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New York Supreme Court
Appellate Division — First Department

Supreme Court Index No. 653118/2014
Appellate Division Case No. 2020-01908

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

Plaintiffs-Respondents,

– against –

KESHA ROSE SEBERT p/k/a Kesha,

Defendant-Appellant,

– and –

PEBE SEBERT, VECTOR MANAGEMENT, LLC and JACK ROVNER,

Defendants.

KESHA ROSE SEBERT p/k/a Kesha,

Counterclaim-Plaintiff-Appellant,

– against –

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

Counterclaim-Defendants-Respondents.

BRIEF OF *AMICUS CURIAE* SAMUEL D. ISALY

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INTEREST OF THE *AMICUS CURIAE*

All parties have consented to Samuel D. Isaly's motion for permission to file this amicus brief.

Mr. Isaly's interest in this appeal derives from his status as a plaintiff in two other pending defamation cases, one in Supreme Court, New York County and the other in the Southern District of New York. *See Isaly v. Garde*, Index No. 160699/2018 (N.Y. Cnty. Sup. Ct.); *Isaly v. Boston Globe Media Partners LLP*, Case 1:18-cv-09620 (S.D.N.Y.). In both cases, Defendants have asserted that Mr. Isaly is a public figure. As a result, Mr. Isaly has an interest in the manner in which this Court applies the First Amendment values that animated the Supreme Court's creation of a dichotomy between those libel plaintiffs who are public figures and those who are not. Indeed, this Court's decision may be cited as precedent in Mr. Isaly's cases, which results in his having an interest in how this Court decides this case. Mr. Isaly's proposed brief is not duplicative of the Appellants' brief because of its unique focus on the history and national recognition of the federal constitutional underpinnings of the public/private figure dichotomy.

Mr. Isaly, like the Appellee in this case, is a professionally successful person whose reputation was damaged by false accusations of workplace sexual misconduct made in the wake of the #MeToo movement. He is the founder of OrbiMed Advisors, LLC and was its Managing Partner. His outstanding professional

reputation as an analyst of and investor/advisor in biotech and healthcare companies is such that he has been widely admired by his peers. The publication of a false and defamatory article changed all that, severely damaging his standing in that sector and in his personal life. He seeks damages for the reputational harm inflicted upon him by that article. His proposed brief respectfully argues that professionally successful persons whose reputations are damaged by false accusations of sexual misconduct are not public figures when, as in this case, the defamation plaintiff was not so famous as to be a general purpose public figure and did not attempt to publicly shape the outcome of a sexual misconduct controversy before publication of the defamatory allegations.

SUMMARY OF ARGUMENT

In 2014, Defendant Kesha Sebert, a popular music recording artist, accused her producer, Plaintiff Lukasz Gottwald, of a sexual misconduct (purportedly committed in 2005). Two years later, in 2016, Kesha accused Gottwald of raping another recording artist, Katy Perry. Gottwald brought this suit, alleging in part that he was defamed by these allegations.

As a defamation plaintiff, Gottwald must prove, *inter alia*, that the defamatory statements were made with "fault"—with the degree of fault required dependent on whether Gottwald is a "public figure" or a private figure. A private figure plaintiff proves fault if he demonstrates mere negligence by the publisher of the defamatory

statements. A public figure must show more: that the defamatory statement was made with "actual malice"—a fault burden that encompasses knowledge that the defamatory statement was false or made with a reckless disregard of the truth when publishing the statement

Justice Schecter determined that Gottwald is a private figure plaintiff. In a well-reasoned opinion, grounded in the leading decisions that discern the boundary between these two different categories of defamation plaintiffs, she explained that Gottwald falls in neither of them as they are defined by the Supreme Court of the United States. That is, Gottwald is not among the few who may be deemed a "general purpose public figure" because he is neither a household name nor someone who has achieved "general pervasive fame and notoriety." Record on Appeal ("R.") at 17. And he is not a "limited purpose public figure" because he did not publicly try to shape the outcome of any "public controversy" seen to have given rise to the making of the defamatory statements. *Id.* at 17-18.

Defendants and their amici nevertheless lodge a ferocious attack on Justice Schecter's determination that Gottwald is a private figure. While Plaintiffs' brief admirably parries that attack and demonstrates why Gottwald is neither a general nor limited purpose public figure, a consideration of the constitutional values that led to the emergence of the public figure concept and then nationwide acceptance reinforces the correctness of Justice Schecter's determination.

The distinction between public and private figures is not derived from the common law of defamation, but from the First Amendment. Four decisions of the Supreme Court from the 1970s stand as the seminal guideposts and make clear when the Constitution does, and does not, demand that a defamation plaintiff be treated as a public figure with a higher proof burden. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979). Each of those four Supreme Court decisions declared the plaintiff to be a private figure.

