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Tik Tok: Time to Eradicate Sexual Assault in the Music Industry Through the Implied Covenant of Good Faith and Fair Dealing

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TIK TOK: TIME TO ERADICATE SEXUAL ASSAULT IN THE MUSIC INDUSTRY THROUGH THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

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I. INTRODUCTION

In 2005, Kesha Rose Sebert (Kesha) met Lukasz Gottwald (Dr. Luke) in pursuit of a mainstream singing career.[1] At only eighteen years old, Kesha was first approached Dr. Luke, the owner of Kasz Money, Inc. (KMI). At this time, he allegedly convinced her to drop out of high school and move to Los Angeles to record an album with him and KMI.[2] Kesha signed a recording contract with Dr. Luke and KMI on September 26, 2005.[3] The contract was for one album, giving KMI the option to extend the term of the contract five separate times. Kesha granted KMI the rights to extend her contract five times, thus holding her to creating a total of six albums with KMI and Dr. Luke.[4] In 2009, in order to promote Kesha's album, KMI developed a second agreement with the record label RCA/JIVE.[5] On November 1,

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[1] *See generally* Kesha Compl., Oct. 14, 2014 (explaining that Kesha is a famous musician and Dr. Luke is her producer).

See generally Kesha Compl., Oct. 14, 2014 (explaining that Kesha is a famous musician and Dr. Luke is her producer).

[2] *See* Richard Salmon, *Recording Contracts Explained*, SOUND ON SOUND (Apr. 2007), http://www.soundonsound.com/music-business/recording-contracts-explained (noting the commonality of moving to Los Angeles to record an album).

[3] *See* Kesha Compl. ¶ 17, Oct. 14, 2014.

[4] *See* Gottwald v. Sebert, No. 653118, slip op. 1, 5 (N.Y. Sup. Ct. 2016) (agreeing to have Dr. Luke as her producer for up to six songs per album).

[5] *See* Gottwald Compl. ¶ 17, Oct. 14, 2014 (recognizing that RCA/JIVE is a sub-label of Sony Entertainment LLC).

2011, Dr. Luke and Sony created the entity Kemosabe Records and Gottwald became the CEO.[6] After November 1, 2011, Kemosabe Records, who shared ownership with Sony, became Kesha's primary record label.[7]

Kesha claims that the abuse between her and Dr. Luke began immediately after she moved to Los Angeles to record with him and KMI.[8] Over the next ten years of her career, Dr. Luke would continue to assault Kesha.[9] Kesha once described a time when Dr. Luke forced himself on her during a flight, despite her intoxicated state.[10] On October 14, 2014, Kesha initiated a lawsuit against Dr. Luke based on the multiple instances of sexual assault she experienced throughout her career.[11]

According to Kesha's complaint, Dr. Luke threatened to end her career if she told anyone about the sexual assaults.[12] Dr. Luke regularly told her that she was not good enough and she would not have been famous if it were not for him.[13] The constant mistreatment caused Kesha to seek emergency medical treatment in January of 2014.[14] It was during this treatment that she was diagnosed with post traumatic stress disorder, depression, and anxiety as a result of the Dr. Luke's alleged continuous sexual assault.[15]

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[6] *See* Gottwald v. Sebert, No. 653118, slip op. at 2 (N.Y. Sup. Ct. 2016) (stating that Gottwald and RCA/JIVE assigned their rights of copyright and production to Kemosabe).

[7] *See id.* at 7 (resulting in Kemosabe receiving one hundred percent interest in Kesha's music recordings).

[8] *See generally* Kesha Compl., Oct. 14, 2014.

[9] *See* Kesha Compl. ¶ 3, Oct. 14, 2014 (highlighting that Kesha's self-confidence was destroyed).

[10] *See id.* ¶ 22 (stating that Dr. Luke forced her to snort illegal drugs and sexually assaulted her after she vomited on herself).

[11] *See generally* Compl., Oct. 14, 2014 (filing suit at the Superior Court of California for the County of Los Angeles).

[12] *See id.* ¶ 24 (avowing that Kesha believed Dr. Luke had the resources to destroy her career).

[13] *See id.* (recognizing that Dr. Luke constantly belittled her).

[14] *See* Compl. ¶ 39 (highlighting that she was advised by her doctor to discontinue any contact with Dr. Luke).

[15] *See id.* at ¶ 40 (detailing that she also suffered from an eating disorder and

Upon her medical release, Kesha brought a civil suit against Dr. Luke and her various record labels in order to be released from her contract with him and Kemosabe Records based on sexual assault allegations.[16] Kesha's suit detailed the physical and psychological abuse she suffered while under contract with her record labels, KMI.[17] Her Complaint in California brought claims against Dr. Luke and Kemosabe Records for gender violence, civil harassment, unfair business practices, and tort claims for intentional and negligent infliction of emotional distress.[18] She sought to void the contracts with Dr. Luke and Kemosabe.[19] While she asserts that the abuse with Dr. Luke was continuous, her claims only address two specific instances of sexual assault.[20] The California decision stayed, but did not dismiss her decision.[21]

A few hours after Kesha's Complaint was filed in the Los Angeles Superior Court, Dr. Luke initiated a suit against Kesha for defamation in the Supreme Court of New York for New York County.[22] Dr. Luke's suit was for defamation and breach of Kesha's original KMI contractual agreement.[23] Kesha consequently countersued on October 16, 2015, and included claims for a "violation of New York Human Rights Laws, bias related violence, sexual harassment, gender motivated violence, intentional infliction of emotional distress, and declaratory relief

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panic attacks).

[16] *See* Charlotte Lytton, *Free Kesha: Sex Abuse and the Music Industry*, THE TELEGRAPH (Feb. 2016), http://s.telegraph.co.uk/graphics/projects/free-kesha-sex-abuse-and-the-music-industry/index.html (detailing that her suit was in California).

[17] *See id.* (noting that Kesha's health was deteriorating).

[18] *See* Gottwald v. Sebert, No. 653118, slip op. 1, 11 (N.Y. Sup. Ct. 2016).

[19] *See id.*

[20] *See id.* at 12 (describing the two instances to have taken place in 2005 and 2008).

[21] *See id.* (stating that since the contract said that all legal action was to take place in New York, the California case would need to be stayed).

[22] *See generally* Gottwald Compl., Oct. 14, 2014 (mentioning that the contract states that any legal action is to take place within the state of New York).

[23] *See generally* Gottwald Compl., Oct. 14, 2014.

that the contract be voided".[24] Kesha also requested a preliminary injunction to enjoin Dr. Luke and Kemosabe's involvement in her music career until this New York suit was dealt with.[25] On February 19, 2016 the Court denied such request.[26] After the denial was made public, Sony stated that they were "ready, willing, and able to approve of a producer for Kesha to work with other than Gottwald."[27] However, Kesha did not want to work with a company that was related to her abuser.[28]

On April 4, 2016, Judge Shirley Werner Kornreich of the New York Supreme Court for New York County reached a decision regarding all of Kesha's counterclaims to Dr. Luke's defamation case.[29] Judge Kornreich denied Kesha's Motion for Declaratory Judgment of the termination of the contractual agreement in regards to Kemosabe Entertainment, but did not reach a ruling regarding Sony.[30] Additionally, Judge Kornreich denied Kesha's claims for a violation of the New York Human Rights Laws because there was no subject matter jurisdiction.[31] The alleged civil rights violation claims for gender motivated violence were denied since there is a statute of limitations of five years for such claims.[32] Kesha's claims for intentional infliction

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[24] *See id.* at 14-26.
[25] *See* Daniel Kreps, *Kesha Denied Injunction Against Dr. Luke, Must Record with Sony*, ROLLING STONE (Feb. 19, 2016), http://www.rollingstone.com/music/news/kesha-denied-injunction-against-dr-luke-must-record-for-sony-20160219.
[26] *See id.*
[27] *See* Grant Rindner, *How Kesha's 3-year Legal Battle with Dr. Luke Shaped her New Album Rainbow,* VOX (Aug. 14, 2017), https://www.vox.com/culture/2017/8/14/16135214/kesha-new-album-lawsuit.
[28] *See id.*
[29] *See generally* Gottwald v. Sebert, No. 653118, slip op. 1 (N.Y. Sup. Ct. 2016).
[30] *See id.* at 15 (stating that since Kesha's counterclaims do not address Sony they did not address Sony in the decision for declaratory judgment).
[31] *See id.* at 18 (recognizing that Kesha had made no claim that the abuse occurred within the state of New York).
[32] *See id.* at 21 (finding that since the abuse happened in 2005, the statute of limitations on such claim expired).

of emotional distress were similarly dismissed.[33] Thus, while Kesha was allowed to record and share her music with the world, she would have to do so under the same label that employed her abuser.[34] Dr. Luke's defamation case is still pending in the New York Court and should reach a decision in 2018.[35]

Kesha's circumstances are just one example of the shocking reality of the music industry; her situation is not unique.[36] In 1976, Jackie Fox from the band Runaways was raped by her producer at just sixteen years old.[37] Similarly, in 2013, Lady Gaga shared that she had also been sexually assaulted by her producer when she was only 19 years old.[38] None of these women pressed charges against their abusers.[39] Comparably, none of these artists said anything about the abuse until after they had reached wide-spread success in the industry.[40] The recording industry is not a business that encourages or facilitates the reporting of instances of sexual assault.[41] This can be attributed to an artist's fear that her record label will drop her if she speaks up about the abuse.[42] Kesha's complaint serves as a strong example of the constant struggles that artists face in the recording industry;

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[33] *See id.* at 23 (recognizing that the one-year statute of limitation for such claims can be extended if the abuse is continuous, but Kesha's counterclaim only mentions specific instances in 2005 and 2008).
[34] *See* Rindner, *supra*, note 27 (highlighting that Kesha was still bound to the terms of her original contract with KMI from 2005).
[35] *See id.*
[36] *See* Lytton*, supra* note 9 (noting that many artists are sexually assaulted with the promise of fame).
[37] *See id.* (stressing that it took Fox forty years to publicly speak about the rape).
[38] *See id.* (highlighting that Lady Gaga released a song about the assault, but never pressed charges).
[39] *See id.* (affirming that none of these artists came forward about what happened to them until after they had become famous).
[40] *See id.* (emphasizing that often times their abusers were imbedded in the artist's label).
[41] *See* Lytton, *supra* note 9 (recognizing that the music industry is focused on making money).
[42] *See id.* (emphasizing that alleging sexual assault will likely ruin an artist's career).

sexual assault is a systemic issue within the music industry.[43]

This Comment argues that recording contracts violate the implied covenant of good faith and fair dealing when they do not respond to an artist that has been sexually assaulted.[44] Part II explains the implied good faith and fair dealing covenant that is required of every contract[45] as well as sexual assaults as they pertain to leases and employment in the context of the music industry.[46] Part III argues that music industry contracts are no different from any other contract and should be treated accordingly as in other industries.[47] Part III further asserts that upon sexual assault, an artist should be allowed to break a recording contract because committing sexual assault or ignoring its reality is a demonstration of bad faith from a contracting party.[48] Part IV recommends that when sexual assault is proven, the artist should be released from her recording contract with no reprisal for breach of contract.[49] Part V concludes that sexual assault violates the implied good faith and fair dealing clause required of contracts and should allow artists to consequently break their contracts.[50]

II. BACKGROUND

[43] *See* Compl. §2, Oct. 14, 2014 (alleging the abuse that Kesha endured at the hands of her producer for ten years).
[44] *See* Martindell v. Lake Shore Nat'l Bank, 154 N.E.2d 683, 685 (Ill. 1958) (asserting that the implied covenant is a part of every contract).
[45] *See infra* Part II (describing the covenant of implied good faith and fair dealing and sexual assault laws).
[46] *See infra* Part II (discussing the impact a sexual assault has in housing contracts and employment).
[47] *See infra* Part III (concluding that limitations on recording contracts should be treated similarly to other contracts outside of the music industry, such as in housing leases where domestic violence is alleged).
[48] *See infra* Part III (explaining that sexual assault shocks the conscience making it a violation of the implied covenant).
[49] *See infra* Part IV (arguing that an artist should be allowed to void a contract if he or she is sexually assaulted, as a matter of policy).
[50] *See infra* Part V (arguing that sexual assault violates the most basic standards of contract law).

A. The Implied Good Faith and Fair Dealing Clause is Required in Every Contract

An offer and an acceptance are considered to be the key elements of a contract.[51] Additionally, there must be consideration from all of the parties to the contract.[52] The implied covenant of good faith and fair dealing also applies to every contract.[53] While its interpretation varies by state, implied good faith and fair dealing clauses exist to protect the performance of contracts and to ensure that contracting parties receive the agreed upon.[54] The implied covenant of good faith and fair dealing requires reasonable action on the part of each contracting party.[55] Each party must have a mutuality of obligation.[56] Contracts can invalidate a good faith and fair dealing clause by imposing language contrary to this implied covenant, but only some states permit such language.[57]

While it has been established that good faith is implied in every contract, the law is vague on what "good faith" actually means.[58] Bad faith, in turn, involves actions that are considered to be hostile, deterring from the meaning behind the bargain, or including deceitful intent.[59] In order to succeed on such a claim,

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[51] *See* Weaver v. Burr, 8 S.E. 743, 752 (W. Va. 1888) (emphasizing that acceptance is given when the contract is signed).
[52] *See* Greenfield v. Philles Records, 780 N.E.2d 166, 168 (N.Y. 2002) (noting that consideration is an equal exchange).
[53] *See* Martindell v. Lake Shore Nat'l Bank, 154 N.E.2d 683, 685 (Ill. 1958) (noting that this covenant ensures that parties receive the benefits of the contract).
[54] *See* Greene v. Oliver Realty, Inc., 526 A.2d 1192, 1195 (Pa. 1987) (finding each party expects to receive its benefits).
[55] *See Martindell*, 154 N.E.2d at 685 (recognizing that fair dealing is the equivalent of acting in good faith).
[56] *See* Brungard v. Caprice Records, Inc. 608 S.W.2d 585,587 (Tenn. Ct. App. 1980) (highlighting that both parties have to give up something to be bound by the contract).
[57] *See Martindell*, 154 N.E.2d at 685 (stressing that the implied covenant is in every contract).
[58] *See* Universal Drilling Co., LLC v. R & R Rig Services, LLC, 271 P. 3d 987, 999 (Wyo. 2012) (avowing that the meaning of good faith varies by jurisdiction).
[59] *See* Allworth v. Howard Univ., 890 A.2d 194, 202 (D.C. 2006)

the plaintiff must prove that the defendant acted in bad faith by behaving in a way that prohibited the plaintiff from receiving the benefits of the contract.[60] Courts have determined that a party can be liable for acting in bad faith even if they did not violate an express term written in the contract.[61] For example, if the plaintiff trusts and makes decisions based upon the defendant's misrepresentative statements, then the plaintiff is entitled to relief.[62]

Violations of the implied covenant of good faith and fair dealing vary by jurisdiction, but there are common factors that courts look to in order to determine such violations.[63] The defendant must have been aware that certain conduct would cause substantial injury to the other contracting parties..[64] If the defendant knew that he was likely to engage in certain conduct and did not disclose it to the plaintiff before entering into the contract, then the defendant would violate the implied covenant.[65] Alternatively, conduct that shocks the conscious and is outrageous is almost always considered a violation of the implied covenant of good faith and fair dealing.[66]

The violation of the implied covenant of good faith and fair dealing amounts to a breach of contract, effectively terminating the

(highlighting that bad faith also includes an abuse of power).

[60] *See id.* at 201 (explaining that lies violate the covenant).

[61] *See* TVT Records v. Island Def Jam Music Group, 412 F.3d 82, 91 (2d Cir. 2005) (claiming that misrepresentations are immaterial unless the plaintiff relied on them).

[62] *See id.* (recognizing that the courts have previously held this as a violation of good faith and fair dealing).

[63] *See* Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 141 (Wash. 2008) (stating that public policy violations can terminate a contract).

[64] *See* RESTATEMENT (SECOND) OF CONTRACTS, § 19, cmt. b (AM. LAW. INST. 1979) (stating that if a person of reasonable intelligence would know a fact, then all parties to the contract must know).

[65] *See* United States v. Brackeen, 969 F.2d 827, 829 (9th Cir. 1992) (highlighting that deliberately withholding information is a violation).

[66] *See* Nelson v. McGoldrick, 896 P.2d 1258, 1262 (Wash. 1995) (noting that unusually harsh conduct shocks the conscience and violates the implied covenant of good faith and fair dealing).

existing contract.[67] Common forms of relief in such cases are for compensatory damages or punitive damages.[68] Often times punitive damages are not allowed unless there is a separate tort for fraud or breach of fiduciary duty.[69] The damages in a breach of contract claim cannot surpass the amount that would have been reached if the contract had been performed fully on both sides.[70] Some jurisdictions treat the breach as a tort liability, permitting compensatory contract damages.[71] Aside from the issue of damages, a common prayer for relief in such breach of contract cases is simply the desire to leave the contract.[72] As the section below discusses, such actions have yet to become the norm in sexual assault cases within the music industry.[73]

B. The Disparity in Legal Standards Required of Sexual Assault Charges in Criminal and Civil Suits and Its Impact on the Music Industry

Prosecution is an imperfect remedy for victims of sexual assault because of prosecutorial discretion.[74] When bringing

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[67] *See* Geler v. Nat'l Westminster Bank USA, 770 F. Supp. 210, 215 (S.D.N.Y. 1991) (emphasizing that this breach amounts to a failure to perform).
[68] *See id.*
[69] *See id.*
[70] *See* Lewis Jorge Constr. Mgmt., Inc. v. Pomona Unified Sch. Dist., 22 Cal. Rptr. 3d 340, 344 (Cal. 2004).
[71] *See* Messina v. Nationwide Mut. Ins. Co., 998 F.2d 2, 5 (D.C. Cir. 1993) (recognizing that courts allow tort liability to exist in insurance company violations, but not much else).
[72] *See Geler*, 770 F. Supp. at 215 (detailing that a breach of contract allows a party to leave the contract).
[73] *See infra* Part II, § B (detailing the common treatment and causes of action for sexual assault cases).
[74] *See* Sofia Resnick, *Victims of Rape and Sexual Assault, Failed by Criminal Justice System, Increasingly Seek Civil Remedies*, REWIRE (Jan. 2016), https://rewire.news/article/2016/01/08/victims-rape-sexual-assault-failed-criminal-justice-system-increasingly-seek-civil-remedies/ (illustrating that pursuing criminal charges does not make the victim whole again).

criminal charges, the victim of a sexual assault has limited control over the case; this is because the state decides whether the case will go forward with ease. If the prosecutor believes that there is not enough evidence to convict, then the state can drop the case.[75] Additionally, there are instances of judicial discretion where a Judge can amend a Defendant's sentence. The Brock Turner case demonstrates this limitation, as Turner was sentenced to only six months imprisonment for raping an unconscious girl behind a dumpster[76] Although the burden of proof was met, the perpetrator was still given a light sentence as his punishment.[77] Even if a criminal prosecution is successful, a civil suit is needed to recover monetary damages to compensate the victim for medical bills and pain and suffering.[78] Civil remedies are necessary to bring justice for victims of sexual assault, as the state lacks the resources to bring charges against every assailant when evidence is insufficient.[79] The implied covenant of good faith and fair dealing provides a means for artists who are sexually assaulted to take control over the aftermath of the assault.[80] It is an opportunity to make victims whole again when a sexual assault has threatened their livelihood and career in the music industry.[81]

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[75] *See id.* (stating that the state can decide not to bring charges).

[76] *See* Katie J.M. Baker, *Here Is the Powerful Letter the Stanford Victim Read Aloud to Her Attacker*, BUZZFEED NEWS (June 2016), https://www.buzzfeed.com/katiejmbaker/heres-the-powerful-letter-the-stanford-victim-read-to-her-ra?utm_term=.kt9X7bp64#.mlO46YZqr (recognizing that this sentence was disproportionate to the crime committed).

[77] *See id.* (noting that while the prosecutors asked for six years, the judge gave Brock Turner six months).

[78] *See* Nora Caplan-Bricker, *Directly Accountable*, SLATE (March 28, 2016), http://www.slate.com/articles/double_x/doublex/2016/03/tort_reform_harms_victims_of_sexual_assault.html (describing that civil suits are one way to make a victim feel whole again).

[79] *See* Resnick*, supra* note 50 (stating that civil remedies inspire others to fight for change).

[80] *See* Sw. Va. Mental Health Inst. v. Wright, 2006 Va. App. LEXIS 454, 9 (Va. Ct. App. 2006) (emphasizing that sexual assault should lead to a finding of liability for all victims).

