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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KATARINA BENZOVA,

Plaintiff,

vs.

GUNS N ROSES; GUNDAM TOURING SERVICES US, LLC; GUNDAM PRODUCTIONS, LLC; TEAM BRAZIL; FERNANDO LEBEIS;

Defendants.

Case No.: 2:23-cv-09538 FMO (Ex)
Related to 2:23-cv-08968 FMO (Ex)

DEFENDANTS GUNDAM TOURING SERVICES US, LLC AND GUNDAM PRODUCTIONS, LLC'S NOTICE OF MOTION AND MOTION TO DISMISS AND/OR FOR A MORE DEFINITE STATEMENT OF CERTAIN CLAIMS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

DATE: JANUARY 11, 2024
TIME: 10:00 AM
CTRM: 6D

TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on January 11, 2024 at 10:00 a.m., or as soon thereafter as counsel may be heard in Courtroom 6D of the United States District Court

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for the Central District of California, located at 350 W. 1st Street, Los Angeles, CA 90012, Defendants Gundam Touring Services US, LLC and Gundam Productions, LLC will move the Court for an order dismissing the second through fourth and sixth through eighth causes of action pursuant to Federal Rule of Civil Procedure 12(b)(6). Specifically:

- The second cause of action for violation of 17 U.S.C. § 1202 fails, because the defendants did not provide any false copyright management information in connection with the photographs taken by Plaintiff;
- The third cause of action for sexual harassment and the fourth cause of action for failure to prevent sexual harassment under California's Fair Employment and Housing Act must be dismissed, because this Court lacks supplemental jurisdiction over the state-law claims that are entirely distinct from the copyright claims, and because Plaintiff failed to exhaust her administrative remedies as to Defendants Gundam Touring Services US, LLC and Gundam Productions, LLC;
- The sixth cause of action for fraud and the seventh cause of action for negligent misrepresentation fail, because the claims are not pleaded with sufficient specificity, statements regarding ownership of copyrights are non-actionable legal opinions and/or the defendants' requirements in negotiating the terms of their agreement with Plaintiff are not false statements of fact, no scienter and/or lack of reasonable grounds for believing the truth of the statements is alleged, no intent to defraud is alleged, there was no reasonable reliance and Plaintiff did not suffer any damages. In addition, the defendants did not owe any duty of disclosure, there are no facts showing a lack of intent to perform, and the causes of action are preempted by the Copyright Act; and,
- The eighth cause of action for violation of *Business & Professions Code* § 17200, which is derivative of the fraud-based claims, fails for the same reasons as the sixth and seventh causes of action.

To the extent any cause of action is not dismissed, the Court must issue an order

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for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e), since Plaintiff's allegations are so deficient that a responsive pleading cannot be framed.

This Motion is based on this notice, the attached memorandum of points and authorities, all pleadings and other papers filed in this case, and such other evidence and argument as may be presented to the Court at the hearing on this motion.

This motion is made following the conference of counsel pursuant to L.R. 7-3 which took place on November 29, 2023.

Dated: December 6, 2023

GUTMAN LAW

By: */s/ John Juenger*
Attorneys for Defendants
GUNDAM TOURING SERVICES US, LLC
and GUNDAM PRODUCTIONS, LLC

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiff Katarina Benzova ("Plaintiff" or "Benzova") alleges she was the tour photographer for the musical group Guns N' Roses between 2010 and 2022. Plaintiff's Complaint judicially admits that "her works were 'a work for hire' during the exclusive Term of the contract" [*Complaint, ¶ 142*], but in a wishful, albeit legally deficient sleight-of-hand, contrives an "Uncontracted Period" when her photographs were supposedly not works made for hire despite being paid pursuant to and in accordance with the written agreements.

Moving Parties here -- Gundam Touring Services U.S. LLC ("Gundam Touring") and Gundam Productions, LLC ("Gundam Productions") – are two of the three plaintiffs in an action for declaratory relief action for copyright invalidity, non-ownership and non-infringement filed on October 24, 2023, promptly after they learned Benzova registered copyrights in the subject photographs. Instead of filing a compulsory counter-claim, Benzova filed her rambling and disjointed 695-page complaint on November 11, 2023 that, in addition to the first cause of action for copyright infringement, has seven other causes of action, all of which must be dismissed pursuant to this motion to dismiss under Fed.R.Civ.P. 12(b)(6).[1]

Plaintiff contends in her second cause of action for violation of 17 U.S.C. § 1202(a) that by posting Plaintiff's photographs on Guns N' Roses' social media accounts and a website that included logos for the band constitutes providing false Copyright Management Information ("CMI"). However, the band logos – which appear every time there is a new posting – do not provide copyright information. As a result, the second cause of action fails as a matter of law.

The six other causes of action in the Complaint are all based on California law.

