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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

ESMÉ BIANCO,

Plaintiff,

vs.

BRIAN WARNER a/k/a MARILYN MANSON, individually; MARILYN MANSON RECORDS, INC.,

Defendants.

CASE NO. 2:21-CV-3677-FLA-MAR

DEFENDANT BRIAN WARNER'S REPLY IN SUPPORT OF HIS MOTION TO DISMISS THE FOURTH AND FIFTH CAUSES OF ACTION IN PLAINTIFF ESMÉ BIANCO'S SECOND AMENDED COMPLAINT

Date: July 1, 2022
Time: 1:30 p.m.
Crtrm.: 6B

The Hon. Fernando L. Aenlle-Rocha

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I. INTRODUCTION

Plaintiff Esmé Bianco's ("Plaintiff") Opposition ("Opposition" or "Opp'n") fails to save her fourth and fifth causes of action, which the Court lacks subject matter jurisdiction to hear and which fail to state a claim on the merits.

While Plaintiff contends the Court has supplemental jurisdiction over the two new state law claims, Plaintiff does not identify even a single fact common to her existing claims. Nor can she because the claims arise from different legal theories and acts separated by nine-plus years. Plaintiff has no meaningful response to the many cases cited in the Motion holding that under these same circumstances, federal courts do not have supplemental jurisdiction.

Plaintiff also fails to state a claim. The Opposition does little more than repeat the Second Amended Complaint's ("SAC") conclusory recitations of claim elements, and incorrectly assert that such allegations are sufficient to survive a motion to dismiss. As to her claim for tortious interference with contract, the Opposition fails to identify any factual allegations in the SAC that establish a valid and enforceable contract between Plaintiff and rock band the Deftones, or Defendant Brian Warner's ("Warner") knowledge of the purported contract (as opposed to merely some association between them). Nor does the Opposition identify any factual allegations establishing *mutual* assent to the purported contract. Indeed, there are none as the SAC references only Plaintiff's *own* "expectations."

With respect to the claim for tortious interference with prospective economic advantage, the Opposition does not identify any non-conclusory allegations that the supposedly interfered-with "opportunities" were "economic" or "probable." Further, the Opposition concedes that Plaintiff does not—and cannot—"plead that the alleged interference was independently wrongful by some measure beyond the fact of the interference itself." *Manwin Licensing Int'l S.A.R.L. v. ICM Registry, LLC*, 2013 WL 12123772, at *8 (C.D. Cal. Feb. 26, 2013).

The fourth and fifth causes of action should be dismissed.

II. THE OPPOSITION FAILS TO ESTABLISH SUPPLEMENTAL JURISDICTION.

As the Opposition recognizes, the critical issue in deciding whether the Court has supplemental jurisdiction over claims for which there is no federal question or diversity jurisdiction is the existence of a "common nucleus of operative fact." *City of Chicago. v. Int'l College of Surgeons*, 522 U.S. 156, 165 (1997) (quoting *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)). "[T]he burden of proof in a 12(b)(1) motion is on the party asserting jurisdiction, and the court will presume a lack of jurisdiction until the pleader proves otherwise." *Pac. Shores Hosp. v. Backus Hosp. Med. Benefit Plan*, 2005 WL 8154685, at *2 (C.D. Cal. May 18, 2005). The Opposition does not come close to establishing jurisdiction.

A. The Opposition Cannot Identify Any Overlapping Operative Facts.

Despite asserting "all of Plaintiff's claims are part of the same nucleus of facts," Opp'n at 4, the Opposition fails to identify any conduct, legal theory, time period, or proof common to her (i) new state law claims for tortious interference, and (ii) existing claims for battery, assault, and forced labor. *See Goel v. Shah*, 2014 WL 460867, at *5 (N.D. Cal. 2014) (claims "involv[ing] separate and distinct legal and factual issues, time-frames, witnesses and evidence" do not arise from a common nucleus of operative fact); *Kellwood Apparel LLC v. Protrend Ltd.*, 2020 WL 8474701, at *3 (C.D. Cal. Dec. 14, 2020) (same). Plaintiff does not identify even a single fact "necessary to establish" either of her tortious interference claims that is also "necessary to establish" any of her assault, battery, or forced labor claims, and vice versa. *Toor v. Khan*, 2009 WL 5064977, at *1 (N.D. Cal. Dec. 23, 2009). Nor can she—the acts underlying her claims are not only different but also nine-plus years apart. *See* Dkt. 42-1 ("Motion" or "Mot.") at 2-3. While Plaintiff argues only a "loose factual connection" is sufficient, Opp'n at 6, here there is no factual connection at all.

