SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

BIANCA KYNE,	:	Index No. 900001/2023
Plaintiff,	:	Hon. Felice Muraca
	:	IAS Part 44
-against-	:	
BRIAN WARNER a/k/a MARILYN MANSON; INTERSCOPE MUSIC PUBLISHING, INC.; NOTHING RECORDS; and DOES 1-20,	:	
Defendants.	:	

DEFENDANT BRIAN WARNER'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS AND STRIKE

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Brian Warner a/k/a Marilyn Manson ("Warner" or "Defendant") moves, pursuant to CPLR 3211(a)(5), to dismiss the time-barred causes of action asserted against him in the Amended Complaint of Plaintiff Bianca Kyne ("Plaintiff" or "Kyne"), and, pursuant to CPLR 3024(b), to strike certain scurrilous allegations that are not relevant to any timely cause of action.

I. PRELIMINARY STATEMENT

Plaintiff sued Warner, Interscope Music Publishing, Inc., and Nothing Records, Inc. asserting various claims based on purported injuries allegedly sustained in Texas and Louisiana in 1995, when Plaintiff was a minor, and in New York in 1999, when Plaintiff was an adult. Under applicable statutes of limitation, her causes of action that accrued in Texas (a portion of Count One and Counts Two through Five in their entirety) expired no later than 2000, and her cause of action that accrued in Louisiana (a portion of Count One) expired no later than 2007. The Motion does not address her battery causes of action arising out of two alleged incidents in New York (the sole remaining portions of Count One).

Plaintiff, a Maryland resident, filed this action in New York to try to take advantage of the claim-revival provisions of New York's Adult Survivors Act, CPLR 214-j (the "ASA"). But her attempt at forum-shopping to exploit the ASA is foreclosed not only by New York's "borrowing statute," CPLR 202, which requires claims to be timely under the law of the state where they accrued (which Plaintiff's are not), but also because the ASA and similar revival statutes have no extraterritorial application to claims like Plaintiff's that are brought by non-residents and accrued outside New York. Because Plaintiff concedes, as she must, that absent application of the ASA her claims are time-barred, dismissal of her causes of action against Warner that accrued in Texas and Louisiana is warranted. Amend. Compl., ¶ 11.

Further, with no cause of action to support, Plaintiff's litany of scurrilous and irrelevant allegations—although provably false—serve no purpose other than to prejudice Warner, and thus should be stricken under CPLR 3024(b).

II. SUMMARY OF RELEVANT ALLEGATIONS

Plaintiff alleges that Warner assaulted her four times—on September 15, 1995, in Dallas, Texas, when she was sixteen years old;[1] on December 9, 1995, in New Orleans, Louisiana, when she was sixteen years old; and twice in April 1999, in New York State, when she was 19 years old. Amend. Compl., ¶¶ 3-4, 43-45, 49-52, 61.

Despite identifying only four alleged incidents, Plaintiff describes her claims as arising from a "continuing course of sexual misconduct that persisted" from September 1995 to April 1999. *Id*., ¶ 78. She alleges that in 1995, Warner "laid the groundwork necessary to intimidate and control her," *id*., ¶ 60, and by 1999, she "had not recovered from the original childhood

[1] Plaintiff alleges that she was assaulted after Warner's concert on the evening of September 15, 1995 but curiously omits where the concert took place. Amend. Compl., ¶¶ 43-45. The Court may take judicial notice that the concert was in Dallas, Texas, a fact that is "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." *People v. Jones*, 73 N.Y.2d 427, 431 (1989). The stops on Warner's 1995 tour are indisputable historical facts, and, to be sure, Plaintiff has publicly discussed the September 15 Dallas concert. King Aff., ¶ 9; *see also People v. Schreier*, 22 N.Y.3d 494, 498 n.1 (2014) (taking judicial notice that "sunrise was at 7:41 a.m. that day"); *Cnty. of Oneida v. Estate of Kennedy*, 189 Misc.2d 689 (Sup. Ct., Oneida County 2001) (court may take judicial notice of "historical facts" and "current events"); *San Diego Branch of NAACP v. Cnty. of San Diego*, No. 16CV2575-JLS (BGS), 2017 WL 2445541, at *2 n.1 (S.D. Cal. June 6, 2017) (taking judicial notice of "general location where the events here at issue took place [which] are objectively verifiable and therefore validly judicially noticed"); *Noble Sys. Corp. v. Alorica Cent., LLC*, 543 F.3d 978, 983 (8th Cir. 2008) (courts may "consider defense despite the plaintiff's artful avoidance of mentioning the facts giving rise to the defense because the court was aware of the facts via judicial notice and it justifiably inferred that the defense applied") (citation omitted). Otherwise, Warner respectfully moves for a more definite statement, identifying the location of the alleged incident, pursuant to CPLR 3024(a).

sexual assault and grooming," *id.*, ¶ 56; *see also id.*, ¶ 59 ("Warner continued to groom, harass and sexually abuse Plaintiff."), ¶ 61 (same).

Plaintiff alleges claims for sexual battery (Court One), negligence (Count Two), negligent supervision and hiring (Court Three), intentional infliction of emotional distress (Court Four), and violation of New York General Business Law section 349 (Count Five). Although the only claims against Warner are those for sexual battery and intentional infliction of emotional distress, all of Plaintiff's claims purport to arise from, and assert injuries first caused by, alleged conduct in Texas and Louisiana in 1995. *See, e.g.,* Amend. Compl., ¶¶ 74, 77, 80, 82-85, 88, 93, 105, 107-109, 119, 121-22, 126-27, 132, 134-36.

III. LEGAL STANDARD

"On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by the applicable statute of limitations, a defendant must establish, *prima facie*, that the time within which to sue has expired." *Quinn v. McCabe, Collings, McGeough & Fowler, LLP*, 138 A.D.3d 1085, 1086 (2d Dept. 2016) (internal quotation marks omitted). "Once that showing has been made, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, an exception to the limitations period is applicable, or the plaintiff actually commenced the cause of action within the applicable limitations period." *Id.*

Under CPLR 3024(b), "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." CPLR 3024(b). Scandalous or prejudicial matters are properly stricken where the allegations are "not necessary for the sufficiency of a plaintiff's cause of action . . . and may instill undue prejudice in the jury." *Soumayah v. Minelli*, 41 A.D.3d 390, 393 (1st Dept. 2007).

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IV. ARGUMENT

The Amended Complaint establishes, on its face, that Plaintiff's causes of action that rely on injuries allegedly sustained in 1995 in Texas and Louisiana—namely the Texas and Louisiana portions of Count One, and the entirety of Counts Two through Five—are untimely and must be dismissed. These causes of action accrued in 1995 in Texas and Louisiana because under New York law, accrual occurs at "the time when, and the place where, the plaintiff first had the right to bring a cause of action." *Glob. Fin. Corp. v. Triarc Corp.*, 93 N.Y.2d 525, 528 (1999). Plaintiff's twenty-seven-year-old claims are untimely under New York's borrowing statute, CPLR 202, which "borrows" Texas's and Louisiana's statutes of limitations—both of which lapsed long ago. This much is undisputed—Plaintiff concedes in her Amended Complaint that, absent application of a recently enacted New York claims-revival statute, CPLR 214-j, her claims are time-barred. Amend. Compl., ¶ 11. But New York appellate decisions have concluded that these statutes were "enacted for the benefit of New York residents" only and thus "do[] not apply extraterritorially to nonresident plaintiffs" like the Plaintiff here. *S.H. v. Diocese of Brooklyn*, 205 A.D.3d 180, 187 (2d Dept. 2022). Because CPLR 214-j does not apply to Plaintiff's causes of action that purportedly accrued in Texas or Louisiana, they are time-barred and must be dismissed.

A. The Adult Survivor's Act does not apply extraterritorially or to claims involving minors.

The Amended Complaint's reference to a "reviv[al]" statute recently enacted by the New York legislature, the ASA, cannot save her admittedly time-barred claims that accrued outside New York. Amend. Compl., ¶ 11. Enacted first in 2019, the so-called Child Victims Act (the "CVA"), CPLR 214-g, "opened a one-year window reviving civil claims or causes of action alleging intentional or negligent acts or omissions that seek to recover for injuries suffered as a

result of conduct which would constitute sex crimes, which conduct was committed against a child less than 18 years of age, for which the statute of limitations had already run." *S.H.*, 205 A.D.3d at 184.[2] Three years later, in 2022, the New York Legislature enacted the ASA, a virtually identical bill that created a similar one-year revival period for otherwise time-barred *adult* sexual assault-related lawsuits. *See* CPLR 214-j.

