

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 17-8360-GW(KSx)	Date	February 28, 2019
Title	<i>Lesia Anson v. Harvey Weinstein, et al.</i>		

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

<u>Javier Gonzalez</u> Deputy Clerk	<u>Katie E. Thibodeaux</u> Court Reporter / Recorder	<u>Tape No.</u>
----------------------------------------	---------------------------------------------------------	-----------------

Attorneys Present for Plaintiffs:

None Present

Attorneys Present for Defendants:

Vincent Cox
Jonathan S. Pink
David Jonelis
Andrew L. Deutsch

PROCEEDINGS: DEFENDANT ENTERTAINMENT ONE LTD.'S MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT PURSUANT TO FED.R.CIV.P. 12(b)(1) AND (6) [127];

DEFENDANT HARVEY WEINSTEIN'S MOTION TO DISMISS [133, 137];

DEFENDANT MIRAMAX, LLC'S MOTION TO DISMISS PLAINTIFF'S THIRD AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6) FOR FAILURE TO STATE A CLAIM [126]

Counsel for Plaintiff is not present.

The Court's Tentative Ruling is circulated and attached hereto. Court hears oral argument. For reasons stated on the record, Defendants' Motions are TAKEN UNDER SUBMISSION. Court to issue ruling.

_____ : _____ 20

Initials of Preparer JG

Anson v. Weinstein; Case No. 2:17-cv-08360-GW-(KSx)
Tentative Rulings on Motions to Dismiss by Defendant Miramax, LLC, Defendant Entertainment One Ltd., and Defendant Harvey Weinstein

I. Background

A. Factual Background

Lesia Anson (“Plaintiff”) filed suit in this Court against Harvey Weinstein; Bob Weinstein; The Weinstein Company, LLC (“TWC”); Dimension Films (“Dimension”); Miramax, LLC (“Miramax”); Lionsgate Entertainment Corporation (“Lionsgate”); Entertainment One Ltd. (“E1”); Blumhouse Productions, LLC (“Blumhouse”); and Does 1-10 (referred to collectively as, “Defendants”) for: (1) copyright infringement under 17 U.S.C. §§ 101 *et seq.*; (2) contributory copyright infringement; (3) vicarious copyright infringement; (4) copyright infringement under Canadian law; (5) copyright infringement under Spanish law; (6) violation of the Lanham Act pursuant to 15 U.S.C. § 1125(a)(1)(B); (7) violation of California Business and Professions Code §§ 17200, 17500 *et seq.*; and (8) declaratory relief under 28 U.S.C. § 2201. *See generally* First Amended Complaint (“FAC”), Docket No. 11. This case arises out of Defendants’ allegedly unlawful production and release of a theatrical motion picture entitled *Amityville: The Awakening*, a work derived from Plaintiff’s deceased husband’s novel *The Amityville Horror*. *See id.* ¶ 8.

The Court granted in part and denied in part Miramax and Harvey Weinstein’s earlier motions to dismiss the FAC. *See* Oct. 4, 2018 Civil Minutes at 14 (“Ruling I”), Docket No. 97.¹ As to Harvey Weinstein, the Court denied his motion to dismiss as to the first, second, and third claims for relief above. *See id.* The Court declined to exercise supplemental jurisdiction over the fourth and fifth claims for relief, and it granted Harvey Weinstein’s motion to dismiss as to the sixth, seventh, and eighth claims for relief without prejudice. *See id.* As to Miramax, the Court denied its motion to dismiss with respect to the first claim for relief. *See id.* The Court declined to exercise supplemental jurisdiction over the fourth and fifth claims for relief, and it granted Miramax’s motion as to the second, third, sixth, seventh, and eighth claims for relief without prejudice. *See id.* Following the Court’s ruling on the motions to dismiss the FAC, Plaintiff filed a second amended complaint. *See* Second Amended Complaint (“SAC”), Docket No. 104. Less than a month after filing the SAC, Plaintiff filed a third amended complaint after the Court granted

¹ Though Ruling I was initially a tentative ruling, the Court made that ruling final on November 1, 2018. *See* Nov. 1, 2018 Civil Minutes, Docket No. 103.

him leave to add Lantern Entertainment LLC (“Lantern”) as a defendant. *See* Third Amended Complaint (“TAC”), Docket No. 115. In the TAC, Plaintiff joins Lantern as a defendant and alleges six causes of action, mirroring those alleged in the FAC minus the foreign copyright claims. *See id.* In the TAC, Plaintiff alleges the following in relevant part:

1. Parties

Plaintiff is the widow and heir of Jay Anson (“Author”), author of the best-selling fictional novel *The Amityville Horror* (“Novel”). *See* TAC ¶ 6. Plaintiff is the proprietor of the copyright in the Novel. *See id.*

As to Defendants, TWC is a limited liability company. *See id.* ¶ 11. Dimension is a division of TWC. *See id.* ¶ 12. Harvey Weinstein is the co-founder, co-principal, and co-owner of TWC and Dimension. *See id.* ¶ 14. Bob Weinstein is the brother of Harvey Weinstein and has been Harvey Weinstein’s business partner for decades (Harvey Weinstein and Bob Weinstein collectively referred to as, “the Weinsteins”). *See id.* ¶ 15. Bob Weinstein is the co-founder, co-principal, and co-owner of TWC and Dimension. *See id.* At all times relevant, the Weinsteins closely owned and controlled TWC and Dimension. *See id.* ¶ 16. TWC, Dimension, and the Weinsteins were alter egos of one another, such that any separateness has ceased to exist in them, they used the assets of one another, and caused valuable assets to be transferred between one another without adequate consideration. *See id.* ¶ 17. Miramax is a limited liability company founded by and previously owned by the Weinsteins. *See id.* ¶ 13. Lionsgate is a company formed in Vancouver, Canada; Entertainment One is a Canadian distributor; and Blumhouse is a limited liability company headquartered in Los Angeles, California. *See id.* ¶¶ 18-20.