In the ensuing decades, state and federal courts across the nation have been engaged in an ongoing national conversation over the meaning of *Gertz*, *Firestone*, *Hutchinson*, and *Wolston*. Critical to the disposition of this appeal is the recognition that *Gertz* was a profound repudiation of the Supreme Court's earlier plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), where a four-Justice plurality concluded that the actual malice standard should extend to defamatory falsehoods relating to *private persons* if the *subject matter* of the statements concerned matters of general or public interest. That all but erased the distinction between public or private plaintiffs.

If *Rosenbloom* were still the law, Mr. Gottwald's status as a private figure might not matter. In the short-lived *Rosenbloom* era, if the subject matter of a

defamatory statement was of general or public interest, the plaintiff had to prove the defendant's "actual malice," regardless of the identity of the plaintiff. But beginning with *Gertz*, a broad national consensus, including in New York, has emerged, which makes the nature of a plaintiff's fault burden dependent on the public or private status of the plaintiff—not on the nature of the defamatory subject matter.

Reflecting the First Amendment underpinning of the public figure doctrine, state and federal courts in New York and nationally routinely look to precedent from across jurisdictional borders when identifying and applying the principles that inform the classification of a plaintiff as public or private figure. Thus, the United States has developed a national body of First Amendment public figure law.

But as would be expected in any arena of American law in which hundreds of lower courts have been called upon to apply precedents of the Supreme Court, without the benefit of that Court's constant guidance, some minor decisional schisms and loose language have emerged. As a result, both libel plaintiffs and defendants are able to commandeer isolated quotations from courts across the nation (including New York) to support their respective positions. In the end, however, this Court ought not merely surrender to a battle of string cites or sound bites, but rather decide the public/private figure question consistently with the constitutional values that govern its resolution.

To be sure, "sexual misconduct" as a *subject* is a matter of public concern. But that observation does not require that Gottwald be subjected to the burden of proof imposed on public figures in libel cases. Instead, the public/private figure question in this case ultimately distills into a single pivotal question of constitutional principle, which is whether Gottwald is properly deemed a public figure on the record established by Appellants here.

One theoretical approach is to deem any person who achieves substantial professional success and some level of public recognition a public figure where he is the subject of accusations by professional associates of sexual misconduct. But this would wrest public figure doctrine from its First Amendment moorings and effectively reinstate the overruled "public interest" holding of *Rosenbloom.*

A better approach is that mere achievement of substantial professional success, accompanied by some public recognition, does *not* by itself render a person a public figure for purposes of accusations of sexual misconduct, *unless he voluntarily injected himself into public controversies* surrounding sexual misconduct. This approach is consistent with the Supreme Court's focus, in *Gertz*, on what the plaintiff did, if anything, to attempt to shape the outcome of the controversy that gave rise to the defamation. Under this approach, not every professionally successful, publicly recognizable American who brings a lawsuit for defamation based on false accusations of sexual misconduct would be a public figure

under *Gertz* and its progeny. Instead, a successful music producer defamed by an accusation of sexual misconduct is a private figure *unless* the music producer's fame is so pervasive as to place him among that very select group of general purpose public figures, or unless the music producer in fact sought to shape the outcome of a controversy that gave rise to and existed in the public sphere before the publication of the defamatory statement.

This Amicus Brief advances the argument that First Amendment principles, properly applied in light of *Gertz*, *Firestone*, *Hutchinson*, and *Wolston*, militate against adoption of the first possible rule articulated above, and instead require adoption of the second proffered rule. As applied to Gottwald, adoption of the second rule mandates affirmance of Justice Schecter's decision, finding that Gottwald is a private figure under the doctrines emanating from the First Amendment.

ARGUMENT

I. GOTTWALD IS NOT AN ALL-PURPOSE PUBLIC FIGURE

Gottwald can be deemed a public figure only if Kesha, who bears the burden to so demonstrate, sustains her burden of proof. *Krauss v. Globe Int'l*, 251 A.D.2d 191, 192 (1st Dep't 1998); *Fairley v. Peekskill Star Corp.,* 83 A.D.2d 294, 298 (2d Dep't 1981). Notwithstanding the protestations of Kesha and her supporting amici,

Kesha comes nowhere close to meeting that burden in her attempt to classify Gottwald as an all-purpose public figure.

Gertz makes it clear that there are *only two* ways in which a defamation plaintiff can fall into the public figure category. Unless he meets the definition of either a "general purpose" (also known as "all purpose") public figure or a "limited purpose public figure," he is a private figure. There is no middle ground. Because decisions determining whether a plaintiff is a public figure for defamation purposes are grounded in First Amendment values (and not local law), courts may and frequently do rely on decisions from other jurisdictions. In effect, public figure law is national.

"Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life." *Gertz*, 418 U.S at 352. *Gertz* 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.* (emphasis added). Thus, to satisfy her burden that the plaintiff is a general purpose public figure the defendant must present "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society." *Gertz*, 418 U.S at 352.

Justice Schecter determined on the record before her that Gottwald is not a general purpose public figure given that he has "never been a household name *or* achieved general pervasive fame and notoriety in the community." R. at 17. Kesha does not seriously challenge those factual findings, but instead attacks Justice Schecter for purportedly founding her ruling on the application of a standard contained in a "forty year old D.C. Circuit opinion . . . never adopted in New York or by the Supreme Court. *See* Kesha Reply at 2-3. First, Kesha is wrong that Justice Schecter looked only to the D.C. Circuit for the general purpose public figure standard. Justice Schecter also explicitly cited *Gertz.* The standard she applied—that general purpose public figure status is for those who become household names *or* achieve "general *pervasive* fame and notoriety" echoes *Gertz* that a person is not a general purpose public figure "[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society." *Gertz*, 418 U.S at 352.

Moreover, the D.C. Circuit Court of Appeals decision that Kesha would relegate to obscurity as some minor decision outside the mainstream of New York's or the Supreme Court's jurisprudence is anything but. That decision, *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 898 (1980), is widely invoked by state and federal courts around the nation as among the seminal influential decisions articulating the contours of the public figure

doctrine set out in *Gertz*. Kesha takes particular umbrage at the definition of a general purpose public figure as one who is a "household name," but New York decisions have likewise described the general public figure standard as applying to celebrities whose fame has arisen to the pervasive level that is best described by the term "household word." *See Horowitz v. Manno*ia, 10 Misc. 3d 467, 469, 802 N.Y.S.2d 917, 921 (Nassau Cnty. Sup. Ct. Oct. 20, 2005) ("whether there has been a clear showing of general fame or notoriety in the community and pervasive involvement in the affairs of society, whether the plaintiff is a well-known celebrity and whether his name is a 'household word.'"); *Krauss v. Globe Int'l Inc*., No. 18008/92, 1996 WL 780550, at *3 (N.Y. Cnty. Sup. Ct. Sept. 16, 1996), *aff'd as modified*, 251 A.D.2d 191, 674 N.Y.S.2d 662 (1st Dep't 1998); ("[C]category generally consists of people who have achieved enough prominence in society that their names are tantamount to household words."); *Farrakhan v. N.Y.P. Holdings, Inc*., 168 Misc. 2d 536, 539, 638 N.Y.S.2d 1002, 1006 (N.Y. Cnty. Sup. Ct., Dec. 19, 1995), *aff'd*, 238 A.D.2d 197, 656 N.Y.S.2d 726 (1997) ("That category generally consists of people who have achieved enough prominence in society that their names are tantamount to household words.").

The frequent judicial invocation of the "household" phrase reinforces the notion that simply being well regarded and well known within one's professional sphere is not what *Gertz* contemplated when it defined general purpose public

figures. Rather, *Gertz* teaches that this is an "extremely rare" category, *e.g.*, consisting of genuine celebrities—persons whose fame extends well beyond their professional field. Again, while Kesha would prefer to pretend that *Waldbaum v. Fairchild Publications* is some fringe decision unworthy of New York jurisprudence, *Waldbaum* is instead among the most influential decisions with regard to all-purpose public figure doctrine ever rendered. Simply put, Gottwald is unlike the general purpose public figures defined in *Waldbaum* as truly famous persons who "may be able to transfer their recognition and influence *from one field to another*" and "to capitalize on his general fame by lending his name to products, candidates, and causes." *Waldbaum*, 627 F.2d at 1294 n.15. *See also Tavoulareas v. Piro*, 817 F.2d 762, 772 (D.C. Cir. 1987) (en banc) (President of well-known Mobil Oil Company <u>not</u> an all-purpose public figure); *Pickens v. Cordia*, 433 S.W.3d 179, 187 (Tex. App. Dallas 2014) (even though plaintiff was "'a highly prominent individual, especially in business circles, … his celebrity in society at large does not approach that of a well-known athlete or entertainer—apparently the archetypes of the general purpose public figure.'").