[81] *See* Martindell v. Lake Shore Nat'l Bank, 154 N.E.2d 683, 685 (Ill. 1958)

Sexual assault is any sexual contact without consent.[82] Many recording companies are based in California; therefore it is likely that sexual assault claims in the music industry would arise there.[83] In California, sexual assault is defined as touching for the purpose of sexual stimulation.[84] Similarly, rape is defined as intercourse with another without her consent due to force, deceit, or coercion.[85] Consent cannot be given if the victim was unconscious, too intoxicated, or lacked capacity to consent.[86] For sexual assault claims, the burden of proof is much higher in a criminal case than civil; thus civil claims may be the only way for victims of sexual assault to obtain relief.

As a society, it is more common to for victims to remain silent than it is to speak up about instances of sexual assault.[87] In the music industry, artists are afraid that a sexual violence complaint will jeopardize their music career. [88] Jackie Fuchs of the Runaways reiterated this fear, explaining that if an artist brings a sexual assault claim against the industry, then that artist is no longer seen as someone who wants to be a part of the music industry.[89] Fuchs stated that, "My rape was traumatic or everyone, not just me...It's taken me years to talk about it without shame. I can only imagine what it must have been like to have watched it happen."[90]

(detailing that all contracts have the implied covenant).

[82] *See* CAL. PENAL CODE §243.4 (Deering 2002) (clarifying that there need not be penetration).

[83] *See* Lytton, *supra* note 9 (recognizing that California is a popular location for artists to record).

[84] *See* CAL. PENAL CODE §243.4(e)(1) (Deering 2002) (detailing that the touching can be for arousal or sexual gratification).

[85] *See id.* §261(2) (Deering 2013) (defining the criminal charge for rape).

[86] *See id.* (declaring that the defendant must have had sex with the victim despite these factors).

[87] *See* Lytton, *supra* note 9 (stating that it is less common for victims to report sexual assaults).

[88] *See id.* (highlighting that no other label will take a chance on Kesha).

[89] *See id.* (asserting that sexual assault is an accepted part of being involved in the music industry).

[90] *See* Amanda Holpuch, *The Runaways' Jackie Fuchs: 'My Rape was Traumatic for Everyone, not Just Me*, The Guardian (July 13, 2005), https://www.theguardian.com/music/2015/jul/13/the-runaways-jackie-fox-

In 1994, Congress passed the Violence Against Women Act (VAWA) to assist victims of domestic violence and ensure that individuals are protected when instances of domestic violence or sexual assault occur.[91] VAWA has expanded to allow victims of domestic violence to be protected in the housing market through the early termination of their leases.[92] California, in particular, established that there is an extreme importance in punishing assailants and protecting the victims of domestic violence.[93] California housing codes demonstrate that there is a public policy interest in protecting victims of domestic violence and sexual assault.[94] The public policy interests that exist in the housing market should be promoted in the music industry as well—there shouldn't be any exceptions to the type of contract or industry applicable to the contract.[95]

A lease is a contract, and California law has determined that such a contract can be broken in light of exigent circumstances by using a totality of the circumstances approach.[96] The totality of the circumstances approach requires that the courts look to all of the factors that are involved in the case before making a decision or a punishment.[97] According to the California Statute, these exigent circumstances can include stalking, sexual

rape-joan-jett-cherie-currie-response (mentioning that Fuchs understands why her bandmates do not want to talk about the rape).

[91] *See* 42 U.S.C. §1404e-11 (2013) (protecting women by not targeting them when they are victims of sexual assault).

[92] *See* CAL. CIV. CODE §1946.7 (Deering 2008) (allowing a victim to break her lease with no penalty).

[93] *See* Pugliese v. Superior Court, 53 Cal. Rptr. 3d 682, 689 (Cal. Ct. App. 2007) (finding that all instances of abuse should play a role in determining the punishment for the perpetrator).

[94] *See e.g.,* Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 134 (Wash. 2008) (illustrating that these statutes prioritize the victim's safety).

[95] *See id.* at 131 (highlighting that public policy should always be protected).

[96] *See* Carr v. Deking, 765 P.2d 40, 41 (Wash. Ct. App. 1988) (finding that a lease was a contract).

[97] *See* Metro N. Owners, LLC v. Thorpe, 870 N.Y.S.2d 768, 774 (N.Y. Civ. Ct. 2008) (determining that a totality of the circumstances approach is appropriate).

assault, and domestic violence..[98] Although these statutes and certain jurisdictions protect victims of domestic violence, they also require documentation of the assault in order to be granted early termination of a lease.[99] Providing documentation to the courts is not a high bar to meet: all the victim needs to show is that she has requested help for domestic violence in the past.[100] While these housing codes are a start, they still fall significantly short in assisting and protecting victims of sexual assault.[101]

Employment law has also recognized that sexual assault victims should be protected in civil cases for liability.[102] Courts have acknowledged that victims of sexual assault should not be expected to work in such hostile environment where an employee or a superior sexually assaults another employee.[103] The tort of wrongful discharge in the employment realm, while hard to prove, ensures that employers will not act against public policy.[104] This standard is difficult to meet because an employee must prove that she was fired for reasons contrary to public policy.[105] Many times, one incident of assault can be enough to prove liability accounting

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[98] *See* Green v. Nevada, 80 P.2d 93, 94 (Nev. 2003) (noting that stalking is a lesser crime than sexual assault with respect to sentencing).

[99] *See* 765 ILL. COMP. STAT. ANN. 750/15(b)(2) (LexisNexis 2007) (declaring that written proof is required to end a lease).

[100] *See id.* (stating that an affidavit by a person familiar with the abuse is enough).

[101] *See* Resnick, *supra* note 50 (illustrating that pursuing criminal charges does not make the victim whole again).

[102] *See* Smith v. Sheahan, 189 F.3d 529, 533-34 (7th Cir. 1999) (claiming that sexual assault in the work place should lead to liability for the employer).

[103] *Compare* Champion v. Nationwide Sec., Inc., 545 N.W.2d 596, 601 (Mich. 1996) (acknowledging that victims should not have to work in the same place as their abuser), *with* Lockard v. Pizza Hut, 162 F.3d 1062, 1077 (10th Cir. 1998) (stating that the assault must affect the victim's ability to do their job).

[104] *See* Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 141 (Wash. 2008) (finding that an employment contract is terminated when the employer acts contrary to public policy).

[105] *See id.* (detailing that discrimination and retributions are two examples of behavior against public policy).

for all the circumstances.[106] However, in the music industry, there is a divide because one incident of sexual assault is not enough to make an employer liable.[107]

III. ANALYSIS

A. Music Industry Contracts Should be Afforded the Same Protections as Contracts in Other Industries.

Since music industry record contracts are the same as all general, non-industry contracts, they should be subjected to the same benefits and protections.[108] Every contract must include an offer, acceptance, and consideration.[109] A record company makes an offer to a prospective artist by writing out the terms of the agreement into a contract, usually after negotiation.[110] These terms must be the same for each party with no confusion, otherwise the offer is invalid.[111] After negotiations are finalized and each respective party signs the agreement, record companies and artists are equally obligated to comply with their respective terms of the contract.[112] Acceptance is given when both the artist and record label sign the contract and agree to be bound by its

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[106] *See* Turnbull v. Topeka State Hosp., 255 F.3d 1238, 1243-44 (10th Cir. 2001) (asserting that one incident is enough when the employee is afraid to go back to work).

[107] *Compare* Doe v. Capital Cities, 58 Cal. Rptr. 2d 122, 133 (Ct. App. 1996) (avowing that in the entertainment industry, one incident of sexual assault is not enough for liability), *with* Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 725 (6th Cir. 1996) (finding that an event that is severe can be liable).

[108] *See* Greenfield v. Philles Records, 780 N.E.2d 166, 168 (N.Y. 2002) (finding that when a record contract is signed, the artist becomes bound by its terms, making it a valid contract).

[109] *See* Weaver v. Burr, 8 S.E. 743, 752 (W. Va. 1888) (detailing that there must be an offer and acceptance).

[110] *See Greenfield,* 780 N.E. 2d at 168 (explaining that the terms of a deal indicate an offer).

[111] *See Weaver*, 8 S.E. at 759 (noting that when there is confusion regarding the terms, the offer becomes invalid).

[112] *See Greenfield,* 780 N.E. 2d at 168 (stating that record labels sign the contract after it is negotiated).

terms.[113] Recording contracts satisfy these two elements of a contract, making record deals no different from basic contracts in terms of offer and acceptance.[114]

Under traditional contract law, all contracts must also involve consideration to be valid.[115] The record label offers consideration in the form of funding, promotion, resources, and the ability to reach a wider audience to an artist.[116] In exchange, an artist agrees to record exclusively with the label, and creates and performs music within the confines of the record label's contract.[117] The exchange of funding, promotion, and resources for performing and creating music is valid consideration, as the artist is allowed to access the resources of the label when recording. This is analogous to a non-compete clause in an employment contract.[118] It is also common for an artist to offer the rights of her music to the label in exchange for the monetary advances provided by the record company.[119]

Consideration is an integral element of any recording contract, making record deals no different than the typical contract.[120] Mutuality of obligation is also a common element according to traditional contract law.[121] Both parties are bound by the mutuality of obligations in both recording contracts and

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[113] *See Weaver,* 8 S.E. at 759 (affirming that there must be acceptance for the terms of a contract to be enforceable).
[114] *See Greenfield*, 780 N.E. 2d at 168 (holding that once a recording contract is signed, it becomes binding).
[115] *See id.* (asserting that consideration is the exchange of benefits in a contract).
[116] *See* Brungard v. Caprice Records, Inc., 608 S.W. 2d 585, 587 (Tenn. Ct. App. 1980) (mentioning that it is common for record labels to offer promotions to an artist in consideration).
[117] *See Greenfield,* 780 N.E.2d at 168 (stating that an artist typically signs an exclusivity agreement).
[118] *See id.* (stating that artists can sign exclusivity agreements with labels).
[119] *See id.* at 167 (highlighting that the record label often owns the rights to the artist's songs).
[120] *See Brungard,* 608 S.W. 2d at 587 (asserting that consideration is required in a record deal).
[121] *See* Greene v. Oliver Realty, Inc., 526 A.2d 1192, 1195 (Pa. 1987) (emphasizing that mutuality of obligation is necessary to ensure that both parties follow through with their obligations).

general non-industry contracts, as each party wants to receive what they negotiated for.[122] If an artist does not satisfy her requirements of the contract, she is in breach and the label has the right to refuse to promote her.[123] Similarly, the record company must provide artists with resources, funding, and promotion for the record label to uphold their side of the contract.[124] Despite the difference in responsibility, mutuality of obligations is an element of both recording and general, non-industry contracts, making them no different from one another.[125]

