SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

LUKASZ GOTTWALD p/k/a DR. LUKE; KASZ MONEY, INC.; and PRESCRIPTION SONGS, LLC, Plaintiffs, -against- KESHA ROSE SEBERT p/k/a KESHA; PEBE SEBERT; VECTOR MANAGEMENT, LLC; and JACK ROVNER, Defendants.	Index No. 653118/2014 Hon. Jennifer Schecter Part 54 **Mot. Seq. No. __**
KESHA ROSE SEBERT p/k/a KESHA, Counterclaim-Plaintiff, -against- LUKASZ GOTTWALD p/k/a DR. LUKE; KASZ MONEY, INC.; PRESCRIPTION SONGS, LLC; and DOES 1-25, inclusive, Counterclaim-Defendants.	

DEFENDANT KESHA ROSE SEBERT'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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PRELIMINARY STATEMENT[1]

Dr. Luke's litigation strategy is to destroy Kesha at all costs. From grotesquely inappropriate deposition questions (berating Kesha for not reporting [redacted] to victim shaming (interrogating witnesses about [redacted] though Dr. Luke claims they never had sex), to suing Kesha for millions for not using him as a producer (after defeating an injunction by promising the Court he would not insist on producing), Dr. Luke's goal all along has been to crush Kesha into retracting her reports of abuse. But Kesha has not retracted. To the contrary, her reports of Dr. Luke's crimes—to her family, friends, medical providers, and now this Court—have remained unwavering since the horrific evening in October 2005 when Dr. Luke sexually assaulted a teenage Kesha while she was too incapacitated to consent or resist.

Faced with a victim who will no longer be bullied into silence, Dr. Luke's summary-judgment motion seeks to wrestle as much as possible of his $40 million damages claim from the jury. He asks this Court to rule as a matter of law that Kesha should be liable for the statements of her former attorney, Mark Geragos, despite an explicit contractual restriction on Mr. Geragos's ability to make statements without her consent. The Kesha-Geragos retainer agreement specifically required Kesha's approval for any "public statements," yet Dr. Luke cites *not a single fact* demonstrating that Kesha had advance knowledge of *any* of Mr. Geragos's allegedly defamatory statements—or even that she saw them when or after they were made. Rather than proffer evidence that Kesha consented to those statements, Dr. Luke asks the Court to ignore the contract, ignore the lack of evidence of consent, and hold Kesha liable for the statements of her former attorney. That remarkable ask is consistent with Dr. Luke's scorched-

[1] This brief refers to (i) Plaintiff Lukasz Gottwald as "Dr. Luke"; (ii) Plaintiffs together as "Dr. Luke"; (iii) Plaintiff Kasz Money Inc. as "KMI"; (iv) the October 18, 2018 affirmation of Christine Lepera, Esq. as the "Lepera Aff."; (v) the accompanying affirmation of Leah Godesky, Esq. as the "Godesky Opp. Aff."; and (vi) Dr. Luke's summary-judgment brief as "Br." All emphasis is added and all citations are omitted.

earth attack on Kesha—including, for example, seeking to hold her liable for a superfan's twitter posts and statements by her mother. But agency is a question of fact and, absent uncontroverted evidence establishing the purported agent's authority, a question for the jury: Where questions of agency and ratification depend on evidence "from which different inferences reasonably may be drawn," they must "be submitted to the jury under proper instructions by the court." *Hedeman v. Fairbanks, Morse & Co.*, 286 N.Y. 240, 248-49 (1941); *accord Soho Ctr. for Arts & Educ. v. Church of St. Anthony of Padua*, 146 A.D.2d 407, 410 (1st Dep't 1989).

Dr. Luke's grab-bag of remaining contentions—including that he is entitled to summary judgment regarding Kesha's (i) text message to Lady Gaga; (ii) counterclaim for declaratory-judgment relief; (iii) obligation to pay prejudgment interest; (iv) defamation-related affirmative defenses; and (v) contract-related affirmative defenses—likewise ignore triable issues of fact or undisputed record evidence in *Kesha's* favor.

Many of Dr. Luke's arguments, moreover, reveal deliberate tactics by Dr. Luke's legal team to hamstring Kesha's defense. For instance, Dr. Luke did not—originally or in his Second Amended Complaint—plead the vast majority of statements now added to this suit until the close of discovery. Notwithstanding directly on-point case law requiring defamation to be pleaded with specificity, Dr. Luke opted to avoid pleading many statements that would have allowed Kesha to plead litigation privilege as a defense and to have third parties (whose statements Dr. Luke seeks to attribute to Kesha) help pay to defend against Dr. Luke's ever-expanding suit. The bulk of Dr. Luke's claims are thus time-barred and should be dismissed.

Kesha has spent millions to defend herself, standing by her claim even after being offered an out in exchange for retraction. Meanwhile, Dr. Luke has repeatedly blocked Kesha's efforts to release undisputed evidence to the public and [redacted]

Only now, after four years of litigation, is Dr. Luke starting to confess his lies, including that

Kesha's statements about his emotional abuse were not defamatory. Now that judgment day nears, Dr. Luke asks that the jury be prevented from determining the truth in this dispute. But Kesha deserves her day in court. Dr. Luke's summary-judgment motion should be denied.

STATEMENT OF FACTS

Kesha Enters An Interminable KMI Contract As An Artist With No Commercial Success.

In early 2005, a then-32-year-old Dr. Luke met Kesha, a then-18-year-old aspiring singer-songwriter from Nashville, Tennessee.[2] Within months, Kesha signed an exclusive contract with Dr. Luke's music-production company, KMI (the "KMI Contract"), and moved to Los Angeles, California.[3] The KMI Contract grants KMI exclusive rights to produce Kesha's music and requires Kesha to use Dr. Luke to individually produce at least six songs on every album.[4] The producer-artist relationship established under the KMI Contract is significantly more intimate and personal than the relationship most employees have with colleagues or supervisors, and requires Kesha to spend significant time with Dr. Luke.[5]

The KMI Contract provides that before Kesha is paid any royalties, KMI must recoup the $25,000 that Kesha received upon execution, along with its recording, promotion, and marketing costs.[6] Kesha is thereafter paid an approximately 12.5% royalty, 4.5% of which goes directly to Dr. Luke.[7] The KMI Contract contemplated that KMI would enter a "Major Label Recording Agreement" with a record label that would release Kesha's music.[8]

Under the KMI Contract, Kesha has no approval rights regarding her songs, album

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[2] *See* Lepera Aff., Ex. 5 at 16, 40-44; November 20, 2018 Kesha Sebert Aff. ¶ 3.
[3] *See* Lepera Aff., Ex. 47 at VECTOR0000003; *id.*, Ex. 90 at 112-13.
[4] *See id.*, Ex. 47 at VECTOR0000015 § 9(a)(vi)(2); *id.*, Ex. 47 at VECTOR0000010 § 6(f); *id.*, Ex. 1 ¶¶ 25-26.
[5] *See* Godesky Opp. Aff., Ex. 9 at 2, 10-11.
[6] *See* Lepera Aff., Ex. 47 at VECTOR0000007 § 4(a); 4(a); *id.*, Ex. 47 at VECTOR0000009-10 § 6.
[7] *See id.*, Ex. 47 at VECTOR0000007-8 § 4(b); *id.*, Ex. 47 at VECTOR0000010 § 6(f).
[8] *See, e.g.*, Lepera Aff., Ex. 47 at VECTOR0000003-5 §§ 2(b)-(d), (i).

covers, or publicity, other than for certain likenesses and autographed material.[9] KMI has the right to control Kesha's merchandising, endorsements, and fan clubs.[10] The KMI Contract has no termination date, instead indefinitely binding Kesha to Dr. Luke until she releases at least six albums.[11] KMI has the right to exercise "at its sole discretion" an option for each album, and has the unilateral right to terminate "at any time."[12]

The key financial and creative-input terms of the KMI Contract favor KMI, and are generally consistent with those typically included in mid-to-late 2000s production contracts for unknown artists with no commercial success.[13] Consistent with music industry custom and practice, Dr. Luke told Kesha before she executed the KMI Contract that the "bad deal" would be renegotiated after she "get[s] successful," because "[t]hat's what happens in this business."[14]

In the aftermath of the October 2005 sexual assault, Kesha tried desperately to sever all ties with Dr. Luke. She hired manager David Sonenberg of DAS Communications Ltd. ("DAS"), and told DAS that she would not work with Dr. Luke because he raped her.[15] But when Mr. Sonenberg negotiated a Warner Brothers record-label deal for Kesha, Dr. Luke enforced his rights under the KMI Contract to prevent Kesha from signing.[16] Realizing that Dr. Luke was her only option to release music, Kesha apologized for hiring Mr. Sonenberg and pursuing Warner Brothers.[17] Kesha began working with Dr. Luke again in approximately 2008,

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[9] *See* Lepera Aff., Ex. 47 at VECTOR0000011-13 § 8.
[10] *See* Lepera Aff., Ex. 47 at VECTOR0000011-13 § 8(a)-(b).
[11] *See* Lepera Aff., Ex. 47 at VECTOR0000003 § 2.
[12] *See* Lepera Aff., Ex. 47 at VECTOR0000003 § 2(d).
[13] *See* Godesky Opp. Aff., Ex. 9 at 6.
[14] Lepera Aff., Ex. 67 at 150; *see also id.*, Ex. 67 at 162 (noting Dr. Luke called renegotiation "industry norm").
[15] *See* Godesky Opp. Aff., Ex. 78 ¶ 3; *see also* Godesky Opp. Aff., Ex. 12 at PLTS052440; *id.*, Ex. 11 at PLTS049175; Lepera Aff., Ex. 5 at 234-36.
[16] *See* Lepera Aff., Ex. 5 at 246-48; *id.*, Ex. 69 at PLTS052455; *id.*, Ex. 90 at 192; Godesky Opp. Aff., Ex. 13 at PLTS052457; *see also* Lepera Aff., Ex. 67 at 333.
[17] *See* Lepera Aff., Ex. 5 at 244-45; *id.*, Ex. 67 at 333-34.

and DAS filed a lawsuit alleging that Dr. Luke tortiously interfered with the DAS-Kesha contract.[18] Kesha's summary-judgment papers explain the circumstances of her 2011 deposition testimony in that case, when Dr. Luke bullied her into falsely denying the 2005 rape.[19]

Kesha's and Dr. Luke's 2008-2009 Contracts.

2008 KMI Contract Amendment. The December 2008 KMI Contract amendment (i) reduced the number of albums that Kesha is required to release from six to five[20]; (ii) increased Kesha's royalty from 12.5% to 14%, including a 4% royalty for Dr. Luke[21]; and (iii) granted KMI participation and control over all of Kesha's ancillary income, i.e., all non-record income, such as that from touring, merchandise, and sponsorships.[22] The KMI Contract remained consistent with those entered around that time for unknown artists.[23]

2008 Prescription Contract. Under Kesha's November 26, 2008 agreement with Prescription—Dr. Luke's music-publishing company—Prescription secured a 50% interest in all compositions written by Kesha, with no express termination date.[24] The Prescription Contract is divided into an "Initial Period" and two separate "Option Periods," each of which Prescription may exercise at its sole discretion.[25] The Prescription Contract requires Prescription to account for and pay to Kesha—on specific dates twice annually—certain royalties that Prescription receives for exploiting Kesha's songs.[26] The key financial and creative-input terms of the

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[18] *See id.*, Ex. 22 at 198; Godesky Opp. Aff., Ex. 70 at PLTS002931.
[19] *See* Godesky Opp. Aff., Ex. 66; *id.*, Ex. 67 at 9-10. Kesha's mother, Pebe Sebert, was similarly intimidated before her deposition (Kesha told her Dr. Luke threatened to "end [Kesha's] career if we tell the truth," Lepera Aff., Ex. 90 at 86), but truthfully testified that Kesha had no "sexual relationship" with Dr. Luke. Pebe does not "consider rape a 'sexual relationship.'" *Id.* at 94-96.
[20] *See* Lepera Aff., Ex. 48 at VECTOR0000049 ¶ 1.
[21] *See id.* at VECTOR0000050 ¶¶ 4, 7.
[22] *See id.* at VECTOR0000050 ¶ 6.
[23] *See id.*
[24] *See id.*, Ex. 66 at VECTOR0000021-24 §§ 1-3.
[25] *Id.* at VECTOR0000024 § 3.
[26] *See id.* at VECTOR0000030 § 8.