Kesha and her amici mock the "household word" shorthand, as if somehow it is a constitutionally dirty word. To the contrary, it is a useful judicial characterization of *exactly* the standard the Supreme Court in *Gertz* did and intended to articulate. That is precisely why federal and state courts so constantly and

properly invoke the phrase. *Tavoulareas*, 817 F.2d at 772 ("A person becomes a general purpose public figure only if he or she is 'a well-known celebrity, his name a household word.'") (quoting *Waldbaum*); *Boley v. Atlantic Monthly Group*, 950 F. Supp. 2d 249, 260 (D.D.C. 2013) ("A person becomes a general purpose public figure only if he or she is 'a well-known celebrity, his name a household word.' Few people, however, 'attain the general notoriety that would make them public figures for all purposes.'") (internal citations omitted); *Wilson v. Daily Gazette Co*., 214 W. Va. 208, 215 (2003) ("[A]n all-purpose 'public figure is a well-known celebrity, his name a household word.'") (internal citations omitted); *Vassallo v. Bell*, 221 N.J. Super. 347, 365–66, 534 A.2d 724, 733 (App. Div. 1987) ("[T]he record clearly does not support a conclusion that he was a person in a position of 'persuasive power and influence' that would make his name a 'household word.'"); *Riddle v. Golden Isle Broadcasting*, 275 Ga. App. 701, 704, 621 S.E.2d 822, 825 (2005) ("While Riddle may have enjoyed some popularity among Brunswick rap music fans, he was not a household name."); *Brewer v. Memphis Pub. Co*., 626 F.2d 1238, 1254, n.22 (5th Cir. 1980) (describing the all purpose public figure as "those whose names are 'household word(s)'"); *see also Jankovic v. International Crisis Group*, 72 F. Supp. 3d 284, 300 (D.D.C. 2014), *aff'd*, 822 F.3d 576 (D.C. Cir. 2016); *see also Bay View Packing Co. v. Taff*, 198 Wis. 2d 653, 676, 543 N.W.2d 522, 530 (Ct. App. 1995); *OAO Alfa Bank v. Ctr. for Pub. Integrity*, 387 F. Supp. 2d 20, 42 (D.D.C. 2005);

Wiegel v. Capital Times Co., 145 Wis. 2d 71, 82, 426 N.W.2d 43, 48 (Ct. App. 1988); *In re Thompson*, 162 B.R. 748, 767 (Bankr. E.D. Mich. 1993); *Wayment v. Clear Channel Broadcasting, Inc.*, 2005 UT 25, ¶ 24, 116 P.3d 271, 280 (Utah 2005); *Kroll Associates. v. City & County of Honolulu*, 833 F. Supp. 802, 805 (D. Haw. 1993); *Rutt v. Bethlehems' Globe Pub. Co*., 335 Pa. Super. 163, 179, 484 A.2d 72, 80 (1984) ; *Durham v. Cannan Communications, Inc*., 645 S.W.2d 845, 849 (Tex. App. 1982); *Mazur v. Szporer*, 2004 U.S. Dist. LEXIS 13176, at *13 (D.D.C. June 1, 2004) (D.D.C. June 1, 2004); *Paterson v. Little, Brown & Co.*, 502 F. Supp. 2d 1124, 1140 (W.D. Wash. 2007); *Partington v. Bugliosi*, 825 F. Supp. 906, 917 (D. Haw. 1993), *aff'd*, 56 F.3d 1147 (9th Cir. 1995); *Oracle USA, Inc. v. Rimini St., Inc*., 6 F. Supp. 3d 1108, 1129 (D. Nev. 2014); *Jacobson v. CBS Broadcasting, Inc*., 2014 Ill. App. (1st) 132480, ¶ 29, 19 N.E.3d 1165, 1176 (Ill. App. 2014); *Armstrong v. Shirvell*, No. 11-11921, 2013 WL 4833948, at *2 (E.D. Mich. Sept. 11, 2013), *aff'd in part, rev'd in part and remanded on other grounds*, 596 F. App'x 433 (6th Cir. 2015); *Howard v. Antilla*, No. 97-543-M, 2000 WL 144387, at *2 (D.N.H. Nov. 17, 1999); *Gray v. St. Martin's Press, Inc.*, No. 95-285-M, 1999 WL 813909, at *2 (D.N.H. May 19, 1999), *aff'd*, 221 F.3d 243 (1st Cir. 2000).

It is against the backdrop of this overwhelming case law that Dean Rodney A. Smolla, an expert witness for Gottwald, observed that the approach of Kesha's expert in the lower court, Professor Karen North, to discerning general purpose

public figure status, based on vague notions of "notability," "celebrity," and "influencer" status, is out-of-step with existing First Amendment principles under *Gertz*. R. at 6201-03. Although these concepts may appear to bear a "superficial" (*id.*) connection to the necessary constitutional inquiry, they do not make one a public figure *unless* they have defined the person *to the degree that has made them a household name*, which remains the constitutional *sine qua non*. R. at 6208 ("The consensus of courts in this country holds that, in order to be deemed a general or all-purpose public figure, the plaintiffs name must be a "household word.'").