As the Opposition recognizes, the only link between her new and existing claims is that she is the plaintiff and Warner is defendant. But that is not enough. *See*

Carpenters Sw. Admin. Corp. Bd. of Trustees for Carpenters Sw. Trusts v. MCL Constr., Inc., 2019 WL 8884097, at *1 (C.D. Cal. Nov. 15, 2019) (no supplemental jurisdiction where "claims involve the same parties, but they are otherwise factually and legally distinct"); *see also Espinoza v. City of Seattle*, 2019 WL 5079950, at *4 (W.D. Wash. Oct. 9, 2019) ("The mere fact that the parties have a pre-existing relationship is not enough to bless factually distinct state law claims with supplemental jurisdiction.").[1] Plaintiff argues that her new allegations and claims, based on different acts and legal theories, are a "continuation" of her prior allegations and claims. Opp'n at 3. But if that alone could create a "common nucleus of operative fact" the Court would have jurisdiction over any claim between the same parties. Unsurprisingly, Plaintiff cannot cite a single case supporting her argument.

B. The Cases Cited in the Opposition Support Dismissal.

Plaintiff further side-steps the relevant inquiry—whether there is a "common nucleus of operative fact"—by arguing that her new claims "stem from the same motive and origin" as her old claims, *i.e.*, Warner's alleged "unlawful persecution of Plaintiff." Opp'n at 7. Plaintiff cites *St. Paul Mercury Ins. Co. v. Del Webb California Corp.*, 2017 WL 7661491 (C.D. Cal. Nov. 7, 2017), for the proposition that, in determining whether there is a "common nucleus of operative fact," courts can consider whether "the facts are related in time, space, origin, or motivation." Opp'n. at 6-7 (citing *St. Paul*, 2017 WL 7661491 at *3). But there must be some shared operative facts to consider in the first place: In *St. Paul Mercury*, the court concluded there was no supplemental jurisdiction where, like here, the "proof needed to support [the new claims] . . . [we]re unrelated to those necessary to try the original suit," the

[1] For this same reason, Plaintiff's attempt to distinguish *some* of the cases cited in the moving papers, on the grounds that the dismissed claims were "against a different defendant" while "here the claims are between the same two parties," fails. Opp'n at 7-8. Regardless, the lack of factual overlap—not just additional parties—supported dismissal. *See, e.g., Goel*, 2014 WL 460867, at *5

"core issues" were different, and the claims "ar[o]se out of distinct transactions." 2017 WL 7661491 at *3-5. To be sure, a recent Central District decision quoting the "motive" and "origin" language from *St. Paul Mercury* reached the same conclusion—there is no supplemental jurisdiction over claims "based on a completely different set of operative facts." *Bafford v. Northrop Grumman Corp.*, 2022 WL 1002350 (C.D. Cal. Apr. 4, 2022) (holding claims "do not derive from a common nucleus of *operative* facts, and that, to the extent there are common facts between the two sets of claims, those facts are ancillary" (emphasis in original)). Because Plaintiff does not and cannot identify "any legal element or operative fact which overlaps," her appeal to "motive" and "origin" must fail. Opp'n at 7 (quoting *Kellwood*, 2020 WL 8474701, at *3).

Plaintiff's other argument—that the alleged conduct in 2022 "occurred because of the instant litigation"—also fails to manufacture a common nucleus of operative fact where there otherwise is none. Opp'n at 2, 7.[2] The fact that "new state law claims . . . happened to arise during [Plaintiff's] ongoing federal litigation" against Warner is "not enough of a factual nexus" to establish jurisdiction, given the lack of connection to the existing claims and allegations. *Espinoza*, 2019 WL 5079950, at *4. Plaintiff does not cite any case holding an allegation of "conspiracy" and/or "retaliation," by itself, brings discrete acts ***nine years apart*** within the same nucleus of operative fact. *Cf.* Mot. at 6 n.2 (citing *Broadcom Corp. v. Qualcomm Inc.*, 2009 WL 650576, at *8 (S.D. Cal. Mar. 11, 2009) (claim "which alleges a pattern of misconduct" did not "create supplemental jurisdiction")). The only case Plaintiff

[2] This new "retaliation" story is not mentioned once in the SAC. *See Mayes v. Wells Fargo Bank, N.A.*, 2021 WL 5763833, at *2 (S.D. Cal. May 14, 2021) ("[A]llegations . . . not pled within the four corners of the FAC . . . cannot be considered on a motion to dismiss."). But even if it were, it does not help Plaintiff, whose main argument for supplemental jurisdiction is the alleged conduct in 2022 arose from the same "motive" and "origin" as conduct alleged to have occurred several years before this action was even filed.

cites, *Schafer v. Sea-Land Serv., Inc.*, 2001 WL 638409 (9th Cir. 2001), is a one-page unpublished decision in which, unlike here, the claims all appear to arise from the same underlying event—plaintiff's wrongful termination.[3]

Lastly, Plaintiff misstates the law regarding consideration of "judicial economy, convenience, and fairness," Opp'n at 6-7, which is not a catch-call to establish jurisdiction. Under 28 U.S.C. 1367, subsection (a) gives federal courts the power to hear additional state law claims arising from a common nucleus of operative fact, and subsection (c) gives federal courts the discretion to "decline to exercise supplemental jurisdiction over a claim under subsection (a)." The cases Plaintiff cites in the Opposition explain that consideration of "judicial economy, convenience, and fairness" concerns the latter—*i.e.*, whether to keep or dismiss (or remand) claims for which jurisdiction exists. *See Exec. Software N. Am., Inc. v. U.S. Dist. Ct. for Cent. Dist. of California*, 24 F.3d 1545, 1555 (9th Cir. 1994) ("Section 1367 retains the basic division, reflected in *Gibbs*, between the power of a court to entertain a pendent claim and the authority of a court, in its discretion, to decline to exercise that power."); *Perez v. Wells Fargo Bank, N.A.*, 929 F. Supp. 2d 988, 1001 (N.D. Cal. 2013) ("[T]here is a distinction between the power to hear state law claims and the discretionary exercise of that power. To decide whether to exercise jurisdiction over pendent state law claims, a district court should consider and weigh in each case, and at every stage of litigation, the values of judicial economy, convenience, fairness, and comity." (internal citations and quotations omitted)); *Cross v. Aerospace Corp.*, 122 F.3d 1070 (C.D. Cal. 1997) (same). Where there is no common nucleus of operative fact—*i.e.*, the court does not have to power to hear the claim under subsection (a)—there is no decision to make under Section 1367(c). *See* Wright & Miller, 13D Fed. Prac. & Proc. Juris. § 3567.3 (3d ed.) ("If a claim invokes supplemental jurisdiction

[3] The one-page decision lacks a detailed factual discussion, and the twenty-four year old removal order was not available PACER.

under 28 U.S.C.A. § 1367(a) and that jurisdiction is not abrogated by § 1367(b), the court may then consider whether discretionary factors counsel against exercising that supplemental jurisdiction.").[4]

Because Plaintiff does not carry her burden to establish supplemental jurisdiction, the fourth and fifth causes of action should be dismissed. *See Pac. Shores Hosp.*, 2005 WL 8154685, at *2.

III. THE FOURTH CAUSE OF ACTION FAILS TO STATE A CLAIM.

A. The Opposition Confirms the SAC Contains Nothing More than Conclusory Restatements of Claim Elements.

The fourth cause of action for intentional interference with contract should be dismissed because the SAC does not plead a valid and enforceable contract or Warner's knowledge of such a contract. The "threadbare recitals of [the] cause of action's elements, supported by mere conclusory statements" identified in the Motion are insufficient to state a claim, and the Opposition just repeats those same allegations. *W. Air Charter, Inc. v. Schembari*, 2017 WL 10638759, at *9 (C.D. Cal. Oct. 6, 2017) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)); *see also* Mot. at 6-8.

