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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 MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF HIS MOTION TO DISMISS THE FOURTH AND FIFTH CAUSES OF ACTION IN PLAINTIFF ESMÉ BIANCO'S SECOND AMENDED COMPLAINT

Notice of Motion and Motion and Proposed Order filed concurrently

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

The Hon. Fernando L. Aenlle-Rocha

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendant Brian Warner ("Defendant" or "Warner") moves pursuant to Rules 12(b)(1) and 12(b)(6) to dismiss the two new state law claims Plaintiff Esmé Bianco ("Plaintiff") added to her Second Amended Complaint ("SAC"). While these spurious claims fail on the merits, there is no reason to waste Court or party resources getting there. The claims are subject to dismissal at the pleading stage for two straightforward, independently sufficient reasons.

First, the Court lacks subject matter jurisdiction to hear Plaintiff's California law claims. There is no dispute the Court lacks both federal question and diversity jurisdiction, and Plaintiff cannot rely on supplemental jurisdiction under 28 U.S.C. § 1367(a). Far from a "common nucleus of operative fact" between (i) these new claims for tortious interference with contract and prospective economic benefit, and (ii) her existing claims for assault, battery, and forced labor, *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), there are no overlapping facts at all. The existing claims arise from alleged conduct in 2011 to 2013, and the new tortious interference claims arise from different alleged conduct ***nine years later*** in April 2022. Because the new claims "involve separate and distinct legal and factual issues, time-frames, witnesses and evidence," the Court lacks supplemental jurisdiction to hear them. *Goel v. Shah*, 2014 WL 460867, at *5 (N.D. Cal. Feb. 3, 2014).

Second, the new claims fail to state a claim for relief. According to Plaintiff, "[i]n exchange" for allowing rock band the Deftones to photograph her and use the images on their upcoming tour, she "expected" to gain "public exposure" and the "opportunity to continue working with" a "highly sought-after creative director." But even accepting as true Plaintiff's allegations about her vague and illusory expectations, the SAC is devoid of facts establishing numerous essential claim elements (any of which dooms her claims), and instead relies on conclusory recitations of those elements to fill in the gaps. With the interference with contract

claim, Plaintiff does not allege facts establishing a valid and enforceable contract. Indeed, she does not allege the Deftones promised her anything. Nor does she plead any facts establishing Defendant's knowledge of the purported contract. As to her claim for interference with prospective economic relations, the SAC does not establish the "probable" disruption of an actual "economic" relationship. And, critically, Plaintiff fails to allege, as she must, "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).

Accordingly, the fourth and fifth causes of action should be dismissed.

II. SUMMARY OF RELEVANT ALLEGATIONS

Plaintiff's original three claims for sexual assault (first cause of action), sexual battery (second cause of action), and forced labor (third cause of action) arise from conduct alleged to have occurred between 2011 and 2013.[1] Plaintiff alleges Warner:

- "convinced" her to immigrate to the United States in April 2011, SAC ¶ 20,
- "required [Plaintiff] to provide unpaid labor" from April 2011 to July 2011, *id.* ¶ 28;
- "threatened to have her visa revoked" around June 2011, *id.* ¶ 22;
- "committed sexual battery against [her] on multiple occasions . . . in 2011," *id.* ¶ 32; and
- "forcibly kissed her" in 2013, *id.* ¶ 23.

There are no allegations Plaintiff and Defendant had any contact between 2013 and 2021.

On May 11, 2022, the Court granted Plaintiff's request for leave to amend her First Amended Complaint to "add new allegations and claims regarding conduct by

[1] The first two claims were brought under California statute, and the third was brought under federal statute.

[Warner] that allegedly occurred after the filing of the FAC." Dkt. No. 39. The only changes Plaintiff made to her complaint were to add paragraphs 33-38 (under the heading "Tortious Interference") and the fourth and fifth causes of action. In the SAC, Plaintiff alleges in April 2022 she "entered into a contract to provide the musical group Deftones with images of herself to be used as part of the stage set for the band's current tour," but when "Warner discovered Ms. Bianco's participation in the project," he "proceeded to contact the band and confront them over the Deftones' decision to work" with her, using his "power and influence in the entertainment industry to interfere." SAC ¶¶ 33, 35. Plaintiff claims this alleged interference resulted in "the loss of the opportunity to work with the highly regarded creative director, as well as the loss of exposure from her images being used during the Deftones' world tour." *Id.* ¶ 37.

