisele in these matters, including in connection with planning protests against Respondents. R2911; R2736-2740, at 176:3-191:13; R9372-9406; R2767-2768, at 301:23-302:8; R2711, at 76:23-77:2; R2755-2757, at 252:5-259:3; R9407.

IV. Appellant Never Had Any Intention To Prove Her Rape Claim

Appellant's actions and the evidence demonstrate that she never intended to prove any rape-related claim. As the trial court repeatedly noted, Appellant "consistently has sought to try this case in the press," not in the courts. *Gottwald v. Sebert*, 2018 WL8666515, at *2 n.3 (Sup. Ct. N.Y. Cnty. May 24, 2018); *Gottwald v. Sebert*, 58 Misc.3d 625, 638 (Sup. Ct. N.Y. Cnty. 2017).

Appellant strategically *voluntarily* dismissed her rape-related claims in both California and New York while still playing them up in the press. After her

[4] Appellant attempted to conceal her relationship with Eisele, including warning "[not to] say anything about this correspondence publicly" (R9408-9409), and directing Eisele to delete texts. R2913.

California Action was stayed, Appellant filed counterclaims in New York, asserting the same false drugging and rape allegations. R135, ¶ 27. The counterclaims were dismissed before any discovery, and Appellant falsely indicated she would appeal. R1417; R1445; R6707. Then, after telling the California court she would amend (R3118-3120), Appellant *voluntarily dismissed* the California Action (R5777). She devised a clever press release, stating she "dismissed her California action without prejudice *while she pursues her appeal and other claims in the New York courts*." R3124-3125; R9369-9370. However, Appellant then *voluntarily abandoned* her New York appeal of the dismissal of her counterclaims. R1453. Appellant's tactical timing of her voluntary dismissals and false proclamations that Appellant would still pursue a rape-related claim establish she had no intention of doing so.

V. Appellant Falsely Asserts That Gottwald Raped Katy Perry

On February 26, 2016, Appellant texted Lady Gaga falsely stating that she and Katy Perry were both raped by Gottwald. R451-475. Lady Gaga then spread condemning messages about Gottwald publicly, with no personal knowledge of Appellant's false assertions. R3128-3158. Ms. Perry and Gottwald both testified that this accusation is false (R642, at 11:6-22; R8598, at 368:13-19), yet Appellant refuses to concede its falsity, and even issued a press release falsely suggesting it occurred. R7673-7674; R476.

VI. Appellant's Prior Concessions That Geragos And Sunshine Were Her Agents

Appellant and her representatives fought vigorously to conceal her defamation campaign in discovery. She tried to avoid production of her public relations communications on the ground that they were privileged *because Geragos and Sunshine acted as her agents* in their press activities. R1119 (arguing "*agency* exception [to privilege waiver rule] applies" to Sunshine as Appellant's "*agents*"); R1102 at 35:12-15; R1143-1144. Geragos and Sunshine also swore under oath that all of their press activities were conducted on Appellant's behalf. R893-900; R903-907; R911-914.

When she lost that privilege argument with the trial court, she appealed and again represented to this Court that Geragos and Sunshine were her agents in these activities. *See, e.g.*, R1135; R1143; R1146; R1149-1150; R1157-1160. This Court affirmed the trial court's decision compelling the production of these documents. Now, to avoid the damage she caused by these activities, Appellant untenably argues the exact *opposite*. She now claims, falsely, that Geragos and Sunshine were *not* her agents in conducting *these very same press activities*.

VII. The Trial Court Held That A Reasonable Juror Could Conclude That The California Complaint Was A "Sham"

Following the compelled production of Appellant's press-related documents, Respondents sought to amplify their pleadings with further specifics of Appellant's

defamation campaign. Appellant opposed, contending the amendments were barred by the litigation and fair report privileges. In August 2018, the trial court, considering the same evidence submitted on the summary judgment motions, correctly held that "a trier of fact could possibly conclude that the California complaint was a sham maliciously filed solely to defame [Respondents] as part of [Appellant's] alleged campaign to destroy Gottwald as leverage to renegotiate her contracts." R1982.

VIII. The Well-Reasoned Summary Judgment Decision

On October 18, 2018, the parties filed for partial summary judgment. Respondents moved, *inter alia*, for an Order: (i) granting judgment as to four elements of their Second Cause of Action for Defamation; (ii) ruling that Geragos and Sunshine acted as Appellant's agents in publishing defamatory assertions; (iii) dismissing Appellant's contract counterclaim; (iv) awarding prejudgment interest on late royalty payments; and (v) dismissing Appellant's affirmative defenses of opinion/hyperbole.[5] R370-371.

[5] Appellant claims she may appeal "two non-final judgments" (regarding (iii) and (iv)) after a final judgment is entered. Br. at 59 n.10. However, the trial court severed those judgments from the remaining claims, meaning they must be appealed directly. *See* 10A Carmody-Wait 2d § 70:361; *Grullon v. Servair, Inc.*, 121 A.D.2d 502, 502 (2nd Dep't 1986).

Appellant moved, *inter alia*, for an Order: (i) finding Gottwald to be a public figure; (ii) dismissing certain statements as protected by litigation-related privileges; (iii) dismissing certain statements as non-actionable opinion/hyperbole; and (iv) finding she is not liable for Pebe and Eisele's defamatory statements. R9486-9487; R9531-9532.

On February 6, 2020, the trial court denied Appellant's motion in its entirety and granted Respondents' motion as to the above. R5-36.

ARGUMENT

I. Appellant And The *Amici* [6] Proffer False Facts, Misstate The Law, And Indisputably Confirm Gottwald Was Not A Public Figure

Public figure status is a question of law, with each case judged on its facts. *Enigma Software Grp. USA, LLC v. Bleeping Computer LLC*, 194 F.Supp.3d 263, 287-88 (S.D.N.Y. 2016). Appellant's burden is to demonstrate such status exists immediately prior to the defamation. *Krauss v. Globe Int'l*, 251 A.D.2d 191, 192 (1st Dep't 1998); *Waldbaum v. Fairchild Publ'ns, Inc.*, 627 F.2d 1287, 1295 n.19 (D.C. Cir. 1980).

The facts considered are only those that are part of the summary judgment record. *See Cruz v. Mt. Sinai Hosp.*, 191 A.D.2d 325, 326 (1st Dep't 1993)

[6] The claimed "interests" of the *Amici* are irrelevant. The defamation stems from Appellant's own purported observations, and involve no media defendant or media-related "research."

(rejecting "evidence dehors the record and not that which was adduced by defendants at trial"); *People v. Archer*, 68 A.D.2d 441, 449 (2d Dep't 1979), *aff'd on other grounds*, 49 N.Y.2d 978 (1980) ("improper … to raise issues and cite alleged errors … never raised or cited by appellant"). Ignoring that "the inclusion of factual material" by an amicus "is almost always improper," the *Amici* improperly attempt to supplement the record. *Price v. N.Y.C. Bd. of Educ.*, 16 Misc.3d 543, 553 (Sup. Ct. N.Y. Cnty. 2007), *aff'd*, 51 A.D.3d 277 (1st Dep't 2008). Their supplemental evidence must be disregarded.

Far more egregious, in their unrestrained advocacy for Appellant, the *Amici* deliberately proffer false information, attaching dozens of articles *about entirely different people named "Dr. Luke."* And the vast majority of the other articles do not mention Gottwald, or mention him only in passing. *Infra*, pp. 20-21. This shocking behavior demonstrates the lack of credibility of their entire submission. Clearly, the *Amici* are nothing more than advocates for Appellant, rehashing her meritless arguments. *Dental Soc. of State of N.Y. v. N.Y. State Tax Comm'n*, 1987 WL 272396, at *1 (Sup. Ct. Albany Cnty. Sept. 8, 1987) (rejecting amicus whose "interest is partisan with petitioner's"); *210 E. 68th St. Corp. v. City Rent Agency*, 34 N.Y.2d 552, 552 (1974).

The trial court properly applied the *actual* facts in the summary judgment record to the binding legal precedents and correctly ruled Gottwald was not a public figure.

A. Constitutional History Of The Public Figure Doctrine

The U.S. Supreme Court has instructed on this doctrine through its evolving precedent on defamation plaintiffs' burden of proof. In *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80 (1964), the Court held the First Amendment prohibits a "public official" from recovering for a defamation "relating to his official conduct" unless the statement was made with "actual malice" (*i.e.*, knowledge that it was false or reckless disregard of its falsity). The Court later expanded the "actual malice" requirement to plaintiffs who "thrust" themselves into the "vortex of an important public controversy." *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 155 (1967). Then, in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 49 & n.17 (1971), a four-Justice plurality initially extended the actual malice standard to defamation concerning matters of "general or public interest," regardless of the plaintiff's status. Critically, *Rosenbloom* was soon overruled by the seminal case of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), which held that *Rosenbloom*'s "public or general interest" test "inadequately serves both of the competing values at stake"—*i.e.*, the "need to avoid self-censorship by the news media" and the "individual's right to the protection of his own good name." *Id.* at 341, 346.

In overruling *Rosenbloom*, *Gertz* adopted a sharp distinction between "all purpose" and "limited purpose" status, holding that all purpose public figures must always prove "actual malice," while a limited purpose public figure only must do so if she had voluntarily injected herself into the particular public controversy that is the subject of the defamation. *Id*. at 342-47. To strike a critical balance, and avoid discouraging individuals from entering arenas of public life, the Supreme Court emphasized that "[w]e would not lightly assume that a citizen's participation in community and professional affairs rendered him a public figure for all purposes." *Id*. at 352. As such, "[a]bsent *clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society*, an individual should not be deemed a public personality for all aspects of his life." *Id*.