Prescription Contract are generally consistent with those typically included in mid-to-late 2000s publishing contracts for unknown artists.[27]

2009 Sony Agreement. On January 27, 2009, KMI entered a "Major Label Recording Agreement" with Sony-affiliate RCA (the "Sony Agreement").[28] KMI and Sony agreed that Kesha would exclusively record and release albums for Sony, with Dr. Luke pre-approved to individually produce at least six songs on every album.[29] The Sony Agreement grants KMI certain approval rights with regard to Kesha's music,[30] but grants Kesha no enforceable approval rights.[31] The Sony Agreement's key financial and creative-input terms are generally consistent with those typically included in mid-to-late 2000s recording contracts for unknown artists.[32]

Kesha signed an Assent to the Sony Agreement stating that if KMI:

> for any reason ceases to be entitled to the Artist's services or the results of the Artist's services as the Artist in accordance with the terms of the Agreement or [KMI] for any reason fails or refuses to furnish to [Sony] the Artist's services or the results of the Artist's services as the Artist in accordance with the terms of the Agreement: (i) *the Artist will be deemed substituted for [KMI] as party to the Agreement*, and (ii) she will render such services and perform such acts as will give RCA the same rights, privileges and benefits it would have received under the Agreement had the Furnishing Party continued to be entitled to the Artist's services … Such rights, privileges, and benefits will be enforceable in RCA's behalf against the Artist.[33]

2009 KMI Contract Amendment. The KMI Contract was further amended in 2009 to require that Kesha pay Dr. Luke (i) 10% of her net receipts derived from exploitation of her name, portraits, pictures, and likeness, tour sponsorships, and endorsements; and (ii) the higher

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[27] *See* Godesky Opp. Aff., Ex. 9 at 7.
[28] *See generally* Lepera Aff., Ex. 38 at VECTOR0000051-113.
[29] *See id.* at VECTOR0000052-58 §§ 1, 3-4.
[30] *See id.* at VECTOR0000055-58 § 4.
[31] *See, e.g.*, *id.* at VECTOR0000108 § 22.05; *see also* Godesky Opp. Aff., Ex. 9 at 8.
[32] *See* Godesky Opp. Aff., Ex. 9 at 8; Lepera Aff., Ex. 46 at 115.
[33] Lepera Aff., Ex. 38 at VECTOR0000115 § 3.

of either 10% of her net touring income or 5% of her adjusted gross tour receipts.[34] The amendment states that Kesha will pay royalties to KMI within 45 or 30 days of particular events.[35] The key financial and creative-input terms of the KMI Contract remained generally consistent with those typically included in mid-to-late 2000s contracts for unknown artists.[36]

Kesha Achieves Remarkable Commercial Success.

In 2010 and 2011, Kesha attained enormous professional success. The RIAA certified Kesha's 2010 *Animal* "platinum,"[37] and its lead single, "Tik Tok," made Kesha the first female artist since 1977 to have her debut single spend nine weeks at #1 on the weekly Hot 100.[38] On November 19, 2010, Sony released Kesha's extended-play record, *Cannibal*,[39] which the RIAA certified "gold."[40] *Cannibal's* "We R Who We R" reached #1 on the Billboard Hot 100.[41]

As Kesha-generated revenue poured in to Sony and Dr. Luke, the parties developed a practice whereby any amounts that Prescription owed Kesha under the Prescription Contract were offset by the ancillary-royalty payments that Kesha owed KMI.[42] Thus, beginning in late 2010 or early 2011, and continuing through present, neither Kesha nor Prescription paid the amounts owed according to the payment schedules in the parties' contracts.[43]

Longstanding Music Industry Custom And Practice Is To Renegotiate Contracts.

Commercial success in the music industry is extremely rare. In 2010, approximately

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[34] *See id.*, Ex. 49 at VECTOR0000117-18 §§ 1-2.
[35] *See id.* at VECTOR0000118 § 3.
[36] *See* Godesky Opp. Aff., Ex. 9 at 9; Lepera Aff., Ex. 46 at 116-17.
[37] *See* Godesky Opp. Aff., Ex. 41 at Sloane0000009-10; *id.*, Ex. 42 at Sloane0000040.
[38] *See id.*, Ex. 46 at Sloane0000052; *id.*, Ex. 47 at Sloane0000034.
[39] *See id.*, Ex. 44 at Sloane0000047.
[40] *See id.*, Ex. 43 at Sloane0000073.
[41] *See id.*, Ex. 48 at Sloane0000043.
[42] *See id.*, Ex. 75 at 1 ("[T]he parties have had a practice of offsetting any monies that would be paid to Ms. Sebert under the Prescription Agreement against ancillary royalties owed by Ms. Sebert under the KMI Agreement."); Schwartz Aff. ¶ 4.
[43] *See* Schwartz Aff. ¶¶ 5-15.

75,000 albums were released,[44] with only 27 non-Latin albums certified platinum.[45] Accordingly, the custom and practice of the music industry is to include in an aspiring artist's initial recording contract financial terms that strongly favor the industry players.[46] But music industry custom and practice is *also* to renegotiate an initial contract, if the artist achieves some degree of commercial success—especially explosive success of Kesha's magnitude.[47] As music-industry expert Owen Sloane explained, "if you are successful[,] we'll renegotiate and if the artist isn't successful it is not going to matter ... everybody knows that eventually with success the contract is going to be renegotiated."[48] The contract is otherwise "unfair" and "outrageous."[49] Indeed, *Dr. Luke's* expert, Nancy Harkness, cannot identify a single platinum-certified or Grammy-nominated artist who remains in an original contract[50]—other than Kesha.

Kesha Attempts To Hold Dr. Luke To His 2005 Renegotiation Promise.

Accordingly, on the heels of *Animal* and *Cannibal*, Kesha attempted to renegotiate her contracts, consistent with industry custom and practice and Dr. Luke's 2005 promise. *See supra* 4–8. The reasonableness of Kesha's renegotiation expectation is further evidenced by (i) contemporaneous documents for Dr. Luke's record label reflecting budgeting for "Kesha renegotiation funds"[51]; and (ii) Ms. Harkness's admission that it was reasonable for Kesha to renegotiate,[52] given her extraordinary commercial success.

Dr. Luke Ramps Up His Emotional Abuse As Kesha Records Her Third Album.

In 2011 and 2012, Kesha began work on her third album, *Warrior*, even though her

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[44] *See* Godesky Opp. Aff., Ex. 9 at 11; *id.*, Ex. 51 at Sloane0000068.
[45] *See* Godesky Opp. Aff., Ex. 9 at 11; *id.*, Ex. 41 at Sloane0000001.
[46] Godesky Opp. Aff., Ex. 9 at 11.
[47] Godesky Opp. Aff., Ex. 9 at 11.
[48] Godesky Opp. Aff., Ex. 3 at 94.
[49] *Id.* at 94–95.
[50] Lepera Aff., Ex. 46 at 117-118, 121-124.
[51] Godesky Opp. Aff., Ex. 29 at 4 (acknowledging "Ke$ha renegotiation funds").
[52] Lepera Aff., Ex. 46 at 195.

contracts remained unchanged. During production, Dr. Luke did everything he could to dominate and control Kesha's music and image. In mid-2012, Monica Cornia of Vector Management ("Vector"), reported that Dr. Luke was "put[ting Kesha] through a lot of hell … but she's strong and making it and being extra tough."[53] Kesha, Ms. Cornia noted, would not "let [Ms. Cornia] leave any studio session," because Kesha did not feel comfortable alone with Dr. Luke.[54] Kesha reiterated her never-left-alone directive,[55] and Ms. Cornia told Vector's Co-President that being around Dr. Luke every day at *Warrior* recording sessions was "insane."[56] "I had no idea until I was around him for so long," Ms. Cornia wrote.[57] "I've seen a good deal of sh*t in my life but nothing like this ever!!"[58] Kesha's physical appearance and weight were among Dr. Luke's favorite targets: Dr. Luke told Kesha "[y]ou look disgusting" as they worked together on "pretty much the entirety of *Warrior*."[59] He insisted that Kesha exercise while the team ate dinner, saying that she "didn't deserve to eat."[60] Dr. Luke taunted Kesha with smears like "[h]uge" and "fat,"[61] and even knocked a fork out of her hand mid-bite at a restaurant.[62]

Kesha contemporaneously sought therapy regarding Dr. Luke's abusive behavior.[63] Kesha explained to her therapist that Dr. Luke was "critical of everything … including her weight."[64] In June 2012, Kesha sought treatment for Dr. Luke-induced anxiety attacks,[65]

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[53] Godesky Opp. Aff., Ex. 15 at VECTOR0133808.
[54] *Id.*
[55] *See id.*, Ex. 16 at VECTOR0134700.
[56] *Id.*, Ex. 17 at VECTOR0136248.
[57] *Id.*
[58] *Id.*
[59] Lepera Aff., Ex. 67 at 126-27.
[60] *Id.* at 127.
[61] *Id.*
[62] *See id.* at 131.
[63] *See, e.g.*, Godesky Opp. Aff., Ex. 32 at KRS_MED_000918.
[64] *Id.*, Ex. 33 at KRS_MED_000919; *see also id.*, Ex. 34 at KRS_MED_000920.
[65] *See id.*, Ex. 35 at KRS_MED_000921.

confessing that "she is scared of him."[66] The next month, Kesha reported "she could not tolerate any more abusive behavior"[67]; she returned, however, "intimidated by [Dr. Luke's] power."[68]

Kesha's experience is not unique. Kelly Clarkson characterizes Dr. Luke as "kind of a bully and demeaning,"[69] and said "*almost every female at [RCA] doesn't like working with him*."[70] When RCA threatened to "sit on [her] album," Ms. Clarkson made it clear that she "didn't want to talk to him," requested "a buffer," and had "[n]ot one" interaction with him.[71] P!nk similarly reports that Dr. Luke is "not a good person," so she "do[es] not work with him."[72]

Kesha's Management Team Is Frustrated By Dr. Luke's Refusal To Renegotiate.

Around the same time, Sony further cemented Dr. Luke's control over Kesha by assigning in March 2012 "all [its] prospective rights and obligations with respect to [Kesha's] recording services" to Kemosabe Records, a label where Dr. Luke was CEO.[73] Dr. Luke, in turn, leveraged his ever-growing power to prevent any reasonable modification to Kesha's contract.[74]

Unsurprisingly, Kesha's Vector team was upset by Dr. Luke's unprofessional conduct and failure to renegotiate in good faith. For example, after reviewing in March 2012 Dr. Luke's proposed revised deal, Kesha's manager, Jack Rovner, observed to Irving Azoff, a well-known music-industry veteran, that the counter-proposal reflected "Luke's bs caveats."[75] Lamenting that it was "[d]isgusting on creative and art," Mr. Azoff recommended accepting the deal and "pursu[ing] relentlessly on the creative anyway"; "[t]hat's why she has us."[76] When Kesha did

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[66] *Id.*
[67] *Id.*, Ex. 36 at KRS_MED_000922.
[68] *Id.*
[69] *Id.*, Ex. 6 at 17; *see also id.*, Ex. 71.
[70] *Id.*, Ex. 6 at 30.
[71] *Id.* at 21, 23-24.
[72] *Id.*, Ex. 72 at 7.
[73] *Id.*, Ex. 31 at Sloane0000102.
[74] *See, e.g.*, *id.*, Ex. 20 at VECTOR0027915.
[75] Lepera Aff., Ex. 86 at VECTOR0269204.
[76] *Id.*

not have a new deal by May 2012, Mr. Azoff recommended "shut[ting] down the recording [of *Warrior*],"[77] but Vector President Ken Levitan ultimately decided to continue because the record was nearly complete.[78] Ms. Harkness has begrudgingly admitted that Kesha's management team's frustration regarding Dr. Luke's feet-dragging was "possibly" justified.[79]

Dr. Luke Refuses To Execute The Modification To Kesha's Recording Contract.