While the explicit terms of a recording contract may differ from general, non-industry contracts, all of the same elements required of contract law remain the same.[126] The elements of offer, acceptance, consideration, mutuality of obligations, and legal capacity are present in a recording contract as well as in a general, non-industry contract.[127] For this reason, the ability to break a contract due to violation of the implied covenant of good faith and fair dealing should be available in recording contracts as in any general, non-industry contract.[128] While such argument has yet to be made in the music industry, it should follow that if a breach of the implied covenant of good faith and fair dealing can lead to the termination of a contract generally, it should be no different in the music industry.[129] Indeed, there is precedent

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[122] *See Greene,* 526 A.2d at 1195 (avowing that each party to the contract wants to receive the benefits that she negotiated for).
[123] *See* Salmon, *supra* note 2 (explaining that when an artist signs a five album deal, they must produce five albums).
[124] *See* Brungard v. Caprice Records, Inc. 608 S.W. 2d 585, 587 (Tenn. Ct. App. 1980) (illustrating that labels pay advances).
[125] *See Greene*, 526 A.2d at 1195 (mentioning that consideration can be any exchange).
[126] *See* Greenfield v. Philles Records, 780 N.E. 2d 166, 168 (N.Y. 2002) (emphasizing that recording contracts have all the same elements as general contracts).
[127] *See e.g.,* Weaver v. Burr, 8 S.E. 743, 752 (W. Va. 1888) (claiming that an offer and acceptance is required of a contract).
[128] *See* Geler v. Nat'l Westminster Bank USA, 770 F. Supp. 210, 215 (S.D.N.Y. 1991) (holding that a breach of the implied covenant is the same as breach of contract).
[129] *See id.* (noting that breach of contract leads to a termination of the

generally for violence against women to be the basis for renegotiating or reconsidering the terms of a general contract.[130]

B. Domestic Violence Housing Codes Parallel Recording Contracts and Accordingly, it Should Follow That Recording Artists Can Void Their Contracts Without Repercussion

Housing codes in California demonstrate that there is a want and need by courts and legislature to protect those victims of sexual assault.[131] Since the passage of the Violence Against Women Reauthorization Act (VAWRA), states have begun enacting early termination of lease laws for victims of domestic violence and sexual assault.[132] These state specific statutes allow women and men to terminate housing leases early in order to safely and legally escape abusive relationships.[133] A victim's ability to break a lease is not based on contract law, but is rather reflective of the public policy against confining victims to dangerous situations.[134] Such statues demonstrate a willingness to allow considerations of safety and autonomy placing them above the basic existing obligations of contract law.[135]

A lease is a contract as it contains an offer, acceptance, consideration, and a mutuality of obligations from all parties

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agreement).

[130] *See* 42 U.S.C. §1404e-11 (2013) (highlighting the need to protect women from instances of domestic violence).

[131] *See e.g.,* Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 134 (Wash. 2008) (recognizing that victims of domestic violence have difficulty living with their abusers).

[132] *See* Pugliese v. Superior Court, 53 Cal. Rptr. 3d 681, 689 (Ct. App. 2007) (asserting that individuals cannot be evicted because they are victims of domestic violence or sexual assault).

[133] *See* CAL. CIV. CODE §1946.7 (Deering 2008) (enabling the termination of leases with no penalties if the person is a victim of domestic violence, stalking, or sexual assault).

[134] See Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 131-34 (Wash. 2008) (demonstrating a public policy rationale for preventing victims from staying in abusive homes).

[135] *See id.* at 134 (admitting that safety should be prioritized).

involved.[136] Yet notably, courts have recognized that even when a valid lease exists, certain exigent circumstances, such as domestic violence and sexual assault, void the agreement.[137] However, when dealing with recording contracts, these exigent circumstances do not terminate the arrangement.[138] Leases can last for as little as a month, but have the potential to be in place for years, leading the victim to be trapped in a home with her abuser.[139]

Both the court's and the legislature's treatment of contracts between the landlord and tenants in response to instances of sexual assault demonstrate their want to protect victims of sexual assault. In *Pugliese v. Superior Court*, the Court found that the legislative history of California demonstrated that the victims of domestic violence and sexual assault must be protected.[140] A victim, Michelle, filed for divorce from her abusive husband and sought to admit evidence of the constant abuse that he inflicted in order to get out of her lease.[141] The Court admitted the evidence because the state statute required complete recovery for instances of abuse.[142] This case illustrates that all instances of abuse are important and relevant to the crime of sexual assault.[143] If a state is willing to allow individuals out of their leases for instances of sexual assault, then it should follow that musicians should be let

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[136] *See* Carr v. Deking 765 P.2d 40, 41 (Wash. Ct. App. 1988) (noting that an equal exchange makes the lease valid).
[137] *See Danny*, 193 P.3d at 134 (announcing that this is a public policy rationale).
[138] *See* TVT Records v. Island Def Jam Music Group, 412 F.3d 82, 91 (2d Cir. 2005) (contending that recording contracts are difficult to void).
[139] *See Danny*, 193 P.3d at 133 (highlighting that many victims do not leave their abuser because of their leases).
[140] *See* Pugliese v. Superior Court, 53 Cal. Rptr. 3d 681, 689 (Ct. App. 2007) (detailing that the state believes assailants should be punished and victims protected).
[141] *See id.* at 682-83 (declaring that the abuse had been ongoing for thirteen years).
[142] *See id.* at 689 (stating that damages should be calculated based on all instances of abuse).
[143] *See id.* (finding that damages based on one instance of abuse does not make the victim whole and is disproportionate).

out of their contract for the same detrimental act.[144] If, as a matter of public policy, leases can be terminated on short notice for victims of domestic violence and sexual assault, then it follows that recording contracts should be subjected to early termination options when certain exigent circumstances, such as sexual assault, are similarly present.[145]

Similarly, recording contracts are often negotiated for multiple albums, each of which may easily span more than a year.[146] Such contracts amount to multiple year contracts that the artist must fulfill until the end of the terms, even if that contract takes multiple years.[147] The legislature has given all leases an early termination exception through these exigent circumstances because the legislature recognizes the potential dangers of living with an perpetrator for a long period of time.[148] These same dangers exist when a recording artist is forced to work with her abuser because she cannot get out of her contractual agreement with her record label.[149] Thus, recording contracts should be subject to early termination in instances of sexual assault.[150]

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[144] *Compare* Weaver v. Burr, 8 S.E. 743, 752 (W.Va. 1888) (recognizing that the contract requires offer, acceptance, and consideration), *with* Greenfield v. Philles Records, 780 N.E.2d 166, 168 (N.Y. 2002) (stating that recording contracts have the same elements as all contracts).

[145] *Compare* 765 ILL. COMP. STAT. ANN. 750/5 (LexisNexis 2007) (noting that victims must be permitted to break a lease in order to prioritize the victim's safety), *with* Deshmore, 2008 Cal. App. Unpub. LEXIS 4367 at 2 (recognizing that the termination of contracts in the recording industry are difficult to secure).

[146] *See generally* Dehsmore v. Mazarek, 2008 Cal. App. Unpub. LEXIS 4367 (Cal. Ct. App. 2008) (illustrating that a six album deal required six years for The Doors to fully comply).

[147] *See id.* (emphasizing that each album takes a year to record).

[148] *Compare* CAL. CIV. CODE §1946.7 (Deering 2008) (allowing the early termination of a lease for instances of domestic violence and sexual assault), *with Deshmore*, 2008 Cal. App. Unpub. LEXIS 4367 (examining the normalcy of multiple year contracts and the difficulty of terminating them).

[149] *See* Compl. ¶ 39, Oct. 14 2014 (indicating the danger that Kesha faces by being required to work with Dr. Luke).

[150] *Compare* 765 ILL. COMP. STAT. ANN. 750/5 (LexisNexis 2007) (noting that victims must be permitted to break a lease in order to prioritize the victim's safety), *with* Deshmore, 2008 Cal. App. Unpub. LEXIS 4367 at 2

Early termination lease statutes explicitly permit a victim to terminate a lease contract due to sexual assault, domestic violence, or stalking.[151] Stalking carries a lesser punishment when compared to sexual assault or domestic violence. Stalking, however, is still a permissible reason to seek early lease terminations.[152] Comparatively, in record contracts, there is currently no early termination based on the presence of any of these offenses.[153] As a result, lawyers have an extremely difficult time coming up with a cause of action when these situations arise.[154]

A victim must inform their landlord in wiring in order to be granted a lease termination without penalty. [155] Additionally, in an early lease termination case, the victim must either provide the landlord with a police report documenting the incidents, a restraining order, or statement from a victim services organization.[156] In record contracts, if an artist feels uncomfortable because of an incident of sexual assault, the artist's only option is to seek out legal action.[157] Recording artists have no clear path to early termination in place, which serves as a public policy and legal issue when prioritizing the victim's

(recognizing that the termination of contracts in the recording industry are difficult to secure).

[151] *See* CAL. CIV. CODE §1946.7(b) (Deering 2008) (stating that these are three qualifications for terminating a lease early).

[152] *See* Green v. Nevada, 80 P.3d 93, 94 (Nev. 2003) (illustrating that the defendant was sentenced to ten years for sexual assault and only thirty-five months for stalking).

[153] *See* TVT Records v. Island Def Jam Music Group, 412 F.3d 82, 91 (2d Cir. 2005) (holding that it is very hard to secure a termination of a recording contract).

[154] *See generally,* Compl. Oct. 14, 2014 (seeking eight different causes of action to secure early termination for Kesha).

[155] *See* Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 133 (Wash. 2008) (highlighting that the victim must provide some sort of low-level proof to be granted an early termination).

[156] *See* 765 ILL. COMP. STAT. ANN. 750/15(b)(2) (LexisNexis 2007) (noting that medical records can also be proof).