Gertz then explained that the "limited purpose" public figure analysis requires a different assessment—it looks to "the nature and extent of an individual's participation *in the particular controversy giving rise to the defamation.*" *Id*. at 352. There is no middle ground or sliding scale. If a person lacks the *pervasive* fame required to establish all purpose status, then any lesser level of fame is irrelevant to the limited purpose analysis. *See Waldbaum*, 627 F.2d at 1298 n.32 ("anomalous" result that one "who falls slightly short of the general fame required to be a general public figure but who is not involved in any particular public controversy is a private person, while a citizen who becomes

influential in a single issue is a limited-purpose public figure" is "correct and consistent with the principles underlying *New York Times* and *Gertz*."). *Gertz* thus mandates a clear distinction between "a citizen's participation in community and professional affairs," and actions that "thrust himself into the vortex of [a] public issue" or "engage the public's attention … to influence its outcome." *Gertz*, 418 U.S. at 352.

New York adopts this "binary" approach and applies the same definitions articulated by *Gertz* and its progeny. *See*, *e.g.*, *Krauss*, 251 A.D.2d at 192 (either "general public figure" or "limited public figure" and adopting *Gertz* definition); *Lee v. City of Rochester*, 174 Misc.2d 763, 768-70 (Sup. Ct. Monroe Cnty. 1997), *aff'd*, 254 A.D.2d 790 (4th Dep't 1998) ("two categories … (1) public figures for all purposes … and (2) … 'vortex' public figures"; recognizing "like the federal authority … New York cases hold that the limited public figure harbors that status only for the particular controversy she thrusts herself into"); *James v. Gannett Co.*, 40 N.Y.2d 415, 421-23 (1976) ("public figures for all purposes" or "only with respect to a narrow area of interest"); *White v. Tarbell*, 284 A.D.2d 888, 889 (3d Dep't 2001) ("two alternative bases"); *O'Neil v. Peekskill Faculty Ass'n*, 120 AD.2d 36, 44 (2d Dep't 1986) ("public figure for all purposes" or "limited purpose

public figure”). Appellant concedes “New York law is consistent with *Gertz*.” R7068.[7]

Under the undisputed record, Gottwald fits within neither category. Knowing that, Appellant and the *Amici* proffer non-existent, amorphous legal standards that contradict *Gertz.* Appellant also incorrectly contends that “injecting oneself into a public controversy is not a prerequisite for [limited] public figure status” and that one can become a limited public figure for any “statements relating to the cause of their fame.” Br. at 28-29. Appellant and the *Amici* improperly seek to invoke the long-overruled *Rosenbloom* “public concern” test expressly rejected in *Gertz*.

B. Gottwald Was Not An All Purpose Public Figure

1. *The Trial Court Applied The Correct “All Purpose” Standard*

A plaintiff is an all purpose public figure only where the individual achieves “such *pervasive* fame or notoriety that he becomes a public figure for all purposes and in all contexts.” *Gertz*, 418 U.S. at 351. There must be “clear evidence of general fame or notoriety in the community and *pervasive* involvement in the affairs of society.” *Id*. at 352. This test is a “strict one.” *Waldbaum*, 627 F.2d at 1292.

[7] Appellant claims New York is “entitled to provide a broader … meaning to public figures than federal law provides” (Br. at 16 n.6), but provides no authority that New York actually has a broader standard. It does not, as it follows *Gertz*.

In this context, "general fame" means "being known to a large percentage of the well-informed citizenry." *Waldbaum*, 627 F.2d at 1295 n.20. The individual must be a megacelebrity—a "household word"—"whose ideas and actions the public in fact follows with great interest." *Id*. at 1292; Smolla, *Law of Defamation*, §2:80 (2d ed.) ("'larger than life' megacelebrities"). "Few people … attain the general notoriety that would make them public figures for all purposes," and accordingly, "the general public figure is a *rare creature*." *Waldbaum*, 627 F.2d at 1292, 1296; *Wolston v. Reader's Digest Ass'n, Inc*., 443 U.S. 157, 165 (1979) ("small group of individuals"). Mere "celebrity" or success does not make an all purpose public figure.

Appellant's claim that the trial court "applied the wrong legal standard" is false. Br. at 17. The trial court followed *Gertz* exactly in holding "Gottwald certainly is not a 'general public figure'" because "[a]lthough he may be well known in music industry circles, he has never been a household name *or achieved general pervasive fame or notoriety in the community*." R17. Numerous New York decisions (including decisions affirmed by this Court) have adopted this exact standard. *See, e.g., Farrakhan v. N.Y.P. Holdings*, 168 Misc.2d 536, 539 (Sup. Ct. N.Y. Cnty. 1995), *aff'd*, 238 A.D.2d 197 (1st Dep't 1997) ("people who have achieved enough prominence in society that their names are tantamount to household words"); *Krauss v. Globe Int'l, Inc*., 1996 WL 780550, at *3 (Sup. Ct.

N.Y. Cnty. Sept. 16, 1996), *aff'd as modified*, 251 A.D.2d 191 (1st Dep't 1998) (same).

2. *The Trial Court Correctly Found That Gottwald Was Not An All-Purpose Public Figure*

Gottwald's status must be analyzed prior to Appellant's defamation, meaning no later than before Appellant's filing of the Sham Complaint on October 14, 2014. R309-311, ¶¶ 59-64.[8]

Nothing in the record shows that, as of October 2014, Gottwald had sufficient *Gertz* notoriety to be deemed an all purpose public figure. Appellant and the *Amici* cobble together various media mentions that purportedly reference Gottwald, but ignore the content of the articles and that they fail to reflect any widespread notoriety at the time of the defamation.[9] None of the articles

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[8] Appellant and the *Amici* improperly rely upon post-defamation evidence: "The Song Machine" was published in 2015 (R6378; R6380), and other articles discussing Gottwald (*e.g.*, Core Water) are from 2015 or later. *See, e.g.*, R4940; R5471; R5477; R4936; R4962-4964. The *Amici*'s post-defamation evidence improperly includes Gottwald's 2016 Twitter activity and his work with other artists. AmBr. at 28-32.

[9] Appellant improperly attempts to smuggle in a host of unauthenticated, inadmissible articles through the "expert" report of Professor North; however, a plain reading of North's report demonstrates that none of her findings required any "expert" analysis. Moreover, as Dean Smolla explains at length, North's methodology and the concepts she creates to argue public figure status ("notability," "celebrity," and "influencer") do not align with the law. R6202-6203; R6217-6251; R9086, at 40:15-25.

demonstrate Gottwald was a "household name" or had "pervasive fame." In fact, most are not even about Gottwald, or barely mention him.

Gravely troubling is the *Amici*'s patently false assertion that "727 nationally published articles throughout 63 major publications" purportedly "mention" Gottwald. AmBr. at 4 & n.5. Outrageously, at least 49 articles refer to *other doctors (not Gottwald) whose names happen to include "Luke."*[10] At least 23 do not mention Gottwald or any other "Dr. Luke," at least 20 are duplicates, and at least 124 are not accessible at the links provided. The vast majority of the remaining articles make only passing reference to Gottwald. Clearly, the *Amici* have misrepresented the content and import of these articles, which fail entirely to support Gottwald as a public figure. It is thus unsurprising that Appellant only included 6 of the "mentions" articles with her summary judgment motion.[11] *Id.*, Nos. 37, 339, 342, 348, 419, 513. The remaining articles should be stricken.

Appellant and the *Amici* also provide no evidence that any articles (much less relevant articles) were read by the general public. Many are from irrelevant niche publications. *Huggins v. Moore*, 253 A.D.2d 297, 312 (1st Dep't 1999),

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[10] *See, e.g.*, No. 123 (Dr. Luke Clark); 131 (Dr. Luke Sato); 270 (Dr. Luke Schneider).

[11] The same is true of the *Amici*'s "features" articles. At least 12 are not accessible, and the majority of remaining articles concern others, not Gottwald. AmBr. at 10, n.11. And only 5 articles are in the record. *Id.*, Nos. 2, 3, 14, 32, 40.

rev'd on other grounds, 94 N.Y.2d 296 (1999). And Appellant's "expert" makes no connection between general outlet circulation and readership of specific articles. Being mentioned even in a widely circulated publication cannot on its own create public figure status; otherwise, every person mentioned—including each of the other "Dr. Lukes"—would be a public figure, an absurd result contrary to law.

The record facts do not support the contention that Gottwald was an all purpose public figure. Rather, undisputed facts (ignored by Appellant) establish Gottwald was *not* well known prior to the defamation. R5360 (Gottwald was a "*producer you've never heard of*"); R5363 ("music-maker *behind the scenes*"; "most successful pop producer *you've never heard of*"). The "*New York Times*-reviewed book" (Br. at 19-20)—published after the defamation—discusses how "hit-makers" such as Gottwald are "*mostly anonymous*." R6379. Discussing Gottwald, the author states, while "[d]irectors of films are public figures … the people behind pop songs *remain in the shadows*, taking aliases … to preserve the illusion that the singer is the author of the song." *Id*. Multiple witnesses testified that they did not know of Gottwald prior to this action. R9164, at 89:11-13; R7524, at 48:4-6.

Even Appellant's reference to Gottwald's proposed (and quickly withdrawn) selection as an American Idol judge in August 2013 (Br. at 20) is irrelevant and rebutted by the actual press coverage confirming Gottwald's lack of notoriety.