Neither the CVA nor the ASA, however, may be deployed "extraterritorially" by non-New York plaintiffs like Plaintiff here, who lives in Maryland and does not allege to have ever lived in New York. *See* Amend. Compl., ¶¶ 7, 55, 59. These New York statutes do not apply to claims "where the plaintiff is a nonresident, and the alleged acts of sexual abuse were perpetrated by a nonresident outside of New York" because "there is no express provision . . . providing for [their] application to a nonresident whose injury occurred outside of New York." *S.H.*, 205 A.D.3d at 187-90 (revival statutes are "extreme examples of legislative power and are narrowly construed") (internal quotations and brackets omitted); *see also Kidder v. Hanes*, No. 21-CV-1109S, 2023 WL 361200, *6-7 (W.D.N.Y Jan. 23, 2023) (holding the CVA did not revive intentional infliction of emotional distress ("IIED") claim where the "initial incident" was alleged to occur outside of New York). Because there is no dispute that neither Plaintiff nor Warner are—or were—New York residents, she cannot seize on legislation "enacted for the benefit of New York residents" to save claims that accrued outside of New York. *S.H.*, 205 A.D.3d at 187. In fact, CPLR 202—enacted to prevent the type of New York forum-shopping here—precludes application of a claim-revival statute, such as the CVA or ASA, if the claims it would revive are otherwise untimely under the law of the place of accrual, which here they are.

[2] The CVA's window originally closed on August 14, 2020, but the New York legislature extended the deadline by one year due to the COVID-19 pandemic. *Jones v. Cattaraugus-Little Valley Cent. Sch. Dist.*, No. 19-cv-707S, 2022 WL 2124608, at *3 (W.D.N.Y. June 13, 2022).

Id. at 194 ("The fact that CPLR 202 will prevent some nonresident plaintiffs from pursuing their actions does not lead to the conclusion that CPLR 214-g precludes the application of CPLR 202."); *id.* at 195 ("[T]he CVA revival statute, does not override the application of CPLR 202, and therefore, the plaintiff's negligence cause of action is time-barred[.]").

Moreover, even assuming for argument's sake that extraterritorial application is proper, the ***Adult*** Survivors Act does not apply to claims alleging assault against ***minor***. *See* Amend. Compl., ¶¶ 43, 49, 52; CPLR 214-j (reviving claims alleging injuries "suffered as a result of conduct which would constitute a sexual offense as defined in article one hundred thirty of the penal law committed against such person *who was eighteen years of age or older*") (emphasis added). Plaintiff apparently agrees. *See* Amend. Compl., ¶ 11 ("As to claims arising out of sexual abuse *after Plaintiff turned 18 years of age*, Plaintiff brings this Complaint pursuant to the New York Adult Survivors Act, CPLR § 214-j.") (emphasis added). Even if the ***Child*** Victims Act could hypothetically apply to alleged conduct outside of New York (which Plaintiff does not allege), the lookback window under that statute (*i.e.*, the specified time during which a plaintiff may take advantage of the statute) already closed on August 14, 2021. *Jones*, 2022 WL 2124608, at *3 (dismissing claims filed outside of window, and citing 2020 N.Y. Sess. Laws c. 130, § 1).

Because Plaintiff concedes her claims arising from alleged misconduct against a minor are time-barred absent the improper application of the ASA, and because the ASA does not apply to her causes of action that accrued outside of New York, Counts Two through Five, and the Texas and Louisiana portions of Count One, must be dismissed.[3]

[3] No other tolling is alleged to apply. *See E. Hampton Union Free Sch. Dist. v. Sandpebble Bldrs., Inc.*, 90 A.D.3d 821, 822 (2d Dept. 2011) (holding that once movant meets its burden, "the nonmoving party, in order to successfully oppose the motion, must raise a question of fact

B. Plaintiff's causes of action arising from alleged out-of-state conduct in 1995 are time-barred.

1. New York's "borrowing statute" dictates whether claims that accrued outside of New York are timely.

New York's "borrowing statute," CPLR 202, states that:

> An action based upon a cause of action accruing without the state cannot be commenced after the expiration of the time limited by the laws of either the state or the place without the state where the cause of action accrued, except that where the cause of action accrued in favor of a resident of the state the time limited by the laws of the state shall apply.

Said differently, "[w]hen a nonresident sues on a cause of action accruing outside New York, CPLR 202 requires the cause of action to be timely under the limitation periods of both New York and the jurisdiction where the cause of action accrued." *Glob. Fin. Corp.*, 93 N.Y.2d at 528; *see also Ins. Co. of N. Am. v. ABB Power Generation, Inc.*, 91 N.Y.2d 180, 187 (1997) ("CPLR 202 requires that a court, when presented with a cause of action accruing outside New York, should apply the limitation period of the foreign jurisdiction if it bars the claim.").

Particularly apt here, the purpose of CPLR 202 is to "prevent[] nonresidents from shopping in New York for a favorable Statute of Limitations" to maintain an otherwise time-barred claim that accrued elsewhere. *Glob. Fin. Corp.*, 93 N.Y.2d at 528; *see also Deutsche Bank Nat'l Tr. Co. v. Barclays Bank PLC*, 34 N.Y.3d 327, 337 (2019) ("Among the goals of CPLR 202 is the prevention of forum shopping and uniformity.").

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as to whether the statute of limitations was tolled or otherwise inapplicable"). Rather than plead any facts supporting a theory of tolling, Plaintiff concedes that her claims are "time-barred" absent application of the ASA. Amend. Compl., ¶ 11.

2. Plaintiff's causes of action arising from alleged assaults in 1995 accrued in Texas and Louisiana.

To apply CPLR 202, the Court must determine where Plaintiff's claims accrued. *See Maiden v. Biehl*, 582 F. Supp. 1209, 1212 (S.D.N.Y. 1984) ("For non-New York residents, the critical question for borrowing statute purposes is where the cause of action accrued."); *see also Deutsche Bank*, 34 N.Y.3d at 334 ("If we determine that California is the place of accrual, the second issue is whether plaintiff's causes of action are timely according to California's limitations period."). "A cause of action accrues at the time and in the place of the injury . . . in tort cases involving the interpretation of CPLR 202." *Global Fin. Corp.*, 93 N.Y.2d at 529; *see also Mercano v. City of New York*, No. 15 Civ. 3544 (LGS), 2017 WL 1969676, *4 (S.D.N.Y. May 12, 2017) (tort claims "based on harm allegedly stemming from an assault, accrue on the date of the alleged assault"). Recent appellate decisions applying CPLR 202 confirm that causes of action stemming from an alleged assault accrue at the time and place of the alleged assault. *See S.H.*, 205 A.D.3d at 191 (holding that claims arising from alleged assaults in Florida were time-barred under CPLR 202 and Florida law); *Shapiro v. Syracuse Univ.*, 208 A.D.3d 958, 961-62 (4th Dept. 2022) (holding that claims arising from alleged assaults in Massachusetts were time-barred under CPLR 202 and Massachusetts law).

Battery cause of action (Texas): Plaintiff's cause of action for battery stemming from the alleged assault on September 15, 1995 accrued in Texas. *See* Amend. Compl., ¶¶ 43-45, 74; *Kidder*, 2023 WL 361200, at *7 (finding "each assault incident was a separate [battery] cause of action" that accrued in the state where the alleged conduct occurred).