[157] *See* Lytton, *supra* note 9 (illustrating that labels often do not take artists seriously with sexual assault claims).

safety.[158] Early termination in a lease is not contingent upon proof of sexual assault or domestic violence, but is granted as long as the victim is fearful that the event will occur again.[159] Early termination is intended as a remedy against the landlord for circumstances beyond the landlord's control. Furthermore, in the music industry there is no possibility of remedy, which presents a large problem for artists that are being sexually assaulted.[160]

In *Metro North Owners, LLC v. Thorpe*, the court determined that a victim of domestic violence should be let out of her lease early.[161] The court found that her lease could not be terminated solely because the respondent was a victim of domestic violence but rather under the totality of the circumstances rationale.[162] Thorpe was a victim of domestic violence and stabbed a man in her home who had been beating her, which prompted the landlord to terminate the lease.[163] The court determined that the Violence Against Women Act (VAWA) ensured that victims of domestic violence are protected.[164] Based on the multiple instances of domestic violence that Thorpe suffered, the court found that it would be appropriate for her to end her lease early.[165] The Court has proven here that under the totality of the circumstances approach, a victim should be protected from long term abuse in accordance to her lease.[166] It

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[158] *See id.* (noting that sexual assault is considered normal within the music industry).

[159] *See* 765 ILL. COMP. STAT. ANN. 750/15(b)(2) (LexisNexis 2007) (noting that there only needs to be documentation of the abuse).

[160] *See* Gottwald v. Sebert, 2016 N.Y. Misc. LEXIS 348, 4 (N.Y. Sup. Ct. 2016) (demonstrating that the court dismissed Kesha's counterclaims for breach of contract).

[161] *See* Metro N. Owners, LLC v. Thorpe, 870 N.Y.S.2d 768, 774 (N.Y. Civ. Ct. 2008).

[162] *See id.* (asserting that totality of the circumstances means that the court took all of the factors into account).

[163] *See id* at 770 (illustrating that Thorpe had often sought out the police for protection from her abuser).

[164] *See id.* (emphasizing that the Violence Against Women Act must stop the landlord from punishing a victim of domestic violence).

[165] *See id.* (finding that Thorpe met the qualifications to terminate her lease early due to the recurring abuse).

[166] *See id.* (declaring that the quantity of abuse is a factor).

should follow that victims of domestic violence and sexual assault in the music industry are should be protected in a similar manner.[167] Under a totality of the circumstances approach, it would be easier for a court to find that an artist was subjected to sexual assault based on observing all factors relevant to the situation.[168] Thus, the atmosphere of the industry along with the power of authority could be taken into account in a sexual assault case within the music industry. Since music industry contracts are the same nature as the contracts in all other industries, they should be given the same protections, including the termination of a contract.[169]

Permitting consideration of sexual assault as a violation of the implied covenant of good faith and fair dealings allows proof of the sexual assault to follow the ordinary course of contracts litigation.[170] A guilty finding of sexual assault would no doubt be probative but not required.[171] Music contracts are the same as the contracts in any other industry and therefore should not be disadvantaged because of industry norms.[172] If contracts regarding property law can be successfully terminated by crimes such as sexual assault, domestic violence, or stalking, then recording

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[167] *Compare* Metro N. Owners, LLC v. Thorpe, 870 N.Y.S.2d 768, 770 (N.Y. Civ. Ct. 2008) (highlighting that if the victim shows documentation of the abuse, then they should be protected by the Violence Against Women Act), *with* Gottwald v. Sebert, No. 653118, slip op. at 20 (N.Y. Sup. Ct. 2016) (dismissing Kesha's claims of gender violence and gender discrimination).

[168] *Compare* Metro N. Owners, LLC v. Thorpe, 870 N.Y.S.2d 768, 774 (N.Y. Civ. Ct. 2008) (recognizing that the court must take all factors into account), *with* Gottwald v. Sebert, No. 653118, slip op. at 20 (N.Y. Sup. Ct. 2016) (dismissing the case without looking at all the circumstances).

[169] *See* Greenfield v. Philles Records, 780 N.E.2d 166, 168 (N.Y. 2002) (highlighting that record contracts have the same elements of all contracts).

[170] *See* 765 ILL. COMP. STAT. ANN. 750/15(b)(2) (LexisNexis 2007) (claiming that written proof is required under lease statutes).

[171] *See id.* (noting that proof goes to weight).

[172] *See Greenfield*, 780 N.E.2d at 168 (recognizing that music contracts are similar to all contracts regardless of the industry); *see also* Lytton, *supra* note 9 (stating that the music industry shields the record companies more than it protects musicians).

contracts in the music industry should allow artists to similarly terminate such agreements when sexual assault is present.[173] While the termination of a lease within California's housing laws is not based on the landlord's violation of the good faith and fair dealing clause within the lease, the government has demonstrated through these housing laws that protecting individuals from this type of abuse is necessary. That same concern should be extended victims of sexual assault within the music industry because not only is the implied covenant of good faith and fair dealing being violated by not allowing for such release, but also the recording company may bear a certain level of culpability in the abuse itself.

C. Employers Can and Should be Held Responsible for Sexual Assaults Occurring During the Time of a Recording Contract if They Protect the Abuser.

The current standard for bringing a claim of employer liability in the music industry is much higher than in any other civil employment cases.[174] It is well established that sexual assault maintains a high prevalence in the employment context.[175] A single incident of sexual assault in the workplace is generally enough to establish a legal claim and may lead to a finding of liability for the employer.[176] A court need only look to the totality of the circumstances surrounding the incident to determine if

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[173] *Compare* Cal. Civ. Code. §1946.7(c) (Deering 2008) (allowing a victim to get out of her lease when sexually assaulted), *with* TVT Records v. Island Def Jam Music Group, 412 F.3d 82, 91 (2d Cir. 2005) (stating that not even false statements can terminate a contract).

[174] *Compare* Smith v. Sheahan, 189 F.3d 529, 533-34 (7th Cir. 1999) (stating that a single incident can be enough to bring liability), *with* Doe v. Capital Cities, 58 Cal. Rptr. 2d 122, 133 (Ct. App. 1996) (dismissing an employer liability claim due to there being only one incident of sexual assault).

[175] *See generally* Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (finding that sexual assault has occurred in employment settings very frequently).

[176] *See* Smith v. Sheahan, 189 F.3d 529, 533-34 (7th Cir. 1999) (explaining that liability can result in damages for the victim, criminal charges being filed, or a termination of the contract).

liability for the employer is appropriate.[177] However, the difference in standards between the music industry and employment claims demonstrates an inequality between industries, in light of the similarity between employment contracts and recording contracts.[178] If a single incident of sexual assault is sufficient to bring suit in general employment law, then it should also be sufficient to establish employer liability in the music industry.[179]

Oftentimes in the entertainment industry, one instance of sexual assault may not lead to a finding of liability by the courts.[180] In terms of sexual assault in the music industry, an artist may only have proof to substantiate one of her claims.[181] It therefore becomes crucial that a musician is given an opportunity to prove liability of her employer when sexual assault occurs during the term of her contract.[182]

Outside of the entertainment industry, employers have been held liable for much less egregious behavior than sexual assault.[183] In *Faragher v. City of Boca Raton*, Faragher's supervisors' touched her and the other lifeguards inappropriately and constantly made comments about her body.[184] The court indicated that

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[177] *See id.* (claiming that the number of instances of harassment is not the deciding factor).

[178] *See* Greenfield v. Philles Records, 780 N.E.2d 166, 168 (N.Y. 2002) (recognizing the similarities between music industry contracts and all other contracts).

[179] *See* Champion v. Nationwide Sec., Inc., 545 N.W. 2d 596, 601 (Mich. 1996) (highlighting the fact that an employee should not be expected to work in a hostile work environment).

[180] *See* Doe v. Capital Cities, 58 Cal. Rptr. 2d 122, 133 (Ct. App. 1996) (finding that one instance of sexual assault was not sufficient to establish liability).

[181] *See* Lytton, *supra* note 9 (noting that artists are accused of defamation for bringing causes of action for rape).

[182] *See id.* (explaining that labels and producers often face no repercussions when they sexually assault their artists).

[183] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 780 (1998) (finding that employers can be held liable for discrimination).

[184] *See id.* at 782 (detailing that her supervisor suggested that she should date him or clean the bathroom).

employers have been held liable in the past for activities that were not related to the fundamental aspects of the job.[185] When it comes to sexual assault, an employer should be liable as such a risk is the cost of doing business.[186] If the behavior is viewed as an expected part of the job, then the employer should be held liable, regardless of the industry of employment.[187] In the music industry, meeting at a producers house can be seen as a predictable part of the job and could mean that anything that happens in the home, for example sexual assault, could be subject to employer liability.[188]

Under Kesha's circumstances, a record label, such as Sony, could argue that a producer or a label executive was not representing their employment interests when they sexually assaulted Kesha.[189] The label could further assert that the they should not be liable for such behaviors because sexual assault is not part of a fundamental responsibility of being a record producer for a musician, so it is not representative of the company as a whole.[190] However, under *Faragher v. City of Boca Raton* precedent, the label would be liable because the behavior does not need to be fundamental to the job itself.[191] Kesha avows in her complaint that her labels, Sony and Kemosabe, knew or should have known about the sexual assault; she should therefore

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[185] *See id.* at 794 (highlighting that courts have held employers liable in the past for behavior that occurred in the office).

[186] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 796 (1998) (explaining that sexual assault liability was the result of an employee's fundamental responsibilities to the job).

[187] *See id.* (finding that if the behavior is probable, then the employer should be held liable).

[188] *Compare* Lytton, *supra* note 9 (recognizing that meetings outside of the office are common), *with Faragher*, 524 U.S. at 780 (holding that anticipatable behavior makes an employer vicariously liable for sexual discrimination).

[189] *See* Compl. ¶ 22, Oct. 14, 2014 (alleging that Dr. Luke sexually assaulted her for a decade).

[190] *See* Doe v. Capital Cities, 58 Cal. Rptr. 2d 122, 129 (Ct. App. 1996) (recognizing that scope of employment is determined by looking at the connection between the job and type of act).