By fall 2012, *Warrior* was near-ready for release, and Kesha, Dr. Luke, and Kemosabe Records had negotiated a long-form modification to the Sony Agreement that at least started to reflect Kesha's professional achievements.[80] The terms and provisions of the modification were customary and appropriate for an artist in Kesha's position as of the early 2010s.[81] *Dr. Luke's own attorney* circulated execution copies in October 2012,[82] but Dr. Luke never signed.[83] Less than a month later, Kemosabe Records released *Warrior*.[84] The album reached #6 on the United States Billboard 200, and its lead single, "Die Young," reached #2 on the Billboard Hot 100.[85]

Around the same time, Kesha responded to Dr. Luke's bad-faith refusal to renegotiate by beginning to withhold ancillary-royalty payments to KMI,[86] i.e., her only form of income that did not flow directly through Dr. Luke or his companies. Prescription, in turn, stopped paying Kesha her music-publishing royalties.[87] Yet under the then-seven-years-stale KMI Contract, Dr. Luke and his companies continued to earn substantial revenue from Kesha's music.[88]

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[77] *Id.*, Ex. 87 at VECTOR0251416.
[78] *See id.* at VECTOR0251415.
[79] Lepera Aff., Ex. 46 at 268.
[80] *See* Godesky Opp. Aff., Ex. 18 at PLTS053999 (reflecting increased advances, royalties, and creative-approval rights).
[81] *See* Lepera Aff., Ex. 9 at 12-13.
[82] Godesky Opp. Aff., Ex. 18 at PLTS053998.
[83] *See* Lepera Aff., Ex. 5 at 325-26; *id.*, Ex. 67 at 155-56.
[84] Godesky Opp. Aff., Ex 45 at Sloane0000076.
[85] Godesky Opp. Aff., Ex. 49 at Sloane0000074; *id.*, Ex. 50 at Sloane0000075.
[86] *See* Lepera Aff., Ex. 53 at 113-114.
[87] *See* Schwartz Aff. ¶ 8; *see also* Godesky Opp. Aff., Ex. 75 at 2.
[88] *See* Lepera Aff., Ex. 47; Godesky Opp. Aff., Ex. 76; *id.*, Ex. 8 at 57.

Recording Another Album With Dr. Luke Is Impossible.

Despite the fact that she had again achieved remarkable professional success with *Warrior*, a then-26-year-old Kesha found herself struggling in mid-2013 with a long-term eating disorder exacerbated by Dr. Luke's relentless criticism, and depression and anxiety regarding any continuing obligation to work with her abuser.[89] Her mother, Pebe Sebert, was "desperate" to help, "trying to get somebody to do something … so [Kesha] didn't [] kill herself because she was so miserable."[90] On December 30, 2013, Pebe sent an e-mail to Dr. Luke and his attorneys protesting the injustice of Kesha having to work directly and indefinitely with someone who "abused Kesha, both physically and mentally" (the "December 2013 E-mail").[91] At the time, Pebe was struggling with a then-longstanding alcohol addiction,[92] and Kesha neither had advance knowledge of Pebe's e-mail, nor directed or authorized Pebe to send the message.[93]

Kesha Resorts To Settlement Negotiations.

In late 2013, Kesha engaged attorneys to represent her in new negotiations aimed at eliminating her contractual obligation to work directly with Dr. Luke.[94] Unlike the pre-*Warrior* renegotiation attempt, where Kesha sought to improve the contracts' financial and creative terms, Kesha focused in fall 2013 on Dr. Luke's role as her exclusive music producer.[95] Accordingly, Kesha's attorney, Kenneth Meiselas, proposed that the parties simply adopt the financial and creative terms reflected in the execution-ready contracts that Dr. Luke's attorney had circulated in 2012,[96] to focus on revisions that would eliminate any need for Kesha to be in the same room

[89] *See* November 20, 2018 Kesha Sebert Aff. ¶ 9.
[90] Lepera Aff., Ex. 90 at 211.
[91] *Id.*, Ex. 30 at GSM000738.
[92] *See id.*, Ex. 90 at 51-54; *id.* at 282.
[93] *See* November 20, 2018 Kesha Sebert Aff. ¶ 4.
[94] *See* Lepera Aff., Ex 29 at 32, 59-60.
[95] *See id.*, Ex 29 at 54-55, 59-60.
[96] *See* Godesky Opp. Aff., Ex. 19 at GSM000746.

as her abuser.[97] Neither Sony nor Dr. Luke rejected the no-direct-contact request: both engaged in months of settlement negotiations, exchanging multiple long-form settlement agreements.[98]

Kesha Engages Litigation Counsel As Settlement Negotiations Stall.

In early 2014, Kesha engaged litigator Mark Geragos to prepare for the eventuality that she would have to file suit against Dr. Luke.[99] Mr. Geragos agreed that he would "not engage in any publicity regarding the matter or any lawsuit resulting therefrom (including, without limitation, *making any public statements*, issuing any press releases or engaging in any interviews with members of the press) without [Kesha's] prior approval."[100]

Mr. Geragos began preparing a complaint to be filed in California state court (where both parties lived), if no settlement agreement were reached, and in June 2014, Sony General Counsel Julie Swidler asked to see it.[101] Mr. Meiselas (who is based in New York near Sony's headquarters) showed Ms. Swidler a draft complaint that described the 2005 rape and Dr. Luke's subsequent emotional abuse.[102] Dr. Luke did not accuse Kesha of defamation or report any extortion to law enforcement. Nor did he terminate settlement discussions, which continued.[103]

Mr. Geragos Engages Public-Relations Experts At Sunshine Sachs.

In October 2014, as settlement negotiations reached a stalemate, Mr. Geragos engaged public-relations firm Sunshine Sachs to communicate with the press regarding Kesha's anticipated lawsuit, as is typical in high-profile cases of this magnitude.[104] On October 9, Mr.

[97] *See* Lepera Aff., Ex 29 at 54-55, 59-60.
[98] *See, e.g.*, Godesky Opp. Aff., Ex. 22 at GSM000004; *id.*, Ex. 23 at GSM001070; *id.*, Ex. 24 at GSM000672.
[99] *See* Lepera Aff., Ex. 7 at 5; *see also* Godesky Opp. Aff., Ex. 7 at 90.
[100] Lepera Aff., Ex. 7 at 5.
[101] *See* Lepera Aff., Ex. 29 at 151 (Meiselas: Swidler called him and said, "I'd like to see the complaint."); *see also* Godesky Opp. Aff., Ex. 21 at GSM001142.
[102] Lepera Aff., Ex. 29 at 173; *id.*, Ex. 96 at 63-64; *see also* Godesky Opp. Aff., Ex. 25 at KRS_ESI_0034379.
[103] *See* Godesky Opp. Aff., Ex. 26 at GSM000775.
[104] Lepera Aff., Ex. 13 ¶¶ 6-8.

Geragos and Sunshine Sachs executed an engagement letter to which Kesha was not a party, and which Kesha never reviewed.[105] Sunshine Sachs subsequently drafted a strategy memorandum reflecting its (self-evident) goal of assuring Kesha favorable press coverage (the "SS Strategy Memorandum)."[106] Kesha never received nor reviewed the memorandum, and had no knowledge it was prepared.[107] Although Mr. Geragos directed Sunshine Sachs to conduct a training session for Kesha and her family regarding lawsuit-related press inquiries, Kesha had no contact with Sunshine Sachs regarding Mr. Geragos's allegedly defamatory statements.[108]

On October 14, 2014, Kesha filed her California complaint against Dr. Luke alleging sexual assault and battery, sexual harassment, and intentional infliction of emotional distress.[109] According to Dr. Luke, the transmittal to TMZ of an advance, embargoed copy of Kesha's complaint is evidence of her purportedly "malicious" public-relations campaign. *See* Br. 10-11. But Dr. Luke *did nearly the same thing* in another litigation.[110] Indeed, this type of press activity is—as Sunshine Sachs's David Falkenstein explained—routine in celebrity litigations.[111] Later that same day, Dr. Luke initiated this litigation, claiming that Kesha defamed him when Mr. Meiselas showed Ms. Swidler the draft complaint containing sexual-assault allegations.[112]

Between October 14 and December 13, 2014, Mr. Geragos made 9 public statements about the case, including to CNN, Access Hollywood, and the digital press. *See* Appx. B. Kesha did not have advance knowledge of—let alone approve, direct, or authorize—any of the 9

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[105] Lepera Aff., Ex. 10; November 20, 2018 Kesha Sebert Aff. ¶ 6.
[106] *See* Lepera Aff., Ex. 17; *see also id.*, Ex. 1 ¶ 6.
[107] *See* November 20, 2018 Kesha Sebert Aff. ¶ 7.
[108] *See id.* ¶¶ 6-7.
[109] Lepera Aff., Ex. 56.
[110] *See*, *e.g.*, Godesky Opp. Aff., Ex. 14.
[111] *Id.* at MSK-SS000010; *id.* at 000014 ("Below is a draft item for TMZ … We've essentially written the story for them."); Lepera Aff., Ex. 11 at 225 ("[I]t's very common in litigation like this that a[] [media] outlet would be given an embargo to complaint shortly ahead of the filing.").
[112] Godesky Opp. Aff., Ex. 77.

statements before they were made.[113] There is also no evidence that Kesha saw any of the statements when or after they were made. In fact, as a self-protective measure, Kesha was affirmatively *not* tracking press coverage, which "exacerbated [her] anxiety."[114]

Kesha Seeks a New York Preliminary Injunction.

On September 18, 2015, Kesha sought an injunction permitting her to work without Dr. Luke.[115] The Court denied Kesha's motion, based on adamant representations by Dr. Luke and Sony that Kesha would be "free to record without any contact with Gottwald."[116] In connection with contemporaneous media coverage, Mr. Geragos made four September 2015 to March 2016 public statements, including on his podcast "Reasonable Doubt." *See* Appx. B. Kesha did not have advance knowledge of, approve, direct, or authorize, any of Mr. Geragos's statements.[117] There is also no evidence that Kesha was aware of the statements when or after they were made.

Kesha Sends A Private Text Message To Lady Gaga.

In early 2016, Kesha's friend, known professionally as "Lady Gaga," invited Kesha to visit her in Santa Monica.[118] Lady Gaga asked Interscope Records CEO John Janick to discuss options for recording Kesha's next album with another label.[119] According to both Kesha and Lady Gaga, Mr. Janick stated at the meeting that he had heard Dr. Luke had raped Katy Perry.[120]

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[113] *See* November 20, 2018 Kesha Sebert Aff. ¶ 8; *see also* Lepera Aff., Ex. 43 at 464:10-465:1 (Lepera: "Did you approve of any of the press that [Mr. Geragos] sent out?"; Kesha: "I do not approve of some of the press … what I did see, most of it, I did not approve.").
[114] Lepera Aff., Ex. 43 at 464-465 ("I don't know of all the press. Like I said before … during this time, I tried to keep all TVs off, technology to a minimum. It exacerbated my anxiety.").
[115] Godesky Opp. Aff., Ex. 52.
[116] *See*, *e.g.*, *id.*, Ex. 53; *see id.*, Ex. 55 at 33 (Justice Kornreich: "You're willing to allow her to produce without him." Dr. Luke's Counsel: "We said that clearly in the papers."); *id.* at 36 (Sony's Counsel: "[N]othing in the [Sony] recording agreement or the assent obligates Kesha to hire Gottwald to produce records, and Kemosabe Records has been and remains willing to approve producers with whom Kesha can work other than Gottwald.").
[117] *See supra* n. 113-114.
[118] *See* Lepera Aff., Ex. 43 at 567-69l
[119] *See* Lepera Aff., Ex. 43 at 570.
[120] *See* Lepera Aff., Ex. 43 at 577; Godesky Opp. Aff., Ex. 2 at 36-37.