III. LEGAL STANDARDS

A. Federal Rule of Civil Procedure 12(b)(1)

Under Rule 12(b)(1) "a complaint must be dismissed if the Court lacks subject matter jurisdiction to adjudicate the claims." *Mazal Grp., LLC v. Ben Ami*, 2018 WL 11397506, at *2 (C.D. Cal. May 23, 2018); *accord Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). "[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) (citing *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994)). Rule 12(b)(1) jurisdictional challenges can be either "factual" or "facial." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000); *see also Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). In a "facial" attack such as this Motion, "the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Safe Air*, 373 F.3d at 1039; *see also Wolfe v. Strankman*, 392 F.3d 358, 362 (9th Cir. 2004) ("Whether subject matter jurisdiction exists therefore does not

depend on resolution of a factual dispute, but rather on the allegations in [the] complaint.").

B. Federal Rule of Civil Procedure 12(b)(6)

To survive this Rule 12(b)(6) Motion, the SAC must be facially plausible—that is, it must allege sufficient "factual content" to "allo[w] the court to draw the reasonable inference" that Warner is "liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *accord Eclectic Props. E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 995-96 (9th Cir. 2014). "If a pleader's allegations of wrongdoing are merely 'threadbare recitals of a cause of action's elements, supported by mere conclusory statements' a court will not accept the allegations as true." *EMC Corp. v. Sha*, 2013 WL 4399025, at *2 (N.D. Cal. Aug. 13, 2013) (quoting *Iqbal*, 556 U.S. at 678).

IV. ARGUMENT

The fourth and fifth causes of action should be dismissed pursuant to Rule 12(b)(1) and Rule 12(b)(6).

A. The Court Does Not Have Subject-Matter Jurisdiction Over Plaintiff's State Law Tortious Interference Claims.

The fourth and fifth causes of action must be dismissed because the Court does not have subject matter jurisdiction over them. Fed. R. Civ. P 12(b)(1). There is no federal question jurisdiction for state law tortious interference claims under 28 U.S.C. § 1331. *See BHRAC, LLC v. Regency Car Rentals, LLC*, 2015 WL 3561671, at *6 (C.D. Cal. June 4, 2015). Nor, in this action, is there diversity jurisdiction under 28 U.S.C. § 1332 given that "Plaintiff has not alleged the existence of diversity among the Parties." *Id.*; SAC ¶¶ 8-10 (alleging all parties are citizens of California). Rather, Plaintiff only appears to contend the Court has supplemental jurisdiction under 28 U.S.C. § 1367. SAC ¶ 6. But there is no supplemental jurisdiction because the new claims arise from "entirely separate alleged conduct" than the existing claims. *Ryan v. City of Roseville*, 2018 WL 4611407, at *3 (E.D. Cal. Sept. 26, 2018).

Section 1367(a) only bestows federal supplemental jurisdiction over state law claims "that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). To that end, supplemental jurisdiction requires a "common nucleus of operative fact." *City of Chicago. v. Int'l College of Surgeons*, 522 U.S. 156, 165 (1997) (quoting *Gibbs*, 383 U.S. at 725). Where state law claims "involve separate and distinct legal and factual issues, time-frames, witnesses and evidence," they do not arise from a common nucleus of operative fact. *Goel*, 2014 WL 460867, at *5; *Kellwood Apparel LLC v. Protrend Ltd.*, at *3 (C.D. Cal. Dec. 14, 2020) (dismissing state law counter-claims that "involve[d] different conduct, legal theories, and time periods, and will require different sources of proof"); *Carne v. Stanislaus Cnty. Animal Servs. Agency*, 445 F. Supp. 3d 772, 776 (E.D. Cal. 2020) ("When the acts are different, it appears that there is no common nucleus unless there is some evidentiary overlap.").

Here, there can be no dispute that Plaintiff's tortious interference claims do not arise from a common nucleus of operative fact with her assault, battery, and forced labor claims. Whereas the new claims concern alleged conduct in April 2022, the existing claims arise from different alleged conduct in 2011 to 2013. *See White v. Deloitte & Touche, LLP*, 2013 WL 12222421, at *3 (C.D. Cal. Mar. 25, 2013) (dismissing state law claims that "arise out of events occurring over two years later involving completely different allegations"). None of the facts (or acts) underlying the tortious interference claims is "necessary to establish" (or is even alleged to establish) the assault, battery, or forced labor claims, and vice versa. *Toor v. Khan*, 2009 WL 5064977, at *1 (N.D. Cal. Dec. 23, 2009); *see also* SAC ¶¶ 33-38. And the new claims will involve evidence and testimony from third parties such as the Deftones and a "creative director" who have nothing to do with the existing claims. There are no "overlapping facts," let alone those that are "so pervasive" and "so central to each dispute" as is needed to consider the claims part of the same case or

controversy. *Toll CA, L.P. v. Am. Safety Indem. Co.*, 2017 WL 2628059, at *6 (S.D. Cal. June 16, 2017); *see also BHRAC*, 2015 WL 3561671, at *5 ("There is no common nucleus of operative fact if there is no evidentiary overlap whatsoever between [the] claims." (internal quotations omitted)). The new state law claims arise from a "different incident" as the existing claims, and as a result they must be dismissed. *BHRAC*, 2015 WL 3561671, at *6.[2]