R5426 (proposal "*prompted headlines like 'Dr. Who?'*"); R5427-5428 (readers commenting: "*I've been in the TV/Film business 25 years. Even if he's a music Producer, I've never heard of him*."; "*Who the hell is this person?*"; "*he'll mean nothing to the general public*."). Gottwald was nowhere near the level of having the requisite "pervasive fame" at this time. *See Gertz*, 418 U.S. at 352 ("None of the prospective jurors called at the trial had ever heard of petitioner prior to this litigation, and respondent offered no proof that this response was atypical …").[12]

Notwithstanding these undisputed facts showing Gottwald was unknown to the general public, Appellant tries to bootstrap Gottwald's notoriety to the renown of the artists with whom he worked. That, however, is not *Gottwald's* renown. *See Krauss*, 251 A.D.2d at 192 (husband of "television celebrity" who was "not famous in his own right" not all purpose public figure). Further, mere success, advertising of a business, or being known within a certain segment of society, does not render a plaintiff an all purpose public figure. *See Waldbaum*, 627 F.2d at

[12] Appellant erroneously claims (without rationale) that the number of Gottwald's tweets is probative. Br. at 22. This daily act of numerous private citizens does not result in "pervasive fame." The *Amici*'s citation to Gottwald's Twitter followers in 2013 (AmBr. at 24, 27)—unauthenticated hearsay outside the record— ignores Gottwald's testimony that many followers were not real people. R8525, at 75:21-76:17. The *Amici* misrepresent the "conclusions" of *U.S. v. Sergentakis*, 2015 WL 3763988, at *5 (S.D.N.Y. June 15, 2015), which held that the individual at issue was neither an all nor limited purpose public figure. The portion quoted concerns a different case, which is not a defamation case and which is inapposite.

1299 ("Being an executive within a prominent and influential company does not by itself make one a public figure."); *Mitre Sports Int'l Ltd. v. Home Box Office, Inc.*, 22 F.Supp.3d 240, 250 (S.D.N.Y. 2014) ("New York courts have repeatedly rejected the notion that advertising alone makes a business a public figure.") (collecting cases). And while Appellant claims that Gottwald *almost* receiving a star on the Hollywood Walk of Fame proves his public figure status, not only did he not get a star, but there are hundreds of people on the Walk of Fame who do not have the pervasive fame required for all purpose status. R6381-6403.

Indeed, in *Gertz*, the plaintiff was entitled to private figure status despite having "long been active in community and professional affairs," having "published several books and articles," and being "consequently well known in some circles." 418 U.S. at 351-52. Similarly, in *Time, Inc. v. Firestone*, 424 U.S. 448, 454-55 (1979), the Supreme Court held that a member of one of America's well-known wealthy industrial families was a private figure. Courts in New York, and beyond, concur. *See Krauss*, 251 A.D.2d at 192 (television producer not general purpose public figure); *Davis v. High Soc'y Magazine*, 90 A.D.2d 374, 384 (2d Dep't 1982) (well-known boxer "not a public figure in the general sense"); *Farber v. Jeffreys*, 33 Misc.3d 1218(A), at *10 (Sup. Ct. N.Y. Cnty. 2011), *aff'd*, 103 A.D.3d 514 (1st Dep't 2013) (despite "widespread reputation" journalist not all purpose public figure); *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 137 (2d Cir.

1984) (novelist with "world-wide following" and "international renown" was "not that rare person the *Gertz* decision identifies as an all purpose public figure"); *Mitre*, 22 F.Supp.3d at 250 ("one of the largest sporting goods companies in the world" not all purpose public figure); *Computer Aid, Inc. v. Hewlett-Packard Co*., 56 F.Supp.2d 526, 535 (E.D. Pa. 1999) (Hewlett-Packard, "one of the largest and most influential corporations in the world," not all purpose public figure); *Tavoulareas v. Piro*, 817 F.2d 762, 772 (D.C. Cir. 1987) (*en banc*) (Mobile Oil President, "a highly prominent individual," not all purpose public figure); *Pickens v. Cordia*, 433 S.W.3d 179, 186 (Tex. App. Dallas 2014) (famous oil magnate not all-purpose public figure).[13]

The facts of this case distinguish it from *Winklevoss v. Steinberg*, 170 A.D.3d 618 (1st Dep't 2019), which concerned Olympic athletes who participated in the world's largest sporting competition (televised worldwide) and licensed their name and likeness for use in a blockbuster motion picture about Facebook, the

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[13] Appellant argues, without legal support, that Gottwald is a public figure because he hired public relations agents. Br. at 21. Not so. Access to media channels alone cannot create public figure status. *Gertz*, 418 U.S. at 344-52 (not public figure despite substantial media access); *Firestone*, 424 U.S. at 486 (same). There is no evidence that the agents did anything besides advertise Gottwald's business and zero evidence that they transformed Gottwald into a household name. *See Greenberg v. CBS Inc.*, 69 A.D.2d 693, 704-05 (2d Dep't 1979) (not "extensiveness of the activities which is the critical factor," rather "breadth of the audience coupled with the appeal of the topic").

largest social media network in the world. Their activities were "front of the camera," like those of famous athletes, performers and actors, often acknowledged as all purpose public figures. Gottwald is *not* a performer; he is a music producer who works behind the scenes, in the studio, to create music. Appellant's evidence establishes that Gottwald's work is done out of the public eye. *Supra*, pp. 22-24.

Appellant also mistakenly relies on *James*, which found plaintiff (a performer suing over an interview) to be a limited purpose public figure. 40 N.Y.2d at 421-423 (not "public figure[] for all purposes"; only for "purposes of this publication"). Her other purported "all purpose" cases are unavailing. In *Maule v. NYM Corp*., 54 N.Y.2d 880 (1981), the court did not specify whether plaintiff was an all or limited purpose public figure; in any event, it is distinguishable. Unlike Gottwald's largely anonymous songwriting, that plaintiff admitted he was one of the "best known" writers at *Sports Illustrated*, had a "by-line for his articles" for nearly 20 years, authored 28 books, and "appeared many times on television"— all "conduct obviously designed to project his name and personality before millions … ." *Id*. at 822. In *Celle v. Filipino Reporters Enters. Inc*., 209 F.3d 163, 177 (2d Cir. 2000), plaintiff was a radio performer who, unlike Gottwald, had "characterize[ed] … himself as … 'well known[.]'" Similarly, in *San Antonio Exp. News v. Dracos*, 922 S.W.2d 242 (Tex. App. 1996), plaintiff was as a "television reporter and news commentator" who stipulated in a prior litigation

that he "was a public figure as that term is defined by the United States Supreme Court." *Id*. at 245, 254.

The *Amici's* nationwide cases are similarly inapplicable. In *Manzari v. Associated Newspapers*, 830 F.3d 881, 888-89 (9th Cir. 2016), plaintiff admittedly was "the most downloaded woman on the internet," with a website "far surpassing the amount of Internet traffic for websites of such ubiquitous celebrities as Martha Stewart and Oprah Winfrey." In *Carafano v. Metrosplash.com Inc.*, 207 F.Supp.2d 1055, 1070-71 (C.D. Cal. 2002), plaintiff was a well known Star Trek actress with multiple leading movie roles, had an action figure and trading card made of her, and was featured on numerous magazine covers. In *Rebozo v. Washington Post Co.*, 637 F.2d 375, 379 (5th Cir. 1981), plaintiff was essentially a public official—one of Nixon's top aides and even described as Nixon's "agent" by the court. In two cases, plaintiffs conceded public figure status. *Michel v. NYP Holdings, Inc*., 816 F.3d 686, 702 (11th Cir. 2016) (attorney conceded "his client … [is] a public figure."); *Carson v. Allied News Co*., 529 F.2d 206, 209 (7th Cir. 1976) ("plaintiffs admit that they are both 'public figures'"). In the remaining cases, plaintiffs either had far more notoriety than Gottwald or were found to be limited purpose—not all purpose—public figures, on distinguishable facts. *See Butts*, 388 U.S. at 155 (defamation concerned conduct by plaintiff (fixing games) directly tied to his job responsibilities as athletic director); *Pauling v. Nat'l Review,*

Inc., 49 Misc.2d 975, 981 (Sup. Ct. N.Y. Cnty. 1966) ("world famous scientist" a public figure where defamation concerned "criticisms of his public conduct and of the motives for that public conduct."); *Brewer v. Memphis Pub. Co*., 626 F.2d 1238, 1248, 1257 (5th Cir. 1980) ("well known entertainer … nationally" who attained national fame through relationship with Elvis Presley was public figure regarding "article that dealt primarily with that romantic relationship"). Appellant relied on many of these cases below, which were properly rejected.

Appellant mischaracterizes Gottwald's pleadings from two copyright lawsuits as "proclamations of his own fame." Br. at 23. Gottwald made no concession of being personally "well known" in these pleadings. In one, the portions quoted generally described all three plaintiffs (including Appellant) and their success in the music industry. R5783-5785, ¶¶ 4, 9. The other solely concerns Gottwald's success—not any widespread notoriety. R5805, ¶ 37. As the law makes clear, Gottwald's success and accolades did not confer "all purpose" status on him, nor do his efforts to promote his work as a producer. Gottwald was not a performer, and he was not well known known to the public by virtue of successfully producing artists who were household names.