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Battery cause of action (Louisiana): Plaintiff's cause of action for battery stemming from the alleged assault on December 9, 1995 accrued in Louisiana. *See* Amend. Compl., ¶¶ 49-52, 74; *Kidder*, 2023 WL 361200, at *7.[4]

Non-battery causes of action: In contrast to Plaintiff's battery causes of action, which separately accrue at the time and place of each alleged assault, her non-battery claims, including the claim for IIED against Warner, purport to rely on conduct in Texas, Louisiana, and New York. *See* Amend. Compl., ¶¶ 82-84, 105, 113-16, 119, 121-22, 126-27, 134-36. If a tort claim like negligence or infliction of emotional distress purports to arise from conduct in more than one state, "[a]ccrual occurs for purposes of Section 202 '[at] the time when, and the place where, the plaintiff ***first*** had the right to bring the cause of action.'" *Doe v. Roman Cath. Diocese of Erie, Pa.*, No. 20-CV-0257 (LEK/ML), 2021 WL 5232742, at *6 (N.D.N.Y. Nov. 10, 2021) (quoting *Glob. Fin. Corp.*, 93 N.Y.2d at 528) (emphasis added); *see also Kidder*, 2023 WL

[4] The Amended Complaint's single claim for "sexual battery" (Count One) alleges four assaults (one in Texas, one in New Orleans and two in New York), Amend. Compl., ¶¶ 74, 77, and thus comprises four causes of action. *Kidder*, 2023 WL 361200, at *7. This Motion does not seek to dismiss the two remaining battery causes of action for alleged incidents in New York, Amend. Compl., ¶¶ 61, 77, which Warner likely will address through summary judgment. Plaintiff has no basis to argue that the causes of action for the supposed assaults in Texas and Louisiana accrued in New York by alleging a "continuing course of sexual misconduct that persisted from . . . 1995 though . . . 1999." *See id*., ¶¶ 76, 78. Causes of action for battery accrue separately, and the continuing tort/violation exception does not apply. *Kidder*, 2023 WL 361200, at *7; *see also Lettis v. U.S. Postal Serv.*, 39 F. Supp. 2d 181, 204 (E.D.N.Y. 1998) ("Causes of action for assault and battery accrue immediately upon the occurrence of the tortious act and thus, are not appropriate for the continuing violation exception."); *Abdullajeva v. Club Quarters, Inc.*, 1996 WL 497029, at *7 (S.D.N.Y. Sept. 3, 1996) ("[B]attery . . . [is a] tort[ ] in which the cause of action accrues for each wrong immediately upon the occurrence of the tortious act and thus [is] not appropriate for the continuing violation exception."). But even assuming the causes of action arising from the alleged 1995 incidents accrued in New York, they are still admittedly untimely, Amend. Comp. ¶ 11, and the *Adult* Survivor's Act would not "revive" time-barred causes of action alleging misconduct against minors. *Supra.*, § IV.A.

361200, at *7 (referencing location of "initial incident" for purposes of applying CPLR 202 to IIED claim that alleged "continuous conduct" in multiple states).

Plaintiff alleges her non-battery claims, including the IIED claim against Warner, arise from "continuous conduct," and thus for purposes of CPLR 202, the ***entirety*** of those claims accrued at the location of "the initial incident," which was Texas. *Kidder*, 2023 WL 361200, at *7; *see also Diocese of Erie*, 2021 WL 5232742, at *6-8. Plaintiff alleges that Warner intended to cause her harm "both ***as a minor [in 1995]*** and a young woman [in 1999]," and that the other defendants "enable[d] [conduct] that ***started when she was a minor [in 1995]*** and continued when she was young woman [in 1999]." *Id.*, ¶¶ 121-22 (emphasis added).[5]

Accordingly, Plaintiff's non-battery claims, as alleged, are just like those in *Kidder* and *Diocese of Erie* for purposes of applying CPLR 202. In *Kidder*, the court held that claims for intentional infliction of emotional distress based on related incidents of abuse that occurred first in Pennsylvania and then in New York accrued in Pennsylvania for purposes of CPLR 202. *See* 2023 WL 361200, at *7. Likewise, in *Diocese of Erie*, the court held that claims for negligence and negligent retention, training, and supervision based on related incidents of abuse that occurred first in Pennsylvania and then in New York accrued in Pennsylvania for purposes of CPLR 202. *See* 2021 WL 5232742, at *6-7. Here, all of Plaintiff's non-battery claims,

