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**United States District Court
Central District of California**

ERIC PODWALL,
Plaintiff,
v.
WILLIAM “SMOKEY” ROBINSON, JR.,
Defendants.

Case № 2:16-CV-06088-ODW (AJWx)

**ORDER DENYING IN PART AND
GRANTING IN PART
DEFENDANT’S MOTION TO
DISMISS [53]**

I. INTRODUCTION

In this breach of contract action, Plaintiff Eric Podwall seeks to recover commissions from Defendant William “Smokey” Robinson, Jr. that Podwall claims he earned under a personal management contract. Robinson moves to dismiss certain claims in Podwall’s First Amended Complaint (“FAC”) on the grounds that Podwall failed to state a claim on which he can recover. For the reasons discussed below, the Court **DENIES in part and GRANTS in part** Defendant’s Motion to Dismiss (the “Motion”).¹

¹ After considering the papers filed in support of and in opposition to the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78(b); C.D. Cal. L.R. 7-15.

II. BACKGROUND²

1
2 Robinson is a well-known musician who has been in the music business for
3 decades. (FAC ¶ 1, ECF No. 52.) Podwall is a talent and music manager with more
4 than twenty years of experience in the entertainment industry, but he is not a licensed
5 talent agent. (*Id.* ¶ 7, Ex. 1 ¶ 3.)

6 On September 12, 2012, Podwall and Robinson entered into a written
7 agreement (the “Agreement”) that established Podwall as Robinson’s “personal
8 manager.” (*Id.* ¶ 8, Ex. 1.) The Agreement provided that Podwall would receive
9 “[t]en percent of gross compensation derived from all products of [Robinson’s]
10 services initially rendered or created from and after” the Agreement’s inception.
11 (*Id.* Ex. 1, ¶ 2.) The Agreement limited Podwall’s commission on Robinson’s live
12 performances to those booked after the date of the Agreement and performed after
13 June 1, 2013. (*Id.*) Among other things, the Agreement explicitly clarified: “[f]or
14 avoidance of doubt, there will be no commission at any time on any royalties earned
15 for products exploited prior to the term of this agreement” (*Id.*)

16 Podwall alleges he revived Robinson’s career by providing career advice,
17 handling Robinson’s business arrangements, and presenting “innovative methods to
18 increase the profitability of his touring revenue.” (*Id.* ¶¶ 10, 12.) As one example, he
19 alleges he assisted in closing a favorable royalties collection agreement in 2014 with
20 Global Music Rights (“GMR Royalties Deal”) on Robinson’s behalf. (*Id.* ¶¶ 16–21.)
21 Podwall claims that Robinson has refused to pay Podwall’s commissions on revenue
22 generated during the Agreement’s term from Robinson’s touring, performance, and
23 recording, as well as from the GMR Royalties Deal. (*Id.* ¶¶ 13, 15, 21, 27.)

24 On July 15, 2016, Podwall filed a Complaint against Robinson seeking unpaid
25 commissions pursuant to the Agreement. (Compl., ECF No. 1-1.) On October 20,
26

27
28 ² All factual references derive from Podwall’s FAC, unless otherwise noted, and well-pleaded
factual allegations are accepted as true for purposes of this Motion. *Ashcroft v. Iqbal*, 556 U.S. 662,
678 (2009).

1 2016, the Court denied Robinson’s first motion to dismiss and stayed this case to
2 allow Podwall to petition the Labor Commissioner for a determination on whether
3 Podwall violated the Talent Agency Act (“TAA”) in acting as Robinson’s personal
4 manager without being a licensed talent agent. (Order Denying Def.’s Mot. to
5 Dismiss and Staying the Case, ECF No. 19.)