C. Gottwald Was Not A "General Public Figure Within A Relevant Community"

The *Amici* argue Gottwald was a public figure "within a relevant community," claiming that "nationwide fame" is not required, and an individual

can be a public figure in the community "where he was defamed."[14] AmBr. at 32. Even if this category exists, the *Amici* have not demonstrated it applies.[15]

Most of the *Amici*'s cases concerned defamation limited to a discrete community in which the plaintiff had attained significant notoriety. *See DeCarvalho v. daSilva*, 414 A.2d 806, 813 (R.I. 1980) ("in the Portuguese language" and "aimed at a community of Portuguese-Americans"); *Kaplansky v. Rockaway Press, Inc*., 203 A.D.2d 425, 426 (2d Dep't 1994) (articles in local newspaper); *Stolz v. KSFM 102 FM*, 30 Cal.App.4th 195, 206 (1994) ("Sacramento community"); *Steere v. Cupp*, 602 P.2d 1267, 1273 (Kan. 1979) (articles in local newspapers); *Chapman v. Journal Concepts, Inc*., 528 F.Supp.2d 1081, 1091-92 (D. Haw. 2007) (issue of *The Surfer's Journal*).

The *Amici* baselessly argue these cases apply because Appellant "communicat[ed]" her false drugging and rape accusations to "members of the female pop community (through litigation)." AmBr. at 40. Absolutely false.

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[14] *Barry v. Time, Inc.*, 584 F.Supp. 1110, 1120 n.13 (N.D. Cal. 1984), did not endorse this concept; it discussed another court's invocation and described it as "not without problems."

[15] This argument is a thinly disguised effort to resurrect the overturned *Rosenbloom* "public concern" test. *See* AmBr. at 39-40 ("of *especial interest* to those involved in with and interested in [the music] industry"; "of *great concern* to artists and their fans"; "of *interest* to those in the music field"). *Gertz* rejected this, ruling the content of the defamation has no relevance to all purpose status.

Appellant blasted her defamation to the general public with a Press Plan designed to achieve the "maximum level of negative publicity for [Gottwald]." R919. She armed TMZ with her false allegations before she filed the Sham Complaint, as "[o]ther tabloid and celebrity outlets, *as well as mainstream media*, follow TMZ closely for their breaking news so the story will quickly spread from there and onto other online outlets." *Id.* The "relevant community" for purposes of assessing Gottwald's status was the general public, not a fabricated subset. Here, there is no demonstration that "the allegedly defamatory statements [occurred] *within the limits of the particular community in which Plaintiff is claimed to be a public figure*." *Chapman*, 528 F.Supp.2d at 1091.[16]

The *Amici* misrepresent their other cases. *Maule* did not hold plaintiff to be a public figure within the football community (AmBr. at 35), and is distinguishable. *Supra*, p. 26; *infra*, p. 38. The plaintiff in *Adler v. Conde Nast Publ'ns*, 643 F.Supp. 1558, 1564-65 (S.D.N.Y. 1986), was a *limited purpose* public figure due to her prior conduct regarding the controversy related to the defamation. The remaining cases are also inapposite for the reasons discussed

[16] Appellant's text to Lady Gaga changes nothing. Gottwald's public figure status must be assessed as of October 13, 2014, at the latest. Appellant's very public defamatory campaign continued for years thereafter, including through her message to Lady Gaga. Appellant also defamed Gottwald in a later press statement to the general public, *after* Ms. Perry's unequivocal sworn denial. R476.

herein. AmBr. at 34-37 (discussing *Wilsey, Celle, and James*). *Supra*, p. 26; *infra*, pp. 38-39.

D. Gottwald Was Not A "Limited Purpose" Public Figure

Limited purpose public figure analysis requires a court to define the public controversy as it relates to the defamation. *Gertz*, 418 U.S. at 352; *White*, 284 A.D.2d at 890-91 (emphasizing "absence of evidence of plaintiffs' alleged involvement with the public and news media *regarding the subject matter of defendant's allegedly defamatory statements*"). "Once the court has defined the controversy, it must analyze the plaintiff's role in it." *Waldbaum*, 627 F.2d at 1297.

Importantly, "[n]ot everyone who participates in activities that affect the public becomes a public figure" and "[t]rivial or tangential participation is not enough." *Id*. at 1297, 1300. The plaintiff must have "thrust [himself] to the forefront of the controvers[y] so as to become [a] factor[] in [its] ultimate resolution" and "must have achieved a 'special prominence' in the debate." *Id*. (quoting *Gertz*, 418 U.S. at 345, 351); *Lerman*, 745 F.2d at 136 (must "assume[] a position of prominence in the public controversy"); *Lee*, 174 Misc.2d at 771.

1. *The Trial Court Correctly Defined The "Controversy" And Properly Found That Gottwald Had Not Injected Himself Into That Controversy*

The trial court properly recognized that the issue giving rise to the defamation claims was Appellant's (false) assertions that Gottwald drugged and raped her and raped Katy Perry. Appellant failed to prove a direct connection between a *pre-existing* public controversy regarding this topic and Gottwald's *prior* prominent involvement therein. Appellant's contention that she need only show that the topic is important overall was rejected in *Gertz* when it overturned *Rosenbloom*. Under *Gertz*, a successful, even well-known, person accused of drugging or sexual assault is not a limited purpose public figure if he has never previously thrust himself into the public discussion on drugging or sexual assault.

The trial court correctly held:

> Gottwald did not thrust himself into the vortex of the public issues or engage the public's attention on the important public matters implicated by the defamatory statements … [t]hough Gottwald has sought publicity for his label, his music and his artists—none of which are the subject of the defamation here—he never injected himself into the public debate about sexual assault or abuse of artists in the entertainment industry.

R17-19 (collecting cases).

Unable to sustain her required burden, Appellant concocts a different "controversy" unrelated to sexual assault. She first claims "[a] serious public controversy exists over abusive artist contracts and the treatment of artists by

powerful industry executives," *i.e.* the "artist-treatment controversy." Br. at 30-31. Appellant erroneously claims Gottwald "thrust himself" into the forefront of that (non-existent) controversy by "highlighting his own relationships with the young, female, mega-celebrity artists in his portfolio" (Br. at 31)—despite there being no evidence that Gottwald ever attempted to take a leading role in any such purported public debate. Appellant is wrong as a matter of fact and law.[17]

The defamation in this case is not about the vague self-serving and broadly defined "abusive artist *contract*/artist treatment issue." Appellant's defamation was that Gottwald drugged and raped her, and raped Katy Perry—a far cry from a complaint about contracts. The only relevant "controversy" is drugging and sexual assault. *See Naantaanbuu v. Abernathy*, 816 F.Supp. 218, 225 (S.D.N.Y. 1993)

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[17] None of the *Amici*'s cases support broadly defining the controversy in this manner. In each, the relevant controversy was either conceded, expressly limited to its facts, or directly connected to the subject matter of the defamation and the plaintiff's involvement. *Jankovic v. Int'l Crisis Grp.*, 822 F.3d 576, 585-86 (D.C. Cir. 2016) (plaintiff conceded *topic* of controversy, but argued to narrow it *temporally*); *Tavoulareas*, 817 F.2d at 773-74 (plaintiff accused of nepotism within oil industry and controversy was "credibility and integrity of representatives of the oil industry"); *Waldbaum*, 627 F.2d at 1298-1300 (plaintiff known as leading advocate of controversial policies, and defamation directly questioned those policies); *Fine v. ESPN, Inc.*, 2016 WL 6605107, at *7 (N.D.N.Y. Mar. 25, 2016) (wife of basketball coach made numerous public appearances in support of basketball program and defamation criticized program); *Forteich v. Advance Magazine Publishers, Inc.*, 765 F.Supp. 1099, 1108 (D.D.C. 1991) (plaintiff spoke out regarding prior litigation and defamation concerned that litigation); *Bell v. Associated Press*, 584 F.Supp. 128, 132 (D.D.C. 1984) (limiting holding to "professional athletes at this particular time").

("'controversy' into which a plaintiff has allegedly entered is defined as the *event* that the defamatory statements describe."); *see also Cummins v. Suntrust Capital Mkts., Inc.*, 649 F.Supp.2d 224, 242 (S.D.N.Y. 2009) (defining controversy too broadly "would effectively require finding that every executive receiving stock options was a public figure for purposes of critical comment concerning those options.").

There is no evidence that Gottwald commented on the issue of drugging or sexual assault prior to Appellant's defamation—as he did not. Accordingly, Gottwald cannot be a limited purpose public figure.[18] *See Pisani v. Staten Island Univ. Hosp.*, 2008 WL 1771922, at *15 (E.D.N.Y. Apr. 15, 2008) ("plaintiff's purported prominence was wholly unrelated to the topic of the Hospital's statement"); *Naantaanbuu*, 816 F.Supp. at 225 ("That [plaintiff] sought out the press on matters completely unrelated … is immaterial."); *Calvin Klein Trademark Tr. v. Wachner*, 129 F.Supp.2d 248, 252 (S.D.N.Y. 2001) (none of "the various press releases, news articles, and interviews from trade and popular newspapers … directly relates to the [subject matter of the defamation].").[19]

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[18] Nor did Gottwald take any pre-defamation public stance on the purported "artist treatment" controversy.

[19] *See also Armstrong v. Shirvell*, 596 F.App'x 433, 445-46 (6th Cir. 2015) (no connection with defamation); *Bennett v. Hendrix*, 426 F.App'x 864, 866 (11th Cir. 2011) ("not germane to the sole public activity in which [plaintiff] participated");

In a tortured attempt to connect Gottwald with the defamation, Appellant and the *Amici* offer a few articles discussing Gottwald's successful business relationships (including numerous males like Adam Levine, Taio Cruz, Juicy J, Flo Rida, and Adam Lambert). R5301; R5209-5236. These sparse media mentions did not make Gottwald's general working relationships a "public controversy," nor do they concern drugging, rape or the purported "artist treatment controversy."[20]

Again, an individual does not "thrust itself" into a controversy merely by promoting services. *Behr v. Weber*, 1990 WL 270993, at *2 (Sup. Ct. N.Y. Cnty. Jan. 5, 1990), *aff'd*, 172 A.D.2d 441 (1st Dep't 1991). "If that was the only criterion, any business that advertised would, merely by the fact of advertising, become a public figure, a proposition rejected in the cases." *Lee*, 174 Misc.2d at 772. By promoting his work, Gottwald did not inject himself into any controversy relating to the subject matter of this action—drugging and sexual assault.[21] *Id*. at

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Dawe v. Corr. USA, 506 F.App'x 657, 659 (9th Cir. Feb. 1, 2013) (disconnect between controversy and defamation).