B. The SAC Fails to State a Claim for Tortious Interference with Contract (Fourth Cause of Action).

"In order to prove the tort of intentional interference with contractual relations, a plaintiff must establish: (1) it has a valid and existing contract with a third party; (2) defendants had knowledge of the contract; (3) defendants committed an intentional act designed to induce a breach or disrupt the contractual relationship; (4) actual breach or disruption of the contract relationship occurred; and (5) damages were suffered as a result." *W. Air Charter, Inc. v. Schembari*, 2017 WL 10638759, at *3 (C.D. Cal. Oct. 6, 2017). The SAC fails to adequately allege at least the first two elements, either of which warrants dismissal.

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[2] Plaintiff's contention that the alleged conduct in April 2022 reflects "continu[ing] work to silence Ms. Bianco through threats, intimidation, and coercion," SAC ¶ 38, does not manufacture a "common nucleus of operative fact." *See, e.g., Broadcom Corp. v. Qualcomm Inc.*, 2009 WL 650576, at *8 (S.D. Cal. Mar. 11, 2009) (holding claim "which alleges a pattern of misconduct" did not "create supplemental jurisdiction"). However, to the extent the Court is inclined to find a "common nucleus of operative fact" it should nevertheless exercise its broad discretion to decline supplemental jurisdiction pursuant to Section 1367(c). *See NetApp, Inc. v. Nimble Storage, Inc.*, 41 F. Supp. 3d 816, 838 (N.D. Cal. 2014) ("Judicial resources are best conserved by dismissing the case at this stage. The claims against Reynolds and against the employees involve different conduct, legal theories, and geographic locations, and will thus likely require different sources of proof.").

1. Plaintiff Does Not Plead a Valid and Enforceable Contract.

"The existence of a valid contract is an essential element of a claim for tortious interference." *Micro-Tech. Concepts, Inc. v. Xigmatek Co.*, 2010 WL 11601323, at *3 (C.D. Cal. Sept. 29, 2010). Aside from the SAC's "threadbare recitals of [the] cause of action's elements, supported by mere conclusory statements," *see* SAC ¶ 52, Plaintiff fails to allege any facts "establish[ing] that a valid and enforceable contract existed at the time of the alleged interference." *W. Air Charter*, 2017 WL 10638759, at *9 (quoting *Iqbal*, 556 U.S. at 678); *see also Micro-Tech.*, 2010 WL 11601323, at *3 (dismissing tortious interference claim because "Plaintiff has not sufficiently alleged a valid contract").

The purported "contract" between Plaintiff and the Deftones is not attached to the SAC, and despite its absence Plaintiffs fails to allege its terms. *See Orchard Supply Hardware LLC v. Home Depot USA, Inc.*, 939 F. Supp. 2d 1002, 1012 (N.D. Cal. 2013) ("Plaintiff must plead sufficient factual allegations about the terms of its enforceable contracts, such that Defendants are sufficiently on notice to defend themselves from the claim of causing the breach or disruption of those contracts."); *see also 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"). Plaintiff does not even "clearly allege[]," as she must, *Jones v. Deja Vu, Inc.*, 2005 WL 1629941, at *2 (N.D. Cal. July 6, 2005), that the Deftones agreed to actually use Plaintiff's images on their tour—to the contrary, at the time of the purported contract, the images had not yet been taken. *See* SAC ¶¶ 33-34.

Moreover, to the extent the purported contract's terms could be identified, the SAC still "do[es] not allege mutual assent to the terms." *See Haynes v. Dart*, 2009 WL 590684, at *5 (N.D. Ill. Mar. 6, 2009) (dismissing tortious interference claim for failure to "allege the basic elements of a contract"). Plaintiff only offers her own vague and illusory "expect[ations]" of what could result from a "collaboration" with

the band: "In exchange for providing her images, *Ms. Bianco expected* an economic benefit from significant public exposure via the band's worldwide tour and the opportunity to continue working with the highly sought-after creative director who oversaw the project." SAC ¶ 33 (emphasis added).

2. Plaintiff Does Not Plead Defendant's Knowledge of the Purported Contract.

"Knowledge of a contract at issue at the time of alleged interference is critical to a tortious interference claim." *Furnari v. Nuance Commc'ns, Inc.*, 2012 WL 13102331, at *5 (M.D. Fla. Feb. 27, 2012). Aside from Plaintiff's conclusory recitation of this element, SAC ¶ 53, the SAC fails to allege any facts establishing that Warner knew of a contract between Plaintiff and the Deftones. *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). The allegation that "Warner discovered Ms. Bianco's *participation in the project* for the Deftones," SAC ¶ 35 (emphasis added), in addition to being conclusory itself, does not "allege facts showing [Warner's] knowledge of *the contracts* at issue." *FashionPass, Inc.*, 2019 WL 3782332, at *5 (emphasis added); *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).