6 On June 22, 2018, the Labor Commissioner issued its Determination of
7 Controversy. (*See* Req. for Judicial Notice (“RJN”), Ex. 6 (Cal. Labor Comm’r
8 Determination of Controversy (“CLC Det.”)), ECF No. 56-6.) The Labor
9 Commissioner made numerous findings of fact, including that the William Morris
10 Agency (“WME”) had been Robinson’s “licensed talent agent” for at least ten years
11 and had procured hundreds of performance events for Robinson during the time
12 Podwall served as Robinson’s personal manager. (CLC Det. 2, 4, 17.) The Labor
13 Commissioner found that Podwall was not required to obtain a talent agency license
14 for certain agreements, including the GMR Royalties Deal, but that Podwall’s
15 involvement in procuring four specific performance events violated the TAA because
16 Podwall had acted as a talent agent without a license with respect to those events.
17 (*Id.* at 11–16, 19.) In determining whether to invalidate the Agreement because of the
18 four violations, the Labor Commissioner concluded that the four violative
19 engagements “are not representative of the hundreds of events [WME], not [Podwall],
20 secured for [Robinson] during the three years [Podwall] served as personal manager.”
21 (*Id.* at 17.) After severing those four events, the Labor Commissioner concluded that
22 the Agreement was not invalid or unenforceable under the TAA. (*Id.* at 19.)

23 Following the Labor Commissioner’s Determination, the Court lifted the stay.
24 (Order on Req. to Lift Stay, ECF No. 35.) The Court denied in part and granted in
25 part Robinson’s renewed motion to dismiss and granted Podwall thirty days to amend
26 his Complaint, which he did on December 11, 2018. (Order, ECF No. 50; FAC.)

1 Robinson now moves to dismiss Podwall’s FAC, arguing Podwall fails to state
2 a claim with respect to his entitlement to commissions on Robinson’s engagements
3 and the GMR Royalties Deal. (Mot. to Dismiss FAC (“Mot.”), ECF No. 53.)

4 III. LEGAL STANDARD

5 A court may dismiss a complaint under Rule 12(b)(6) for lack of a cognizable
6 legal theory or insufficient facts pleaded to support an otherwise cognizable legal
7 theory. *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). To
8 survive a motion to dismiss, a complaint need only satisfy the minimal notice pleading
9 requirements of Rule 8(a)(2)—a short and plain statement of the claim. *Porter v.*
10 *Jones*, 319 F.3d 483, 494 (9th Cir. 2003). The factual “allegations must be enough to
11 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550
12 U.S. 544, 555 (2007). That is, the complaint must “contain sufficient factual matter,
13 accepted as true, to state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S.
14 at 678 (internal quotation marks omitted). The factual allegations must provide “fair
15 notice and enable the opposing party to defend itself effectively.” *Starr v. Baca*, 652
16 F.3d 1202, 1216 (9th Cir. 2011).

17 The determination of whether a complaint satisfies the plausibility standard is a
18 “context-specific task that requires the reviewing court to draw on its judicial
19 experience and common sense.” *Iqbal*, 556 U.S. at 679. A court must construe all
20 “factual allegations set forth in the complaint . . . as true and . . . in the light most
21 favorable” to the plaintiff. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir.
22 2001) (internal quotation marks omitted). But a court need not blindly accept
23 conclusory allegations, unwarranted deductions of fact, and unreasonable inferences.
24 *Spewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A court is
25 generally limited to the pleadings in ruling on a Rule 12(b)(6) motion but may
26 consider documents attached to the complaint or properly subject to judicial notice
27 without converting a motion to dismiss into one for summary judgment. *See Lee*, 250
28 F.3d at 688–89.

1 **IV. REQUEST FOR JUDICIAL NOTICE**

2 Podwall requests the Court take judicial notice of pleadings and briefing before
3 the Labor Commissioner, the transcript of the administrative evidentiary hearing, and
4 the Labor Commissioner’s Determination of Controversy. (RJN 1, ECF No. 56.)
5 Robinson does not oppose Podwall’s request.