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[1] Moving Parties submit that resolution of their declaratory relief action will dispose of Benzova's first cause of action for copyright infringement.

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On the third and fourth causes of action for sexual harassment and failure to prevent sexual harassment under California's Fair Employment and Housing Act, this Court does not have supplemental jurisdiction over Plaintiff's state-law claims, which turn on entirely independent legal issues than her federal copyright claims – i.e., the sexual harassment allegations have absolutely no bearing on whether the photographs were works-for-hire.[2] In addition, Plaintiff did not exhaust her administrative remedies with respect to Defendants Gundam Touring and Gundam Productions. Therefore, those causes of action must be dismissed.

The sixth cause of action for fraud and seventh cause of action for negligent misrepresentation are based on the absurd argument that the defendants misrepresented they owned the copyrights in Plaintiff's photographs. Of course, these causes of action necessarily fail as the photographs are "works-for-hire." Nonetheless, dismissal at this stage is appropriate since the defendants properly understood they owned the copyrights in the photographs they paid Plaintiff to take under a work-for-hire agreement, therefore, there could be no misrepresentation of fact. The fraud-based causes of action fail for numerous other reasons, as explained below.

The eighth cause of action for violation California *Business & Professions Code* § 17200 is derivative of the fraud-based causes of action, and fails for the same reasons.

In the unlikely event the Court does not dismiss any of the challenged causes of action, it should issue an order for a more definite statement pursuant to Federal Rule of Civil Procedure 12(e).

II. STATEMENT OF FACTS

Plaintiff alleges she began taking photographs for the defendants in 2010.

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[2] Moving Parties have not been named as defendants in the Complaint's fifth cause of action for sexual harassment in professional relationships, however, it is clear there is no basis for the exercise of supplemental jurisdiction against Defendant Fernando Lebeis.

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[*Complaint, ¶ 62.*] She executed multiple written contracts between December 2010 and August 2021, each of which included a work-for-hire provision. [*Complaint, ¶¶ 165-168, 172; Exhibit 5.*] The work-for-hire provision in the 2021 written contract states:

> "You acknowledge and agree that the results and proceeds of your services rendered during the Term will be on a 'work-for-hire' basis. We shall own the copyrights and all intellectual property rights to all of the video and photographs created by you during the term of your employment. In addition, we shall have the right, but not obligation to use your name, likeness, voice and biographical material in connection with the results and proceeds of your services hereunder."

Plaintiff judicially admits that most of her photographs were works-for-hire, but has desperately conjured up a tortured theory under which she claims ownership of certain photographs taken after expiration of the time period in the written agreement, ignoring the inescapable legal conclusion that the written agreements were orally modified and the modification of the term was fully executed, as she was paid pursuant to and in accordance with the written agreements with the work-for-hire provision.[3] Every agreement with Plaintiff had a work-for-hire provision.

Separately, Plaintiff alleges she was subjected to unwelcome advances by Fernando Lebeis ("Lebeis"), and that his conduct constituted sexual harassment under California's Fair Employment and Housing Act. Plaintiff does not allege that she complained to any of the defendants regarding Lebeis' alleged conduct.

---

[3] The law is clear that full performance by the promisee alone suffices to render the agreement executed and enforceable under California *Civil Code* § 1698. See *Raedeke v. Gibraltar Sav. & Loan Ass'n*, 10 Cal. 3d 665, 673 (1974).

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III. MOTION TO DISMISS

A. Standard on Motion to Dismiss

The Court should grant a motion to dismiss under Fed.R.Civ.P. 12(b)(6) when a complaint fails "to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint is subject to dismissal "when it fails to state a cognizable legal theory or fails to allege sufficient factual support for its legal theories." *Caltex Plastics, Inc. v. Lockheed Martin Corp.*, 824 F.3d 1156, 1159 (9th Cir. 2016). To survive a motion to dismiss, a complaint must plead sufficient facts from which a court could "draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The Court must "accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). However, the Court need not "assume the truth of legal conclusions … cast in the form of factual allegations." *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981). Also, while the Court must accept the allegations as true, it must nevertheless "draw on its own experience and common sense" to determine "whether a complaint states a plausible claim for relief[.]" *Ashcroft*, at 663–664, 679.

B. The Second Cause of Action for Violation of 17 U.S.C. § 1202 Fails

Title 17 U.S.C. § 1202(a) states "no person shall knowingly and with the intent to induce, enable, facilitate, or conceal infringement (1) provide [CMI] that is false; or (2) distribute or import for distribution [CMI] that is false." Title 17 U.S.C. § 1202(b) concerns the removal or alteration of CMI to induce, enable, facilitate, or conceal an infringement without the authority of the copyright owner or the law.

The Complaint does not allege Plaintiff affixed any CMI to any of her photographs, and does not make any reference to 17 U.S.C. § 1202(b). Accordingly, the second cause of action is solely based on providing false CMI under 17 U.S.C. § 1202(a).

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Title 17 U.S.C. § 1202(c) defines CMI as:

> (1) The title and other information identifying the work, including the information set forth on a notice of copyright.
>
> (2) The name of, and other identifying information about, the author of a work.
>
> (3) The name of, and other identifying information about, the copyright owner of the work, including the information set forth in a notice of copyright.
>
> (4) With the exception of public performances of works by radio and television broadcast stations, the name of, and other identifying information about, a performer whose performance is fixed in a work other than an audiovisual work.
>
> (5) With the exception of public performances of works by radio and television broadcast stations, in the case of an audiovisual work, the name of, and other identifying information about, a writer, performer, or director who is credited in the audiovisual work.
>
> (6) Terms and conditions for use of the work.
>
> (7) Identifying numbers or symbols referring to such information or links to such information.
>
> (8) Such other information as the Register of Copyrights may prescribe by regulation, except that the Register of Copyrights may not require the provision of any information concerning the user of a copyrighted work.

The Complaint alleges the false CMI was provided by displaying the vast majority of the photographs on Guns N' Roses' social media accounts, or an online subscription-based fan club called "Nightrain," which also include a Guns N' Roses logo.[4] For two photographs, the Complaint alleges false CMI was provided in

---

[4] *Complaint, ¶¶ 270-271, 274-275, 296-297, 300-301, 319-320, 323-324, 338-339, 342-343, 358-359, 369-370, 387-388, 402-403, 417-418, 421-422, 425-426, 436-437, 446-447, 455-456, 459-460, 474-475, 489-490, 499-500, 509-510, 519-520, 529-530, 545-546, 555-556, 566-567, 577-578, 588-589, 726-727, 730-731, 734-735, 738-739, 742-743, 746-747, 750-751, 754-755, 758-759, 798-800, 804-806, 810-812, 816-818, 822-824, 828-830, 834-836, 840-842, 846-848, 851-852, 855-856, 859-860, 864-865, 869-870, 874-875, 879-880, 884-885, 889-890, 894-895, 899-900, 904-905, 909-910, 914-915, 919-920, 924-925, 929-930, 934-935, 939-940, 944-945, 949-950, 954-955, 959-960, 964-965, 969-970, 974-975, 979-980, 984-985, 989-990, 994-995, 999-*

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connection with third parties posting them on their website without any explanation as to how any of the defendants could have possibly provided false CMI.[5] Accordingly, the claim for providing false CMI is based entirely on the display of the photographs on Guns N' Roses' social media postings and the Nightrain site, which also has a Guns N' Roses logo.

With respect to the social media posts, the Guns N' Roses logo consists of a circular image including two revolvers facing opposite directions with roses intertwined and the words "GUNS •N• ROSES" in the outer circumference, which appears on each separate posting, like the following example from *Docket No. 1-2, page 18*:

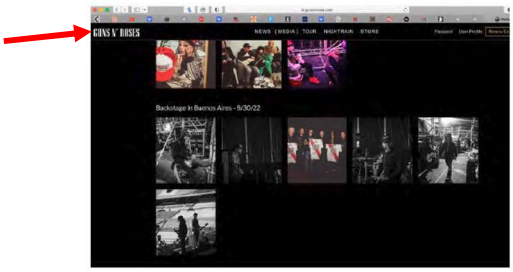


1000, 1002-1003, 1007-1008, 1011-1012, 1021-1022, 1025-1026, 1037-1038, 1041-1042, 1045-1046, 1048-1049, 1052-1053, 1056-1057, 1060-1061, 1064-1065, 1068-1069.

[5] *Complaint, ¶¶ 309-310, 1028-1029.*

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As to the logo on the Nightrain posts, it is simply the words "GUNS N' ROSES" in a stylized manner off to the upper lefthand corner of the screen, as identified in the following example from *Docket No. 1-2, page 287:*



The logos do not constitute CMI under 17 U.S.C. § 1202(c): They do *not* set forth the title or information concerning the photographs, the name or identifying information concerning the author, name or identifying information concerning the copyright owner, the terms and conditions for use of the photographs and/or identifying numbers, symbols or links to copyright information. The photographs simply appear on social media or website posts relating to the band Guns N' Roses.

"The central purpose of CMI is 'to inform the public that something is copyrighted and to prevent infringement.'" *Fashion Nova, LLC v. Blush Mark, Inc.*, 2023 U.S. Dist. LEXIS 114601, *7-8, 2023 WL 4307646 (C.D. Cal June 30, 2023), quoting *Pers. Keepsakes, Inc. v. Personalizationmall.com, Inc.*, 975 F. Supp. 2d 920, 928 (N.D. Ill. 2013). Thus, "courts find that website information cannot serve as CMI where it does not provide the viewer with proper notice that the work is copyrighted." *Fashion Nova, LLC*, at *8.

In *SellPoolSuppliesOnline.com, LLC v. Ugly Pools Arizona, Inc.*, 804 F. App'x 668, 670-671 (9th Cir. 2020), the court held the defendants' copyright notice located at the bottom of the website was not CMI because it "**was generic and did not communicate that Defendants owned the photos** …." (Emphasis added.) Similarly,

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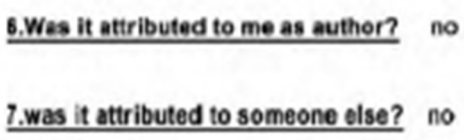
in *Stevens v. Corelogic, Inc.*, 194 F. Supp. 3d 1046, 1051-1052 (S.D. Cal. July 1, 2016), the court held:

> "Plaintiff alleges CoreLogic displayed its own copyright notice on the same webpage as Plaintiffs' photographs, and that this placement constituted false CMI. … The Court agrees with those courts that have found this insufficient. See *Tomelleri v. Zazzle, Inc.*, No. 13-cv-2576-EFM-TJJ, 2015 U.S. Dist. LEXIS 165007, 2015 WL 8375083 (D. Kansas, Dec. 9, 2015) at *12 (finding that **just because an image appears on a website does not mean the website owner is alleging he owns the image**); *Ward v. Nat'l Geographic Soc.*, 208 F. Supp. 2d 429, 450 (S.D.N.Y. 2002) (**the fact that National Geographic's copyright notice was on same page as Plaintiff's photograph is insufficient to show false information based solely on proximity of the notice to Plaintiff's photograph**). Therefore, Plaintiffs have failed to make a showing sufficient to establish an element of a §1202(a) claim."

(Emphasis added.)

Here, in contrast to the cases cited above, Plaintiff has not alleged that the defendants posted a *copyright notice* on the same page as any of her photographs. Rather, she simply alleges a Guns N' Roses *logo* appeared on the same page, making this case even less favorable for Plaintiff. The logos do not suggest ownership of photographs – they are simply logos that appear every time a social media post occurs or on each page of the Nightrain site.

Also, Plaintiff herself judicially admits the alleged CMI fails to provide information concerning attribution of authorship. Included in *Docket No. 1-2* for each of the photographs is a statement from the Plaintiff providing certain information, such as the date of the photograph was taken, when it was delivered, and so on. For each, there are also the questions: "6. Was it attributed to me as an author?" "7. was it attributed to someone else?" For nearly all the photographs with alleged false CMI, the answer to both questions is "no." [*See, e.g., Docket No. 1-2, page 19.*]



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Furthermore, the Complaint fails to establish the "knowingly and with the intent to induce, enable, facilitate, or conceal infringement" element under 17 U.S.C. § 1202(a). To the contrary, Plaintiff admits that her photographs were "works for hire" during the term of her contract. [*Complaint, ¶¶ 142, 165.*] Plaintiff's copyright claim hinges on the preposterous contention that there was no agreement to maintain the "work-for-hire" arrangement when she continued to be paid in the same manner and performed the same services after the date of the purported term indicated in written agreements had allegedly passed, when there was clearly an oral and fully executed modification on the length of the term. Regardless, defendants knew they owned the copyrights to the photographs under the "work-for-hire" arrangement, and could post photographs at their discretion. Therefore, the intent requirement is not met.

For these reasons, the second cause of action for violation of 17 U.S.C. § 1202(a) must be dismissed without leave to amend.

C. This Court Lacks Supplemental Jurisdiction on the Third of Action for Harassment and the Fourth Cause of Action for Failure to Prevent Harassment, and Plaintiff Failed to Exhaust Her Administrative Remedies Against the Moving Parties

Plaintiff's third and fourth causes of action are for sexual harassment and failure to prevent sexual harassment under the Fair Employment and Housing Act ("FEHA"), California *Government Code* §§ 12900-12996.

There is no basis for this Court to exercise supplemental jurisdiction over the third and fourth causes of action. Title 28 U.S.C. § 1367(a) provides that "in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." "Federal courts may exercise supplemental jurisdiction over a state law claim if it shares a 'common nucleus of operative fact' with a federal claim and if 'the state and federal claims would normally be tried together.'" *Ventura Content, Ltd. v.*

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Motherless, Inc., 885 F.3d 597, 619 (9th Cir. 2018), quoting *Bahrampour v. Lampert*, 356 F.3d 969, 978 (9th Cir. 2004).

The copyright claims over which this Court has original jurisdiction are entirely distinct from the alleged sexual harassment. The copyright claims concern whether Plaintiff's photographs were works for hire based on the parties' agreements. The sexual harassment claims are based on alleged instances of Lebeis making unwelcomed advances toward Plaintiff, asking her to drink wine in his hotel room, sending supposedly lewd videos, etc. The sexual harassment allegations have absolutely no bearing on the copyright claims, and supplemental jurisdiction is therefore lacking. See *Eastman v. Apple Inc.*, 2018 U.S. Dist. LEXIS 194487, 2018 WL 5982440, at *4 (N.D. Cal. Nov. 14, 2018) (finding in a patent infringement suit there was no supplemental jurisdiction over plaintiff's termination-related state law claims which would "turn on entirely independent legal issues"); *Doe v. Arnett*, 2012 U.S. Dist. LEXIS 107791, 2012 WL 3150934, at *2 (C.D. Cal. Aug. 1, 2012) (finding that state law defamation claims and copyright claims were not bound by a common nucleus of operative fact, but instead involved entirely different aspects of the plaintiffs' website content).

Further, under the FEHA, a plaintiff must exhaust his or her administrative remedies by filing a complaint with the Civil Rights Department for the State of California. See California *Government Code* §§ 12960-12965. The documents included in Exhibit 1 of the Complaint do not reference either of the Gundam defendants. This was pointed out to Plaintiff's counsel during the meet and confer process. Plaintiff's counsel stated the issue had been addressed, but as of the filing of this motion, Plaintiff's counsel has not established the complaint with the Civil Rights Department was amended. Since the Complaint fails to demonstrate Plaintiff's administrative remedies were exhausted as to the Gundam defendants, they must be dismissed from the third and fourth causes of action.

Accordingly, the third and fourth causes of action must be dismissed.

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D. The Sixth Cause of Action for "Fraud/Fraudulent Concealment/Inducement" and the Seventh Cause of Action for Negligent Misrepresentation Must Be Dismissed

1. Misrepresentations

"'The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.'" *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996), quoting 5 Witkin, Summary of Cal.Law (9th ed. 1988) Torts § 676, p. 778, and citing California *Civil Code* § 1709, *Hunter v. Up-Right, Inc.*, 6 Cal. 4th 1174, 1184 (1993) and *Molko v. Holy Spirit Assn.*, 46 Cal. 3d 1092, 1108 (1988).

Every element of fraud must be specifically pleaded. *Cooper v. Equity Gen Ins.*, 219 Cal.App.3d 1252, 1262 (1990) ("in California, every element of a cause of action for fraud must be alleged with factually and specifically, and the policy of liberal construction of pleadings will not be invoked to sustain a defective complaint"). See also Fed.R.Civ.P. 9(b) ("In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake").

To properly allege an action for fraud against a corporation a plaintiff must (1) describe the specific content of an allegedly false statement, (2) identify who said it, (3) explain the speaker's corporate authority for making the statement, (4) identify when it was said, (5) identify who heard it or received the statement, and (6) explain the specific factual context and specific reasons why the statement was fraudulent – the complaint must explain in detail the "who, what, when, where, why, and how" of the fraud. *In re Glenfed, Inc. Securities Litigation*, 42 F.3d 1541, 1548 (9th Cir. 1994); *Wool v. Tandem Computers, Inc.*, 856 F .2d 1365, 1369 (9th Cir. 1987); *Tarmann v. State Farm*, 2 Cal. App. 4th 156, 157 (1991).

The elements of negligent misrepresentation are the same as the elements of fraud except instead of knowledge of falsity element is replaced by the defendant

having no reasonable grounds for believing it to be true. *Chapman v. Skype Inc.*, 220 Cal. App. 4th 217, 230-231 (2013). As with fraud, the elements of negligent misrepresentation must be pleaded with particularity. *National Union Fire Ins. Co. of Pittsburgh, PA v. Cambridge Integrated Services Group Inc.*, 171 Cal.App.4th 35, 50 (2009). General and conclusory allegations are insufficient. *Cansino v. Bank of America*, 224 Cal. App. 4th 1462, 1469 (2014).

Plaintiff's sixth cause of action for "Fraud/Concealment/Fraud in the Inducement" and her seventh cause of action for negligent misrepresentation are based on the same purported acts: "1)Defendants telling Plaintiff she did not own her own copyrights; 2)Defendants stating they owned Plaintiff's [copyrights]; 3) Defendants asserting illusory 'superior right' to Plaintiff's copyrights; 4) Defendants "appointing themselves" owners of Plaintiff's copyright; 5) Defendants self-dealing and impersonating themselves as owners of Plaintiff's copyrights; 6) Defendants holding self out to third parties as owners of Plaintiff's copyright;7) Defendants concealing the true facts that they were not owners and concealing the fact they were only potential licensees; and 8) Defendants, with no present intent to perform, promising Plaintiff benefits in order to induce and secure her participation, Defendants through its Managing Agent, Fernando Lebeis, an employee acting within the scope of her employment, falsely and frequently and with intent to deceive and defraud Plaintiff, led Plaintiff to believe that Defendant was owner of Plaintiff's copyright /had superior right to Plaintiff's position." [*Complaint, ¶¶ 1237, 1244.*]

As an initial matter, the causes of action are not pleaded with the requisite specificity. The causes of action themselves do not state the specific substance of the alleged statements, when, where and how they were made and/or who heard them other than Plaintiff. The body of the prolix Complaint (over 1,250 paragraphs and 270 pages in length without exhibits) – which violates the requirement for a pleading to contain "a short and plain statement of the claim showing that the pleader is entitled to relief" set forth in Fed.R.Civ.P. 9(a)(2) – references some specific communications, but they

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date back to 2016 and 2017, which is well outside the three-year limitations period for fraud. The unspecified fraud allegations are deficient.

More importantly, no actual misrepresentations are alleged. The first seven of the alleged acts are variations on the defendants asserting they owned the copyrights to the photographs Plaintiff took while she was being paid. Plaintiff admits that photographs she took within the terms set forth in the written contracts were works-for-hire, therefore, it is indisputable the defendants own the copyrights for those photographs. [*Complaint, ¶¶ 142, 165.*] The alleged statements that the defendants owned the copyrights to any other photographs simply indicate the defendants' proper understanding that they hold the copyright rights to all the photographs Plaintiff took while being paid for her services, especially since the evidence is irrefutable that Plaintiff was paid pursuant to and in accordance with the same agreements she has judicially admitted her photographs were works made-for-hire that were owned by defendants. The defendants' alleged statements regarding their understanding of the copyright ownership in any of the photographs cannot be deemed misrepresentations to support causes of action for fraud or negligent misrepresentation.

Put another way, the alleged statements constitute legal opinion that cannot support a claim for fraud. "'It is … well settled, as a general rule, that fraud cannot be predicated upon misrepresentations of law or misrepresentations as to matters of law.' *Am. Jur. 2d of Fraud and Deceit* § 97 (2001). Statements of domestic law are normally regarded as expressions of opinion which are generally not actionable in fraud even if they are false. *Id.*" *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 621 (9th Cir. 2004). See also *Agnew v. Foell*, 113 Cal. App. 2d 575, 577 (1952) ("a legal opinion by a layman cannot constitute the basis of recovery for fraud"). The alleged misrepresentations are simply the defendants' non-actionable legal opinion regarding copyright ownership over the photographs Plaintiff was paid to take based on the work-for-hire agreement the parties agreed to.

Furthermore, the statements regarding copyright ownership of the photographs

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made in connection with the parties' negotiations are statements of the defendants' requirements in connection with Plaintiff's work rather than representations of fact. The defendants repeatedly made clear that they would only hire Plaintiff if the defendants owned the copyrights in the photographs she was hired to take. Plaintiff repeatedly acquiesced, and signed several written contracts with work-for-hire provisions. Insistence on owning the copyrights cannot possibly be a misrepresentation of fact.

By the same token, Plaintiff cannot establish the elements of scienter [fraud] and/or no reasonable grounds for believing truth of the statement [negligent misrepresentation], because the statement of a legal opinion and/or the insistence of a provision in a contract cannot constitute a knowingly false statement, and the defendants had reasonable grounds for believing they owned the copyrights based on the parties' agreement and course of conduct. Plaintiff even signed a written contract in August 2021 with a work-for-hire provision.

In addition, no intent to defraud is properly alleged. Again, statements regarding copyright ownership in the photographs were either an indication of the defendants' requirements in working with Plaintiff or an explanation regarding the parties' agreement. Rather than defrauding Plaintiff, the defendants articulated their requirements and understanding of the arrangement with Plaintiff.

There is also no justifiable reliance. Plaintiff alleges she reasonably relied on the supposed misrepresentations concerning copyright ownership in the photographs because the defendants thwarted the use of written contracts, "Lebeis wielded his power from a preexistent position of apparent authority as Guns N' Roses manager/proxy/managing agent-stating he, with the aid of his lawyer, had superior knowledge in the complexities of copyright law," the defendants are sophisticated and Plaintiff is a foreign citizen whose first language is not English and the defendants, "knew that her copyrights were intangible and thus were not readily discernible …." [*Complaint, ¶ 247.*] Plaintiff worked with the defendants for a period of at least 12

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years. At any time, she could have hired an attorney to negotiate the terms of her agreement and/or to determine the copyright status of the photographs. Plaintiff signed a written agreement in August 2021 that included a work-for-hire provision by which time she had been paid several hundred thousand dollars. There was nothing preventing her from seeking legal advice.

As to damages, Plaintiff essentially contends she missed out on unidentified opportunities to license the photographs she took while working for the defendants. [*Complaint, ¶ 1239.*] Of course, everyone understood Plaintiff did not own the copyrights in the photographs the defendants paid her to take, and she had no right to license them to third parties. Again, Plaintiff signed a contract in August 2021 with a work-for-hire provision. Plaintiff's supposition she could have licensed the photographs she was paid to take to unidentified third parties does not constitute cognizable damages.

For these reasons, the misrepresentation claims fail.

2. Concealment

Plaintiff's sixth cause of action is entitled "Fraud/Fraudulent Concealment/Fraud in the Inducement."

The elements for concealment are: (1) the defendant must have concealed or suppressed a material fact; (2) the defendant must have been under a duty to disclose the fact; (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff; (4) the plaintiff must have been unaware of the fact and would not have acted as he did if he had known of the concealed or suppressed fact; and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage. *Bader v. Johnson & Johnson*, 86 Cal. App. 5th 1094, 1130 (2022).

"There are 'four circumstances in which nondisclosure or concealment may constitute actionable fraud: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not

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known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; and (4) when the defendant makes partial representations but also suppresses some material facts.'" *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 336 (1997) quoting *Heliotis v. Schuman*, 181 Cal. App. 3d 646, 651 (1986).

The alleged concealment is essentially identical to the alleged misrepresentation that the defendants owned the copyright in the photographs they paid Plaintiff to take: "Defendants concealing the true facts that they were not owners and concealing the fact they were only potential licensees …." [*Complaint, ¶ 1237.*] Accordingly, the alleged concealment is not actionable for all the reasons set forth above with respect to the alleged misrepresentation.

Furthermore, the defendants did not owe Plaintiff any duty to "disclose" the false "fact" regarding copyright ownership in the photographs. Plaintiff has not alleged a fiduciary duty (nor can she), and a "'mere contract … does not … create a fiduciary relationship.'" *Wolf v. Superior Court*, 107 Cal. App. 4th 25, 33-34 (2003), quoting *Waverly Productions, Inc. v. RKO General, Inc.*, 217 Cal. App. 2d 721, 731-732 (1963). The defendants did not have exclusive knowledge over any material *facts* concerning the parties' agreement, they did not actively conceal any material *facts* from Plaintiff and they did not make any partial representations while suppressing some material *facts*. The defendants simply understood that the photographs were works for hire for which Plaintiff did not own the copyrights. It was impossible for the defendants to "conceal" anything regarding the photographs, and they did not owe a duty to make such a disclosure.

3. Promissory Fraud

"'Promissory fraud' is a subspecies of the action for fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud." *Lazar*, at 638.

"To properly plead promissory fraud, a plaintiff must allege, with specific

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factual support, that a 'promise had been made without the intent to perform.' *Riverisland Cold Storage, Inc. v. Fresno-Madera Prod. Credit Ass'n*, 55 Cal. 4th 1169, 1182, 151 Cal. Rptr. 3d 93, 291 P.3d 316 (2013). Indeed, 'the intent element of promissory fraud entails more than proof of an unkept promise or mere failure of performance.' *Id.* at 1183." *Anthony v. Iron Mt.*, 2020 U.S. Dist. LEXIS 182199, *33, 2020 WL 5793449 (C.D. Cal. Sept. 25, 2020). See also *Reeder v. Specialized Loan Servicing LLC* 52 Cal. App. 5th 795, 804 (2020) (affirming trial court's sustaining of a demurrer without leave to amend to a promissory fraud cause of action where the complaint failed to allege facts demonstrating dishonesty at the time the contract was made).

The only allegation regarding intention not to perform in the sixth cause of action is the vague contention that "Defendants, with no present intent to perform, promising Plaintiff benefits in order to induce and secure her participation, Defendants through its Managing Agent, Fernando Lebeis, an employee acting within the scope of her employment, falsely and frequently and with intent to deceive and defraud Plaintiff, led Plaintiff to believe that Defendant was owner of Plaintiff's copyright /had superior right to Plaintiff's position." [*Complaint, ¶ 1237.*] There is no indication what obligation the defendants had that they did not intend to perform, let alone when, where, etc. The primary obligation was for the defendants to pay Plaintiff, and there is no question she was paid several hundred thousand dollars over the course of her work with the defendants.

The only other apparent reference to lack of an intent to perform concerns alleged discussions regarding credit Plaintiff would receive. However, the work-for-hire provision made clear the defendants had "the right, but not obligation to use [Plaintiff's] name, likeness, voice and biographical material in connection with the results and proceeds of your services hereunder." [*Exhibit 5.*] Moreover, Plaintiff's own allegations make clear that at times she was given credit: "From then on, from 2016 to 2022, when credit was not provided as promised, Benzova objected, notified,

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and gave warning about such unauthorized use." [*Complaint, ¶ 211.*] This not only demonstrates that there was no intent to deny Plaintiff credit at the time the alleged promise was made, but also that this was an ongoing issue since 2016. Nonetheless, Plaintiff continued taking photographs for the defendants and even signed a contract with a work-for-hire clause in August 2021. Obviously, Plaintiff was willing to continue working under the same arrangement irrespective of whether she received the credit she believes she was entitled to, meaning the alleged false promise was not regarding a material "fact," and that she would not have acted differently had she known she would not always receive credit.

4. Preemption

The Copyright Act preempts state-law claims arising out of conduct encompassed by the Copyright Act. *Summit Mach. Tool Mfg. Corp. v. Victor CNC Sys.*, 7 F.3d 1434, 1439-1444 (9th Cir. 1993). "If a state law claim includes an 'extra element' that makes the right asserted qualitatively different from those protected under the Copyright Act, the state law claim is not preempted by the Copyright Act." *Altera Corp. v. Clear Logic, Inc.*, 424 F.3d 1079, 1089 (9th Cir. 2005). However, "Courts do not automatically conclude that, if misrepresentation or deceit is alleged, a claim is not preempted by the Copyright Act.… Rather, the Court must determine if the State law claim is equivalent to any of the exclusive rights within the general scope of copyright as specified by 17 U.S.C. § 106." *Terarecon, Inc. v. Fovia, Inc.*, 2006 U.S. Dist. LEXIS 48833, *10, 2006 WL 1867734 (N.D. Cal. July 6, 2006).

Here, Plaintiff's fraud-based causes of action contend she was damaged due to the defendants telling her they held "superior" copyright interests in her photographs. [*Complaint, ¶¶ 1237, 1244.*] There is no qualitative difference between the rights being asserted in these causes of action and under the Copyright Act. Indeed, if the defendants prevail on the copyright issue, the fraud-based causes of action necessarily fail.

For all these reasons, Plaintiff's sixth cause of action for fraud and seventh

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cause of action for negligent misrepresentation must be dismissed without leave to amend.

E. The Eighth Cause of Action for Violation of *Business & Professions Code* § 17200 Must Be Dismissed

"'The purpose of the UCL [Unfair Competition Law] (*Bus. & Prof. Code* § 17200 *et seq.*) 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. [Citation].'" *McAdams v. Monier, Inc.*, 182 Cal. App. 4th 174, 187 (2010). Despite this noble intention, the UCL has become a source of "'[f]rivolous unfair competition lawsuits [that] clog our courts [,] cost taxpayers' and 'threaten[] the survival of small businesses.'" *Hale v. Sharp Healthcare*, 183 Cal. App. 4th 1373, 1382 (2010), quoting *Californians for Disability Rights v. Mervyn's, LLC*, 39 Cal. 4th 223, 228 (2006).

In considering the scope of the UCL, the California Supreme Court in *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1150 (2003), reaffirmed that the UCL is not to be expanded to basic contract and/or tort causes of action based on the statute's limitations on damages to injunctive relief and restitution. See also *Paulus v. Bob Lynch Ford, Inc.*, 139 Cal. App. 4th 659, 677 (2006) (an action under the UCL is not an all-purpose substitute for a tort or contract action).

Plaintiff's eighth cause of action for violation of the UCL is based on the same defective contention that the defendants claimed to own the copyrights in the photographs Plaintiff was paid to take. For all the same reasons set forth above with respect to the sixth and seventh causes of action, the claim under *Business & Professions Code* § 17200 fails. Moreover, this action concerns a discrete dispute, and has no implication with respect to consumers or anyone other than Plaintiff.

Accordingly, the eighth cause of action for violation of the UCL must be dismissed without leave to amend.

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IV. IN THE UNLIKELY EVENT THE COURT DOES NOT DISMISS THE CHALLENGED CLAIMS, IT SHOULD ORDER A MORE DEFINITE STATEMENT

An order for a more definite statement is appropriate when the pleading is so vague or ambiguous that the party cannot reasonably prepare a response." Fed.R.Civ.P. 12(e). Such a motion "must point out the defects complained of and the details desired." *Id.*

In the unlikely event that the Court finds dismissal is not appropriate for any of the causes of action addressed in this motion, it should order Plaintiff to provide a more definite statement under Fed.R.Civ.P. 12(e).

With respect to the second cause of action, the Complaint fails to set forth how the logos appearing on the Guns N' Roses social media accounts and the Nightrain website constitute CMI when they provide no indicia of copyright ownership.

As to the sixth through eighth causes of action, there are no allegations demonstrating any material misrepresentation of fact, any duty of disclosure and/or any facts suggesting the lack of intent to perform at the time any contract was made.

Absent more definite statements, the defendants cannot meaningfully respond.

V. CONCLUSION

For the foregoing reasons, the motion to dismiss and/or motion for a more definite statement must be GRANTED.

Dated: December 6, 2023

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