IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SONG FI, INC., JOSEPH N. BROTHERTON, LISA M. PELLEGRINO, N.G.B., RASTA ROCK, INC.,

Plaintiffs,

v.

GOOGLE, INC., YOUTUBE LLC,

Defendants.

/

No. C 14-5080 CW

ORDER ON MOTION TO DISMISS THIRD AMENDED COMPLAINT

(Docket No. 107)

Defendants Google, Inc. and YouTube LLC move to dismiss Plaintiffs' Third Amended Complaint (3AC). The Court grants Defendants' motion in part, and denies it in part.

BACKGROUND

The Court described this case's factual and procedural background in its order granting Defendants' motion to dismiss Plaintiffs' Second Amended Complaint (2AC). There, the Court dismissed Plaintiffs' Cartwright Act, fraudulent concealment, libel per quod and tortious interference claims, with leave to amend. The Court ruled that Plaintiffs may not add further claims. Plaintiffs filed timely their 3AC.

LEGAL STANDARD

A complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to state a claim, dismissal is appropriate only when the complaint does not give the defendant fair notice of a legally cognizable

claim and the grounds on which it rests. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007). In considering whether the complaint is sufficient to state a claim, the court will take all material allegations as true and construe them in the light most favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d 896, 898 (9th Cir. 1986). However, this principle is inapplicable to legal conclusions. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are not taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 555).

In Iqbal, 556 U.S. at 679, the Supreme Court laid out the following approach for assessing the adequacy of a plaintiff's complaint:

> a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

A claim has facial plausibility "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. at 678. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S. at 556). Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 679.

When granting a motion to dismiss, the court is generally required to grant the plaintiff leave to amend, even if no request to amend the pleading was made, unless amendment would be futile. Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv. Inc., 911 F.2d 242, 247 (9th Cir. 1990). In determining whether amendment would be futile, the court examines whether the complaint could be amended to cure the defect requiring dismissal "without contradicting any of the allegations of [the] original complaint." Reddy v. Litton Indus., Inc., 912 F.2d 291, 296 (9th Cir. 1990). Leave to amend should be liberally granted, but an amended complaint cannot allege facts inconsistent with the challenged pleading. Id. at 296-97. Courts consider whether the plaintiffs have previously amended the complaint in determining whether to grant leave to amend. See, e.g., Fid. Fin. Corp. v. Fed. Home Loan Bank of S.F., 792 F.2d 1432, 1438 (9th Cir. 1986) ("The district court's discretion to deny leave to amend is particularly broad where the court has already given the plaintiff an opportunity to amend his complaint.").

DISCUSSION

I. Cartwright Act

In its previous order, the Court dismissed Plaintiffs' Cartwright Act claim because it did not support that 1) Plaintiffs' injuries were proximately caused by the alleged conspiracy for view count inflation; 2) the conspiracy harmed competition; and 3) Defendants were involved in the conspiracy or worked with other alleged conspirators.

In the 3AC, Plaintiffs reframe the alleged conspiracy as follows. The conspiring entities include Defendants, at the

direction of various executives; Universal Music Group and its subsidiaries, associated record labels and distribution partners; other major music labels, referred to as "Major Labels"; Raymond Braun Media Group and Scooter Braun personally; and the Fake View Facilitators.[1] Together, these parties conspired to restrain the following market: "the sale, promotion, and distribution of recorded music and music videos in the United States." 3AC ¶ 17. They did so largely by manipulating view counts on YouTube. Plaintiffs allege that Defendants, through YouTube, are "the dominant provider of online video hosting services" and that there is "no other music or video website operating anywhere in the world that remotely rivals Youtube's viewership, market share, profitability, and name recognition." Id. ¶ 15. Notably, Plaintiffs' description of YouTube does not connect YouTube to the relevant market or describe its share of that market. The conspiracy allegedly benefitted the conspirators to the detriment of advertisers on YouTube as well as Plaintiffs and others in the independent artist community.

The conspiracy began in 2006, when Google acquired YouTube and transformed it into a vehicle to effectuate the conspiracy. At this point, Google entered into contracts with the Major Labels, "which called for the splitting of advertising revenues from Major Label videos posted on YouTube." Id. ¶ 28.

Under these contractual agreements, Defendants and the Major Labels split revenue from the pay-per-click advertisements that

[1] Fake View Facilitators are shell companies set up by the conspirators so hackers can create fake views. Id. ¶¶ 76-77.

run alongside the music videos. Id. ¶ 29. Defendants' role in the conspiracy included selectively enforcing the Terms of Service by allowing fake views to inflate Major Labels' artists' view counts and collecting the money from the advertisers. Defendants did not enforce Term of Service § 4H, the prohibition of automated view counts, against the Major Labels and their artists. Defendants' executives refused to implement any fake view count filter. YouTube's set-up allowed "anyone to simply copy the URL . . . and purchase Fake Views by sending payment to the service provider." Id. ¶ 38. Defendants publish no guidelines as to how views are counted, which supported the conspiracy. Finally, Defendants split the money from the advertisers with the conspiring entities.