6 “[A] court may judicially notice a fact that is not subject to reasonable dispute
7 because it: (1) is generally known within the trial court’s territorial jurisdiction; or
8 (2) can be accurately and readily determined from sources whose accuracy cannot
9 reasonably be questioned.” Fed. R. Evid. 201(b). “Judicial notice is appropriate for
10 records and ‘reports of administrative bodies.’” *United States v. 14.02 Acres of Land*
11 *More or Less in Fresno Cty.*, 547 F.3d 943, 955 (9th Cir. 2008) (quoting *Interstate*
12 *Nat. Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1954)); *see also Tech. &*
13 *Intellectual Prop. Strategies Grp. v. Fthenakis*, No. C 11-2373 MEJ, 2011 WL
14 3501690, at *7 n.2 (N.D. Cal. Aug. 10, 2011) (taking judicial notice of the California
15 Labor Commissioner’s notice of claim and conference and notice of completed
16 investigation).

17 The Labor Commissioner’s Determination of Controversy is a report of an
18 administrative body, appropriate for judicial notice. The Court **GRANTS** Podwall’s
19 request for judicial notice of the Labor Commissioner’s Determination of Controversy
20 (RJN Ex. 6 (CLC Det.)). However, the Court **DENIES** Podwall’s request for judicial
21 notice as to all other exhibits, which are unnecessary to the outcome of this motion.

22 **V. DISCUSSION**

23 Robinson moves to dismiss on the grounds that Podwall fails to state a claim
24 upon which he can recover, and specifically refutes Podwall’s claims for commissions
25 on performance engagements and the GMR Royalties Deal.

26 **A. Federal Rules of Civil Procedure 12(g)**

27 As a preliminary matter, Podwall challenges Robinson’s Motion as a
28 procedurally improper serial motion under Federal Rules of Civil Procedure 12(g).

1 (Opp’n 11–12, ECF No. 55.) “Rule 12(g) applies to situations in which a party files
2 successive motions under Rule 12 for the sole purpose of delay.” *Davidson v.*
3 *Countrywide Home Loans, Inc.*, No. 09-CV-2694-IEG JMA, 2011 WL 1157569, at *4
4 (S.D. Cal. Mar. 29, 2011) (internal quotation marks omitted). Here, no evidence has
5 been presented that Robinson filed the instant motion to delay proceedings or for any
6 other improper motive. Rather he has responded to Podwall’s FAC and the Court’s
7 concerns as identified in the previous Order. Further, even had Robinson brought
8 successive motions, “the Court has discretion to consider the arguments to expedite a
9 final disposition on the issue.” *Id.*

10 **B. Engagements**

11 Podwall seeks to recover commissions on Robinson’s engagements during the
12 time Podwall served as Robinson’s personal manager under the Agreement. (FAC
13 ¶¶ 14–15.) Robinson argues Podwall may not recover such commissions because he
14 failed to exhaust administrative remedies by obtaining a determination that he had not
15 violated the TAA, specifically as to the hundreds of engagements identified for the
16 first time in the FAC. (Mot. 6.) Podwall opposes, noting that the Labor
17 Commissioner expressly found that Podwall had not procured hundreds of Robinson’s
18 performance engagements during Podwall’s time as Robinson’s personal manager.
19 (Opp’n 13–16, ECF No. 55.) Thus, Podwall argues that he did in fact exhaust his
20 administrative remedies.

21 Under California law, the Labor Commissioner is given exclusive original
22 jurisdiction to hear controversies that colorably arise under the TAA. Cal. Lab. Code
23 § 1700.44; *Marathon Entm’t, Inc. v. Blasi*, 42 Cal. 4th 974, 981 n.2 (2008); *Styne v.*
24 *Stevens*, 26 Cal. 4th 42, 59 (2001). The term “colorable” is used in its “broadest
25 sense.” *Styne*, 26 Cal. 4th at 59 n.10. “The [TAA] specifies that ‘[i]n cases of
26 controversy arising under this chapter, the parties involved shall refer the matters in
27 dispute to the Labor Commissioner.’” *Id.* at 54. “[R]eference of disputes involving
28 the [TAA] to the Commissioner is mandatory.” *Id.* Such a referral is necessary, for

1 instance, when an artist-defendant raises the TAA as a defense to a breach of contract
2 action such as this one. *See id.* at 60. However, the TAA “does not require any party
3 to invoke the Commissioner’s jurisdiction *before* such a controversy has arisen. The
4 filing of a lawsuit may be the defendant’s first inkling that such a controversy exists.”
5 *Id.* at 59–60.