While Plaintiff does not dispute "[t]he existence of a valid contract is an essential element of [her] claim," *Micro-Tech. Concepts, Inc. v. Xigmatek Co.*, 2010 WL 11601323, at *3 (C.D. Cal. Sept. 29, 2010), the Opposition does little more than assert—without reference to any facts—there was a contract. Opp'n at 9. The Opposition does not address Plaintiff's failure to plead the material terms of the purported contract, but instead contends, contrary to the law, that this showing is not

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[4] Even were the Court to find a common nucleus of operative fact here, *Perez* explains why it should nevertheless decline to exercise jurisdiction. *See also* Mot. at 6 n.2. There, judicial economy, convenience, and fairness weighed in favor of remand because, like here, the amended complaint contained allegations and California law claims "substantially different" from those raised before, and given the early stage of the case, the court had "not performed a substantial amount of legal analysis that would need to be repeated." *Perez*, 929 F. Supp. 2d 988 at 1006.

required. *See Perea v. Rush Univ. Med. Ctr.*, 2019 WL 11665018, at *1 (N.D. Ill. May 7, 2019) (dismissing tortious interference claim where plaintiff "neither attache[d] the [contract] to her complaint nor allege[d] the purported contract's material terms").

Nor does Plaintiff explain how the SAC pleads mutual assent given Plaintiff alleges only her *own* "expectations" about what she was to receive "in exchange" for being photographed. Mot. at 7-8. As stated in the Motion, and misstated in the Opposition, the SAC does not actually allege the Deftones promised Plaintiff anything, let alone legal, non-illusory consideration. Mot. at 7; *see also* SAC ¶ 33.

The Opposition also fails to identify any factual allegations in the SAC establishing Warner's "knowledge of the contract." Plaintiff is incorrect that paragraph 35 of the SAC alleges "Warner was made aware of *the contract*." Opp'n at 10 (emphasis added). That paragraph instead says Warner "discovered Ms. Bianco's participation in *the project* for the Deftones." SAC ¶ 35 (emphasis added). Even assuming "the project" is the same as "the contract," which the Opposition contends, *see* Opp'n at 10, this is still nothing more than a conclusory statement unsupported by any factual allegations. *See FashionPass, Inc. v. Rent the Runway, Inc.*, 2019 WL 3782332, at *5 (C.D. Cal. June 24, 2019) (holding "mere conclusory allegations will not suffice" to establish knowledge of the contract); *see also Swipe & Bite, Inc. v. Chow*, 147 F. Supp. 3d 924, 935 (N.D. Cal. 2015) (dismissing tortious interference claim where plaintiff alleged knowledge of contracts without any facts showing knowledge). Plaintiff's further contention that "[h]ad Defendant Warner not been aware of the contractual relationship between Plaintiff and the Deftones, he would not have had reason to confront the Deftones about their work with Plaintiff and ultimately convince them to breach the contractual relationship" is unavailing. Opp'n at 10. Not only is it circular, but it is also a conclusory statement within a conclusory statement. Plaintiff ignores that she must plead *facts* showing knowledge of the purported contract, a required element of the claim.

IV. THE FIFTH CAUSE OF ACTION FAILS TO STATE A CLAIM.

A. Unidentified "Opportunities" are Not Probable Economic Relationships.

The Opposition does not save the SAC from failing to plead (i) "a specific economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff" and (ii) "knowledge by defendant of the existence of the relationship." *W. Air Charter*, 2017 WL 10638759, at *4.

First, the Opposition does not identify any factual allegations in the SAC establishing that any purported relationship was "economic." *See Vascular Imaging Pros., Inc. v. Digirad Corp.*, 401 F. Supp. 3d 1005, 1012 (S.D. Cal. 2019) ("[G]eneral conclusory allegations . . . do not satisfy the pleading requirements of the first element of the claim."); *Prince v. Universal Music Corp.*, 2009 WL 10672282, at *5 (C.D. Cal. May 18, 2009) (holding a "conclusory allegation of prospective economic relationships is insufficient to sustain a claim for tortious interference"). Neither the SAC nor the Opposition says anything, for example, about financial compensation Plaintiff would receive from the Deftones, the unidentified "similar social media opportunities," or "future work" with unnamed "creative directors." *Asia Inv. Co. v. Borowski*, 133 Cal. App. 3d 832, 840 (1982) (affirming dismissal where relationship "cannot be characterized as an economic relationship"); *Blank v. Kirwan*, 39 Cal. 3d 311, 330 (1985) (same). The Opposition's attorney argument and conjecture cannot replace non-existent factual allegations. Opp'n at 11-12.