The inflated view counts also changed the perceived popularity of the Major Labels' artists, which encouraged purchases that may not have otherwise occurred. This prevented "the Independent Artists from competing fairly in the relevant market." Id. ¶ 35. The conspirators aimed to minimize the popularity of independent artists in relation to the Major Labels' artists. Id. ¶ 31. To this end, Defendants "employ[ed] aggressive and contrived enforcement action against Plaintiffs and others in the Independent Artist community" by accusing them of violating § 4H, removing their view counts, likes and public comments, and then libeling them. Id. ¶ 23. Plaintiffs link this aim of the conspiracy with the defrauding of the YouTube advertisers by describing Defendants as "holding members of the Independent Artist community down and using them as diversionary scapegoats." Id. ¶ 24.

Plaintiffs allege that they suffered the following damages proximately caused by this two-pronged conspiracy: loss to the value of the "Respect and Love Manifesto" and the music and film score "Rasta Rock Opera"; and loss of funds owed to Song fi and Rasta Rock as a result of the termination of funding arrangements by Precision Contracting Solutions (PCS).[2] Id. ¶ 85.

Plaintiffs attempt to bolster the plausibility of this two-part conspiracy in several ways. First, they attach the Vocativ article that they cited in the 2AC. See id. ¶ 33; Ex. 2. The article explains that "YouTube views . . . can make or break a new career - and add a lot of money to the bank accounts of existing stars." 3AC ¶ 33 (quoting Ex. 2). This article does not help Plaintiffs. The email from Scooter Braun, described in the article, stated: "We do not want any traces or any low-quality views that can get us in trouble." Ex. 2. The article also mentions a "Google crackdown," and that companies are "trying to stay one step ahead of YouTube." Id. These statements do not make it plausible that Defendants were part of this alleged conspiracy in the ways alleged. Second, the 3AC incorporates Exhibit 3, which contains print-outs of advertisements for fake view facilitators. Id. ¶ 39. According to Plaintiffs, this paragraph "proves" that Defendants were selling sponsored ads to companies in the business of selling fake views. However, Exhibit 3 evinces no link to Google; nor does it show that YouTube was involved in any conspiracy. Third, Plaintiff Brotherton has

[2] Plaintiffs also claim a loss in "live performance revenues for shows that were canceled," but the only show specifically alleged, the Nike show, did not involve revenue.

allegedly tested the claim that view counts count actual views; when he has watched videos multiple times, the view count increases by one. Id. ¶ 47.[3]

A. Injuries and proximate cause

Plaintiffs' alleged injuries do not fall within the "target area" of the antitrust claim. Kolling v. Dow Jones & Co., 137 Cal. App. 3d 709, 723 (1982). In the 3AC, Plaintiffs describe the alleged conspiracy as promoting Major Labels' artists while suppressing independent artists' participation by removing videos and selectively enforcing the Terms of Service. However, the allegations suggest that Defendants' goal in the alleged conspiracy was to defraud advertisers in order to make more money, not to suppress competition within the music market. It is not plausible that Defendants intended to defame independent artists as part of this conspiracy.

B. Harm to competition

In addition to the flaws described above, the 3AC fails to allege with sufficient particularity how the conspiracy harmed competition. Antitrust law protects competition, not competitors. Injuries to Plaintiffs are insufficient to demonstrate that competition was harmed. Further, Plaintiffs' description of YouTube's position in the relevant market is inadequate. YouTube's prominence as a "music or video website" does not explain its market share in "the sale, promotion, and distribution

[3] Defendants argue that Plaintiffs' allegation that view counts represent users and not views is false. However, in a motion to dismiss the Court takes as true all of Plaintiffs' allegations.

of recorded music and music videos in the United States." 3AC ¶¶ 15, 17. Plaintiffs failed to allege plausibly that this conspiracy harmed competition in the relevant market.

Because the 3AC is still flawed with respect to proximate cause and harm to competition, the Court need not discuss Defendants' involvement with the conspiracy. The Court GRANTS Defendants' motion to dismiss Plaintiffs' Cartwright Act claim, without leave to amend, because Plaintiffs have already had an opportunity to amend. See Fid. Fin. Corp., 792 F.2d at 1438.