Rather than attempt to deal with the virtual tsunami of precedent rejecting classification of libel plaintiffs as all-purpose public figures in circumstances involving plaintiffs as or more famous than Gottwald and applying the "household name" standard that she disdains, Kesha devotes most of her argument to comparing Gottwald to the plaintiffs in a single case, *Winklevoss v. Steinberg*, 170 A.D.3d 618 (1st Dep't 2019). In that case, the Court, after first finding the plaintiffs to be limited purpose public figures, also—and unnecessarily—described the two plaintiffs as general purpose public figures "famous by virtue of their participation in the Olympics, their portrayal in the film 'The Social Network,' and routine coverage in popular media, coverage in which they willingly participate." *Winklevoss*, 170 A.D.3d at 619. Gottwald, despite the success he has achieved in his field, has unquestionably not obtained the Winklevoss twins' level of saturation in the public

mind that arguably has made them household names. But more to the point, the Court in *Winklevoss*, did not purport to alter the timeworn national standard for determining whether defamation plaintiffs are general purpose public figures. Further, because the *Winklevoss* panel initially and correctly focused on whether the Winklevoss plaintiffs were limited purpose public figures and then found them to be such[1], its curt reference to the plaintiffs as general purpose public figure was unnecessary to its determination, and thus *dicta*.

Ultimately, an assessment of the fame of the Winklevoss twins does not aid the Court in either identifying the standard for general purpose public figures or assess, on the particular record here, whether Gottwald has achieved such fame in American society at large as to make him a general purpose public figure. Gottwald is a successful record producer whose name is familiar to the teens and young adults most attuned to the behind the scenes happenings of a particular music industry niche, but the lower court correctly found that this alone is not sufficient and that he is not a person who is a household name or who has achieved *pervasive* fame and

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[1] *See Winkleovss* at 619 ("Through their voluntary participation in numerous interviews, in widely-covered conferences and meetings with entrepreneurs, and in their own radio broadcasts, they *have attracted public attention to themselves as investors in start-ups, have voluntarily injected themselves into the world of investing, and have sought to establish their reputation as authorities in the field*.") (emphasis added). The public subject matter was distinctly different from that presented by Kesha's side in the court below.

notoriety. R. at 17. Thus, under the well-established constitutional standard of *Gertz* and its extensive progeny, he is simply not a general or all-purpose public figure.

Of much greater pertinence to the resolution of this appeal is this Court's decision in *Huggins v. Moore*, 253 A.D.2d 297 (1st Dep't 1999), *rev'd on other grounds*, 94 N.Y.2d 296 (1999), which rejected the defendant's claims that plaintiff, a successful recording artist manager and ex-husband of celebrity singer-actress Melba Moore, was either a general purpose public figure or limited purpose public figure. This court, citing *Gertz* and its prior decision in *Krauss v Globe Intl.,* 251 A.D.2d 191 (1st Dep't 1998), found that notwithstanding his personal business success, including the promotion of his celebrity clients and his own business, Huggins was not a general purpose public figure. *Id.* at 312-13. And, equally pertinent to this brief's following argument, consistent with the United States Supreme Court's decision in *Time Inc v. Firestone*, 424 U.S. 448 (1976), Huggins also was not a limited purpose public figure because the subject matter of the defamatory allegations was related to the *private* matter of the divorce proceedings between the parties, not a public matter that he voluntarily attempted to influence. *Id.* at 310.

II. GOTTWALD IS NOT A LIMITED-PURPOSE PUBLIC FIGURE

In applying the limited-purpose public figure doctrine emanating from *Gertz*, courts in New York and across the nation emphasize such factors as whether a pre-

existing public controversy existed *prior* to the incident that gave rise to the defamatory statement, the extent to which a plaintiff voluntarily thrust himself into the controversy to attempt to influence its outcome, and the connection between the defamation and the plaintiff's involvement in the pre-existing public controversy. *See* Rodney Smolla, *Law of Defamation* §§ 2:25-2:26, 2:30 (2020 Update Edition) (collecting cases); *see also Lerman v. Flynt Distributing Co., Inc.*, 745 F.2d 123, 136-37 (2d Cir. 1984) ("A defendant must show the plaintiff has: (1) successfully invited public attention to his views in an effort to influence others prior to the incident that is the subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media."); *Borzellieri v. Daily News, LP*, 39 Misc. 3d 1215(A), 975 N.Y.S.2d 365 (Queens Cnty. Sup. Ct., Apr. 22, 2013) (quoting *Lerman*).