6 The TAA requires anyone who solicits or procures employment or artistic
7 engagements for artists to obtain a talent agency license. Cal. Lab. Code § 1700.5;
8 *Marathon*, 42 Cal. 4th at 985. “[T]he TAA does not cover services such as personal
9 management, but does cover managers . . . if they solicit and procure employment on
10 behalf of artists.” *Siegel v. Bradstreet*, No. CV 08-2480 CAS (SSx), 2008 WL
11 4195949, at *3 (C.D. Cal. Sept. 8, 2008); *see also Siegel v. Su*, No. 2:17-CV-07203-
12 CAS (SSx), 2018 WL 1393984, at *1 (C.D. Cal. Mar. 16, 2018) (“[T]he TAA applies
13 to a personal manager . . . if he ‘solicits or procures employment for his artist-
14 client.’”). “A manager can provide advisory and logistical support for tours without
15 procuring or soliciting tour venues and performance opportunities for [artists].”
16 *Lauwrier v. Garcia*, No. CV 12-07381-MMM (SHx), 2013 WL 11238497, at *8 (C.D.
17 Cal. Mar. 8, 2013) (citing *Marathon*, 42 Cal. 4th at 980). Thus, a controversy may
18 colorably arise requiring the Commissioner’s determination where a manager’s
19 conduct crosses the line between advice and procurement. “The Commissioner’s
20 expertise in applying the Act is particularly significant in cases where, as here, the
21 essence of the parties’ dispute is whether services performed were by a talent agency
22 for an artist.” *Styne*, 26 Cal. 4th at 58; *see also Marathon*, 42 Cal. 4th at 988 (“The
23 Labor Commissioner’s views are entitled to substantial weight if not clearly
24 erroneous.”).

25 Although Podwall fails to allege any facts in his FAC regarding the
26 administrative proceeding or the Labor Commissioner’s findings, the Court takes
27 judicial notice of the Labor Commissioner’s Determination of Controversy. The
28 Labor Commissioner concluded that Podwall did not procure (and thus did not violate

1 the TAA with respect to) hundreds of Robinson’s engagements during Podwall’s time
2 as Robinson’s personal manager. (*See* FAC; CLC Det. 17.) Podwall petitioned the
3 Labor Commissioner to determine whether his personal management services
4 provided to Robinson fell “within the scope of the TAA or jurisdiction of the Labor
5 Commissioner.” (CLC Det. 7.) After briefing and an evidentiary hearing, the Labor
6 Commissioner found that Podwall’s conduct violated the TAA with respect to four
7 specific engagements, but that Podwall had not procured (and thus had not violated
8 the TAA with respect to) hundreds of other engagements, which, instead were
9 procured by Robinson’s licensed talent agency, WME. (*See* CLC Det. 17 (“the
10 overwhelming weight of the evidence offered by [Robinson] and [Podwall] alike
11 demonstrate that the four engagements found to be in violation here are not
12 representative of the hundreds of events [WME], not Podwall, secured for [Robinson]
13 during the three years [Podwall] served as personal manager for [Robinson].”).)
14 Based in part on this finding, the Labor Commission concluded that severing the four
15 illegal acts to preserve the Agreement furthered the interests of justice. (CLC
16 Det. 16–18, 19.)

17 In his FAC, Podwall lists more than one hundred engagements during the
18 relevant time period, but does not allege that WME procured the listed engagements.
19 He also does not allege that the listed engagements are the same “hundreds of events”
20 the Labor Commissioner concluded Podwall did not procure. However, construing
21 the allegations in the light most favorable to Podwall, it is plausible at the pleadings
22 stage that the newly identified engagements in Podwall’s FAC are those the Labor
23 Commissioner considered and found not violative.

24 Accordingly, Podwall has pleaded sufficient facts to state a claim for relief that
25 is plausible on its face. The Court **DENIES** Robinson’s Motion with respect
26 Podwall’s claim to recover commissions on engagements.

1 **C. The GMR Royalties Deal**

2 Podwall seeks commissions on royalties earned via the GMR Royalties Deal.
3 (FAC ¶¶ 16–21, 27.) Robinson argues that Podwall cannot recover such commissions
4 because the GMR Royalties Deal is for royalties of *previously recorded* music and the
5 plain and unambiguous terms of the Agreement exclude commissions on previously
6 recorded material. (Mot. 9.) Podwall disagrees and contends that the proper
7 interpretation of the commission provision does not exclude commissions on royalties
8 earned on previously recorded music, or in the alternative, the language is ambiguous.
9 (Opp’n 18–23.) Podwall contends that, at the very least, he is entitled to commission
10 royalties on music recorded during the term of the Agreement. (*Id.* at 23.)

11 Where “contractual language is clear and explicit and does not involve an
12 absurdity, the plain meaning governs.” *Am. Alt. Ins. Corp. v. Superior Court*, 135 Cal.
13 App. 4th 1239, 1245 (2006); *see also* Cal. Civ. Code § 1638. “The words of a
14 contract are to be understood in their ordinary and popular sense,” unless used in a
15 legal or technical sense or assigned a special meaning. Cal. Civ. Code § 1644;
16 *Mountain Air Enters., LLC v. Sundowner Towers, LLC*, 3 Cal. 5th 744, 752 (2017)
17 (“[I]f the meaning a layperson would ascribe to contract language is not ambiguous,
18 we apply that meaning.”). A court must review the agreement as a whole and
19 ascertain the mutual intention of the parties as gathered from the four corners of the
20 instrument. *Machado v. S. Pac. Transp. Co.*, 233 Cal. App. 3d 347, 352 (1991); *see*
21 *also* Cal. Civ. Code §§ 1639 (“When a contract is reduced to writing, the intention of
22 the parties is to be ascertained from the writing alone, if possible.”), 1641 (“The whole
23 of a contract is to be taken together, so as to give effect to every part.”). Each word
24 must be given force and effect to avoid interpretations that would render other
25 provisions surplusage. *In re Crystal Props.*, 268 F.3d 743, 748 (9th Cir. 2001).

26 The Agreement includes a commission provision setting out the parameters of
27 Podwall’s entitlement to commission Robinson’s earnings. (*See* FAC Ex. 1, ¶ 2.) As
28 relevant to the GMR Royalties Deal, it provides that Podwall is entitled to

1 [t]en percent of gross compensation derived from all products of your
2 [Robinson’s] services *initially rendered or created from and after the*
3 *date* [of this agreement] For avoidance of doubt, there will be no
4 commission at any time on any royalties earned for products exploited
prior to the term of this agreement.

5 (*Id.* (emphasis added).)

6 Reading the provision as a whole and construing the words in their ordinary
7 sense, the language is clear and unambiguous. “[P]roducts of [Robinson’s] services”
8 would logically include songs Robinson has recorded. The phrase “initially rendered
9 or created from and after the date [of this agreement]” establishes a bright line date
10 after which Podwall may commission newly rendered or created products. The phrase
11 “[f]or avoidance of doubt” signals further clarification that commissions on royalties
12 for products exploited before the Agreement are similarly excluded. When read as a
13 whole in the ordinary sense, the plain language precludes commissions, including on
14 royalties, for Robinson’s previously recorded music.