Shortly thereafter, on February 26, 2016, Kesha and Lady Gaga exchanged one-on-one, private text messages regarding the stress of this litigation.[121] Kesha vented that she was "really upset with Katy Perry": "she could bring the whole thing to a head," given that "she was raped by the same man."[122] Lady Gaga responded, "[s]he is probably really afraid to lose everything; U are really strong standing up to him, she's not as strong as u yet."[123] After Lady Gaga offered to "talk to" Katy Perry,[124] Kesha said she "know[s] why [Katy Perry's] not coming forward," noting that Lady Gaga was "right and very insightful."[125] Dr. Luke has presented no evidence whatsoever that the text or the information from Mr. Janick was ever communicated beyond the one-on-one text message, other than through *Dr. Luke's* publication in adding it to this lawsuit.

The Parties Resume Making Royalty Payments.

During a December 5, 2016 status conference with this Court, Kesha reported that Prescription was withholding Kesha's music-publishing royalties.[126] Spurred to payment by threat of Court oversight, Prescription paid Kesha more than $500,000 that had been wrongfully withheld,[127] and Kesha then paid KMI approximately $1.3 million in ancillary royalties.[128]

Dr. Luke Files A Second Amended Complaint ("SAC").

In early 2017, Dr. Luke filed the SAC. He expressly limited his defamation claims to (i) statements "*Prior To The Commencement Of This Action*" (Count I); and (ii) Kesha's alleged "Statements to Lady Gaga" in her 2016 text message (Count II).[129]

[121] *See* Godesky Opp. Aff., Ex. 28 (Kesha text that she is "feeling … not strong at all").
[122] Lepera Aff., Ex. 3 at KRS_ESI_0024825; *id.* at KRS_ESI_0024829; *id.* at KRS_ESI_0024834.
[123] Lepera Aff., Ex. 3 at KRS_ESI_0024836; *id.* at KRS_ESI_0024837.
[124] Lepera Aff., Ex. 3 at KRS_ESI_0024840.
[125] Lepera Aff., Ex. 3 at KRS_ESI_0024846.
[126] *See* Godesky Opp. Aff., Ex. 75 at 1.
[127] *See id.* at 2.
[128] *See id.*, Ex. 74 at 3.
[129] *See id.*, Ex. 60 at 20-21.

Kesha Seeks Leave To Assert An Impossibility Counterclaim.

In early 2017, Kesha sought leave to seek declaratory relief terminating the KMI and Prescription Contracts on the ground that it is impossible for her to perform as required, given Dr. Luke's abuse and this suit.[130] On March 21, 2017, the Court denied Kesha's request.[131] As to the KMI Contract, the Court held that it was "speculative, not justiciable" whether (i) Sony would continue to ensure that Kesha is able to release new music; and (ii) KMI would "choose to exercise its options for future albums."[132] Kesha appealed.[133]

***Rainbow* Lays Bare The Gross Unconscionability Of Kesha's Contracts.**

On August 11, 2017, Kemosabe Records released *Rainbow* to enormous acclaim. The album debuted at #1 on the U.S. Billboard 200 chart,[134] and the lead single, "Praying," was certified "platinum" in several countries.[135] At the Grammy Awards, the album was nominated for Best Pop Vocal Album, and "Praying" was nominated for Best Pop Solo Performance.[136] Ms. Harkness again concedes that post-*Rainbow*, it would not have been unreasonable for Dr. Luke to renegotiate Kesha's *now-thirteen-years-old* KMI Contract.[137] Yet not only has Dr. Luke continued to refuse to renegotiate, he has further capitalized on the contracts' unconscionability:

- The SAC alleges that Kesha breached the KMI Contract by recording *Rainbow* without using Dr. Luke as her producer,[138] even though that was the arrangement to which the parties and Court agreed at the 2016 preliminary-injunction hearing. *See supra* 15.

- The KMI Contract is so unfavorable to Kesha that she earned *no* record royalties on *Rainbow* the first year of the album's release.[139]

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[130] *See id.*, Ex. 58; *id.*, Ex. 59 at 6, 11; Lepera Aff., Ex. 64 at 20-21.
[131] *See* Lepera Aff., Ex. 65.
[132] *See* Lepera Aff., Ex. 65 at 8.
[133] *See* Godesky Opp. Aff., Ex. 62.
[134] *See id.*, Ex. 37.
[135] *See id.*, Ex. 38.
[136] *See id.*, Ex. 39; *id.*, Ex. 40.
[137] *See* Lepera Aff., Ex. 46.
[138] *See* Godesky Opp. Aff., Ex. 60 ¶ 91.
[139] Schwartz Aff. ¶¶ 16-18; Godesky Opp. Aff., Ex. 30.

- On May 8, 2018, Kesha argued her appeal of the Court's denial of her motion for leave to assert an impossibility counterclaim.[140] As he did before this Court, Dr. Luke claimed it was speculative whether KMI would even exercise its right to a fourth album.[141] On May 10, *two days after oral argument*, Dr. Luke sent notice he was exercising the option.[142]

The Court Grants Dr. Luke Leave To Wildly Expand His Defamation Claims.

On August 31, 2018, on the eve of the note-of-issue deadline, the Court granted Dr. Luke leave to file a Third Amended Complaint ("TAC") in which he seeks to hold Kesha liable for *36* additional defamatory statements that are nowhere referenced—let alone specifically pleaded—in the SAC (or Dr. Luke's two prior complaints).[143] Among the 36 newly identified statements are 13 public statements by Mr. Geragos. *See* Appx. B.

Dr. Luke Concedes He Cannot Prove Kesha's Abuse Claims Are Defamatory.

On October 15, 2018, Plaintiffs' counsel stated that Dr. Luke no longer claims that Kesha's statements about his verbal and emotional abuse are defamatory.[144]

ARGUMENT

I. DR. LUKE IS NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW THAT MARK GERAGOS AND PEBE SEBERT ACTED AS KESHA'S AGENTS.

A. There Is A Triable Issue Of Fact Regarding Whether Mr. Geragos Acted As Kesha's Agent With Regard To His 13 Allegedly Defamatory Statements.

Dr. Luke asserts that under the actual-authority, apparent-agency, and ratification doctrines, he is entitled to judgment that Mr. Geragos acted as Kesha's agent when he made certain public statements. Br. 19. Dr. Luke's everything-but-the-kitchen-sink agency arguments misstate New York law, fail to identify *any* supporting facts for critical assertions, and ignore contrary record evidence. Dr. Luke has thus fallen far short of proving agency as a matter of

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[140] *See* Godesky Opp. Aff., Ex. 63 at 8; *see* Lepera Aff., Ex. 26 at 84.
[141] *See* Godesky Opp. Aff., Ex. 64 at 30, 35.
[142] *See id.*, Ex. 73.
[143] *See* Lepera Aff., Ex. 58; *compare id.*, Ex. 1 *with* Godesky Opp. Aff., Ex. 60.
[144] *See* Godesky Opp. Aff. ¶ 1 and Ex. 1.

law. *See Ellis v. Republic Ins. Co.*, 118 A.D.2d 411, 411 (1st Dep't 1986) (reversing summary-judgment grant due to "issues of fact" as to "defendant agency's relationship with the insurer").

1. Actual Authority

Under New York law, actual authority "results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control." *Heredia v. United States*, 887 F. Supp. 77, 80 (S.D.N.Y. 1995); *accord Pensee Assocs., Ltd. v. Quon Indus., Ltd.*, 241 A.D.2d 354, 359 (1st Dep't 1997). "The basic tenet of a principal-agent relationship is that the principal retains control over the conduct of the agent with respect to matters entrusted to the agent, and the agent acts in accordance with the direction and control of the principal." *Race v. Goldstar Jewelry, LLC*, 84 A.D.3d 1342, 1342-43 (2d Dep't 2011).

Accordingly, it is black-letter law that "[a] principal is only liable for the conduct of an agent acting within the scope of one's authority." *McGarry v. Miller*, 158 A.D.2d 327, 328 (1st Dep't 1990). "[T]he extent of the agent's actual authority is interpreted in the light of all the circumstances," including the "formal agreement between the parties, and the facts of which both parties are aware." *New York Cmty. Bank v. Woodhaven Assocs., LLC*, 137 A.D.3d 1231, 1233 (2d Dep't 2016). "[A]n agent constituted for a particular purpose, and under a limited and circumscribed power, cannot bind his principal by an act beyond his authority." *Bank of New York v. Alderazi*, 900 N.Y.S.2d 821, 823 (N.Y. Sup. Ct. 2010); *see also Meisel v. Grunberg*, 651 F. Supp. 2d 98, 111-13 (S.D.N.Y. 2009) (sufficient evidence to infer agency relationship as to certain duties but not others). That limitation "applies to the attorney-client relationship as to third parties injured by an attorney's torts." *Carolco Pictures Inc. v. Sirota*, 700 F. Supp. 169, 172 (S.D.N.Y. 1988); *accord Poucher v. Blanchard*, 86 N.Y. 256, 256 (1881).

The crux of Dr. Luke's actual-authority argument is that Kesha is liable for Mr. Geragos's "public statements" because she agreed to Mr. Geragos acting on her behalf. Br. 20.

But Dr. Luke ignores the well-settled limitation on a principal's liability, described above: A principal is *not* liable for the acts of her agent outside the scope of his authority. *See McGarry*, 158 A.D.2d at 328. Here, the "formal agreement between the parties," *New York Cmty. Bank*, 137 A.D.3d at 1233, makes clear that Mr. Geragos's "public statements" fell outside the scope of the Kesha-Geragos agency relationship. Mr. Geragos specifically agreed that he would "not engage in any publicity regarding the matter or any lawsuit resulting therefrom … *without [Kesha's] prior approval*."[145] Despite extensive document and deposition discovery of both Kesha and Mr. Geragos, Dr. Luke offers no evidence that Kesha had advance knowledge of—let alone approved, directed, or authorized—*any* of the 13 statements before they were made. *See* Br. 20. To the contrary, Kesha has stated that she pre-approved *none* of the statements at issue.[146] And Mr. Geragos specifically disclaimed Kesha involvement in certain statements for which Dr. Luke seeks to now hold her liable.[147] Dr. Luke likewise fails to identify any evidence that Kesha was aware of the statements when or after they were made. *See* Br. 20.

To escape a careful examination of the scope of the Kesha-Geragos agency relationship, Dr. Luke urges that an agent's conduct need be only "generally foreseeable" to impute liability to the principal. Br. 19-20. Dr. Luke comes nowhere close to establishing that Mr. Geragos's press statements were foreseeable to Kesha as a matter of law. Indeed, just the opposite is true: Because Kesha required him to sign a retainer agreement that plainly and unequivocally required Kesha's advance approval of all "public statements" by Mr. Geragos, a reasonable jury could readily conclude that Geragos's unauthorized statements—which violated the terms of the operative retainer agreement—were not foreseeable to Kesha. In any event, "foreseeability" is

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[145] Lepera Aff., Ex. 7 at 5.
[146] *See* November 20, 2018 Kesha Sebert Aff. ¶ 8.
[147] *See, e.g.*, Godesky Opp. Aff., Ex. 7 at 269 ("I made this statement on behalf of me. It says Mark Geragos. It doesn't say Mark Geragos on behalf of Kesha.").

irrelevant. New York law is straightforward: A principal's liability turns on the scope of the agent's authority, not "foreseeability." *See* 19, *supra*. Dr. Luke's two authorities[148] change nothing, because neither (i) invokes the "general forseeab[ility]" standard on which Dr. Luke relies; or (ii) involves a contract that—like the Kesha-Geragos retainer agreement—specifically foreclosed the possibility of unauthorized agent activity.[149]

2. *Ratification*

Dr. Luke thus pivots to a ratification theory, arguing that even if Mr. Geragos did not possess actual authority for his public statements, Kesha or Vector ratified them. Br. 22. Not so.

a. Kesha Did Not Ratify Mr. Geragos's Statements.