[20] The *Amici*'s attempt to broaden the controversy based on the so-called "Free Kesha" campaign fails. AmBr. at 46. In October 2013, "Free Kesha" promoted Appellant's efforts to obtain greater creative control, not Appellant's sexual assault allegations. R2898. Moreover, Appellant and her representatives encouraged Eisele's efforts, and cannot "create [her] own defense by making [Gottwald] a public figure." *Hutchison v. Proxmire*, 443 U.S. 111, 135 (1979).

[21] Nor do statements about a particular controversy create a public figure, so long as the party is not "aim[ing] to influence the public's views on the controversy."

767 (despite "high profile effort to promote his business" because "no public controversy attend[ing] plaintiff's self-promotion efforts"); *Enigma*, 194 F.Supp.3d at 289 ("sales and recognition" not enough).[22]

Recognizing that the purported "artist treatment controversy" fails, Appellant falsely contends that Gottwald somehow injected himself into the public controversy of "drugging" based on a few statements he purportedly made about drinking with Avril Lavigne. Br. at 31-32. However, none of the quoted statements attributed to Gottwald by Appellant actually are in the referenced video. R5369-70. And, it is absurd to even suggest that a music-related video which may have discussed voluntary drinking would inject someone into a serious public controversy about rape and drugging.[23]

Mitre, 22 F.Supp.3d at 252; *see also Hutchison*, 443 U.S. at 135 (not public figure where "concern is shared by most and relate[d] to most public expenditures").

[22] The *Amici*'s cases are distinguishable. In *Alcor Life Extension Found. v. Johnson*, 43 Misc.3d 1225(A), at *4 (Sup. Ct. N.Y. Cnty. 2014), plaintiff "concede[d] that it is a limited purpose public figure." And in *Grishin v. Sulkess*, 2019 WL 4418543, at *6 (C.D. Cal. May 31, 2019), plaintiff "creat[ed] public websites and social media accounts involving the marital disputes with his wife" and the defamation concerned those disputes.

[23] Gottwald's involvement in a policy roundtable is irrelevant. Br. at 20. That roundtable took place at a *private* studio and concerned his process of making music, not the subject matter of the defamation. R5395. In *Carto v. Buckley*, 649 F.Supp. 502, 507 n.3 (S.D.N.Y. 1986), plaintiffs "[did] not deny that they are public figures."

Brazenly, the *Amici* falsify "facts" and try to create a record they are not entitled to make by pointing to examples of Gottwald's supposed interactions with various artists. AmBr. at 51-53. In addition to being irrelevant, the examples regarding Katy Perry and Appellant rely on submissions outside the record, and should be disregarded. The statements from the Perry and Cyrus articles are not Gottwald's—they are all unauthenticated, inadmissible hearsay statements by the reporter or artist. *Peckman v. Mut. Life Ins. Co. of N.Y.*, 125 A.D.2d 244, 247 (1st Dep't 1986). Nor do these statements remotely evidence Gottwald's injection into the controversy of sexual assault or drugging.[24]

The fallacious underlying predicate in all of Appellant's arguments is that *Appellant's* status somehow matters in the analysis—it does not. It is not the role of the defamer that dictates whether an individual is a limited purpose public figure. Rather, it is the subject matter of the accusation and *plaintiff's* prior involvement (if any) in the controversy that is determinative.

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[24] The *Amici*'s submission is rife with other outrageous misrepresentations. They falsely state that Gottwald described his *artists* as "my babies" when that comment was about Gottwald's *employees* at his publishing company; that Gottwald "keeps the atmosphere loose" while working; and Gottwald is an "avatar of girls, or girl lovers everywhere." AmBr. at 50. Those are the inadmissible words of a reporter, not Gottwald's. These and numerous other hearsay statements purportedly describing Gottwald must be disregarded. *See, e.g.*, AmBr. at 8, 21; Br. at 19-20.

2. *Gottwald Cannot Be Held To Be A Limited Purpose Public Figure For Statements Relating To The Cause of His Success*

Appellant also tries to create an entirely new public figure category by contending, incorrectly, that all defamation plaintiffs are limited purpose public figures "with respect to statements relating to the cause of their fame." Br. at 28. The defamation here is about drugging and sexual assault, and does not "relate[] to the cause of [Gottwald's] fame." And in Appellant's cases, each plaintiff previously commented on the precise topic raised in the defamation. In *Winkelvoss*, the plaintiffs "attracted public attention to themselves as investors in start-ups" and "sought to establish their reputation as authorities in the field," and the defamation at issue "related to a stock purchase deal where [plaintiffs] were to purchase defendant's shares in a startup company." 170 A.D.3d at 618-19. In *James*, plaintiff was interviewed about her stage performances, and then sued for defamation regarding that interview, denying that she made certain statements. 40 N.Y.2d at 418. As the trial court recognized, the defamation in *Maule* "denigrated the plaintiff's writing abilities" after he had previously "actively sought publicity for his … professional writing." R19, n.4. In *Kipper*, the plaintiff promoted his medical practice "extensively in the media" and "appeared as a medical expert more than 100 times on television" and the defamation claimed that "the state medical board revoked Kipper's license." *Kipper v. NYP Holdings, Inc.*, 15 Misc.3d 1136(A) (Sup. Ct. N.Y. Cnty. 2007). The same is true of Appellant's

other cases. *See Park v. Capital Cities Commc'ns*, 181 A.D.2d 192, 194 (4th Dep't 1992) (plaintiff spoke publicly about quality of his eye surgeries, the subject of the defamation); *Curry v. Roman*, 217 A.D.2d 314, 319 (4th Dep't 1995) (plaintiffs sought media attention for auction and defamation questioned legitimacy of auction); *Wilsey v. Saratoga Harness Racing, Inc.*, 140 A.D.2d 857, 857-59 (3d Dep't 1988) (plaintiff spoke publicly regarding termination from race track and defamation regarding termination).[25] There, plaintiffs were not public figures because the statements "related to the cause of their fame." Each had previously commented specifically on the subject of the defamation. Gottwald never did. And to the extent Gottwald was known, it was for the quality of the songs he wrote, not for having any particular views on how artists are treated in the industry.

E. The "Gross Irresponsibility" Standard Does Not Apply

The trial court correctly rejected Appellant's attempt to require Respondents to prove her "gross irresponsibility" because this standard "does not apply to a first-hand account of events not involving any media publication, investigation or

[25] Appellant's remaining cases are also inapplicable. *Roche v. Mulvihill*, 214 A.D.2d 376, 376-77 (1st Dep't 1995) (no reasoning, just "indisputable" plaintiff was a public figure); *Davis*, 90 A.D.2d at 384 (right of publicity claim (not defamation) and plaintiff was the first female boxer and article concerned female boxing); *Atkins v. Friedman*, 49 A.D.2d 852, 852 (1st Dep't 1975) (relying on *Rosenbloom* (now overruled), found plaintiff who named world famous diet after himself to be all purpose public figure).

newsgathering." R19-20 (citing *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1975) and collecting cases).

The "gross irresponsibility" standard established in *Chapadeau* applies "where the content of the *article* is arguably within the sphere of legitimate public concern" and requires that "the publisher" of the article (*i.e.*, a media defendant) "act[] in a grossly irresponsible manner without due considerations for the standards of information gathering and dissemination ordinarily followed by responsible parties" to establish fault. *Id.*; *Huggins*, 94 N.Y.2d at 302 ("[W]e held in [*Chapadeau*] that a private plaintiff must prove a *publisher's* or *broadcaster's* gross irresponsibility … that the *media defendant* 'acted in a grossly irresponsible manner …'").

Chapadeau recognized the need for journalistic liberty and the media's inherent reliance on sources in order to report on matters of public concern. Those concerns are simply not present here, where the defamation is premised on Appellant's own alleged observations.

Appellant's authorities are unavailing. In *McGill v. Parker*, 179 A.D.2d 98, 108 (1st Dep't 1992), the court declined to apply this standard and acknowledged it "may not always be apt in the case of a non-media defendant … reporting [her] own observations." Appellant's remaining cases involved situations akin to media reporting. *Konikoff v. Prudential Ins. Co. of Am.*, 234 F.3d 92, 94 (2d Cir. 2000)

(defamation in investigative report); *Crucy v. Jackall*, 275 A.D.2d 258, 258 (1st Dep't 2000) (defamation "in a nonfiction book" with "genesis in an investigation"); *Farber*, 33 Misc.3d 1218(A), at *7 (third party analysis of "errors" in article); *Sheridan v. Carter*, 48 A.D.3d 444, 446 (2d Dep't 2008) (third party flyers); *Colon v. City of Rochester*, 307 A.D.2d 742, 742-43 (4th Dep't 2003) ("broadcast documentary"). Nor does Appellant even attempt to explain how the *Chapadeau* standard—which focuses on compliance with journalistic standards—could even be applied to a first-hand account by a non-media defendant (or how Appellant purportedly complied with those standards).