[5] *See also* Amend. Compl., ¶¶ 3-4 ("Defendant Warner first targeted Plaintiff in 1995 when she was 16 years old . . . [t]hen, in 1999 when Plaintiff was approximately 19 years old, Defendant Warner perp[e]tuated his grooming, manipulation, exploitation and sexual assault of Plaintiff over the course of approximately 4 weeks."), ¶ 56 ("In March 1999 . . . Plaintiff had not recovered from the original childhood sexual assaults and grooming by Defendant Warner."), ¶ 60 ("While she was a child, Defendant Warner purposefully and intentionally laid the groundwork necessary to intimidate and control her."), p. 18 ("Defendant Warner Continues to Sexually Assault Plaintiff at Age 19"); ¶ 78 ("Defendant Warner had a continuing course of sexual misconduct that persisted from his first encounter with Plaintiff in September 1995 through the sexual misconduct described above in 1999.").

including the IIED claim against Warner, purport to rely on injuries allegedly sustained as early as 1995, and thus for purposes of CPLR 202, they each accrued in Texas in 1995—where she "first had the right to bring the cause of action." *Kidder*, 2023 WL 361200, at *7; *Diocese of Erie*, 2021 WL 5232742, at *6-8; *Glob. Fin. Corp.*, 93 N.Y.2d at 528.

3. Plaintiff's claims that accrued in Texas expired more than twenty years ago.

Plaintiff's causes of action that accrued in Dallas in September 1995, including her claims for battery and IIED against Warner, are time-barred under Texas law. Effective June 15, 1995, Texas law provided for a five-year statute of limitations for claims involving sexual assault. *See S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996) ("In 1995, the Legislature enacted a special five-year statute of limitations for" cases in which "the injury arises as a result of . . . sexual assault") (citing Tex. Civ. Pract. & Rem. Code § 16.0045); 1995 Tex. Sess. Law Serv. Ch. 739 (H.B. 2330) (stating was §16.0045 "[a]pproved" and "[e]ffective June 15, 1995").[6] Thus, Plaintiffs claims needed to have been brought no later than 2000.[7] Even assuming Plaintiff could claim benefit to the 2015 amendment to Section 16.0045, which "extend[ed] the limitations period from five to fifteen years for claims involving sexual assault or abuse of a child," her claims are still untimely, as they needed to have been brought no later than 2010. *King-White v. Humble Indep. Sch. Dist.*, 803 F.3d 754, 759 (5th Cir. 2015); *see also* 2015 Tex. Sess. Law Serv. Ch. 918 (H.B. 189) § 3 ("A cause of action that accrued before the effective date of this Act is

[6] The prior statute of limitations for suits "for . . . personal injury" was two years. *S.V.*, 933 S.W.2d at 4.

[7] Texas's two-year statute of limitations for negligence and infliction of emotional distress claims is even shorter. *See Ellis v. Edward Abstract & Title Co.*, No. 13-98-578-CV, 2000 WL 35721235, at *2 (Tex. App. May 11, 2000) (citing Tex. Civ. Prac. & Rem. Code Ann. § 16.003).

governed by the law applicable to the cause of action immediately before the effective date of this Act, and that law is continued in effect for that purpose.").

Nor can Plaintiff claim benefit to the Texas legislature's 2019 amendment, which increased the statute of limitations from fifteen years to 30 years. Tex. Civ. Pract. & Rem. Code § 16.0045(a)(1) ("A person must bring suit for personal injury not later than 30 years after the day the cause of action accrues if the injury arises as a result of conduct that violates . . . Section 22.011(a)(2), Penal Code (sexual assault of a child)"). That amendment operates prospectively only and not to any claim, like Plaintiff's, that already lapsed under a prior version of the statute. *See* 2019 Tex. Sess. Law Serv. Ch. 1306 (H.B. 3809) ("The change in law made by this Act applies to a cause of action that accrues on or after the effective date of this Act or a cause of action that accrued before the effective date of this Act, if the limitations period applicable to the cause of action immediately before the effective date of this Act has not expired before the effective date of this Act.").

In sum, Plaintiff's claims that accrued in Texas in 1995 expired under Texas law by 2000, and thus are untimely under CPLR 202. *See Shapiro*, 208 A.D.3d at 961-62 (claims arising from alleged abuse in Massachusetts in the 1970s accrued in Massachusetts in the 1970s and were time-barred); *S.H.*, 205 A.D.3d at 191 (claims arising from alleged abuse in Florida in 1983-84 accrued in Florida in 1983-84 and were time-barred).[8]

4. Plaintiff's battery cause of action that accrued in Louisiana expired over fifteen years ago.

Plaintiff's battery cause of action arising from alleged conduct in New Orleans in 1995 is also time-barred (or in local parlance, "prescribed"). *See* Amend. Compl., ¶¶ 49, 52, 74. In

[8] Even assuming the five-year limitations period ran from 1999, the date of the last alleged incident, Plaintiff's claims would still be time-barred by nineteen years.