One of the most widely followed formulations of the limited purpose public figure test is that set forth in *Waldbaum*, under which the court must: 1) "isolate the public controversy" and "define its contours;" 2) "analyze the plaintiff's role in it. Trivial or tangential participation is not enough;" and 3) find that the alleged defamation "was germane to the plaintiff's participation in the controversy." *Waldbaum*, 627 F.2d at 1296-98.

Gottwald is a successful music producer. The First Amendment, however, does not demand that a person who is successful in his calling be deemed a limited purpose public figure if he sues for defamation. And for good reason. If merely becoming successful as a banker, lawyer, farmer, restaurateur, cleric, athlete, artist, entertainer, entrepreneur, business executive, scientist, academic, or any other calling were *enough*, *standing alone*, to warrant public figure status, the core jurisprudential balance struck by *Gertz* would be disturbed.

Gertz was decided as it was because the Supreme Court sought to *balance* society's interest in the free flow of information with society's interest in the protection of individual reputation and human dignity. Concern for an individual's ability to protect his reputation and seek redress for reputational harm is why *Gertz* quoted so prominently the famous statement of Justice Potter Stewart, who emphasized that the individual's right to sue for the protection of his own good name:

> reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system.

Gertz, 418 U.S. at 341 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring)).

Gertz thus decided that *even as applied to persons who are highly successful within a field*, states are free to apply the negligence standard—the workhouse backbone of the law of torts—to defamation actions that do not involve an individual's efforts to influence the outcome of a pre-existing public controversy. The proof of this proposition is demonstrated by how the Supreme Court actually applied the principles it was announcing to Elmer Gertz himself, the famous lawyer held to be a private figure by the Court. Gertz was at least as well known, as a lawyer in Chicago, as Gottwald was, as producer within the music business. Gertz was an activist civil rights and civil liberties lawyer, accused of being a communist by a publication of the John Birch Society. As a lawyer, Gertz was a great success. *Gertz*, 418 U.S. at 351-52.[2] The publishers of the defamation against Gertz stated that a nationwide conspiracy was in progress to discredit local law enforcement and pave the way for a national police force poised to support a communist takeover. *Id* at 326. When a youth named Nelson was shot and killed by a Chicago police officer, Gertz agreed to represent the victim's estate in a suit against the officer. The John Birch Society then took aim at Gertz, falsely accusing Gertz of being the architect of a frame-up against the officer, of being a "Leninist" and "Communist-fronter," and of being a leader in the National Lawyers Guild, described as a Communist

[2] *See Hotchner v. Castillo-Puche*, 404 F. Supp. 1041, 1044 (S.D.N.Y. 1975), *rev'd on other grounds*, 551 F.2d 910 (2dCir.), *cert. denied*, 434 U.S. 834 (1977) (noting that Elmer Gertz "had considerable stature as a lawyer, author, lecturer, and participant in matters of public import").

organization that orchestrated the attack on police during the 1968 Democratic Party National Convention. *Id.* Elmer Gertz was no private recluse. The Seventh Circuit doubted Gertz was a private figure, noting in an opinion by its then-Judge and later Supreme Court Justice Stevens that "Plaintiff's considerable stature as a lawyer, author, lecturer, and participant in matters of public import undermine the validity of the assumption that he is not a 'public figure' as that term has been used by the progeny of *New York Times*." *Gertz v. Robert Welch, Inc.,* 471 F.2d 801, 805 (7th Cir. 1972).

Yet despite all of his fame and accomplishment, the Supreme Court held that Elmer Gertz was a private figure. He lacked the pervasive fame required to achieve all-purpose public figure status. And he did not try to shape the outcome of the *specific* controversy conjured by the defamation against him. *It is impossible to reconcile the notion that Gottwald is a limited purpose public figure with the Supreme Court's conclusion that Elmer Gertz was not.* The key to this analysis is to separate "success" from "public figure" status. Merely doing the things that successful persons and businesses do to achieve success do not, by themselves, establish public figure status.

A defamation plaintiff does not become a public figure merely because the plaintiff is successful in the ordinary course of business and has achieved some level of public recognition. In many business callings, the ordinary course of business

involves robust advertising and marketing efforts. The popular music entertainment industry is steeped in promotion and marketing. Mr. Gottwald's efforts to promote the recording artists he has mentored and produced, as well as to promote himself as a producer, are all routine activities common in his professional realm. These activities do not constitute voluntary thrusting of oneself into a specific pre-existing *controversy* in order to influence the outcome of that controversy. Limited-purpose public figure status, as a term of art in defamation, is simply not the same as success and recognition within one's professional field.