F. The Purported Public Policy Arguments Are Misplaced And Unbalanced

Appellant and the *Amici* suggest various public policy interests surrounding sexual assault accusations should influence this Court to find Gottwald to be public figure. Br. at 28-29; AmBr. at 41-43. Appellant wrongly analogizes to irrelevant accusations of sexual assault by others. References to scandalized individuals is only made unfairly to try to poison the well here; there is no good faith basis for raising their names whatsoever.

Policy concerns relevant to the truthful reporting of sexual misconduct also have no application to the unique circumstances here. Appellant published an accusation of rape (denied previously under oath) under the pretense of litigation, solely to obtain business leverage. Generally, and certainly here, there is an

equally availing public policy to protect individuals who are the subject of false and malicious accusations in their pursuit of judicial redress.

The *Amici* argue that Gottwald should be deemed a public figure in order to protect the "important" public policy interest the media has to report issues of "public concern" and to avoid "a chilling effect upon the media's investigation of public events" that would "unconstitutionally inhibit debate and comment concerning public controversies." AmBr. at 41, 43. This is both misleading and incorrect. First, the *Amici* completely ignore the unique facts here which distinguish this case from truthful, good faith reports of sexual misconduct, and which involves no media defendant. Second, they ignore New York's existing special protections for media defendants reporting on issues of "public concern" under the (inapplicable) "gross irresponsibility" standard articulated in *Chapadeau*. *Supra*, pp. 39-41. Third, in their frenzied advocacy, they fully ignore the other policy concerns, including a (private) individual's right to protect their name.

* * *

Appellant's and the *Amici*'s arguments are contrary to the careful legal distinction set forth by the U.S. Supreme Court between all and limited purpose public figures, and wrongly seek to revert to the "public concern" test of *Rosenbloom* overturned by the "public figure" test of *Gertz*. Their arguments should be fully rejected.

II. Appellant Improperly Relitigates Issues, Takes Inconsistent Positions And Manufactures Legal Doctrines That Do Not Exist

A. The Trial Court Properly Rejected Appellant's Second Attempt To Assert Her Implied Covenant "Defense"

The trial court's decision to reject the defense of alleged breach of the implied covenant of good faith and fair dealing by Gottwald's purported refusal to renegotiate the KMI Agreement was correct and not "*sua sponte*."[26] Br. at 56. Appellant raised this argument *twice* below (R7676; R7680), and the trial court was required to adjudicate Appellant's theory. R29 n.13; R31 n.14; *see also GE Oil & Gas, Inc. v. Turbine Generation Servs., L.L.C.*, 51 Misc.3d 1226(A), at *5 n.6 (Sup. Ct. N.Y. Cnty. 2016) (no *sua sponte* dismissal where "claims were previously argued and ruled on, after extensive briefing").[27]

As Appellant concedes, Gottwald did not "refuse" to renegotiate, but rather engaged in years-long, albeit unsuccessful, renegotiation efforts.[28] Br. at 10-11,

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[26] Appellant has abandoned her implied covenant theory based on alleged "abuse" by Gottwald. Br. at 56-59. Nevertheless, the trial court "already rejected" that theory in March 2017 (R29 n.13), and in 2016, Appellant expressly waived her right to assert "abuse" as a defense. R4568.

[27] Appellant's cases are inapposite, as the claims or defenses at issue were not raised by the parties.

[28] Nor did Gottwald's purported actions have "the effect of destroying or injuring the right of [Appellant] to receive the fruits of the contract," as required to breach any implied covenant. *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995). Appellant admittedly received her bargained-for consideration under the KMI Agreement, including substantial monies and releasing music. Br. at 7, 58.

42. Regardless, the trial court rightly concluded that "[n]othing in the parties' agreement legally obligated renegotiation of the existing contract," and "the implied covenant cannot be used as a vehicle to add terms to the parties' contract that they did not expressly adopt particularly, where, as here, the parties agreed that no additional representations were made." R29, n.13; *Fesseha v. TD Waterhouse Inv'r Servs. Inc.*, 305 A.D.2d 268, 268 (1st Dep't 2003) ("cannot … create independent contractual rights").

Appellant's attempt to impose an unstated duty to renegotiate based on purported industry custom and practice also fails, as she concedes the implied covenant cannot "imply obligations inconsistent with other terms of the contractual relationship … ."[29] Br. at 58; *accord Chase Equip. Leasing Inc. v. Architectural Air, L.L.C.*, 84 A.D.3d 439, 439 (1st Dep't 2011); *see also Michael J. Torpey, Inc. v. Consol. Edison Co. of N.Y.*, 99 A.D.2d 484, 484 (2d Dep't 1984) ("custom and usage cannot be used to contradict, alter or vary the express terms of an unambiguous contract"). Appellant's hypothetical "renegotiated" contract sought material terms (*e.g.*, payment, length) plainly inconsistent with the terms of the KMI Agreement.

[29] Appellant was not denied the opportunity to raise this issue (Br. at 58-59), as she discussed her expert's conclusions. R7654-7655.

B. This Court Should Reject Appellant's Efforts To Relitigate Her Privilege-Related Defenses

The trial court first rejected Appellant's judicial proceedings and fair report defenses in 2018, when it granted Respondents leave to amend based on evidence largely identical to the summary judgment record.[30] *Supra*, pp. 11-12. Appellant appealed that decision, and this Court affirmed it in its entirety, holding "[t]he court properly granted plaintiffs leave to amend … to include allegations concerning recent dissemination of defamatory statements by [Appellant's] agents and related allegations." Dkt. 2223. That decision bars Appellant's attempt to relitigate these issues. *Massey v. Byrne*, 164 A.D.3d 416, 416 (1st Dep't 2018).

1. *The Trial Court Correctly Rejected Appellant's Second Attempt To Invoke The Judicial-Proceedings Privilege*

Appellant claims six statements are protected as a matter of law by the judicial proceedings privilege, which she bears the burden of establishing. Br. at 40; *Kroemer v. Tantillo*, 270 A.D.2d 810, 810 (4th Dep't 2000). This privilege is not unlimited, and may be lost if abused. *Front, Inc. v. Khalil*, 24 N.Y.3d 713, 719

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[30] Appellant may argue that her prior appeal did not fully consider her privilege defenses. Her notice of appeal, however, contained no limitations, and to the extent she failed to raise these issues in her appellate briefing, she thereby "abandoned" and is precluded from raising them. *See In re Breeyanna S.*, 52 A.D.3d 342, 342–43 (1st Dep't 2008); *Matter of Estate of Thomas*, 179 A.D.3d 98, 103 (4th Dep't 2019) (where "[o]n the prior appeal … petitioners never addressed that issue in their briefs," issue deemed abandoned and petitioners "effectively precluded from raising that issue").

(2015); *Halperin v. Salvan*, 117 A.D.2d 544, 547-48 (1st Dep't 1986). As Appellant concedes, no privilege exists where a litigation is a "sham." Br. at 36; *Thomas v. G2 FMV, LLC*, 147 A.D.3d 700, 701 (1st Dep't 2017).

The trial court thoroughly considered and properly rejected Appellant's argument that her privilege defenses apply as a matter of law, holding that it

> cannot decide, as a matter of law on papers and without any assessment of credibility, who should be believed and whether [Appellant] commenced the California Action, *which she would not have done if she had been released from her contracts*, in good faith or as a sham to defame Gottwald and obtain business leverage. That decision is for the jury.

R26-27.

Appellant seeks to avoid these proper jury determinations by concocting a non-existent theory, claiming "the sham exception applies only where there is zero basis for the underlying claim, … the trial court's own conclusion that a reasonable juror could accept or reject the claim … defeats the 'sham litigation' exception." Br. at 42. Appellant's irrational argument seeks to nullify the "sham" doctrine, requiring that all "sham" theories be established as a matter of law. None of Appellant's cases support this unsound argument.[31] This Court describes a "sham"

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[31] In *Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163, 173 n.5 (1st Dep't 2007), plaintiff "obviously [did] not allege that the Westchester County action was a sham proceeding." *Grasso v. Mathew*, 164 A.D.2d 476, 479 (3d Dep't 1991) involved "correspondence between litigating parties" and, unlike here, the facts surrounding that correspondence were "undisputed." *Reszka v. Collins*, 136

action as simply one that was "commenced solely to defame the plaintiff." *Flomenhaft*, 127 A.D.3d at 637. This Court recently acknowledged that there *can* of course be questions of fact on the "sham" issue that should be presented to a jury. *See*, *e.g.*, *Napoli v. N.Y. Post*, 175 A.D.3d 433, 435 (1st Dep't 2019); *Beach v. Touradji Capital Mgmt., LP*, 144 A.D.3d 557, 560 (1st Dep't 2016).

A wealth of evidence—fully ignored by Appellant—shows the relevant issues of disputed fact, including the extensive record of emails demonstrating her representatives' long-standing desire to "ruin" Gottwald and "battle [him] in the press." *Supra*, p. 5; *see also Thomas v. G2 FMV, LLC*, 2016 WL 320622, at *5, *9 (Sup. Ct. N.Y. Cnty. Jan. 27, 2016), *aff'd*, 147 A.D.3d 700 (1st Dep't 2017) (sham claim viable where defendant threatened to "bury" and "bankrupt" plaintiff through "'shock and awe' litigation offensive"). The Press Plan (which Appellant tried to conceal) demonstrates that the Sham Complaint was filed not to seek judicial relief, but for the express purpose of creating a "deluge of negative media attention and public pressure" and "achiev[ing] the maximum level of negative publicity for [Gottwald]." R919. As the trial court already acknowledged, there is strong evidence that Appellant never intended to pursue the merits of her sexual

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A.D.3d 1299, 1301 (4th Dep't 2016) and *Flomenhaft v. Finklestein*, 127 A.D.3d 634, 638 (1st Dep't 2015) permitted defamation claims to proceed despite a claim of privilege. *Front*, which involved the qualified pre-litigation privilege, is inapplicable. *Infra*, p. 50.

assault claims because she *voluntarily* abandoned all of them before any discovery. R1982, n.8; *see also Thomas*, 2016 WL 320622, at *7 ("failure to pursue the underlying case … tends to support allegations that the underlying action was brought maliciously for the purpose of defamation") (collecting cases).