Under New York law, "[b]efore a principal can be held to have ratified the unauthorized act of the assumed agent," "he must have full knowledge of the facts, so that it can be said that he intended to ratify the act." *Prichard v. Sigafus*, 103 A.D. 535, 539 (1st Dep't 1905); *accord Cologne Life Reinsurance Co. v. Zurich Reinsurance (N. Am.), Inc.*, 286 A.D.2d 118, 128 (1st

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[148] *See Murray v. Watervliet City Sch. Dist.*, 130 A.D.2d 830, 832 (3d Dep't 1987) (addressing foreseeability standard only in context of distinguishable respondeat-superior liability); *Maurillo v. Park Slope U-Haul*, 194 A.D.2d 142, 146-47 (2d Dep't 1993) (mistakenly cited by Dr. Luke as First Department authority) (stating unremarkable proposition that agency "results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control").

[149] Dr. Luke's apparent-authority argument, *see* Br. 20 n.11, is equally meritless. "The mere creation of an agent for *some* purpose does not automatically invest the agent with 'apparent authority' to bind the principal without limitation"; "[a]n agent's power to bind his principal is coextensive with the principal's grant of authority." *Ford v. Unity Hosp.*, 32 N.Y.2d 464, 472 (1973). "[T]he existence of 'apparent authority' depends upon a factual showing that the third party relied upon the misrepresentations of the agent because of some misleading conduct on the part of the *principal*—not the agent." *Id.* at 473; *Standard Funding Corp. v. Lewitt*, 89 N.Y.2d 546, 551 (1997) (apparent authority demands "*words or conduct of the principal*, communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction"). Here, Dr. Luke offers not a shred of evidence suggesting that Kesha misleadingly communicated to any third party that she authorized Geragos's public statements. *See* Br. 20 n.11. He also cites no authority for the notion that an attorney-client relationship establishes carte-blanche "apparent authority" regarding the attorney's public statements—particularly when those statements contravene the express terms of a retainer agreement.

Dep't 2001) (ratification "requires knowledge of material facts"). If a principal's "knowledge is partial or imperfect, he will not be held to have ratified the unauthorized act"; "proof of adequate knowledge of the facts should be reasonably clear and certain." *Prichard*, 103 A.D. at 539.

Although Dr. Luke acknowledges that a principal's "knowledge of the facts" is critical to any ratification argument (Br. 22), he fails to offer *any* evidence establishing Kesha's knowledge of Mr. Geragos's 13 allegedly defamatory statements. *See Prichard*, 103 A.D. at 539 (requiring "reasonably clear and certain" evidence of principal's knowledge). Dr. Luke's conclusory claim that it would be "entirely incredulous" for Kesha not to have ratified the statements (Br. 22) is nowhere near adequate to warrant judgment as a matter of law.[150] Indeed, Dr. Luke cites *no record facts* in support of his hyperbolic assertion. *See id.* Kesha's evidence, on the other hand, establishes that she lacked the requisite knowledge. *See supra* 14–15. In fact, she had retreated from the press, and did not know Geragos's statements would be made. *See supra* 15.

Even setting aside Dr. Luke's failure to establish that Kesha had the requisite knowledge to ratify Mr. Geragos's statements, ratification also requires a principal's "clearly established" "assent" to the agent's conduct. *Holm v. C.M.P. Sheet Metal, Inc.*, 89 A.D.2d 229, 233 (4th Dep't 1982) (ratification "may not be inferred from doubtful or equivocal acts or language."); 21 N.Y. Jur. *Ratification* §§ 86, 87; Restatement (Second) of Agency §§ 91, 93. Dr. Luke identifies no evidence reflecting Kesha's assent to Mr. Geragos's statements, let alone her doing so unequivocally. *See* Br. 22. Instead, Dr. Luke suggests that Kesha's purported failure to repudiate Mr. Geragos's statements suffices to establish her liability. *See* Br. 22. His theory of liability, however, finds no support in New York law. Ratification can *only* be "implied from

[150] To the extent that Dr. Luke is arguing that Kesha cannot contest Mr. Geragos's agency with regard to his unauthorized public statements because she conceded Mr. Geragos properly acted as her attorney agent in other contexts (*see* Br. 18-19, 22), Dr. Luke misses the point. An agent is not an agent for *all purposes* simply because he is an agent for *one purpose*. *See supra* 19.

knowledge of the principal coupled with a failure to repudiate," if the opposing party "has in some way relied upon the principal's silence or where the effect of the contract depends upon future events." *In re Nigeria Charter Flights Contract Litig.*, 520 F. Supp. 2d 447, 466 (E.D.N.Y. 2007) (quoting *Monarch Ins. Co. of Ohio v. Ins. Corp. of Ir.*, 835 F.2d 32, 36 (2d Cir. 1987)); *McGarry*, 158 A.D.2d at 327 (implied ratification only where "party reasonably relied on such misrepresentations because of some misleading conduct on the part of the principal"). Dr. Luke cites no facts demonstrating that he—or anyone else—relied on Kesha's alleged silence, or attributed any meaning to it whatsoever. *See* Br. 22.

b. Vector Did Not Ratify Mr. Geragos's Statements On Kesha's Behalf.

Dr. Luke next argues that Vector endorsed Mr. Geragos's allegedly defamatory statements. *See* Br. 22. That argument is a non-starter. First off, Dr. Luke fails to offer *any* evidence establishing that *anyone* at Vector had specific advance knowledge of the thirteen Geragos statements for which Dr. Luke seeks to hold Kesha liable, other than the press statement that Mr. Geragos issued the day Kesha filed her California complaint. *See* Br. 21; Appx. B.

More fundamentally, Vector was charged with managing Kesha's career as an artist—nothing more.[151] Vector's engagement agreement with Kesha expressly *denounces* any agency relationship, stating their "relationship is that of *independent contractor and contractee* and neither party are the employees of the other."[152] The agreement likewise states that Vector is not "responsible for any … act or omission on the part of any third-party person, firm or corporation with whom any engagement or other contract is negotiated, arranged or secured."[153]

As a general rule, "a principal is not liable for the acts of independent contractors."

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[151] *See* Lepera Aff., Ex. 21 at VECTOR000120 ¶ 1 (Vector was Kesha's "personal manager … in connection with [Kesha]'s career in the entertainment industry").
[152] *Id.*, Ex. 21 at VECTOR000124 ¶ 7.
[153] *Id.*, Ex. 21 at VECTOR000125 ¶ 11(b).

Melbourne v. New York Life Ins. Co., 271 A.D.2d 296, 297 (1st Dep't 2000). That principle applies with full force here, where Vector's contract explicitly rejects responsibility for the acts of any other third party in Kesha's orbit. The authority to ratify statements made by Mr. Geragos, an attorney with whom Kesha had an independent engagement agreement, falls far outside the scope of Vector's relationship with Kesha. Even if Vector *were* Kesha's agent for that purpose, Dr. Luke cites no authority holding a principal liable for her agent's ratification of *another agent's* statements, in the absence of a sub-agency relationship—i.e., where, as here, two agents possess independent relationships vis-à-vis the principal, operating in different spheres on the principal's behalf. Kesha thus cannot be held liable for Mr. Geragos's statements—or the statements of any other third party[154]—on a Vector-based theory of ratification. *See Travalja v. Maieliano Tours*, 213 A.D.2d 155, 155 (1st Dep't 1995) (no agency relationship where agreement defined company as independent contractor).

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[154] Dr. Luke also apparently seeks summary judgment as to Sunshine Sachs's status as Kesha's agent. Br. 18-22. Although Dr. Luke's brief refers loosely to Sunshine Sachs's "press activities," Br. 21, the TAC does not clearly attribute *any* of the allegedly defamatory statements to Sunshine Sachs, other than the SS Strategy Memorandum and Kesha's Complaint, *see* Lepera Aff., Ex. 1 ¶ 6, and it is undisputed that the SS Strategy Memorandum was never publicly disseminated. Nevertheless, to the extent Dr. Luke is alleging defamation based on Sunshine Sachs statements, he has failed to establish that Sunshine Sachs was Kesha's agent. *First*, Dr. Luke's assertion that Kesha previously conceded agency when she claimed privilege over Sunshine Sachs-related communications (*see* Br. 18) is a blatant misrepresentation of the record. Kesha argued that Sunshine Sachs was *Mr. Geragos's* agent, *not hers*. *See* Dkt. 1094 (arguing privilege extends to communications involving agents of client *or attorney*). *Second*, "[t]he relation of principal and agent does not exist between the principal and a subagent" whose appointment by the agent was unauthorized. *O.A. Skutt, Inc., v. J. & H. Goodwin*, 251 A.D. 84, 84 (4th Dep't 1937); *People v. Betillo*, 279 N.Y.S.2d 444, 452 (N.Y. Sup. Ct. 1967). A reasonable trier of fact could find that Mr. Geragos's use of Sunshine Sachs in connection with public statements that Kesha did not expressly approve was indeed unauthorized by Kesha. The record evidence that Dr. Luke cites reflecting Kesha's participation in a Sunshine Sachs training on press-response tactics (*see* Br. 21) has nothing to do with Kesha's knowledge of Mr. Geragos's use of Sunshine Sachs for other purposes. The same facts likewise preclude a finding that Kesha cloaked Sunshine Sachs with apparent authority or ratified any of its statements.

B. Kesha Is Entitled To Judgment As A Matter Of Law That Pebe Sebert Did Not Act As Her Agent In Sending The December 2013 E-mail.

Under New York law, a defendant is liable for a third party's defamatory statements only if she authorized those statements. *See Art. Fin. Partners, LLC v. Christie's, Inc.*, 58 A.D.3d 469, 471 (1st Dep't 2009) (principal-agent relationship only if "consent of one person to allow another to act on his or her behalf and subject to [] her control"); *Geraci v. Probst*, 15 N.Y.3d 336, 342 (2010) (no liability for defamation "without [] authority or request, by others over whom [defendant] has no control"). Only rarely can an "agency relationship" be premised on "interfamilial activity." *Struebel v. Fladd*, 75 A.D.3d 1164, 1165-66 (4th Dep't 2010).

The undisputed facts establish that Kesha neither authorized nor directed the December 2013 E-mail in which her mother—then struggling with alcoholism—protested the injustice of Kesha having to work directly and indefinitely with her rapist and abuser. *See supra* 12. In fact, it is undisputed that Kesha did not even know about the December 2013 E-mail before it was sent. *See supra* 12. Dr. Luke's argument to the contrary, *see* Br. 23, rests on a lone statement by Raquel Bellamy, a junior attorney associated with Bone McAllester Norton PLLC.[155] During Mr. Meiselas's April 2017 deposition, Ms. Bellamy erroneously stated that Pebe acted as Kesha's agent in sending the e-mail.[156] Ms. Bellamy's error does not alter the analysis: attorney statements can be held against a client only where the statements are made with the client's "consent," *In re Doe*, 38 N.Y.S.3d 874, 877 (N.Y. Co. Ct. 2016), and the attorney is "acting in his capacity," *Tai Wing Hong Imps., Inc. v. King Realty Corp.*, 208 A.D.2d 710, 711 (2d Dep't 1994); *accord DiCamillo v. City of New York*, 245 A.D.2d 332, 333 (2d Dep't 1997). And courts often consider whether the client was "the source of the information contained" in the statement in question. *Miller v. Lewis*, 2013 WL 1735131, at *4 (N.Y. Sup. Ct. 2013); *accord People v.*

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[155] *See* November 19, 2018 Bellamy Aff. ¶ 5.
[156] *See id.* ¶ 7.