The achievement of success and fame within a calling or profession is one thing; the achievement of public figure status when there is no nexus between a defendant's voluntary entry into a pre-existing public controversy germane to the defamation is entirely another. *See, e.g.*, *Blue Ridge Bank v. Veribank, Inc.*, 866 F.2d 681, 688 (4th Cir. 1989) (Bank found to be a private figure, with the court observing: "We do not believe that the existence of an ongoing public interest in the stability of society's financial institutions and markets, or in the supervision of the gaming industry, or in the regulation of utilities automatically elevates every member of the regulated class to public figure status. . . . Rather, we think that in this context, as in others, a plaintiff should not be considered a limited-purpose public figure absent the existence of a pre-defamation public controversy in which the plaintiff has become directly involved."); *Arctic Co. v. Loudoun Times Mirror*,

624 F.2d 518, 521 (4th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981) (Company not a public figure; it did not "'press itself' into the public controversy"); *Golden Bear Distributing Sys. v. Chase Revel, Inc.*, 708 F.2d 944, 952 (5th Cir. 1983) (Corporate plaintiff did not become a public figure merely by virtue of advertising for its services, because such normal advertising had not thrust itself into a public controversy.); *Bruno & Stillman, Inc. v. Globe Newspaper Co*., 633 F.2d 583, 591 (lst Cir. 1980) (holding a company to be a private figure, emphasizing "whether the controversy preceded the alleged defamation" and whether there was "thrusting into the vortex" of the controversy by the company); *Computer Aid, Inc. v. Hewlett Packard Co*., 56 F. Supp. 2d 526, 535 (E.D.Pa. 1999) (holding that Hewlett Packard, despite being "one of largest and most influential corporations in the world", was not a limited purpose public figure since it had not voluntarily thrust itself into a public controversy surrounding a corporate acquisition and that its mere power and access to channels of communication did not make it a public figure); *Medure v. Vindicator Printing Co*., 273 F. Supp. 2d 588, 611-12 (W.D. Pa. 2000) (The plaintiff, an entrepreneur and owner of a casino corporation held to be a private figure; the court, noting that neither his filing a lawsuit nor background media reports regarding his business constituted his injection into a public controversy.) (*quoting Gertz*, 418 U.S. at 345); *Lawlor v. Gallagher Presidents' Report, Inc*., 394 F. Supp. 721, 730-31 (S.D.N.Y. 1975) ("Defendants . . . contend that since plaintiff was a high

corporate executive in one of the 'top 100 corporations' and Report is directed exclusively to that group, we should find that plaintiff was a limited public figure . . . . and allow them to invoke the qualified privilege of *New York Times Co. v. Sullivan*. We think the contention untenable for such a rule would sweep all corporate officers under the restrictive *New York Times* rule and distort the plain meaning of the public official or public figure category beyond all recognition."); *Pages v. Feingold*, 928 F. Supp. 148, 154 (D. P.R. 1996) (Prominent real estate developer a private figure for defamation purposes, noting that: "While it is true that he is well-known within the real estate business community as a developer of social-interest housing, his business role does not carry prominence and notoriety in the Puerto Rico society or government."); *Gettner v. Fitzgerald*, 297 Ga. App. 258, 264, 677 S.E.2d 149 (Ga. App. 2009) (holding there was no public controversy); *Snead v. Redland Aggregates, Ltd.*, 998 F.2d 1325, 1329-1330 (5th Cir. 1993) (Holding that "the inquiry must be made on a case by case basis, examining all the relevant facts and circumstances."); *Lundell Manufacturing Co. v. ABC Inc.*, 98 F.3d 351, 364 (8th Cir. 1996) (Relying on the Supreme Court's decisions in *Hutchinson* and *Wolston*, the court stated that "it is the plaintiff's role in the controversy, not the controversy itself, that is determinative of public figure status."); *New Franklin Enterprises v. Sabo*, 192 Mich. App. 219, 480 N.W.2d 326 (1991) (satellite dealer that advertised to the public and belonged to trade group that lobbied legislature not

public figure); *Hodgins Kenels, Inc. v. Durbin*, 170 Mich. App. 474, 429 N.W.2d 189 (1988) (amusement park operators and owners who operated park on city property were not public figures for purposes of dispute with city when no prior public controversy regarding the matters existed); *Bank of Oregon v. Independent News*, 298 Or. 434, 693 P.2d 35, *cert. denied*, 474 U.S. 826 (1985) (bank is not a public figure without a preexisting controversy).

What the case law cited above teaches is that if a successful person is not *so* successful that she crosses cultural lines to become an all-purpose public figure, the defamation *must* be germane to a specific pre-existing controversy that the public figure entered. Unless this line is maintained, the primary holding of *Gertz*, which was to overrule *Rosenbloom*, would be eviscerated.