[191] *See Faragher,* 524 U.S. at 796 (1998) (finding that employers can be liable for acts that were not required of the job).

realistically have no difficulty bringing a suit against her labels for employer liability.[192] The Court determined that without explicit proof of the label knowing about it, her claim was to be dismissed.[193] However, in the employment industry, Courts have held employers liable for behavior that occurred in the office.[194] The music industry is different from the typical employment industry as work on an album typically occurs outside out of the office; thus her argument that the label should have known should have been successful as sexual assault is the risk of doing business in the music industry.[195] Nevertheless, since the Court rejected Kesha's assertion, this argument has yet to be done successfully in the music industry.[196] There should not be a different standard for sexual assault claims within the music industry just because it encompasses circumstances that are unique to traditional employment.

i. Employers Should Still be Liable for Sexual Assaults that Arise in Situations Outside of the Workplace

Courts have found that sexual harassment in the workplace should be overseen by a stricter standard when employers are aware of the abuse in the employment setting.[197] In *Champion v. Nationwide* Securities, Champion was raped after her supervisor tricked her into working a job while he called all the other employees off without Champion's knowledge.[198] After she was

[192] *See* Compl. ¶ 3 (contending that Sony and Kemosabe were aware that Dr. Luke was sexually assaulting her).
[193] *See id.*
[194] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 794 (1998) (finding that employers can be held liable for discrimination).
[195] *See id.* at 796.
[196] *See* Gottwald v. Sebert, No. 653118, slip op. at 20 (N.Y. Sup. Ct. 2016) (finding that Dr. Luke was not liable).
[197] *See* Champion v. Nationwide Sec., Inc., 545 N.W. 2d 596, 600 (Mich. 1996) (finding that harassment that went on with the knowledge of the employer is worse than if he was unaware).
[198] *See id.* at 598 (avowing that she was led to believe that everyone was

alone with her supervisor, the supervisor locked the door and forced himself on her without Champion's consent.[199] The court determined that this behavior was a decision that affected her employment as a whole because she did not feel safe working for the company any longer.[200] The court also held that the employer would be liable for the rape that occurred at the workplace by the supervisor because the supervisor was a representative of the company.[201]

Kesha's complaint alleges that her record labels, Sony and Kemosabe, were aware or should have been aware of the sexual assault committed by Dr. Luke.[202] While she did not make any specific assertions in her Complaint about the record label's knowledge, courts have found in the employment industry that such knowledge is not necessary if the abusive behavior occurred in the workplace.[203] While the music industry does not have a typical office, activities in association with promotion or creation of an album would be considered elements required of a person's job within the industry; thus, the label could be liable.[204] *Champion v. Nationwide Securities* applies a strict liability standard to cases where supervisors commit sexual assaults based on their powers as a supervisor.[205] Under this precedent, Sony and Kemosabe would not be able to defend such a claim because Dr. Luke was acting as a supervisor when he threatened Kesha's

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expected to work this job).

[199] *See id.* at 598 (asserting that the supervisor raped her).

[200] *See id.* at 600 (contending that the rape must drastically affect employment to bring a sufficient claim of liability).

[201] *See id.* at 601 (claiming that employers must be held accountable because they distribute those tasks to supervisors).

[202] *See* Compl. ¶ 4, Oct. 14, 2014 (avowing that the label covered up the abuse).

[203] *See id.* at ¶ 75 (asserting that the label continued to pay Dr. Luke despite being aware of his abusive tendencies and everything within the complaint); *see also See* Faragher v. City of Boca Raton, 524 U.S. 775, 794 (1998).

[204] *See id.* at 796 (recognizing that the behavior does not need to be essential to the job itself).

[205] *See* Champion v. Nationwide Sec., Inc., 545 N.W. 2d 596, 601 (Mich. 1996) (recognizing that this involves the ability to threaten job loss or promotional aspects).

success in the industry if she did not comply with his orders.[206] Therefore, Kesha's label could be liable for the behavior committed by Dr. Luke.[207] However, sexual assaults by employers do not always happen inside the physical space of the employment setting, particularly in the music industry.[208]

Courts have determined that employers can be held liable for a sexual assault even when it occurs outside of the work place.[209] In *Doe v. Capital Cities,* John Doe was attempting to become an actor and sought out Jerry Marshall as his agent.[210] Doe and Marshall constantly had meetings outside of the office.[211] Marshall lured Doe to his home and proceeded to drug and rape him.[212] The court determined that it is possible for a casting director to take advantage of his position of power and use it to commit sexual assault even if the assault does not occur at the place of employment.[213] Positions of power are constantly abused outside of the office and these abuses occur frequently in all realms of the entertainment industry, including the music industry.[214] An abuse of power such as this could make it extremely difficult for an artist to come forward based on a fear of

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[206] *Compare id.* (finding that employers would not have defenses to this liability because no employer would ever authorize sexual assault on behalf of the company), *with* Compl. ¶ 24, Oct. 14, 2014 (stating that Kesha believed that Dr. Luke could destroy her career if she said anything about the abuse).

[207] *See* Compl. ¶ 4 (avowing that they were aware of the abuse).

[208] *See* generally Compl., Oct. 14, 2014 (alleging that all of Kesha's sexual assaults occurred outside of the office).

[209] *See* Doe v. Capital Cities, 58 Cal. Rptr. 2d 122, 129 (Ct. App. 1996) (recognizing that sexual assault by an employer does not need to happen at the office).

[210] *See id* at 125 (confirming that John Doe is an alias).

[211] *See id.* at 129 (recognizing that this is normal for the entertainment industry and has become a common practice).

[212] *See id.* (claiming that Doe believed the meeting to be professional in nature).

[213] *See id.* at 129 (recognizing that in the entertainment industry people often exchange sex for parts in movies or TV).

[214] *See* Lytton, *supra* note 9 (detailing that sexual assault is not spoken about because it often involves abuses of power).

losing her career.[215] Kesha faced this same abuse of power at the hands of her producer, Dr. Luke.[216] Even though the circumstances surrounding Kesha's sexual assault did not occur in the office, her employer would still be subject to liability.[217]

Further, the court indicated in *Doe v. Capital Cities* that Marshall's behavior was within the scope of his employment because he was organizing a business meeting with entertainment executives, even though this event occurred in his home.[218] This is because the entertainment industry often has meetings that occur outside of the office, so it was reasonable that Doe would expect a meeting at Marshall's home to be business related.[219]

The court has recognized that the nature of the entertainment industry makes it common for sexual assaults to occur outside of the office, thereby making those employers susceptible to liability under the right circumstances.[220] Nevertheless, Doe's employer was still not held liable due to limitations involving employer awareness that may be more difficult in the entertainment industry where there is little oversight.[221]

Similarly, in Kesha's complaint. Luke's alleged abuse took place either on a plane or in his home.[222] Despite the long-term abuse that she suffered, Kesha contends that Sony and Kemosabe

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[215] *See id.* (stating that victims stay quiet due to a fear of being cut out of the music industry for speaking up).

[216] *See generally*, Compl., Oct. 14, 2014 (avowing that Dr. Luke used his position as Kesha's producer to control her).

[217] *Compare* Doe v. Capital Cities, 58 Cal. Rptr. 2d 122, 129-30 (Ct. App. 1996) (finding that the sexual assault need not occur in the officer), *with* Compl. ¶ 22 (alleging that the abuse took place on an airplane).

[218] *See Doe,* 58 Cal. Rptr. 2d at 129-30 (emphasizing that scope is determined by a nexus between the job and the type of tort).

[219] *See id.* at 129 (highlighting that professional meetings may occur outside of the office).

[220] *See id.* at 129 (highlighting the unique circumstances surrounding the entertainment industry in liability claims).

[221] *See* Lytton, *supra* note 9 (recognizing that the number of assaults that have gone unreported in the industry indicates that there is likely little supervision in the industry).

[222] *See* Compl. ¶ 22, Oct. 14, 2014 (maintaining that Dr. Luke sexually assaulted her while on an airplane).

knew about or should have known about it during the entirety of her contract.[223] If her case were decided similarly to *Doe v. Capital Cities*, then Kesha would not have a successful claim unless she could demonstrate that the label was indeed aware of the sexual assault.[224] Only allowing protection when the label becomes aware of the assault is inadequate, as the courts have determined that the predictability of such acts is so high that it becomes a cost of doing business.[225] Kesha should not have to continue working with someone that allegedly abused her.[226]

Some courts have even found that if an assault occurs in the workplace, the employer can be held civilly liable for that sexual assault.[227] Under these California jurisdictions, if the employers should have known that abuse was occurring and did nothing to stop it, then the employers should be liable.[228] If the employer can be held liable for harassment occurring in the workplace, then this should provide relief for artists in the music industry who are sexually assaulted.[229] These claims do not always coincide with the laws governing the music industry.[230]

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[223] *See id.* at ¶ 3 (contending that Sony was aware of the longevity of the abuse).

[224] *See* Doe v. Capital Cities, 58 Cal. Rptr. 2d 122, 132 (Ct. App. 1996) (detailing that knowledge of behavior that is likely to occur is not the same as knowledge that the same behavior has actually been committed).

[225] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 796 (1998) (finding that sexual assault is common in employment contexts).

[226] *See id.* at 796 (avowing that inappropriate behavior that arose from the essential obligations of the job is subject to liability).

[227] *See* Smith v. Sheahan, 189 F.3d 529, 533-34 (7th Cir. 1999) (noting that if the harassment involves the workplace, then that constitutes sufficient grounds for termination of the contract).

[228] *See id.* at 535 (emphasizing that this abuse can occur by a supervisor, coworker, or non-employee).

[229] *See* Lytton, *supra* note 9 (claiming that sexual assault is expected in the industry).

[230] *See* Gottwald v. Sebert, No. 653118, slip op. at 20 (N.Y. Sup. Ct. 2016) (determining that no liability existed for Dr. Luke).

ii. Employers Should be Held Liable for Offensive Behavior that Impacts the Fundamental Responsibilities of an Employee

An employer is subject to liability claims when there is sexual assault in the work place, leading to a hostile work environment claim.[231] In such cases, the severity of the hostility in the work environment must be objectively and subjectively offensive.[232] The Court must look at the totality of the circumstances surrounding the abuse, such as the frequency and severity of the conduct as well as how much the conduct interferes with the employers' work responsibilities.[233]

In *Lockard v. Pizza Hut,* Lockard was sexually assaulted and harassed by customers after her supervisor required her to wait on customers even after lewd comments and inappropriate touching occurred.[234] The court determined that this instance was more than offensive and it inhibited her ability to complete her job as a waitress.[235] Accordingly, a single incident of sexual assault was enough to uphold a hostile work environment claim because she no longer felt comfortable working at the restaurant.[236] When an employee is so disturbed by the incident of sexual assault that she cannot return to work, the employer is likely to be held liable.[237]

Kesha's complaint alleges that she perceived Dr. Luke's conduct to be offensive and therefore she should have an appropriate cause of action if a reasonable person were to perceive

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[231] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) (asserting that a sexual assault must be severe to be liable).

[232] *See id.* (explaining that if a reasonable person would find the conduct to be abusive, then the conduct is actionable).

[233] *See id.* at 787-88 (stating one factor is humiliation).

[234] Lockard v. Pizza Hut, 162 F.3d 1062, 1077 (10th Cir. 1998) (stating that she was vocal about her discomfort).

[235] *See id.* at 1071 (holding that the employer was liable).