1995, Louisiana had a "ten-year prescriptive period" for claims involving sexual assault of a minor," which "did not commence to run until the day that the minor attained majority." *Lousteau v. Congregation of Holy Cross S. Province, Inc.*, No. 21-cv-1457, 2022 WL 2065539, at *3 (E.D. La. June 8, 2022). Because Plaintiff turned 18 in 1997, *see* Amend. Compl., ¶ 43, her claim against Warner that accrued in 1995 prescribed under Louisiana law in 2007. *See id*., ¶¶ 47, 80, 126-27; *Shapiro*, 208 A.D.3d at 961-62; *S.H.*, 205 A.D.3d at 191.

Plaintiff cannot exploit recent amendments to the statute that eliminated the prescription period, *see* La. Stat. Ann. § 9:2800.9; 2021 La. Sess. Law Serv. Act 322 (H.B. 492), § 2, because they are unconstitutional under Louisiana law when applied retroactively to claims that had already prescribed, like Plaintiff's here. *See Lousteau*, 2022 WL 2065539, at *15 (granting motion to dismiss and rejecting retroactive application of § 9:2800.9 because "depriving a defendant of his right to plead prescription as a defense, would disrupt a vested right, and therefore is not constitutionally permissible under Louisiana law").[9]

Therefore, Plaintiff's cause of action for an alleged battery that supposedly occurred in Louisiana in 1995 expired under Louisiana law no later than 2007, and thus is untimely under CPLR 202. *See Shapiro*, 208 A.D.3d at 961-62; *S.H.*, 205 A.D.3d at 191.

[9] This decision is currently on appeal in the Fifth Circuit, where it appears fully briefed and set for oral argument. *Lousteau v. Congregation of Holy Cross S. Province, Inc.*, No. 22-30407 (5th Cir. May 8, 2023). Similarly, the Supreme Court of Louisiana granted a writ instructing the Louisiana Court of Appeal to determine "whether the 2021 amendment to La. R.S. 9:2800.9 manifested an express intent to revive all claims prescribed under the prior law, and if so," whether "such a result would unconstitutionally impair [the plaintiff's] vested right in the defense of liberative prescription." *Doe v. Soc'y of the Roman Cath. Church of the Diocese of Lafayette*, 2022-00829 (La. 10/4/22), 347 So. 3d 148. But regardless of the outcome of this case, the claim is still admittedly untimely under New York law, and thus fails under CPLR 202. *See, e.g.,* Amend. Compl. ¶ 11; *see also Freedom Tr. 2011-2 v. HSBC Bank USA, N.A.*, 214 A.D.3d 404, 405, 184 N.Y.S.3d 340, 341-42 (2023) (courts "must enforce the shorter period of the two").

C. Plaintiff's scandalous allegations relating only to time-barred claims should be stricken.

With no timely cause of action arising from acts against minors, the Complaint's litany of scandalous allegations about minors and acts against minors should be stricken under CPLR 3024(b), which permits the Court to "strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." *See* King Aff., ¶ 10 (attaching redline of proposed amended complaint); Amend. Compl., ¶¶ 1-3, 5-6, 16-53, 56, 60, 76-78. Applying this rule, courts have repeatedly held that "[m]atters that are unnecessary to the viability of the cause of action and would cause undue prejudice to the defendants should be stricken from the pleading." *Irving v. Four Seasons Nursing & Rehab. Ctr.*, 121 A.D.3d 1046, 1048 (2014).

Because all of Plaintiff's causes of action that accrued in 1995 are time-barred under CPLR 202, her allegations about Warner's alleged conduct towards *minors*, are irrelevant and immaterial to her remaining cause of action for battery against an *adult*. *See Waterbury v. New York City Ballet, Inc.*, 205 A.D.3d 154, 166 (1st Dept. 2022) (holding that the "terms 'assault,' 'battery,' and 'abuse' should be excised . . . because they are highly inflammatory and the corresponding claims have also been dismissed").