Appellant cannot avoid this evidence by her conclusory (*and heavily disputed*) claim that her defamatory accusations "are long documented in [her] contemporaneous reports," "hotel, phone, and medical records," or "uncontroverted empirical data." Br. at 42. Appellant's supposed "contemporaneous reports" are the completely biased (largely uncorroborated) testimony of Pebe and Appellant's best friend, given in this litigation more than a decade after the alleged events, and after Appellant and Pebe denied them under oath previously. The only truly contemporaneous medical record is Appellant's report to a medical professional three days after the alleged event stating that she was "doing well," obviously entirely inconsistent with her accusations. R7629, at 71:2-25; R7639. The hotel records do not reflect the substance of any phone calls, but rather demonstrate, as Appellant admitted, that she may have ordered room service and a pay-per-view movie, which is at odds with Appellant's assertion of being frantic and incapacitated. R7247, at 390:20-23. In light of these factual disputes, the trial court was correct to send this question to the jury.

The trial court's decision will not "untenably chill litigation and reporting of judicial proceedings" or result in "[e]very single person who sues regarding sexual assault [becoming] subject to an automatic counterclaim for defamation that would go to a jury." Br. at 42. The decision was based on the unique facts here that impact no one other than Appellant, who admittedly used the Sham Complaint to threaten Gottwald, then filed it to create a "deluge" of negative publicity about Gottwald to harden business leverage, and thereafter voluntarily withdrew any claim of assault.

2. *The Facts Demonstrating Appellant's Litigation Was A "Sham" Preclude Application Of The Fair Report Privilege*

Appellant's reliance on Civil Rights Law § 74 (nineteen statements) is equally misplaced. As the trial court recognized in August 2018, the fair report privilege does not apply where the underlying litigation was a sham. R1982, n.9; *see also Williams v. Williams*, 23 N.Y.2d 592, 598-99 (1969); *Reszka*, 136 A.D.3d at 1300. Because questions of fact exist on the sham issue, the fair report defense cannot be determined as a matter of law.

3. *These Facts Also Preclude Application Of The Qualified Pre-Litigation Privilege*

The qualified pre-litigation privilege "is lost where a defendant proves that the statements were not pertinent to a good faith anticipated litigation." R6716. "This requirement ensures that privilege does not protect attorneys who are seeking

to bully, harass, or intimidate their client's adversaries by threatening baseless litigation or *by asserting wholly unmeritorious claims, unsupported in law and fact*, in violation of counsel's ethical obligations." *Front*, 24 N.Y.3d at 720.

Again, the trial court correctly ruled that factual disputes exist as to whether Appellant's litigation was a sham. *See, e.g.*, *Coan v. Estate of Chapin*, 156 A.D.2d 318, 319 (1st Dep't 1989) ("a party's good faith, which necessitates examination of a state of mind, is not an issue which is readily determinable on a motion for summary judgment"). Appellant also cannot establish that either the draft complaint or the pre-filing transmittal of the Sham Complaint to TMZ were, as a matter of law, pertinent to *good faith* litigation.[32] Appellant's attorney presented the draft complaint to Sony, *not* Respondents, and omitted Sony as a defendant in the Sham Complaint.[33] *Compare* R3753 *with* R1939. This is in stark contrast to the pre-litigation communication at issue in *Front*, *i.e.*, a letter seeking to settle with the person eventually sued. 24 N.Y.3d at 720. Nor could the transmittal to TMZ be pertinent, as the "[d]elivery of a complaint or summary of a complaint to

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[32] Appellant claims expending "substantial resources" evidences her good faith, but points to nothing showing she devoted *any* resources to pursuing her rape claims. Br. at 38. Similarly incredulous is Appellant's argument that her claims were valid because they extorted (unsuccessful) contract negotiations. *Id.* at 37.

[33] Unlike here, in *Liberty v. Coursey*, 2016 WL 5944468, at *2 (Sup. Ct. N.Y. Cnty. Oct. 7, 2016), the draft complaint "was sent to Plaintiffs' lawyers."

the press is neither essential nor relevant to the judicial proceedings themselves." *Bridge C.A.T. Scan Assocs. v. Ohio-Nuclear Inc.*, 608 F.Supp. 1187, 1195 (S.D.N.Y. 1985).[34] More importantly, the Sham Complaint was given to TMZ to incite a "deluge" of negative media attention and public pressure on Gottwald in order to force him to release his contractual rights. R919.

Finally, there is no qualified privilege "when such statements are spoken with malice, knowledge of their falsity, or reckless disregard for their truth." *Giuffre v. Maxwell*, 2017 WL 1536009, at *8 (S.D.N.Y. Apr. 27, 2017); *see also Edwards v. Nicolai*, 153 A.D.3d 440, 441-42 (1st Dep't 2017) (overcome by "facts from which malice can be inferred"). The same facts demonstrating Appellant's sham litigation unquestionably raise issues of fact regarding Appellant's malice. *See, e.g.*, *Giuffre*, 2017 WL 1536009, at *8 (statement "made for the inappropriate purpose of 'bully[ing],' 'harass[ment],' and 'intimid[ation].'"); *New Testament Missionary Fellowship v. E.P. Dutton & Co.*, 112 A.D.2d 55, 57 (1st Dep't 1985) ("hostility may support an inference of actual malice"); *Misek-Falkoff v. Keller*,

[34] As for Appellant's federal cases (Br. at 36-39), other authorities demonstrate New York does not provider broader protection to press communications than statements made in litigation—particularly those that served no proper litigation purpose. *See*, *e.g.*, *D'Annunzio v. Ayken, Inc.*, 876 F.Supp.2d 211, 217 (E.D.N.Y. 2012) (statements "in a press conference or press release[] are not covered by the absolute privilege."). And *Feist v. Paxfire, Inc.*, 2017 WL 177652, at *5 (S.D.N.Y. Jan. 17, 2017) involved allegations involving "hundreds of thousands, if not millions" of putative class members—entirely different than the defamation here.

153 A.D.2d 841, 842 (2d Dep't 1989) ("malice is usually a question of fact to be resolved by the jury … .").

4. *Appellant Admits That Her California And New York Filings Asserted The Same Sham Rape Claims*

Appellant contends that Respondents' "sham" theory cannot apply to her statements in this New York action because she is only defending it. Br. at 43. Appellant first raised this argument below on reply, and it is thus waived. *Shmuklyer v. Feintuch Commc'ns, Inc.*, 158 A.D.3d 469, 470 (1st Dep't 2018). Appellant's argument also is fundamentally illogical, as she concededly asserted identical claims in both cases. Br. at 13 (counterclaims "based on the same rape … allegations"); 38 (counterclaims "based on the same allegations"). Appellant's contention that the "sham" doctrine should never apply to a counterclaim also is nonsensical, as it would mean counterclaim plaintiffs could file sham pleadings with no recourse. That is not the law.

C. The Trial Court Correctly Found That, As A Matter Of Law, Geragos And Sunshine Acted As Appellant's Agents

Appellant has repeatedly taken the position that Geragos' and Sunshine's press activities regarding her rape accusations were authorized and conducted as her *agents* in connection with her *litigation strategy*. *Supra*, p. 11. Despite these prior admissions, Appellant now tries to avoid responsibility for the defamatory

press activities they conducted on her behalf. The trial court correctly saw through this incredulous about-face.[35]

Appellant cannot dispute that a principal is liable for defamatory statements made by her agents. *Stevenson v. Cramer*, 151 A.D.3d 1932, 1934 (4th Dep't 2017). The agent's conduct need only be "generally foreseeable" for liability to be imputed. *Murray v. Watervliet City Sch. Dist.*, 130 A.D.2d 830, 831 (3d Dep't 1987).[36] Therefore, "[a]gency liability exists even though the principal does not specifically ratify, participate in, or know of such 'misconduct', or *even if he forbade or disapproved of an act*." *Maurillo v. Park Slope U-Haul*, 194 A.D.2d 142, 147 (2d Dep't 1993).

The press activities of Geragos and Sunshine satisfy these standards as a matter of law. The trial court correctly ruled that "[a]s [Appellant's] lawyer,

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[35] Appellant also contends that she is not liable, as a matter of law, for statements made by Pebe and Eisele because she purportedly did not authorize or direct them. Br. at 47-51. Appellant and her agents have long been coordinating with Eisele to spread her defamation. *Supra*, p. 9. And during a deposition in this case, Appellant's counsel conceded that Pebe was Appellant's agent in sending a defamatory email in 2013. R1214, at 82:23-83:12; R7232. This admission raises a question of fact with respect to Pebe's later statements. The trial court discussed this evidence and correctly found questions of fact preclude summary judgment. R22-23.

[36] Appellant provides no legal support justifying limiting *Murray* to the employment context. Br. at 46, n.9. Regardless, Geragos and Sunshine's activities were not only foreseeable, but were known, authorized and ratified.