[236] *See id.* at 1077 (emphasizing that the sexual assault must impact the responsibilities of the employee).

[237] *See* Turnbull v. Topeka State Hosp., 255 F.3d 1238, 1243-44 (10th Cir. 2001) (stating that when a single incident was objectively hazardous to employment, it leads to liability).

that conduct as offensive as well.[238] Kesha, along with her doctors, asserted that working with Dr. Luke would be dangerous to her mental health.[239] Under the standard set in *Lockard v. Pizza* Hut, when an employee's ability to complete her job is inhibited, liability is likely to result for the employer.[240] Kesha's job has similarly been hindered because working with a producer is an essential part of making music and working with a label.[241] Kesha continues to be uncomfortable working with Dr. Luke and her labels, Sony and Kemosabe, since the labels allowed the abuse to continue for around a decade.[242] Kesha is able to demonstrate these instances of behavior to a court and should therefore be able to hold Sony, Kemosabe, and Dr. Luke liable for the abuse that she endured under a hostile work environment claim.[243]

iii. Employer Behavior that Contradicts Public Policy and is Considered Unacceptable Should Subject the Employer to Liability

The tort of wrongful discharge prevents employers from acting against public policy; therefore, employers should be similarly liable in record industry contract cases that involve allegations of sexual assault.[244] In *Danny v. Laidlaw Transit*

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[238] *See id.* (contending that there is a hostile work environment claim if the employer's conduct is reasonably offensive).

[239] *See* Compl. ¶ 41, Oct. 14, 2014 (alleging that continued work with him would make it difficult to perform in her contract).

[240] *See Lockard*, 162 F.3d at 1077 (contending that the employer was liable for forcing his employee to wait on customers who were sexually harassing her).

[241] *See* Compl. ¶ 41, Oct. 14, 2014 (recognizing that many artists have a producer).

[242] *See id.* at ¶39 (avowing that it would be unsafe for Kesha to continue working with Dr. Luke).

[243] *Compare id.* at ¶ 3 (claiming that the abuse continued for ten years), *with Turnbull*, 255 F.3d at 1243-44 (holding that an employer should be held liable for sexual assault when it causes an employer to be fearful of returning to work).

[244] *See* Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 141 (Wash. 2008) (determining that when an employer violates public policy, this terminates a contract).

Services, the court determined that employer behavior that contradicts public policy is unacceptable.[245] Danny and her five children were victims of domestic violence and upon asking for time off to relocate to a shelter, she was demoted and discharged shortly thereafter.[246] Actions such as these constitute a viable tort of wrongful discharge action and are in place to prevent employers from acting against public policy.[247]

Kesha's complaint alleges that Dr. Luke sexually assaulted her during the term of her recording contract with Sony and Kemosabe.[248] Dr. Luke was acting as her supervisor in the realm of this contract and therefore was inappropriate in sexually assaulting her.[249] It should so follow that if an employer can be held accountable for acting against public policy in domestic violence cases for responding inappropriately, then an employer should be held accountable for the same violation in a sexual assault case.[250] While these claims offer promise to a recording artist, the accusations do not always succeed when applied to the music industry. This is why contract relief is necessary to allow an artist to leave her contract when there has been a sexual assault by an employer.[251]

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[245] *See id.* (holding that such behavior leads to a successful wrongful discharge case).

[246] *See id.* at 130-31 (emphasizing that Danny asked for time off after her thirteen-year-old son was admitted to the hospital).

[247] *See id.* at 131-34 (recognizing that these laws indicate a state desire to protect victims of domestic violence).

[248] *See* Compl. ¶ 34 Oct. 14, 2014 (avowing that the abuse occurred while she was under contract with Sony and Kemosabe).

[249] *See id.* at ¶ 3 (claiming that Kesha almost lost her life as a result of this abuse).

[250] *Compare* Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 141 (Wash. 2008) (holding that a violation of public policy leads to a successful wrongful termination claim), *with* Gottwald v. Sebert, No. 653118, slip op. at 20 (N.Y. Sup. Ct. 2016) (alleging gender motivated violence occurred during the time of her contract but it was irrelevant to the contract).

[251] *See* Doe v. Capital Cities, 58 Cal. Rptr. 2d 122, 133 (Ct. App. 1996) (holding that the employer was not liable because the employer was not aware of the abuse).

D. Sexual Assault Should Permit an Artist to Break a Recording Contract Without Consequences Because Sexual Assaults Shock the Conscience

Conduct that shocks the conscience is considered a violation of the implied covenant of good faith and fair dealing.[252] Courts have determined that the standard for measuring behavior is appropriate in situations outside of disproportionate force cases, including sexual assault claims.[253] In *Lillard v. Shelby County Board of Education*, a fourteen-year-old student was verbally attacked and slapped by her physical education teacher.[254] This was an isolated incident and therefore was not severe enough to lead to liability.[255] The court found that this behavior did not shock the conscience.[256]

The circumstances surrounding Kesha's sexual assaults were not isolated and involved more than just a slap in the face and verbal abuse.[257] Kesha was sexually and physically assaulted and emotionally taken advantage of for ten years.[258] According to her complaint, Kesha was constantly berated in front of others and told to stop eating so she could lose weight.[259] She claims that when she threatened to tell others of his abuse, Dr. Luke threatened her family's safety.[260] A reasonable person would believe that this conduct was outrageous and that a normal person

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[252] *See* Nelson v. McGoldrick, 896 P.2d 1258, 1262 (increasing a legal fee by fifty percent did not lead to a violation).
[253] *See* Lillard v. Shelby County Bd. of Educ., 76 F.3d 716, 725 (6th Cir. 1996) (recognizing that the "shock the conscience" standard is most common in cases of excessive force).
[254] *See id.* at 719 (illustrating that there was no legitimate reason for the teacher to slap a student in this instance).
[255] *See id.* at 725-26 (dismissing the liability claim).
[256] *See id.* (reasoning that the slap was not repeated behavior).
[257] *See* Compl. ¶ 3, Oct. 14, 2014 (avowing that Dr. Luke repeatedly sexually assaulted her and emotionally abused her).
[258] *See id.* (alleging that her self-confidence was destroyed).
[259] *See id.* at ¶ 32 (claiming that Dr. Luke called Kesha a "fat f***ing refrigerator).
[260] *See id.* at ¶ 37 (alleging that this constant fear is what caused her to keep quiet for so many years).

should not be subjected to it.[261] While the court has determined that a slap is not considered to be enough to sustain the shock-the-conscience-standard, sexual assault and physical abuse are more than sufficient.[262]

Some courts have explicitly determined that sexual assaults have the capability to shock one's conscience when they are severe.[263] In *Lee v. Borders*, Lee was sexually assaulted by a state employee while she was a resident at a state facility.[264] The court determined that the sexual assault would be invasive to an objective person as well as the plaintiff.[265] The sexual assault was actionable because it shocked the conscience of the court.[266]

In Kesha's complaint, she alleges that during one of her flights, Dr. Luke took advantage of her by coercing her to snort drugs so that he could force himself on her.[267] Similarly, *Lee* involves an abuse of power comparable to the circumstances surrounding Kesha's incidents.[268] Kesha alleges that she was sexually assaulted by her producer, who is technically her supervisor.[269] Additionally, both cases involve a fearfulness to return to work, as stated in Kesha's complaint by her doctors.[270] Kesha's doctors

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[261] *See* Turnbull v. Topeka State Hosp., 255 F.3d 1238, 1243-44 (10th Cir. 2001) (stating that if a reasonable person believes that the conduct is offensive, then there is a cause of action).

[262] *Compare Lillard*, 76 F.3d at 725-726 (holding that a slap is not enough to shock the conscience), *with* Compl. ¶ 3 (claiming that Kesha was assaulted physically and mentally for ten years at the hands of her producer).

[263] *See Turnbull*, 255 F.3d at 1243-44 (claiming that severity takes into account the fearfulness of the employee to return to work).

[264] *See* Lee v. Borders, 2013 U.S. Dist. LEXIS 120786, 12 (E.D. Mo. 2013) (stating that it was the defendant's job to take care of Lee).

[265] *See id.* (noting that this would shock the conscience).

[266] *See id.* (denying the motion to dismiss).

[267] *See* Compl. ¶ 22, Oct. 14, 2014 (contending that she was so drunk that she vomited on herself).

[268] *Compare Lee,* 2013 U.S. Dist. LEXIS 120786 at 12 (explaining that Lee was sexually assaulted by a person in a position of power), *with* Compl. ¶ 24 (alleging that Kesha was sexually assaulted by her producer, Dr. Luke).

[269] See Compl. ¶ 7 (avowing that Dr. Luke is the CEO of Kemosabe Records, the partner label that Kesha is signed with).

[270] *Compare* Lee v. Borders, 2013 U.S. Dist. LEXIS 120786, 12 (E.D. Mo. 2013) (recognizing that the court took fearfulness of returning to work into

assert that not only is she afraid to work with Dr. Luke, but it would be detrimental to her health.[271] If the court under *Lee* states that sexual assault in a state facility shocks the conscience, then Dr. Luke's behavior toward Kesha on the flight should shock the conscience of the court as well.[272]

Some courts have determined that behavior that is intense and unanticipated can shock the conscience.[273] In *Southwestern Virginia Mental Health Institution v. Wright*, Wright was sexually assaulted by two patients while she was working at the hospital.[274] Wright was trapped in a corner by two patients while the two men grabbed her crotch, talked about how much they wanted to have sex with her, and laughed at her fear.[275] Wright's employers argued that this activity should be expected because she deals with sex offenders as a part of her job and therefore the behavior should have been anticipated.[276] The court disagreed with the employers, finding that even though Wright worked with sex offenders, it was unreasonable to expect Wright to await her own assault.[277] Ultimately, the court held that the sexual assault was so outrageous that the employer was liable for Wright's injuries sustained as a

account when looking at employer liability), *with* Compl. ¶39 (emphasizing that Kesha is afraid to work with Dr. Luke).

[271] See *id.* (recognizing that Kesha's doctors told her no contact with Dr. Luke was the best option for her health).

[272] *Compare* Compl. ¶ 22 (asserting that she was sexually assaulted while on an airplane and extremely intoxicated), *with* Lee, 2013 U.S. Dist. at 12 (stating that a reasonable person would believe that a sexual assault occurring within a state facility would be offensive and therefore shocking to the conscience).

[273] *See* Sw. Va. Mental Health Inst. v. Wright, 2006 Va. App. LEXIS 454, 9 (Va. Ct. App. 2006) (claiming that sexual assault can shock the conscience).