C. The SAC Fails to State a Claim for Tortious Interference with Prospective Economic Relations (Fifth Cause of Action).

"To plead a claim for intentional interference with prospective business advantage, a plaintiff must allege '(1) a specific economic relationship between the plaintiff and some third person containing the probability of future economic benefit to the plaintiff; (2) knowledge by defendant of the existence of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) damages proximately caused by the

defendant's acts.'" *W. Air Charter*, 2017 WL 10638759, at *4 (citations omitted). The SAC fails to plead the first three elements, each warranting dismissal.

1. Plaintiff Does Not Allege The Probability of Future Economic Benefit, or Knowledge of Such a Relationship.

"There are no allegations in the complaint from which the court could infer the probable disruption of an actual economic relationship." *NU Sci. Corp. v. Efasteam.com*, 2004 WL 1918888, at *3 (N.D. Cal. Aug. 24, 2004). For one, the SAC does not include any facts to show an "economic" benefit. *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 "conclusory allegation of prospective economic relationships is insufficient to sustain a claim for tortious interference"). Plaintiff's sole reliance on "public exposure" and "the opportunity to continue working with the highly sought-after creative director," SAC ¶ 33, fails because she does not provide any basis to conclude these were economic, as opposed to non-economic, benefits. *See* SAC ¶¶ 33, 34, 37, 59; *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).[3]

Nor does the SAC include any factual allegations from which to conclude that "but for defendant's interference" it was "reasonably probable" she would have gained "significant public exposure" or "continu[ed] working with the . . . creative director." *Infectolab Americas LLC v. ArminLabs GmbH*, 2021 WL 1561627, at *2 (N.D. Cal. Apr. 21, 2021); *see also Pardi v. Kaiser Foundation Hospitals*, 389 F.3d

[3] Accordingly, Plaintiff also fails to allege knowledge of such an "economic" relationship, as is required by the third element. The SAC's conclusory allegations, SAC ¶¶ 35, 60, are insufficient. The SAC further fails to allege any knowledge of Plaintiff's supposed relationship with the "creative director."

840, 852 (9th Cir. 2004) (claim dismissed for failing to allege interference was but-for cause of plaintiff's failure to receive expectancy); *Donoho v. Cty. of Sonoma*, 2015 WL 3866228, at *8 (N.D. Cal. June 22, 2015) (same); *Google Inc. v. Am. Blind & Wallpaper Factory, Inc.*, 2005 WL 832398, at *9 (N.D. Cal. Mar. 30, 2005) (same). Reference to the "public" is too vague. *See 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.'"). And the mere "opportunity" to work with the same creative director beyond the Deftones's "current tour" (perhaps not even in connection with the Deftones), SAC ¶ 33, is too speculative. *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).

2. Plaintiff Does Not Allege an Independently Wrongful Act.

"[U]nlike a claim for tortious interference with contract, for this claim a plaintiff must also plead 'that the defendant engaged in an independently wrongful act in disrupting the relationship." *O'Connor v. Uber Techs., Inc.*, 2013 WL 6354534, at *14 (N.D. Cal. Dec. 5, 2013). In other words, "the plaintiff must 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); s*ee also Stevenson Real Estate Servs., Inc. v. CB Richard Ellis Real Estate Servs., Inc.*, 138 Cal. App. 4th 1215 (2006) ("A plaintiff need not allege the interference and a second act independent of the interference," but rather that "the conduct alleged to constitute the interference was independently wrongful, i.e., unlawful for reasons other than that it interfered with a

prospective economic advantage."). "[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.'" *O'Connor*, 2013 WL 6354534, at *14.

But the most Plaintiff can muster is Warner "used his power and influence in the entertainment industry to interfere." SAC ¶ 35, *see also id.* ¶ 61 (conclusory recitation of claim elements). Because she fails to even attempt pleading the alleged act constituting interference was wrongful independent of the interference itself, the claim must be dismissed. *See, e.g.*, *Dollar Tree Stores Inc. v. Toyama Partners, LLC*, 2010 WL 1688583, at *4 (N.D. Cal. Apr. 26, 2010) ("These allegations merely restate acts of the alleged interference with the contracts themselves and are insufficient to state a claim."); *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."); *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.").

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 first and second causes of action be dismissed.

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DATED: May 26, 2022

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By: */s/ Howard E. King*
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