L.D., N.Y.S.3d 863, 865-66 (N.Y. Sup. Ct. 2018).

Ms. Bellamy makes clear that neither Kesha nor Pebe directed, authorized, or approved her statement[157]; indeed, she did not discuss the assertion with either before the deposition.[158] In other words, Ms. Bellamy's mistaken on-the-fly statement was made without Kesha's consent, and by an attorney never authorized to characterize that relationship. And Kesha did not provide Ms. Bellamy with the content of the disputed statement; rather, Kesha has consistently maintained that Pebe was *not* acting as her agent with respect to any of Pebe's allegedly defamatory statements.[159] Ms. Bellamy's incorrect statement thus cannot be held against Kesha.[160] At the very least, the question of Kesha's liability for Pebe's e-mail must go to a jury.

II. DR. LUKE IS NOT ENTITLED TO PARTIAL SUMMARY JUDGMENT REGARDING KESHA'S TEXT MESSAGE TO LADY GAGA (COUNT II).

A. Dr. Luke Has Not Proved The Alleged Statement's Falsity.

Dr. Luke has failed to establish that no triable issue of fact exists with respect to the alleged statement's falsity. Indeed, Lady Gaga and Kesha testified that Interscope Records CEO John Janick reported to them that Dr. Luke raped Katy Perry.[161] Dr. Luke's reference to his and

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[157] *See id.* ¶ 8; November 20, 2018 Kesha Sebert Aff. ¶ 5.
[158] *See id.* ¶ 8; November 20, 2018 Kesha Sebert Aff. ¶ 5.
[159] Dr. Luke perplexingly asserts that Kesha "ratified Pebe's agency" by confirming Pebe's role as Defendant's agent in transmitting this document. Br. 23. Dr. Luke offers no factual support whatsoever for this naked—and plain wrong—assertion.
[160] Dr. Luke suggests that Kesha should be "estopped" from denying that Pebe was her agent, because Ms. Bellamy's incorrect statement precluded him from asking Mr. Meiselas about his conversations with Pebe regarding the December 2013 E-mail. Br. 23. But Ms. Bellamy's incorrect statement caused no prejudice to Dr. Luke. Had Mr. Meiselas responded to the unanswered deposition question—i.e., "[h]ow did you get Pebe to quiet down for several weeks?," *see* Godesky Opp. Aff., Ex. 4 at 82—he would have testified that he never met or spoke to Pebe before December 30, 2013. *See* November 20, 2018 Meiselas Aff. ¶ 3. Thus, notwithstanding Ms. Bellamy's erroneous assertion*, no such communications existed*. Mr. Meiselas could therefore not have provided *any* information about communications with Pebe. Rather, any answer would have been privileged due to his attorney-client relationship with *Kesha*, *see* Godesky Opp. Aff., Ex. 4 at 82 (starting to answer "I told Kesha --")—as Ms. Bellamy properly noted. *See id.*
[161] *See* Lepera Aff., Ex. 43 at 576-77; Godesky Opp. Aff., Ex. 2 at 36-37.

Katy Perry's testimony that the statement was false, *see* Br. 17-18, changes nothing; Kesha cannot concede a fact for which she lacks personal knowledge. *Cf. Vasquez v. Vengroff*, 295 A.D.2d 421, 422 (2d Dep't 2002) ("A notice to admit may not seek information which would not reasonably be expected to be within the personal knowledge of the party served."). Kesha only knows what Mr. Janick *told* her; she cannot state definitively what *happened* between Dr. Luke and Katy Perry—that remains a triable issue of fact. Indeed, for obvious reasons, an alleged rapist's denial is hardly proof that the rape did not occur. And victims often deny sexual abuse, particularly when the perpetrator and victim share a personal or professional relationship; that is precisely why domestic-violence prosecutions often proceed in the face of a denial of abuse.[162]

B. Dr. Luke's Element-Based Summary-Judgment Request Is Improper.

New York courts routinely deny element-based summary judgment motions that fail to resolve separable issues or to significantly advance the litigation. In *Odrich v. Trustees of Columbia Univ. in City of N.Y.*, 2005 WL 3077144, at *5 (N.Y. Sup. Ct. Feb. 14, 2005), for example, the plaintiffs sought partial summary judgment that a prior finding of illegal conduct by the defendant satisfied the "wrongful means" element of a tortious-interference claim. The court agreed, but "nevertheless denied" the motion because "the determination sought … would neither adequately resolve an issue which is properly separable from the larger question presented by the claim … nor be useful in significantly advancing this litigation." *Id.* at *6.

Dr. Luke claims he is entitled to partial summary judgment as to the first, second, third, and sixth elements of his Count II claim that Kesha's February 26, 2016 text to Lady Gaga is defamatory. *See* Br. 16-18. Dr. Luke is thus seeking partial summary judgment on *some*, but not all, elements of defamation for *one statement* (out of 43 statements, *see* Appx. A) in this case.

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[162] *See* Godesky Opp. Aff., Ex. 10 at 18-19 (sexual-assault expert Dawn Hughes identifying "numerous matters where victims of interpersonal violence have later denied abuse").

As Dr. Luke concedes, however, he would still need to prove that the statement was published without privilege and with fault, *see* Br. 16, and identify any lost profits (Kesha will demonstrate at trial, however, that the only reason her private message went public was *Dr. Luke's* decision to reference it in a public litigation filing, *see supra* 16). Dr. Luke's motion thus seeks to resolve zero causes of action and zero statements at issue in this litigation, and should be rejected.

III. DR. LUKE HAS NOT ESTABLISHED THAT HE IS ENTITLED TO JUDGMENT ON KESHA'S COUNTERCLAIM FOR DECLARATORY-JUDGMENT RELIEF.

A. Kesha's Election Of Remedies Argument Is Meritorious.

Kesha's First Amended Counterclaim seeks termination of the KMI Contract based on Dr. Luke's "election to sue [Kesha] for damages" while "fail[ing] to perform."[163] Contrary to Dr. Luke's assertion that this claim is "meritless," Br. 24, there are triable issues of fact as to whether Dr. Luke contravened the election-of-remedies doctrine by (i) choosing to continue the KMI Contract and sue to reap its benefits, while (ii) breaching his own obligations under the contract. *See Ryan v. Volpone Stamp Co., Inc.*, 107 F. Supp. 2d 369, 397-98 (S.D.N.Y. 2000).

It is "well settled" under New York's election-of-remedies doctrine that when a party breaches, the adverse party must make an election: "treat the entire contract as broken and sue immediately for the breach or reject the proposed breach and continue to treat the contract as valid." *Inter-Power of N.Y. Inc. v. Niagara Mohawk Power Corp*., 259 A.D.2d 932, 934 (3d Dep't 1999); *accord Rebecca Broadway Ltd. P'ship v. Hotton*, 143 A.D.3d 71, 80-81 (1st Dep't 2016) (party must choose "between declaring a breach and terminating the contract or, alternatively, ignoring the breach and continuing to perform under the contract."). The adverse party cannot "at the same time treat the contract as broken and as subsisting"; "[o]ne course of action excludes the other." *Inter-Power*, 259 A.d.2d at 934. Importantly, where an adverse party

[163] Godesky Opp. Aff., Ex. 33 ¶ 72.

chooses to affirm and continue a contract, it "remain[s] obligated to perform." *Computer Possibilities Unlimited v. Mobil Oil Corp.*, 301 A.D.2d 70, 80 (1st Dep't 2002). "What the non-breaching party *cannot* do is avoid its obligations under the contract and yet continue to reap the benefits." *Ryan*, 107 F. Supp. 2d at 397-98.

Here, Dr. Luke is choosing to continue rather than terminate the KMI Contract, suing Kesha for allegedly breaching the agreement by failing to pay certain ancillary royalties or to use him as a *Rainbow* producer.[164] Yet at the same time, since at least 2011, *Dr. Luke* has breached the KMI Contract's covenant of good faith and fair dealing, which New York law "implie[s] in[to] every contract," *Ellison v. Island Def Jam Music Grp.*, 79 A.D.3d 458, 458 (1st Dep't 2010), by: (i) refusing to renegotiate to reflect Kesha's commercial success (as he promised to induce her to sign, and as is standard practice in the music industry), *see supra* 7–8; and (ii) verbally and emotionally abusing Kesha (as he now essentially concedes through his eleventh-hour withdrawal of his abuse-based defamation claims), *see supra* 8–10. Under controlling precedent, Dr. Luke's conduct terminated his contractual relationship with Kesha vis-à-vis the KMI Contract. *See Rebecca Broadway*, 143 A.D.3d at 81 ("[A] party has no right to represent himself as continuing to perform under the contract … while at the same time surreptitiously breaching his own duty by flouting his own implied duty of good faith and fair dealing.").

Dr. Luke will undoubtedly respond that he did not breach the implied covenant. That, however, amounts to a factual dispute—which is precisely why Dr. Luke's request for summary judgment on Kesha's election-of-remedies argument must be rejected. *See AG Prop. of Kingston, LLC v. Besicorp-Empire Dev. Co.*, 14 A.D.3d 971, 973-75 (3d Dep't 2005) (no summary judgment if questions of fact exist as to election of remedies); *Marathon Enters., Inc.*

[164] *See* Lepera Aff., Ex. 1 ¶¶ 47-49.

v. Schroter GMBH & Co., 2003 WL 355238, at *6 (S.D.N.Y. Feb. 18, 2003) (same).[165]

B. There Is A Triable Issue Of Fact Regarding Whether Kesha Is Substituted For KMI Under The Sony Agreement.

Dr. Luke offers two arguments for why Kesha should not be substituted for KMI under the Sony Agreement pursuant to the terms of her Assent. Both lack merit. *First*, Dr. Luke argues that Kesha's claim is moot because Kesha has "continued performing under the KMI Agreement." Br. 25. That, however, is completely irrelevant, as to both the actor and the agreement. What matters under the Assent is whether *KMI* is performing under the *Sony Agreement*.[166] As discussed above, *see supra* 29, there are triable issues of fact regarding whether KMI has "cease[d] to be entitled to [Kesha's] services," given Dr. Luke's implied-covenant breach. There are also triable issues of fact as to whether KMI "*for any reason* fail[ed] … to furnish to [Sony] [Kesha's] services … in accordance with the terms of the Agreement":

- The Sony Agreement states that KMI "will cause [Kesha] to render Performances exclusively for us … to the best of the Artist's ability, … which [KMI] will cause to be produced."[167] It is apparent that KMI did not "cause" *Rainbow* to be produced when, at the 2016 preliminary-injunction hearing, Dr. Luke instead specifically agreed to allow Kesha to record her album *without* his involvement. *See supra* 17. Likewise, KMI did not "cause" Kesha to render performances to the "best of her ability" when she was forced to record under a contract with a company owned and run by her abuser. *See id.*

- Under the Sony Agreement, KMI must "cause [Kesha] to render [her] services … on a 'first priority' basis."[168] Dr. Luke concedes that Kesha did not render her services to KMI on a

[165] Dr. Luke relies on the prior dismissal of Kesha's *Eighth* Amended Counterclaim to assert that this Court should dismiss Kesha's *First* Amended Counterclaim, arguing that both are "premised on [the] same baseless 'election of remedies' theory." Br. 24. False. While the former was based on Dr. Luke's "fail[ure] to sue for specific performance," the latter *also* seeks termination of the KMI Contract based on Dr. Luke's "election to sue [Kesha] for damages" while simultaneously "fail[ing] to perform under the contract." The prior ruling thus does not resolve the election-of-remedies argument raised by the First Amended Counterclaim.