[274] *See id.* at 4-5 (illustrating that she was working at a facility that took care of many patients that were sex offenders).

[275] *See id.* (detailing that she developed constant panic attacks and could no longer sleep at night).

[276] *See id.* at 10 (arguing that behavior that could be anticipated should not shock the conscience).

[277] *See id.* at 9 (contending that under all circumstances, sexual assault should never have to be anticipated).

result of the sexual assault.[278]

Similarly, in Kesha's complaint, she alleges that Dr. Luke sexually assaulted her on multiple occasions for ten years.[279] Sony, Kemosabe, and Dr. Luke could argue that Kesha is a part of an industry where sexual favors are often exchanged for fame and that Dr. Luke's behavior should have been anticipated.[280] However, under the view of *Southwestern Virginia Mental Health Institution v. Wright*, this argument would be without merit.[281] Just because Kesha is a part of an industry that is associated with sexual favors does not mean that she should expect to be sexually assaulted.[282]

Sexual assault can leave lifelong wounds for the victim, a fact that was no exception in the Brock Turner case of March 2016.[283] Brock Turner sexually assaulted a woman that was unconscious and half naked behind a dumpster at Stanford University.[284] After reading the victim's impact statement, it is evident that the sexual assault that she experienced shocked the conscience.[285] She goes on to explain that she learned what happened to her that night the same time that every news outlet

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[278] Sw. Va. Mental Health Inst. v. Wright, 2006 Va. App. LEXIS 454, 14 (Va. Ct. App. 2006) (noting that the medical evidence made it clear that the victim suffered as a result).

[279] *See* Compl. ¶ 3, Oct. 14, 2014 (alleging that Kesha almost lost her life due to the emotional and physical abuse).

[280] *See* Lytton, *supra* note 9 (asserting that sex is a big part of the music industry).

[281] *See Sw. Va. Mental Health Inst.,* 2006 Va. App. LEXIS at 10 (contending that just because one works in an industry where sexual assault is expected, it does not mean that she should anticipate being sexually assaulted).

[282] *Compare* Lytton, *supra* note 9 (mentioning that sexual assault and the music industry go hand and hand), *with* Sw. Va. Mental Health Inst., 2006 Va. App. LEXIS at 10 (illustrating that one should never have to expect to be sexually assaulted).

[283] *See* Baker, *supra* note 53 (providing the victim impact statement from the Brock Turner sexual assault case).

[284] *See id.* (illustrating that Brock Turner depicted that she liked it and consented because she rubbed his back).

[285] *See id.* (detailing that there were pine needles and dirt found inside of her vagina after the assault).

did.[286] This one event changed her life and she will never be able to get back that day or become the person she was before she was violated behind that dumpster.[287] After reading this statement, it becomes evident that a sexual assault impacts two lives, that of the victim and that of the perpetrator.[288]

Brock Turner's case illustrates that even when there is a sexual assault that shocks the conscience, the remedies for a victim are imperfect.[289] In the music industry, these sexual assaults may not even amount to a finding of liability for the employer.[290] Courts have found that sexual assaults do shock the conscience and therefore should lead to a breach of contract or damages for the victim, but in the music industry this is not the case.[291] Civil remedies seem to be the only way that a victim can get back her voice and become whole again.[292] The implied covenant of good faith and fair dealing is the way to do this, but it has not been utilized by the music industry yet.[293]

I. POLICY RECOMMENDATION

As musicians begin to speak up about the prevalence and normalcy of sexual assault in the recording industry, more cases similar to Kesha's will likely be brought to the public eye.[294]

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[286] *See id.* (noting that Turner's attorneys stated that since she could not remember, she could not prove there was no consent).
[287] *See id.* (asserting that she had to put her life on hold for a year to pursue charges).
[288] *See id.* (avowing that Turner faced material damages by being put on the registry and her damages were internal).
[289] *See* Baker, *supra* note 53 (illustrating that Turner was sentenced to six months in jail for his crime).
[290] *See* Gottwald v. Sebert, No. 653118, slip op. at 20 (N.Y. Sup. Ct. 2016) (finding no liability with Dr. Luke and Sony).
[291] *See id.* (noting that Kesha's sexual assault did not amount to a finding of breach of contract).
[292] *See* Resnick, *supra* note 50 (asserting that victims are given back their sense of control through civil remedies).
[293] *See Gottwald*, No. 653118, slip op. at 20 (illustrating that no claim of breach of the implied covenant of good faith and fair dealing was alleged in Kesha's complaint).
[294] *See* Lytton, *supra* note 9 (recognizing that Kesha's situation is not as unique as we thought to the industry).

Legislators have taken a stand against sexual assault and domestic violence in the housing market through the Violence Against Women Act.[295] Cases in employment law have also adopted a firm position on sexual assaults arising in the workplace, deeming sexual assaults inappropriate and employers vicariously liable.[296] Sexual assault can have lifetime implications for the victim as well as the assailant.[297]

The implied covenant of good faith and fair dealing is a viable solution for recording artists when sexual assault arises in the course of their contract.[298] Kesha's complaint illustrates the struggle that lawyers face when asserting a cause of action against a record label because there is no cognizable solution for sexual assault in the music industry.[299]

The implied covenant of good faith and fair dealing applies in every contract and recording contracts are not immune from its application.[300] Courts have recognized that sexual assault does shock the conscience and therefore would lead to a violation of the implied covenant of good faith and fair dealing.[301] In Kesha's case, a reasonable person would believe that being sexually assaulted on an airplane while unconscious is outrageous and

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[295] *See* CAL. CIV. CODE §1946.7 (Deering 2008) (emphasizing that victims of domestic violence are allowed early termination).

[296] *See* Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) (holding that if the sexual assault in the work place is objectively severe, then the employer is liable).

[297] *See* Baker, *supra* note 53 (noting that Brock Turner's victim has suffered internal harm and he will be on the registry for life).

[298] *See* Geler v. Nat'l Westminster Bank USA, 770 F. Supp. 210, 215 (S.D.N.Y. 1991) (recognizing that violating the implied covenant amounts to a breach of contract).

[299] *See generally* Compl., Oct. 14, 2014 (illustrating Kesha's attorneys brought eight claims against Dr. Luke and Sony, but there was no claim of breach of the implied covenant).

[300] *See* Martindell v. Lake Shore Nat'l Bank, 154 N.E.2d 683, 685 (Ill. 1958) (recognizing that the implied covenant of good faith and fair dealing is present in all contracts).

[301] *See* Lee v. Borders, 2013 U.S. Dist. LEXIS 120786, 12 (E.D. Mo. 2013) (emphasizing that if a reasonable person found that the conduct was outrageous, then it would shock the conscience).

shocking to the conscience.[302] Permitting labels to operate their contracts in a similar manner to how they have been will continue to normalize sexual assaults, forcing artists to choose between their safety and employment.[303]

Employment law illustrates that a sexual assault committed by an employer in the workplace is unacceptable and creates liability for the employer..[304] When an artist is sexually assaulted by her producer, like Kesha, it is clear that this behavior is intolerable under the law.[305] If this behavior is improper in employment law, it would also be intolerable in the music industry.[306]

The implied covenant of good faith and fair dealing applies to record contracts and sexual assault shocks the conscience, thereby making situations such as Kesha's a violation of this covenant.[307] Violations of the implied covenant of good faith and fair dealing are equivalent to a breach of contract.[308] This should permit an artist to escape their contract when instances of sexual abuse occur during the course of a contract..[309]

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[302] *See* Compl. ¶ 22, Oct. 14, 2014 (detailing that Dr. Luke sexually assaulted her after she vomited on herself).

[303] *See id.* (recognizing that recently artists have come forward to change the harsh reality of sexual assault in the industry).

[304] *See generally* Faragher v. City of Boca Raton, 524 U.S. 775, 787 (1998) (finding that victims of sexual assault should be protected when employers are the assailants).

[305] *Compare id.* at 796 (asserting that employers should be found liable when sexual assault results from behavior that is essential to job performance*), with* Compl. ¶ 17, Oct. 14, 2014 (detailing that Dr. Luke is a music producer whose job is to produce Kesha's records).

[306] *See* Brungard v. Caprice Records, Inc., 608 S.W.2d 585, 587 (Tenn. Ct. App. 1980) (identifying that record contracts include the same elements as a general, non-industry contract).

[307] *See* Nelson v. McGoldrick, 896 P.2d 1258, 1262 (Wash. 1995) (recognizing that when conduct shocks the conscience, it violates the implied covenant of good faith and fair dealing).

[308] *See* Geler v. Nat'l Westminster Bank USA, 770 F. Supp. 210, 215 (S.D.N.Y. 1991) (highlighting that a violation of the implied covenant is a breach of the contract itself).

[309] Danny v. Laidlaw Transit Servs., Inc., 193 P.3d 128, 141 (Wash. 2008)

II. CONCLUSION

Currently, there are no outlets for artists to successfully terminate their contracts early when an instance of sexual assault by a member of the record label occurs.[310] Nevertheless, courts have demonstrated their willingness to void other types of contracts to protect victims of sexual assault and domestic violence in other types of contract law.[311] Precedent in employment law has further established that sexual assault in the workplace is not only inappropriate but provides sufficient grounds for finding employer liability.[312]

The increase in prevalence of artists speaking up about sexual assaults in the music industry demonstrates that Kesha's sexual assault at the hands of her producer is not as rare as one might think.[313] One potential solution to ensure the safety of artists from sexual assaults is through the application and enforcement of the implied covenant of good faith and fair dealing.[314] Record contracts are no different from any other contract and therefore should be treated equally by the courts and the law.[315]

(finding that violations of public policy can lead to the termination of a contract).

[310] *See generally* Compl., Oct. 14, 2014 (demonstrating that Kesha's attorneys brought eight claims, and none have been successful).

[311] *See* CAL. CIV. CODE §1946.7 (Deering 2008) (allowing leases to be terminated early for victims of domestic violence).

[312] See Faragher v. City of Boca Raton, 524 U.S. 775, 796 (1998) (finding that employers could be held liable for sexual harassment that occurs in the workplace).

[313] *See* Lytton, *supra* note 9 (providing five other examples of sexual assaults in the music industry).

[314] *See* Nelson v. McGoldrick, 896 P.2d 1258, 1262 (Wash. 1995) (holding that a violation of the implied covenant is behavior that shocks the conscience).

[315] Greenfield v. Philles Records, 780 N.E.2d 166, 168 (N.Y. 2002) (recognizing that record contracts satisfy all the elements of a contract).