Geragos was her agent with speaking authority. He filed the California complaint that is alleged to be a sham and the catalyst for [Appellant's] publicity campaign on [Appellant's] behalf. He spoke to the media on [Appellant's] behalf." R21. Likewise, Sunshine's "very job was to speak on [Appellant's] behalf. Indeed, the only reason Sunshine Sachs made any of the statements or formulated the Press Plan was because [Appellant] paid it to do so." R21.

Appellant's arguments are unavailing. She contends the trial court erred because her agreement with Geragos "specifically prohibited Geragos from 'engag[ing] in any publicity regarding the matter or any lawsuit resulting therefrom … without [Appellant's] prior approval." Br. at 45. She also claims she is absolved of liability for Geragos' and Sunshine's activities because she did not authorize or have advanced knowledge of each specific statement attributed to Geragos, or authorize Geragos to hire Sunshine.[37] *Id.*, at 45-47. However, Appellant cannot "deny that Geragos was authorized to hire Sunshine Sachs as a press agent on her behalf or that she gave him approval generally to handle publicity, make public statements, issue press releases and conduct interviews with members of the press, all of which he did regularly and starting from very early

[37] Appellant's self-serving, conclusory claims of purported lack of knowledge do not create an issue of fact. *Nelson v. Distant*, 308 A.D.2d 338, 340 (1st Dep't 2003).

on." R22. Thus, "[l]ack of prior knowledge and individualized approval of the particular details or specific contents of the statements does not make them unauthorized." *Id*.

This conclusion was inescapable. Appellant admitted Geragos was her agent (*supra*, p. 11) and she undeniably authorized (and desired) Geragos to spread her accusations. Vector, Appellant's designated agent for dealing with Sunshine on her behalf,[38] was aware of these activities and approved them. R810, at 230:8-231:7; R826, at 294:2-295:8; R804, at 209:5-10; R783, at 122:11-18; R916-931. Sunshine's engagement agreement expressly stated that Sunshine was retained for Appellant's benefit (R746), and Appellant met with Sunshine to prepare for press. R905-906, ¶¶ 18-20; R912-913, ¶¶ 13-15.[39]

Appellant makes the red herring argument that Respondents do not "attribute any allegedly defamatory statements to Sunshine Sachs." Br. at 46. But Respondents clearly allege that Sunshine's agency is highly relevant to

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[38] Appellant concedes Vector's agency status, including for press and communicating with Sunshine. Br. at 48-49; R1161, n.9; R1097-1098, at 30:4-31:5. Vector's knowledge is imputed to Appellant. *See Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 69 A.D.3d 71, 97 (1st Dep't 2009).

[39] Appellant also is liable due to ratification. *See*, *e.g.*, *Meisel v. Grunberg*, 651 F.Supp.2d 98, 110 (S.D.N.Y. 2009); *see generally* Restatement (Third) of Agency, § 4.03 (2006). Vector endorsed these press activities, and Appellant reaped their benefits and never repudiated them. Instead, Appellant repeatedly stated they were performed on her behalf.

demonstrate the dissemination of her defamatory accusations, through the Sham Complaint and various press statements, pursuant to the Press Plan.

D. Appellant's Defamation Is Not Protected Opinion Or Rhetorical Hyperbole

Appellant incredulously contends that eighteen statements constitute opinion or rhetorical hyperbole. Br. at 51. The trial court correctly recognized that Appellant cannot claim that her drugging and rape allegations are grounded in fact for privilege purposes, and at the same time, characterize them as hyperbole or opinion. R25.

Appellant does not dispute that her accusations were "undoubtedly factual because their precise meaning is clear and unequivocal: Gottwald drugged and raped [Appellant]." R24-25. Nor does she dispute that "[t]he statements can be proven true or false because Gottwald either drugged and raped [Appellant] or he didn't." R25; *see Thomas H. v. Paul B.*, 18 N.Y.3d 580, 585-86 (2012). Instead, Appellant argues only that the context of certain statements absolves her of liability. Br. at 51-53.

The trial court fully considered this argument, and rightly held that

> [t]he overall context of the statements … is unmistakably indicative of factual assertions … [Appellant] sued Gottwald for, in fact, drugging and raping her. She wanted to be released from her contracts with [Respondents] because she maintains that Gottwald did drug and rape her. She hired Geragos to pursue justice on her behalf because she asserts that Gottwald drugged

> and raped her not simply because those events may or may not have happened in her opinion.

R25.

Appellant's proposed blanket rule that every statement made in the context of litigation is nonactionable opinion is nonsensical; otherwise there would be no need for judicial proceedings or fair report privileges. Appellant's cases all concern limited circumstances not present here, where a party or lawyer is commenting on the legal merits of an ongoing lawsuit—not publicizing a specific, factual allegation to as broad an audience as possible.[40] Merely because a factual statement is made in a litigation context does not transform it into opinion. *See Giuffre v. Maxwell*, 165 F.Supp.3d 147, 152 (S.D.N.Y. 2016) (actionable statement because sexual assault "is not a matter of opinion"); *Loder v. Nied*, 89 A.D.3d 1197, 1200 (3d Dep't 2011) (actionable in "context of ethics complaints"). Nor are Appellant's statements immunized because some of them occurred on news programs, talk shows, or podcasts. Defamation is not limited to "serious" news outlets. *See, e.g.*, *Giuffre*, 165 F.Supp.3d at 152 (statement in press release regarding litigation); *Martin v. Daily News L.P.*, 121 A.D.3d 90, 100 (1st Dep't

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[40] *See Sabharwal & Finkel, LLC v. Sorrell*, 117 A.D.3d 437, 437-38 (1st Dep't 2014) (about "merits of the lawsuit" and "motivation of [the] attorneys"); *Sprecher v. Thibodeau*, 148 A.D.3d 654, 656 (1st Dep't 2017) (unidentified comments "regarding an ongoing lawsuit"); *Gentile v. Grand St. Med. Assoc.*, 79 A.D.3d 1351, 1353 (3d Dep't 2010) ("loose and generalized statement").

2014) ("Opinion" page article); *Hunter v. Enquirer/Star Inc.*, 210 A.D.2d 32, 33 (1st Dep't 1994) (tabloid article). Rather, media statements are actionable where, as here, "the circumstances under which these accusations were published 'encourag[ed] the reasonable reader to be less skeptical and more willing to conclude that [they] stat[ed] or impl[ied] facts.'" *Davis v. Boeheim*, 24 N.Y.3d 262, 273 (2014); *Greenberg v. Spitzer*, 155 A.D.3d 27, 48 (2d Dep't 2017).[41] Appellant's agents knew that Appellant's accusations (regardless of context) were perceived as facts, and were glad for it. R9371.

E. The Trial Court Correctly Found Appellant's Text to Lady Gaga Was Defamatory *Per Se*

Respondents sought to limit issues for trial by seeking judgment as to four elements of their Second Cause of Action: that Appellant's statement to Lady Gaga that Gottwald raped Katy Perry was (i) a statement of fact; (ii) regarding Gottwald; (iii) false; and (vi) defamation *per se*. *See Epifani v. Johnson*, 65 A.D.3d 224, 233-34 (2d Dep't 2009). The trial court properly held Respondents were "entitle[d] to judgment that [Appellant] published a false statement about Gottwald to a third party that was defamatory per se." R27. There was no liability determination.

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[41] Appellant's cases involve language unlike the accusation here. *Jacobus v. Trump*, 55 Misc.3d 470, 482-83 (Sup. Ct. N.Y. Cnty. 2017) ("loose, figurative, and hyperbolic reference"); *Gisel v. Clear Channel Commc'ns, Inc.*, 94 A.D.3d 1525, 1526 (4th Dep't 2012) (based on "facts that were widely reported … and were known to [defendant's] listeners").

Appellant has abandoned her distasteful arguments from below (which included accusing Ms. Perry of lying under oath), but now contends that her statement is not actionable because it "merely restated information that [Lady Gaga] had already heard," and thus is not a "republication" to a "new audience." Br. at 54-55. Appellant did not make this argument below, and it is waived. *Moreira-Brown v. City of N.Y.*, 109 A.D.3d 761, 761 (1st Dep't 2013). Moreover, Janick denied telling Appellant or Lady Gaga that Gottwald raped Ms. Perry and Lady Gaga did not testify that Janick said this. R4495-4496, at 13:12-14:20; R7701-7702, at 36:20-25, 38:21-39:6.

Regardless, there is no requirement that every defamatory statement must be heard by a "new audience" to be actionable. Appellant grossly misrepresents her cases, which concern the "single publication rule." Pursuant to that doctrine, the initial publication of a defamatory statement determines when the claim accrues; however, an exception exists for "republications" *by that same defendant* that are sufficiently distinct from the original (*i.e.*, to a "new audience") to reset the statute of limitations. *Hoesten v. Best*, 34 A.D.3d 143, 150 (1st Dep't 2006); *Firth v. State of N.Y.*, 98 N.Y.2d 365, 369 (2002); *Gelbard v. Bodary*, 270 A.D.2d 866, 867 (4th Dep't 2000). None of these cases requires that a statement always be made to a "new audience" to be actionable.

CONCLUSION

The trial court's decision should be affirmed.

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MITCHELL SILBERBERG & KNUPP LLP

By: Christine Lepera

Christine Lepera (ctl@msk.com)
Jeffrey M. Movit (jmm@msk.com)
437 Madison Avenue, 25th Floor
New York, New York 10022
Tel.: (212) 509-3900; Fax: (212) 509-7239

Attorneys for Plaintiffs-Respondents/Counterclaim-Defendants-Respondents Lukasz Gottwald p/k/a Dr. Luke, Kasz Money, Inc. and Prescription Songs, LLC

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