15 The GMR Royalties Deal provides that GMR would collect copyright royalties
16 on “permitted use of *previously recorded songs.*” (CLC Det. 5, 15 (emphasis added).)
17 *See Marathon*, 42 Cal. 4th at 988 (“The Labor Commissioner’s views are entitled to
18 substantial weight if not clearly erroneous.”). As the Agreement expressly excludes
19 commissions on previously recorded products, Podwall may not recover commissions
20 on royalties earned via the GMR Royalties Deal.

21 Podwall attempts to create an ambiguity by arguing that the phrase “products of
22 your services” actually means “the productive use of the song (or other copyrighted
23 work).” (Opp’n 21–22.) He contends the “product” created or rendered is actually the
24 productive or permitted use of the song, which occurred after the Agreement’s term,
25 allowing him to recover a commission. The Court disagrees. The language is plain
26 and states “products,” not “productive use” or “permitted use.” Had the parties
27 intended another meaning, they would have used other language. The Court declines
28

1 to read Podwall’s post hoc preferred language into the Agreement to create the
2 ambiguity Podwall seeks.

3 Reading the provision as a whole and construing the words in their ordinary
4 sense, the language is clear and unambiguous. The GMR Royalties Deal is for
5 royalties on previously recorded works, commissions on which the Agreement
6 expressly excludes. As such, Podwall may not recover commissions on royalties
7 earned via the GMR Royalties Deal. Accordingly, the Court **GRANTS** Robinson’s
8 Motion as to Podwall’s claims for commissions on royalties collected from the GMR
9 Royalties Deal.

10 **D. Leave to Amend**

11 Podwall requests leave to amend in the event the Court grants Robinson’s
12 motion. (Opp’n 24.) Where a district court grants a motion to dismiss, it should
13 generally provide leave to amend unless it is clear the complaint could not be saved by
14 any amendment. *See* Fed. R. Civ. P. 15(a); *Manzarek v. St. Paul Fire & Marine Ins.*
15 *Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). A court may deny leave to amend when it
16 “determines that the allegation of other facts consistent with the challenged pleading
17 could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-Well Furniture*
18 *Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986). Thus, leave to amend “is properly
19 denied . . . if amendment would be futile.” *Carrico v. City and Cty. of San Francisco*,
20 656 F.3d 1002, 1008 (9th Cir. 2011).

21 Here, amendment would be futile. The Agreement is before the Court and “the
22 intention of the parties is to be ascertained from the writing alone, if possible.” Cal.
23 Civ. Code § 1639. The disputed provision’s language is clear and explicit, and thus
24 the plain meaning governs. Podwall had the opportunity to amend his Complaint
25 following the administrative proceedings and subsequent motion practice to
26 vigorously argue for his preferred construction in opposition to the instant Motion.
27 However, the Court finds the disputed provision’s language plain and unambiguous.
28 Podwall has failed to persuade otherwise. Podwall has also failed to propose any

1 specific allegations for amendment that might alter this conclusion. Consequently,
2 further amendment would be futile. Accordingly, the Court **GRANTS** Robinson's
3 Motion as to Podwall's claims for commissions on royalties collected from the GMR
4 Royalties Deal **WITHOUT** leave to amend.

5 **VI. CONCLUSION**

6 For the forgoing reasons, the Court **DENIES in part, and GRANTS in part,**
7 Robinson's Motion to Dismiss. (ECF No. 53.) As discussed above, the Court
8 **DENIES** Robinson's Motion with respect Podwall's claim to recover commissions on
9 engagements, and **GRANTS** Robinson's Motion as to Podwall's claims for
10 commissions on royalties collected from the GMR Royalties Deal, **WITHOUT** leave
11 to amend.

12
13 **IT IS SO ORDERED.**

14
15 February 26, 2019

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18 **OTIS D. WRIGHT, II**
19 **UNITED STATES DISTRICT JUDGE**