II. Fraud

In their 2AC, Plaintiffs alleged a count of "Concealment Fraud." This Court dismissed Plaintiffs' fraudulent concealment claim with leave to amend, but stated that Plaintiffs could not add further claims. Rather than amending their fraudulent concealment claim, Plaintiffs plead one count of fraud, which encompasses two new theories: intentional fraud and promissory fraud. 3AC ¶¶ 88-121. It is too late for Plaintiffs to add new claims.

Plaintiffs argue that they are reverting to their Proposed Second Amended Complaint, Docket No. 54-1. That proposal contained a fraud claim that described both an "intentional misrepresentation" and an implicit representation. Judge Conti granted leave to file a revised version of the Proposed Second Amended Complaint. Docket No. 67. Plaintiffs then filed their 2AC, which this Court dismissed. Plaintiffs did not include promissory fraud and intentional fraud in their Second Amended Complaint. They cannot incorporate these new theories now.

Additionally, the new theories' allegations are insufficient. Under the intentional fraud theory, Plaintiffs base their reliance on a view count free from outside manipulation "on the security safeguards of other G-Y services, such as G-mail." 3AC ¶ 96. It is not plausible that users would extrapolate from G-mail safeguards that view counts would be accurate or rely on that conclusion in posting videos to YouTube. Further, Plaintiffs describe an implied promise that YouTube would be free from fake views. Plaintiffs allegedly found this implied promise in section 4H of the terms of service, the absence of any disclosure statement alerting users that the view count might be inaccurate and Defendants' control over the view count. These allegations are not sufficiently particular under Federal Rule of Civil Procedure 9 to claim an implied promise that was false when made.

These new theories also fail for some of the same reasons Plaintiffs' fraudulent concealment claim failed. Plaintiffs still do not allege out-of-pocket damages. Their allegations include the following proposed damages: payments to technical personnel to convert, condense and upload the LuvYa video and manage comments and responses on the Stevie Marco YouTube channel; loss of advertising expenses paid to Facebook to promote LuvYa; the "views, likes, and favorable public comments that are the property of Plaintiffs"; the fair market value of these likes and comments; and attorneys' fees. 3AC ¶ 117. None of these enumerated alleged damages, nor any other damages listed in the 3AC, reflect "the difference in actual value at the time of the transaction between what the plaintiff gave and what he received" due to the allegedly fraudulent nature of the transaction. See Order Dismissing 2AC at

18 (quoting All. Mortg. Co. v. Rothwell, 10 Cal. 4th 1226, 1240 (1995)).[4] Further, the 3AC still fails to allege detrimental reliance. See Order Dismissing 2AC at 20. Like the 2AC, Plaintiffs' 3AC does "not allege the more advantageous marketing they would have pursued had they not posted LuvYa on YouTube." Id.

The Court GRANTS Defendants' motion to dismiss Plaintiffs' fraud claim, without leave to amend.

III. Libel Per Quod

Libel per quod requires that a defamatory statement is capable of being understood to refer to each plaintiff and was so understood. Plaintiffs previously failed to satisfy this "of and concerning" requirement for a libel per quod claim. Order Dismissing 2AC at 24-25. The 3AC elaborates their allegations regarding this requirement as follows.

On February 14, 2014, Plaintiffs uploaded LuvYa to YouTube. The "Title" and "More" section of the video on YouTube "listed Song fi, the Rasta Rock Opera, young N.G.B, and musicians from the Rasta Rock Opera musical group, including Plaintiff Joe Brotherton, as performers." Id. ¶ 124. Plaintiffs describe the various forms of dissemination, and attach emails and Facebook messages. Exhibit 5 is an email that Brotherton sent to N.G.B.'s

[4] Plaintiffs argue that the damages for their fraud claim should be calculated under California Civil Code section 3333, which "will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." This section applies to non-contract torts in general, whereas Alliance Mortgage squarely discusses the monetary loss that a plaintiff alleging fraud must suffer for relief.

teacher, identifying N.G.B. The forwarded message also mentions the Rasta Rock Opera. Exhibit 6 contains several emails sent by Stevie Marco (a member of the Rasta Rock Opera) that share the video link. These emails mention Rasta Rock Opera and N.G.B. Exhibit 7 contains emails from Brotherton disseminating the video link, stating that he and N.G.B. are in the video together, and that the song in the video is part of the Rasta Rock Opera album. Song fi and Rasta Rock Opera also disseminated printed materials at shows, which stated, "Song fi, in association with the Rasta Rock Opera present 'LuvYa,'" and instructed attendees to log onto the Stevie Marco Channel on YouTube to view it. 3AC ¶ 130.

On April 18, 2014, Defendants took down LuvYa and posted the allegedly defamatory notice. Id. ¶ 135. Fans asked Brotherton "what was the problem with the content of the 'LuvYa' video involving young kids." Id. ¶ 131. The notice remained "live" on the original LuvYa link until August 11, 2014. Id. ¶ 150.