[166] Lepera Aff., Ex. 38 at VECTOR0000115 § 3 (Assent's substitution provision triggered when (i) *KMI* "for any reason ceases to be entitled to the Artist's services or the results of the Artist's services as the Artist in accordance with the terms of the Agreement"; or (ii) *KMI* "for any reason fails or refuses to furnish to [Sony] the Artist's services or the results of the Artist's services as the Artist in accordance with the terms of the Agreement").

[167] *Id.*, Ex. 38 at VECTOR0000052 § 1.01.

[168] *Id.*, Ex. 38 at VECTOR0000052 § 1.01.

"first priority" basis: in fact, Dr. Luke complains that "[c]ommencing in 2013, Defendant also refused to provide services under … the KMI Agreement … Defendant did not resume providing recording services under the KMI Agreement until 2016." Br. 8; *id.* at 8 n. 6.

- It is undisputed that KMI did not meet the delivery requirements set forth in the Sony Agreement,[169] because Kesha did not deliver *Rainbow* until after the Court instructed Sony and KMI to allow her to record music without Dr. Luke.

Dr. Luke relies on the general rule that a party cannot insist upon a condition precedent, when that party caused its non-performance. *See* Br. 26 n. 13. But whether KMI's failure to perform under the Sony Agreement was caused by Kesha or instead by *Dr. Luke's* unreasonable refusal to renegotiate and pattern of abuse is a question for the fact finder. *See, e.g.*, *Envtl. Tech. Grp., Inc. v. Gannett Fleming Project Dev. Corp.,* 94 A.D.3d 943, 945 (2d Dep't 2012) (triable issues of fact as to whether defendant's actions caused non-performance of condition precedent.).

Second, Dr. Luke claims that under the Assent, only *Kemosabe Records* can request that Kesha be substituted for KMI. *See* Br. 25. But the final sentence of the substitution provision—stating that "[s]uch rights, privileges, and benefits will be enforceable in [Kemosabe Records's] behalf against [Kesha]"[170]—self-evidently relates back to the immediately preceding statement that if Kesha is substituted for KMI, Kemosabe Records shall have "the same rights, privileges, and benefits it would have received under the Agreement," had KMI continued to perform.[171] The final sentence does nothing to modify the first clause of the substitution clause's plain directive that Kesha "will be deemed substituted for [KMI]" as a direct consequence of KMI's performance failure.[172] Thus, the Assent's plain language requires no action by Kemosabe Records to trigger the substitution event itself. At a minimum, to the extent there is any ambiguity—which there is not—it must be resolved by the trier of fact. *See NFL Enters. LLC v.*

[169] *Id.*, Ex. 38 at VECTOR0000053 § 3.01.
[170] *Id.*, Ex. 38 at VECTOR0000115 § 3.
[171] *Id.*, Ex. 38 at VECTOR0000115 § 3.
[172] *Id.* at VECTOR0000115 § 3.

Comcast Cable Commc'ns, LLC, 51 A.D.3d 52, 61 (1st Dep't 2008).

IV. DR. LUKE IS NOT ENTITLED TO A PREJUDGMENT-INTEREST AWARD.

Dr. Luke's prejudgment-interest demand fails at the most elementary level: under CPLR, 5001(a), a "sum awarded because of a breach of performance of a contract" is a prerequisite to prejudgment interest. Dr. Luke puts the cart before the horse, seeking interest without a ruling that Kesha breached the KMI Contract. *See J. D'Addario & Co., Inc. v. Embassy Indus., Inc.*, 20 N.Y.3d 113, 118 (2012) ("fundamental objection" to such interest where party not "found to have breached any contract"). Because the Court has not made a breach finding or awarded a sum against Kesha,[173] there is "no predicate for an award of interest." *Mfr.'s & Traders Trust Co. v. Reliance Ins. Co.*, 8 N.Y.3d 583, 589 (2007); *WP 760 Mkt. St., LLC v. Thor 760M LLC*, 82 A.D.3d 483, 484 (1st Dep't 2011) (denying prejudgment interest where no sum awarded).[174]

There also remain triable issues of fact for the jury to resolve regarding Dr. Luke's claim that Kesha breached the KMI Contract. *First*, Kesha will show that by "their course of conduct," the parties "alter[ed] or waive[d]" the KMI Contract's requirement that certain payments be made within a set number of days. *See Ficus Invs., Inc. v. Private Capital Mgmt., LLC*, 61 A.D.3d 1, 11 (1st Dep't 2009); *see also Echevarria v. 158th Riverside Dr. Hous. Co., Inc.*, 113

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[173] Importantly, Kesha's 2017 payment of ancillary royalties to KMI is not a "sum awarded," but rather a good-faith gesture to resolve a dispute without troubling the Court. Prescription took the same approach when it paid Kesha $511,932.31—*without interest*—as a "good-faith gesture." Godesky Opp. Aff., Ex. 75 at 2. *Kagan v. HMC-N.Y., Inc.*, 100 A.D.3d 468 (1st Dep't 2012) (*see* Br. 27) changes nothing. Because the court so-ordered a stipulation where defendants agreed to pay $24.2 million, the payment was "a sum awarded" under CPLR 5001(a).

[174] Dr. Luke's requested amount (Br. 28) is wrongly inflated. Prejudgment interest "is not meant to punish defendants." *Mfr.'s & Traders*, 8 N.Y.3d at 589. Rather, its purpose "is to compensate parties for the loss of the use of money they were entitled to," based on the "time value" of money. *Kassis v. Teachers' Ins. & Annuity Ass'n*, 13 A.D.3d 165, 165 (1st Dep't 2004). Prejudgment interest may *not* be awarded if it would constitute an "unwarranted windfall." *Kassis*, 13 A.D.3d at 165-66 (prejudgment interest improper because initial damages calculation included time-updated estimates that "compensated plaintiffs"). Any interest award here must thus be calculated net of the amounts that Prescription owed Kesha during the years in question.

A.D.3d 500, 501 (1st Dep't 2014) (no summary judgment where provision "might have been modified by the parties' subsequent course of conduct"). It is undisputed that under the parties' longstanding "offsetting" agreement, KMI accepted since approximately late 2010 Kesha's ancillary-royalty payments on dates other than those provided for under the KMI Contract. *See supra* 7. KMI's "affirmative conduct [and] failure to [object] … evince[d] an intent not to claim a purported advantage"—i.e., payment on the schedule in the KMI Contract. *Gen. Motors Acceptance Corp. v. Clifton-Fine Cent. Sch. Dist.*, 85 N.Y.2d 232, 236 (1995). Kesha cannot have breached a payment schedule that was no longer enforced. *See Raul Cleaners Corp. v. Rim's Landmark Cleaners Corp.*, 210 A.D.2d 144, 144 (1st Dep't 1994) ("Given the … questions of fact regarding the alleged subsequent modification of the agreement …, summary judgment should have been denied."); *Tranel, Inc. v. Fashion Inst. of Tech.*, 2010 WL 118227,at *1 (1st Dep't Jan. 13, 2010) (per curiam) (waiver of contract rights generally fact question).[175]

Second, a contracting party cannot assert a breach claim when it has itself failed to perform. *See* Dkt. 809; *Maor v. Blu Sand Int'l, Inc.*, 143 A.D.3d 579, 579 (1st Dep't 2016). It is axiomatic that the covenant of good faith and fair dealing is "implied in every contract," *Ellison,* 79 A.D.3d at 458, and a reasonable trier of fact could conclude that Dr. Luke breached the implied covenant by (i) verbally and emotionally abusing Kesha; and (ii) refusing to renegotiate the KMI Contract. *See supra* 29.

[175] Any reliance by KMI on Paragraph 10(c)'s requirement of a signed instrument to modify the agreement and narrow-waiver statement would be insufficient to overcome the modification. "[T]he law is abundantly clear in New York that, even where a contract specifically contains a nonwaiver clause and a provision stating that it cannot be modified except by a writing, it can, nevertheless, be effectively modified by actual performance and the parties' course of conduct." *Aiello v. Bruns Int'l Sec. Servs. Corp.*, 110 A.D.3d 234, 245 (1st Dep't 2013).

V. DR. LUKE IS NOT ENTITLED TO JUDGMENT ON KESHA'S DEFAMATION-RELATED AFFIRMATIVE DEFENSES.

A. 35 Of The Alleged Statements Are Time-Barred.

The statute of limitations for defamation runs one year from "the date of publication." *Casa de Meadows Inc. (Cayman I.) v. Zaman*, 76 A.D.3d 917, 920 (1st Dep't 2010); CPLR 215(3). Yet, Dr. Luke seeks to hold Kesha liable for 35 statements made between October 10, 2014 and April 3, 2016, *see* Appx. D, that Dr. Luke identified for the first time on May 4, 2018.[176] Those statements are time-barred as a matter of law.[177]

Dr. Luke's argument rests solely on the Court's August 31, 2018 order granting leave to amend his pleading to assert the claims. *See* Br. 1. But Dr. Luke ignores that "the standard applied on a motion to amend a pleading is much less exacting than on a motion for summary judgment." *Baskin and Sears, P.C. v. Lyons*, 188 A.D.2d 307, 308 (1st Dep't 1992) (rejecting claims at summary judgment after allowing them at pleading stage). A court may find that a newly added claim relates back under the "patently devoid of merit" amendment standard, *MBIA Ins. Corp. v. Greystone & Co., Inc.,* 74 A.D.3d 499, 499 1st Dep't 2010), but then reach a contrary conclusion under the more stringent summary-judgment standard. For example, in *Jolly v. Russell*, the court initially granted leave to amend despite the defendants' argument that the newly pleaded claim was time-barred, then dismissed the same claim at the summary-judgment stage. 203 A.D.2d 527, 528 (2d Dep't 1994) ("original complaint failed to give proper notice of the transactions or occurrences which formed the basis of the [new] cause of action").

Under the more rigorous summary-judgment standard, Kesha is entitled to judgment that 35 of the allegedly defamatory statements in the TAC do not relate back to Dr. Luke's prior pleadings. *See Spaulding v. Mt. Vernon Hosp*., 283 A.D.2d 634, 635 (2d Dep't 2001) (affirming

[176] *See* Godesky Opp. Aff., Ex. 56 at 5-15.
[177] *See* Lepera Aff., Ex. 60; Godesky Opp. Aff., Ex. 79.

summary judgment on statute-of-limitations grounds where no relation back). As Kesha previously detailed in her summary-judgment motion, all allegedly defamatory statements must be pleaded with particularity under black-letter New York law.[178] *See Gardner v. Alexander Rent-A-Car, Inc.*, 28 A.D.2d 667, 667 (1st Dep't 1967) (complaint "required to state *in haec verba* the particular defamatory words"); *Dillon v. City of N.Y.*, 261 A.D.2d 34, 40 (1st Dep't 1999) (complaint must identify "time, place, and manner of the communication"). The same stringent standards govern whether a new statement relates back to a prior pleading; failure to timely identify the particular defamatory words, speaker, medium, date, or audience deprives the defendant of the required "notice of the transactions [or] occurrences … to be proved." CPLR 203(f). Notice is inherently an issue of fact for the jury to decide.

It is undisputed that the 35 time-barred statements do not appear in Dr. Luke's prior pleadings. *See supra* 18. Despite Dr. Luke's notice of these public statements, they were: (i) quoted nowhere in the earlier pleadings; (ii) made by Mr. Geragos, Michael Eisele, and individuals at Sunshine Sachs, none whom were previously identified; (iii) made on numerous media outlets that were not previously alleged; (iv) made on 27 dates not previously identified; and (v) made to entirely new audiences, including Kesha's Instagram followers and the Court. And Dr. Luke's earlier pleadings *affirmatively represented* that he would *not* be seeking to hold Kesha liable for post-October 14, 2014 statements. *See supra* 18. Kesha cannot be on notice of claims that were required to be specifically pleaded, but Dr. Luke deliberately omitted for strategic-litigation reasons relating to litigation privilege. Relation back is therefore improper.