At the end of the day, the argument advanced by Kesha and her supporting amici hinges on the importance of sexual misconduct as a matter of public interest in the #MeToo era. As a general proposition, sexual misconduct is of course a matter of public importance. Yet as Justice Oliver Wendell Holmes admonished, "[g]eneral propositions do not decide concrete cases." *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Rather, "[t]he decision will depend on a judgment or intuition more subtle than any articulate major premise." *Id*.

The Supreme Court's decision in *Gertz* is not only binding on New York courts, but it was correct, for all the reasons that the plurality decision in *Rosenbloom*

was wrong. To accept the argument of Kesha and her amici would be akin to reviving *Rosenbloom* and suddenly setting New York's public figure jurisprudence adrift. In *Wolston*, the United States Supreme Court called out and rejected a similar stealth attempt to resurrect *Rosenbloom*, observing:

> A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention. To accept such reasoning would in effect re-establish the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.,* which concluded that the *New York Times* standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. We repudiated this proposition in *Gertz* and in *Firestone*, however, and we reject it again today. A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*.

Wolston, 443 U.S. at 167-68.

To affirm Justice Schecter's decision below, this Court need not decide that allegations of sexual misconduct by a successful person always do or always do not warrant application of the actual malice standard. Rather, it may simply hold that such matters are to be decided case-by-case. The pivotal issue in most cases, and in Gottwald's case here, is whether the plaintiff has thrust himself into a public controversy regarding sexual misconduct in an effort to influence *that* controversy.

It is not enough that a plaintiff may have injected himself into other controversies, not germane to the truth or falsity of the alleged defamation giving rise to the case. Kesha and her amici thus seek to transfer the analysis to other

controversies, arguing at times that the "controversy" Gottwald entered was his treatment as a music producer of the musical artists he produced, focusing on his proclivity to work hard and push his artists hard to attempt perfection in their product. Whether this was or was not a "public controversy" of the sort contemplated by *Gertz* and its progeny, however, is irrelevant, *for it is not the controversy at the heart of the defamatory allegations giving rise to the suit*, the contention that Gottwald drugged and raped Kesha. *See, e.g., Waldbaum*, 627 F.2d at 1298 (requiring that the alleged defamation be "germane to the plaintiff's participation in the controversy.").

The Court of Appeals decision in *James v. Gannett Co.*, 40 N.Y.2d 415 (1976), which Kesha heavily relies upon, only underscores this point. There, a professional belly dancer in Rochester whose performances had placed her in the "public spotlight" sued a local newspaper over a feature article that drew upon an interview that she volunteered to sit for. The court observed that "the plaintiff welcomed publicity regarding her performances and, therefore, must be held to be a public figure with respect to newspaper accounts of those performances." *Id.* at 423. The Court narrowly found that she "was not, *for the purposes of this article*, a private individual but was, instead, a public personality." *Id.* (emphasis added). In other words, a limited purpose public figure. The Court relied upon and was consistent with *Gertz* in reinforcing the point that the public figure analysis must hone in on

whether a libel plaintiff attempted to shape the specific controversy actually at the heart of the defamatory allegations, which the *James* plaintiff clearly did and Gottwald did not.

A recent Eastern District of New York decision reinforces the same point. In that case, *Elliot v. Donegan*, 2020 U.S. Dist. LEXIS 114151 (E.D.N.Y. June 30, 2020), the plaintiff sued for defamation after his inclusion on a list of "shitty media men" suggested, falsely, that he had been accused of "sexual violence by multiple women." *Id* at *3. That plaintiff, Stephen Elliot, had written dozens of books and articles, fiction and non-fiction, that included "violent descriptions of sex" and "rape fantasies." *Id* at *2. But in spite of plaintiff Elliot's "extensive writings and interviews about sex, BDSM, and sexual assault," Judge Hall determined that for purposes of his defamation lawsuit, he was a private figure. *Id.* at *19-20 His writings were not about the "controversy here"—"issues of sexual assault, sexual harassment, and consent in the workplace," *id* at *7, because Elliot's writings were not about workplace related issues.

The conclusion that Gottwald is not a limited purpose public figure is even stronger than it was in *Elliot.* Elliot was not a public figure because his writings about sexual subjects did not attempt to shape thinking about sexual assault in the workplace, the broad subject of the "shitty media men" list on which Elliot found himself. Gottwald, also accused of serious sexual misconduct condemned in the

#MeToo era, did not even attempt to shape the public's thinking about sexual subjects in the workplace. Gottwald's public communications were efforts to promote his clients, his own career or to defend himself and did not encompass efforts to shape the public's thinking about sexual assault at all, much less sexual assault in the context of employment or professional relationships. In short, he is simply not a limited purpose public figure, as Justice Schecter's thoughtful opinion correctly determined.

CONCLUSION

For the foregoing reasons, the Court should affirm the Supreme Court's decision.

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Respectfully submitted,

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