Waterbury is on point. There, after determining that the plaintiff failed to state a claim of assault against the defendants, the court also determined that the terms "assault," "battery," and "abuse" should be stricken from the complaint because they were highly inflammatory and had no bearing on the plaintiff's remaining claims. *Id.* The same is true here.

The federal decision *Seidel v. Lee*, 954 F. Supp. 810 (D. Del. 1996), which analyzed the issue under Federal Rule of Civil Procedure 12(f), is also illustrative. There, the plaintiff alleged that defendants engaged in multiple transactions that violated the Investment Company Act of 1940. *Id.* at 812-13. The Court agreed with defendants that "claims based upon transactions

occurring prior to October 14, 1990, [were] time-barred." *Id.* at 813. In ordering "stricken all pre-October 14, 1990 references in the SAC," the court found that "pre-October 1990 factual information relating to these time-barred transactions [was] irrelevant to the claims asserted," and thus "the inclusion of these time-barred transactions serves no purpose other than to potentially confuse a jury or prejudice Defendants." *Id.* The same is true here—Plaintiff's inflammatory allegations concerning minors have no bearing on the only non-time-barred cause of actions remaining: two alleged batteries that occurred in New York when she was an adult. Amend. Compl., ¶¶ 77, 79-80.

Untethered to any timely claim, the dozens of paragraphs in the Amended Complaint about Warner's alleged "obsession" with minors, acts against minors, and the like, serve no purpose other than to prejudice Warner. *See Breest v. Haggis*, 180 A.D.3d 83, 94-95 (1st Dept. 2019) (holding that allegations that "three other women have accused defendant of rape or attempted rape . . . should be stricken as scandalous and prejudicial" because they were "not necessary" to the claims and "serve no purpose at this juncture and tend to prejudice defendant"). Although they are demonstrably false on the merits, striking these irrelevant and scandalous allegations now would help stem the prejudice that Warner has already suffered, and will continue to suffer, as a result of Plaintiff's bootstrapping these heinous allegations to objectively time-barred claims.[10] Doing so would also promote the "worthwhile purpose" of the statute,

[10] For example, dozens, if not hundreds, of major media outlets have publicized the allegations of sexual assault of a minor that never had any basis to be included in the lawsuit. *See* King Aff., ¶ 10 (attaching examples including *New York Post* article titled, *Marilyn Manson sexually assaulted 16-year-old girl on tour bus: suit*; *Rolling Stone* article titled, *Marilyn Manson Sued for Sexual Assault of a Minor*, *Hollywood Reporter* article titled, *Marilyn Manson Sued for Sexual Assault of a Minor*, *Pitchfork* article titled, *Marilyn Manson Sued for 1990s Sexual Battery of a Minor: A woman claims that Manson sexually abused her multiple times in 1995 when she was 16 years old*; *Yahoo!* article titled, *Marilyn Manson Accused of Historic Sexual Abuse of a Minor*).

which is to assure "that civil pleadings, which are public documents . . . , not contain matter that unnecessarily scandalizes or prejudices the adversary party either within the litigation or beyond it." *Pisula v. Roman Cath. Archdiocese of N.Y.*, 201 A.D.3d 88, 97 (2d Dept. 2021).

V. CONCLUSION

While Warner denies the hideous allegations of the Amended Complaint, each of Plaintiff's causes of action that accrued in Texas and Louisiana as pleaded are untimely and should be dismissed with prejudice. Because Plaintiff has no actionable claims for conduct against a minor, the litany of irrelevant and scandalous allegations pertaining to abuse of minors are irrelevant and therefore the Court should strike them under CPLR 3024(b).

Respectfully submitted,

Dated: May 22, 2023
Los Angeles, California

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CERTIFICATION OF WORD COUNT

Pursuant to Section 202.8-b of the Uniform Rules of the Supreme Court, I hereby certify that the total number of words in this memorandum of law, excluding the caption, table of contents, table of authorities and signature block is 5,393.

Dated: May 22, 2023
Los Angeles, California

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