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[178] Dr. Luke further contends that the Court should grant him judgment as a matter of law on Kesha's Twenty-Seventh Affirmative Defense, which alleges that Dr. Luke failed to plead his claims with particularity. *See* Br. 31. To the contrary, as explained in Kesha's summary-judgment motion, Kesha is entitled to judgment as a matter of law that Dr. Luke failed to plead with the requisite particularity the TAC's time-barred statements.

B. 18 Of The Alleged Statements Are Protected Opinion And Hyperbole.[179]

Dr. Luke argues that Kesha's Twenty-First (protected opinion statements) and Thirty-Sixth (protected hyperbole) Affirmative Defenses fail because, according to Dr. Luke, accusations of criminal conduct are never protected. *See* Br. 29-31. That is incorrect. The seminal case cited by Dr. Luke, *Gross v. New York Times Co.*, 82 N.Y.2d 146 (1993), states unequivocally that "there is simply *no special rule of law* making criminal slurs actionable regardless of whether they are asserted as opinion or fact"; "*[i]n all cases*, whether the challenged remark concerns *criminality* or some other defamatory category, the courts are obliged to consider the communication as a whole, as well as its immediate and broader social contexts." *Id.* at 155. *Gross* further makes clear that the holding in *Silsdorf v. Levine*, 59 N.Y.2d 8 (1983)—on which Dr. Luke relies for his purported criminal conduct carve-out (Br. 29-30)—stands for no such rule. *See Gross*, 82 N.Y.2d at 155 (accusations of "blackmail," "fraud," "bribery" and "corruption" could, in certain contexts, be nonactionable); *see also Sandals Resorts Int'l Ltd. v. Google, Inc.*, 86 A.D.3d 32, 41-42 (1st Dep't 2011) ("apparent statements of fact … may assume the character of statements of opinion," depending on "the writing as a whole, as well as the over-all context of the publication.").[180] As Kesha showed in *her* summary-judgment papers, she is entitled to judgment as a matter of law that she is not liable for these 18 statements.

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[179] See Appx. C.

[180] *Hoffman v. Landers*, 146 A.D.2d 744 (2d Dep't 1989) (cited by Dr. Luke at Br. 30) was decided before *Gross*'s clarification. And Dr. Luke's other two authorities (*see* Br. 30) do not support any carve out for accusations of criminal conduct. *See Thomas H. v. Paul B.*, 18 N.Y.3d 580, 585 (2012) (acknowledging "[e]ven when an accusation involves serious criminal conduct, differentiating between fact and opinion is not necessarily an easy endeavor"); *Rossi v. Attanasio*, 48 A.D.3d 1025, 1027 (3d Dep't 2008) (recognizing "an accusation of criminal conduct may be considered nonactionable rhetorical hyperbole … when the circumstances and general tenor of the remarks negate the impression of a factual assertion").

VI. DR. LUKE IS NOT ENTITLED TO JUDGMENT ON KESHA'S CONTRACT-RELATED AFFIRMATIVE DEFENSES.

A. Kesha's Impossibility Defense Raises Triable Issues Of Fact.

Dr. Luke's conclusory claim—supported by *no legal authority*—that the First Department's affirmance of the denial of Kesha's motion for leave to assert an impossibility *counterclaim* precludes Kesha from now asserting impossibility as a *defense* to Dr. Luke's KMI Contract breach claim, *see* Br. 34, must be rejected. The function of a court considering a motion for leave to amend "is not meant to supplant the motion … for summary judgment." *Hawkins v. Genesee Place Corp.*, 139 A.D.2d 433, 434 (1st Dep't 1988). And claims and defenses based on similar theories do not necessarily rise and fall together. *Cf. Key Bank of N. N.Y., N.A. v. Lake Placid Co.*, 103 A.D.2d 19, 28 (3d Dep't 1984) (granting "motion to dismiss a counterclaim does not … allow a court to dismiss [related affirmative] defenses"). That is particularly true here, where Kesha was denied leave to assert her KMI-Contract-based impossibility counterclaim based on Justice Kornreich's determination that her claim was "speculative, not justiciable." *See supra* 17. Since then, however, Kesha's claim has become wholly non-speculative: (i) KMI exercised its option for yet another Kesha album, *see supra* 18; and (ii) Dr. Luke has sued Kesha for failing to use him to individually produce Rainbow, *see id.* (demonstrating that even with Sony's continued involvement in Kesha's work, it is impossible for Kesha to perform as the KMI Contract requires without being sued).[181] *See Sagittarius Broad Corp. v. Evergreen Media Corp.*, 226 A.D.2d 261, 262 (1st Dep't 1996) (triable issue of fact as to foreseeability); *Silverite Constr. Co. v. Town of N. Hempstead*, 189 A.D.2d 811, 811-12 (2d Dep't 1993) (triable issues of fact regarding impossibility defense).

[181] Dr. Luke is speaking out of both sides of his mouth in contending that Kesha's continued performance renders her impossibility defense meritless (Br. 25). In the same brief, Dr. Luke complains about Kesha's "refusal to perform," Br. 26 n.13; he is also undisputedly suing Kesha for her refusal to use him as a *Rainbow* producer. *See* Lepera Aff., Ex. 1 ¶¶ 4, 48, 128.

B. Kesha's Unconscionability Defense Raises Triable Issues Of Fact.

The record evidence reflects a triable issue of fact regarding the Prescription and KMI Contracts' procedural and substantive unconscionability:

Procedural Unconscionability. Acknowledging that "a disparity in bargaining power," "lack of experience," or "deceptive ... tactics" may establish procedural unconscionability, Dr. Luke claims none were present in negotiating the Prescription and KMI Contracts. Br. 35. That is plain wrong for at least three reasons. *First*, it is undisputed that when the KMI Contract was executed in 2005, there was a serious disparity in bargaining power and experience between Dr. Luke (who by that time had produced Kelly Clarkson's smash hit "Since U Been Gone"[182]) and an aspiring-artist teenager. *See supra* 3–4. *Second*, Kesha will show that Dr. Luke promised to renegotiate the KMI Contract if Kesha were successful, *see id.* 4—an undoubtedly "deceptive" tactic. *Third*, it is undisputed that Dr. Luke pressured Kesha into signing the 2008-09 contract amendments. After Kesha tried to extricate herself from Dr. Luke after the 2005 rape, he thwarted her attempt to sign with another label and threatened to tie her up in litigation if she did not work with him. *See supra* 4. That "lack of meaningful choice" establishes procedural unconscionability. *See, e.g.*, *Gillman v. Chase Manhattan Bank*, 73 N.Y.2d 1, 10-11 (1988).

Substantive Unconscionability. The doctrine of substantive unconscionability examines "the contract's terms and analyzes whether they are unreasonably favorable to one party." *People by Schneiderman v. Northern Leasing Sys., Inc.*, 75 N.Y.S.3d 785, 797 (N.Y. Sup. Ct. 2017). There can be no dispute that the Prescription and KMI Contracts unreasonably favor Dr. Luke. Contrary to the labor law of California (where both Kesha and Dr. Luke reside), which bars enforcement of any music-industry personal-services contract like Kesha's for more than seven years, *see* California Labor Code Section 2855(a)—neither has an expiration date. Both

[182] *See* Godesky Opp. Aff., Ex. 8 at Ex. C-2.

instead bind Kesha to Dr. Luke indefinitely. *See supra* 5–7. While Kesha has no ability to terminate either contract, Dr. Luke may do so "*at any time*." *See supra* 4. And both bind Kesha *exclusively* to Dr. Luke and his companies[183] in a "territory" defined as "the universe."[184] Under these terms, Kesha is caught in a catch-22: (i) work exclusively and indefinitely with her abuser, without the possibility of terminating or renegotiating the agreements, or (ii) give up her dreams, career, and ability to earn a livelihood by not working at all—at which point Dr. Luke will undoubtedly claim Kesha is in breach of the agreements and bring another lawsuit.

Dr. Luke does not even attempt to defend the agreements' substantive terms, instead relying solely on Mr. Sloane's "admission" that they are standard for artists with no commercial success. *See* Br. at 36. But Dr. Luke ignores Mr. Sloane's further testimony that new-artist contracts are unquestionably "unfair" and "outrageous," executed with the understanding that they will be renegotiated if the artist reaches any level of success. *See supra* 8. When these agreements are signed by fledgling artists, one of two things happen: (i) the artist is not successful and the terms do not matter; or (ii) the artist is successful and the terms are renegotiated for subsequent albums.[185] Such agreements are thus simultaneously unconscionable when made *and* standard in the music industry. When their unconscionability becomes relevant (i.e., when a successful artist will be locked into making multiple albums for an extended period of time under unconscionable terms), the agreements are renegotiated. *See supra* 8. This renegotiation is so common that *Dr. Luke's own expert* has personally been involved in "50, maybe more" renegotiations,[186] and she cannot identify a single commercially successful artist other than Kesha who remains bound to her initial contracts. *See supra* 8.

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[183] *See* Lepera Aff., Ex. 66 at VECTOR0000021 §§ 1, 2; Ex. 47 at VECTOR0000014 § 9(a)(vi)(2).
[184] Lepera Aff., Ex. 66 at VECTOR0000038 § 14(q); Ex. 47 at VECTOR0000003 § 1.
[185] *See* Godesky Opp. Aff., Ex. 3 at 93-94.
[186] Lepera Aff., Ex. 46 at 192.

C. Kesha's Fraudulent Inducement Defense Raises Triable Issues Of Fact.

Dr. Luke contends that any promise made to Kesha to renegotiate the KMI Contract cannot support a fraudulent-inducement defense because, according to Dr. Luke, a promise as to a future act does not constitute a representation of fact. *See* Br. 36-37. The law is clear, however, that a promise made "with a preconceived and undisclosed intention of not performing it constitutes a misrepresentation of a material existing fact upon which an action for rescission may be predicated." *White v. Davidson*, 150 A.D.3d 610, 611 (1st Dep't 2017). "Such misrepresentations are collateral to the agreement, and can form the basis of a fraudulent inducement claim." *Id.*; *see also Graubard Mollen Dannett & Horowitz v. Moskovitz*, 86 N.Y.2d 112, 122 (1995) ("A false statement of intention is sufficient to support an action for fraud").

A reasonable fact finder could determine that Dr. Luke fraudulently induced Kesha to enter into the KMI Contract by acknowledging that the terms of the deal were poor and promising to renegotiate once Kesha was successful. *See supra* 4. His promise was indisputably "collateral to" the KMI Contract, *White*, 150 A.D.3d at 611-12, and there is ample record evidence demonstrating that Dr. Luke never intended to renegotiate. By 2011, Kesha had released a platinum album and a record-breaking single, and she was generating enormous revenue for Dr. Luke. *See supra* 7. A jury could certainly conclude based on Dr. Luke's stalwart refusal to renegotiate, *see supra* 11–12, that he never intended to in the first place.[187]

CONCLUSION

For the reasons stated herein, the Court should deny Dr. Luke's motion for partial summary judgment.

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[187] The case law cited by Dr. Luke (*see* Br. 36-37) is not to the contrary. Courts sometimes preclude fraud claims based on promises of future performance to prevent parties "from injecting a tort claim into an action that is purely contractual in nature." *United States Fid. & Guar. Co. v. Delmar Dev. Partners, LLC*, 22 A.D.3d 1017, 1019 (3d Dep't 2005). Here, however, Kesha's fraudulent-inducement argument is a defense, and she has no pending breach-of-contract claim.

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Respectfully submitted,

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Rule 17 Word Count Certification

Word Count: I certify that no word-count certification is required under 22 NYCRR § 202.70(g) Rule 17, because the Court gave Kesha a 40-page limit for her summary-judgment briefs during an October 16, 2018 telephone conference with Law Clerk Michael Rand, Esq. This brief is compliant because it is 40 pages.

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