2. The Novel

The Novel was marketed as a true story, but it is a work of fiction replete with literary creations. *See id.* ¶ 24. On July 29, 1977, the Author registered the Novel for copyright. *See id.* ¶ 25. On March 12, 1980, the Author died and Plaintiff duly renewed the Copyright. *See id.*; TAC Ex. A (copyright renewal registration certificate).

3. 1979 Amityville Horror Film

In 1979, Professional Films, Inc. (“PFI”) produced a theatrical feature-length motion picture entitled *The Amityville Horror* (“1979 Amityville Horror Film”). *See id.* ¶ 26. PFI created that film based on duly licensed rights in the Novel. *See id.* American International Pictures distributed it. *See id.*

4. 2005 Amityville Horror Film

In 2005, Dimension and MGM co-produced, co-financed, and co-distributed a new theatrical feature-length motion picture remake, based upon and derived from the Novel and the 1979 Amityville Horror Film. *See id.* ¶ 27. They titled the 2005 remake *The Amityville Horror* (“2005 Amityville Horror Film”). *See id.*

5. 2017 Amityville Horror Film

a. Release of the Film

On or around September 27, 2017, TWC and Dimension announced their release of a feature-length motion picture titled *Amityville: The Awakening* (“2017 Amityville Horror Film”). *See id.* ¶ 31. The film was widely reported as a sequel to the 1979 Amityville Horror Film. *See id.* ¶ 33. It was released in theaters on October 28, 2017. *See id.* ¶ 31. Lionsgate released the 2017 Amityville Horror Film in Blu-Ray, DVD, and digital HD on November 14, 2017. *See id.* ¶ 32. This film performed poorly in the eyes of critics and grossed only \$742 from 10 theaters in its opening weekend. *See id.* ¶¶ 34-35.

b. Production and Distribution of the Film

Dimension and Miramax entered into a pact to produce and distribute sequel motion pictures derived from Miramax’s films like the 2005 Amityville Horror Film. *See id.* ¶ 36. The 2017 Amityville Horror Film was developed pursuant to that pact. *See id.* ¶¶ 36-41. Between 2010 and 2013, Miramax entered into a series of licensing, assignment, collaboration, and financing agreements with TWC, Dimension, and or the Weinsteins including: (i) “License Agreement,” dated April 26, 2010; (ii) “Amendment to Acquisition Agreement,” dated August 16, 2010; (iii) “License Agreement,” dated August 31, 2010; (iii) “License Agreement,” dated December 1, 2010; (iv) “Option, Co-Financing and Participation Agreement,” dated December 3, 2010; (v) “Letter Agreement,” dated March 10, 2011; (vi) “Extension Letter No. 2,” dated June 1, 2012; (vii) “Short Form Option and Amendment No. 1 to Short Form Option,” dated December 3, 2010 and June 5, 2012, respectively; (viii) “Amendment No. 1 to Option, Co-Financing and Participation Agreement,” dated June 5, 2012; and (ix) “Development Financing and Collaboration Agreement,” dated May 10, 2013. *See id.* ¶ 37. The Weinsteins were also parties to the “Option, Co-Financing and Participation Agreement” dated December 3, 2010, and Miramax entered into the “Agreement Confirmation” dated February 11, 2017. *See id.* By virtue of those agreements, Miramax participated in the development and production of the 2017 Amityville Horror Film, by

licensing or purporting to license to TWC and/or Dimension intellectual property from Miramax's film catalog, including with respect to the 2005 Amityville Horror Film, and by co-financing, approving, and collaborating with TWC, Dimension, and/or the Weinsteins on the development and production of works derived from the 2005 Amityville Horror Film. *See id.* ¶ 38. Through those agreements Miramax materially contributed to TWC's, Dimension's, and the Weinsteins' infringement of the Novel. *See id.* Miramax also had the right and ability to supervise the other defendants' development and production of the 2017 Amityville Horror Film, in part because that production was executed pursuant to a license from Miramax to use intellectual property purportedly belonging to Miramax. *See id.* Those agreements provided Miramax with a financial benefit from the development, production, and distribution and in the form of a contingent participation. *See id.* Miramax is an uncredited production company of the 2017 Amityville Horror Film on the database imdb.com. *See id.* ¶ 39.

c. Similarities Between the Film and Novel

The 2017 Amityville Horror Film is substantially similar to the Novel,² and the film contains direct references to the Novel and even a scene with the Novel in it. *See id.* ