

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.,

No. C 14-5080 CW

ORDER ON MOTION TO
DISMISS THIRD
AMENDED COMPLAINT

Plaintiffs,

v.

(Docket No. 107)

GOOGLE, INC., YOUTUBE LLC,

Defendants.

_____ /

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

United States District Court
For the Northern District of California

1 claim and the grounds on which it rests. Bell Atl. Corp. v.
2 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
3 complaint is sufficient to state a claim, the court will take all
4 material allegations as true and construe them in the light most
5 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
6 896, 898 (9th Cir. 1986). However, this principle is inapplicable
7 to legal conclusions. "Threadbare recitals of the elements of a
8 cause of action, supported by mere conclusory statements," are not
9 taken as true. Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)
10 (citing Twombly, 550 U.S. at 555).

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

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

22 A claim has facial plausibility "when the plaintiff pleads factual
23 content that allows the court to draw the reasonable inference
24 that the defendant is liable for the misconduct alleged." Id. at
25 678. "The plausibility standard is not akin to a 'probability
26 requirement,' but it asks for more than a sheer possibility that a
27 defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S.
28 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.

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

19 DISCUSSION

20 I. Cartwright Act

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

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

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

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

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

26
27 ¹ Fake View Facilitators are shell companies set up by the
28 conspirators so hackers can create fake views. Id. ¶¶ 76-77.

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

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

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

7 Plaintiffs attempt to bolster the plausibility of this two-
8 part conspiracy in several ways. First, they attach the Vocativ
9 article that they cited in the 2AC. See id. ¶ 33; Ex. 2. The
10 article explains that "YouTube views . . . can make or break a new
11 career - and add a lot of money to the bank accounts of existing
12 stars." 3AC ¶ 33 (quoting Ex. 2). This article does not help
13 Plaintiffs. The email from Scooter Braun, described in the
14 article, stated: "We do not want any traces or any low-quality
15 views that can get us in trouble." Ex. 2. The article also
16 mentions a "Google crackdown," and that companies are "trying to
17 stay one step ahead of YouTube." Id. These statements do not
18 make it plausible that Defendants were part of this alleged
19 conspiracy in the ways alleged. Second, the 3AC incorporates
20 Exhibit 3, which contains print-outs of advertisements for fake
21 view facilitators. Id. ¶ 39. According to Plaintiffs, this
22 paragraph "proves" that Defendants were selling sponsored ads to
23 companies in the business of selling fake views. However, Exhibit
24 3 evinces no link to Google; nor does it show that YouTube was
25 involved in any conspiracy. Third, Plaintiff Brotherton has

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

1 allegedly tested the claim that view counts count actual views;
2 when he has watched videos multiple times, the view count
3 increases by one. Id. ¶ 47.³

4 A. Injuries and proximate cause

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

16 B. Harm to competition

17 In addition to the flaws described above, the 3AC fails to
18 allege with sufficient particularity how the conspiracy harmed
19 competition. Antitrust law protects competition, not competitors.
20 Injuries to Plaintiffs are insufficient to demonstrate that
21 competition was harmed. Further, Plaintiffs' description of
22 YouTube's position in the relevant market is inadequate.
23 YouTube's prominence as a "music or video website" does not
24 explain its market share in "the sale, promotion, and distribution
25

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

1 of recorded music and music videos in the United States." 3AC
2 ¶¶ 15, 17. Plaintiffs failed to allege plausibly that this
3 conspiracy harmed competition in the relevant market.

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

10 II. Fraud

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

19 Plaintiffs argue that they are reverting to their Proposed
20 Second Amended Complaint, Docket No. 54-1. That proposal
21 contained a fraud claim that described both an "intentional
22 misrepresentation" and an implicit representation. Judge Conti
23 granted leave to file a revised version of the Proposed Second
24 Amended Complaint. Docket No. 67. Plaintiffs then filed their
25 2AC, which this Court dismissed. Plaintiffs did not include
26 promissory fraud and intentional fraud in their Second Amended
27 Complaint. They cannot incorporate these new theories now.

28

1 Additionally, the new theories' allegations are insufficient.
2 Under the intentional fraud theory, Plaintiffs base their reliance
3 on a view count free from outside manipulation "on the security
4 safeguards of other G-Y services, such as G-mail." 3AC ¶ 96. It
5 is not plausible that users would extrapolate from G-mail
6 safeguards that view counts would be accurate or rely on that
7 conclusion in posting videos to YouTube. Further, Plaintiffs
8 describe an implied promise that YouTube would be free from fake
9 views. Plaintiffs allegedly found this implied promise in section
10 4H of the terms of service, the absence of any disclosure
11 statement alerting users that the view count might be inaccurate
12 and Defendants' control over the view count. These allegations
13 are not sufficiently particular under Federal Rule of Civil
14 Procedure 9 to claim an implied promise that was false when made.

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

1 18 (quoting All. Mortg. Co. v. Rothwell, 10 Cal. 4th 1226, 1240
2 (1995)).⁴ Further, the 3AC still fails to allege detrimental
3 reliance. See Order Dismissing 2AC at 20. Like the 2AC,
4 Plaintiffs' 3AC does "not allege the more advantageous marketing
5 they would have pursued had they not posted LuvYa on YouTube."
6 Id.

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

9 III. Libel Per Quod

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

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

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24 _____
25 ⁴ Plaintiffs argue that the damages for their fraud claim
26 should be calculated under California Civil Code section 3333,
27 which "will compensate for all the detriment proximately caused
28 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.

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

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

17 These allegations are sufficient to show that the notice was
18 capable of being understood to refer to each Plaintiff, and that
19 it actually was so understood. See Order Dismissing 2AC at 24
20 (quoting SDV/ACCI, Inc. v. AT&T Corp., 522 F.3d 955, 960 (9th Cir.
21 2008)). Plaintiffs identified themselves when circulating the
22 LuvYa video link before Defendants replaced the video with the
23 notice. Fans asked Brotherton about the problem with the video's
24 content, which demonstrates that third parties connected the
25 notice to Brotherton. See 3AC ¶ 131. Additionally, the 3AC
26 alleges that N.G.B. had an agreement with PCS to perform in a
27 series of commercials on the company's webpage. The performance
28 was "cancelled when PCS clients saw the Notice on the original

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

6 Defendants argue that the defamatory statement must say
7 something about Plaintiffs, rather than about the video itself.
8 However, as the California Court of Appeal has recognized,
9 statements may simultaneously result in "personal aspersion and
10 commercial disparagement." Polygram Records, Inc. v. Super. Ct.,
11 170 Cal. App. 3d 543, 550 (1985). Here, the Community Guidelines
12 implicated in the notice list many forms of depravity that may
13 appear in a video; an average reader may find defamatory meaning
14 in an accusation of posting a video that violates these
15 guidelines. See Order Dismissing 2AC at 24.

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

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

22 IV. Tortious Interference with Business Relationships

23 Plaintiffs Song fi and Rasta Rock allege that Defendants
24 intentionally interfered with their business relationships "with
25 the Nike Corporation and with other business partners, both
26 existing and in negotiation and with Precision Contracting
27 Solutions ('PCS'), the funding entity for Song fi and Rasta Rock."
28 3AC ¶ 160. David Drummond, Defendants' Chief Legal Officer, Board

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

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

19 Under California law, a claim for tortious interference
20 requires: "(1) an economic relationship between the plaintiff and
21 some third party, with the probability of future economic benefit
22 to the plaintiff; (2) the defendant's knowledge of the
23 relationship; (3) intentional acts on the part of the defendant
24 designed to disrupt the relationship; (4) actual disruption of the
25 relationship; and (5) economic harm to the plaintiff proximately
26 caused by the acts of the defendant." Korea Supply Co. v.
27 Lockheed Martin Corp., 29 Cal. 4th 1134, 1153 (2003). Because
28 Plaintiffs' libel per quod claim survives this motion to dismiss,

United States District Court
For the Northern District of California

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

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

15 CONCLUSION

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

21 IT IS SO ORDERED.



22
23 Dated: June 27, 2016

24 _____
25 CLAUDIA WILKEN
26 United States District Judge
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28