These allegations are sufficient to show that the notice was capable of being understood to refer to each Plaintiff, and that it actually was so understood. See Order Dismissing 2AC at 24 (quoting SDV/ACCI, Inc. v. AT&T Corp., 522 F.3d 955, 960 (9th Cir. 2008)). Plaintiffs identified themselves when circulating the LuvYa video link before Defendants replaced the video with the notice. Fans asked Brotherton about the problem with the video's content, which demonstrates that third parties connected the notice to Brotherton. See 3AC ¶ 131. Additionally, the 3AC alleges that N.G.B. had an agreement with PCS to perform in a series of commercials on the company's webpage. The performance was "cancelled when PCS clients saw the Notice on the original

'LuvYa' video link." 3AC ¶ 153(b). The inference here is that PCS saw the notice and attributed it to N.G.B. See also id. ¶ 167 (explaining that Nike saw the notice and canceled a Rasta Rock Opera event because it did not want to be associated with inappropriate children's content).

Defendants argue that the defamatory statement must say something about Plaintiffs, rather than about the video itself. However, as the California Court of Appeal has recognized, statements may simultaneously result in "personal aspersion and commercial disparagement." Polygram Records, Inc. v. Super. Ct., 170 Cal. App. 3d 543, 550 (1985). Here, the Community Guidelines implicated in the notice list many forms of depravity that may appear in a video; an average reader may find defamatory meaning in an accusation of posting a video that violates these guidelines. See Order Dismissing 2AC at 24.

Defendants also argue that Plaintiffs manufactured a libel claim by disseminating the link in emails and messages naming Plaintiffs. However, as explained above, Plaintiffs spread the link before Defendants replaced the video with the notice.

The Court DENIES Defendants' motion to dismiss Plaintiffs' libel per quod claim.

IV. Tortious Interference with Business Relationships

Plaintiffs Song fi and Rasta Rock allege that Defendants intentionally interfered with their business relationships "with the Nike Corporation and with other business partners, both existing and in negotiation and with Precision Contracting Solutions ('PCS'), the funding entity for Song fi and Rasta Rock." 3AC ¶ 160. David Drummond, Defendants' Chief Legal Officer, Board

Member and Executive was notified in writing on May 12, 2014 about the impact that the allegedly libelous notice was having on Song fi's and Rasta Rock's business relationships. Id. ¶ 161; Ex. 9. The letter states that the removal interfered, "without justification, with Song fi and Mr. Marco's prospective economic relationships." Id. Ex. 9. The letter mentions no specific economic relationships.

Economic relationships "were seriously damaged, and in some cases destroyed, as a result of [Defendants'] false and defamatory Notice." Id. ¶ 164. For example, Song fi and Rasta Rock had promoted LuvYa in persuading Nike to allow Stevie Marco to perform the Star Spangled Banner on July 4, 2014 on the roof of its store in Georgetown. Id. ¶ 165. Nike called off the event because it learned of the notice "and as a result was unwilling to risk a possible image problem in associating Nike with inappropriate children's content." Id. ¶ 167. Additionally, on May 10, 2014, PCS notified Song fi and Rasta Rock that it was suspending all further funding until the notice was retracted. Id. ¶ 171.

Under California law, a claim for tortious interference requires: "(1) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge 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) economic harm to the plaintiff proximately caused by the acts of the defendant." Korea Supply Co. v. Lockheed Martin Corp., 29 Cal. 4th 1134, 1153 (2003). Because Plaintiffs' libel per quod claim survives this motion to dismiss,

Plaintiffs have sufficiently alleged that YouTube's conduct was "wrongful by some legal measure other than the fact of interference itself." Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11 Cal. 4th 376, 393 (1995).

Here, Song fi's and Rasta Rock's allegations are sufficient to support that some economic relationship existed, at least as to PCS, which was funding them. They are also sufficient to convey actual disruption of the relationship and economic harm proximately caused by Defendants' acts. Further, as Judge Conti concluded in his order dismissing the First Amended Complaint, Plaintiffs' allegations could satisfy the knowledge and intentional act requirements. For these reasons, the Court DENIES Defendants' motion to dismiss Song fi's and Rasta Rock's tortious interference claim.

CONCLUSION

The Court GRANTS Defendants' motion to dismiss Plaintiffs' Cartwright Act claim and fraud claim, without leave to amend. It DENIES Defendants' motion to dismiss Plaintiffs' libel per quod claim and the claim for tortious interference with business relations.

IT IS SO ORDERED.

Dated: June 27, 2016

CLAUDIA WILKEN
United States District Judge