Second, the Opposition fails to identify any facts establishing that the lost "opportunities" she complains of were "reasonably probable" but for the alleged interference. *Infectolab Americas LLC v. ArminLabs GmbH*, 2021 WL 1561627, at *2 (N.D. Cal. Apr. 21, 2021). To the contrary, the Opposition merely restates the conclusion that "[b]ut for Defendant Warner's interference, Plaintiff would have received significant future economic benefit from the partnership," Opp'n at 12,

asserting that unidentified opportunities were to flow from the project, *id.* at 11 ("similar social media opportunities in the future"), 11 ("exposure for the artist and opportunities for future work"), 12 ("future economic benefit"), 12 ("many different projects in the industry"). As explained in the Motion at 9-10, none of these vague "opportunities" are actionable. *See, e.g.*, *Green Crush LLC v. Paradise Splash I, Inc.*, 2018 WL 4940825, at *10 (C.D. Cal. May 3, 2018) ("Without pleading an existing relationship with an identifiable customer, vendor, or potential franchisee, Plaintiff provides no 'factual basis upon which to determine whether [it] was likely to have actually received the expected benefit.'"); *Westside Ctr. Assocs. v. Safeway Stores 23, Inc.*, 42 Cal. App. 4th 507, 518 (1996) (requiring "the promise of future economic advantage" rather than the "more speculative expectation that a potentially beneficial relationship will eventually arise"); *Blank*, 39 Cal. 3d at 330-31 (allegations that amount to a mere "hope for an economic relationship and a desire for future benefit" are inadequate).

Third, the Opposition does not identify any factual allegations establishing that Warner had knowledge of these allegedly "economic" "opportunities." The most Plaintiff can muster is Warner was an "experienced industry insider." Opp'n at 12. But even taking this as true, it is not plausible Warner would have known about relationships not even Plaintiff herself can identify. *See Iqbal*, 556 U.S. at 663 (requiring "facial plausibility" drawn from "reasonable inference[s]").

B. The Opposition Concedes Plaintiff Does Not and Cannot Identify "Independently Wrongful" Conduct.

The Opposition does not identify any "independently wrongful act in disrupting the relationship." *O'Connor v. Uber Techs., Inc.*, 2013 WL 6354534, at *14 (N.D. Cal. Dec. 5, 2013). To the contrary, Plaintiff concedes the SAC does not and cannot plead this. Opp'n at 14 ("Plaintiff is unable to plead the exact words or actions used by Defendant Warner to interfere in the Second Amended Complaint[.]"). Instead, Plaintiff states Warner used his "power and influence in the entertainment industry"

to induce a breach, and that her other allegations of abuse—from nine years earlier—"indicate[] that Defendant Warner utilized some sort of threat or other illegal action to induce the Deftones's breach." Opp'n at 13-14. This falls far short of identifying conduct that is "proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *O'Connor*, 2013 WL 6354534, at *14; *see also Ronald Cohn, Inc. v. Sprouts Farmers Mkt.*, Inc., 2021 WL 120896, at *5 (S.D. Cal. Jan. 13, 2021) ("Plaintiff FAC fails to show how the alleged wrongful interfering act is independently tortious towards a third party. . . . As such, there are insufficient allegations supporting the required elements of an interference claim.").

Even assuming Plaintiff is correct that she "is not required to make 'detailed factual allegations'" in the SAC, Opp'n at 13, she still fails to "***plead*** that the alleged interference was independently wrongful by some measure beyond the fact of the interference itself," and thus the claim must be dismissed. *Manwin*, 2013 WL 12123772, at *8 (emphasis added); *see also Spy Phone Labs LLC. v. Google Inc*., 2016 WL 1089267, at *4 (N.D. Cal. Mar. 21, 2016) ("Because SPL has not pled such an act, it has failed to state a claim for tortious interference with prospective economic advantage.").

V. CONCLUSION

Because there is no subject matter jurisdiction over Plaintiff's fourth and fifth causes of actions, and Plaintiff otherwise fails to state a claim, Warner respectfully requests that the fourth and fifth causes of action be dismissed.

DATED: June 17, 2022

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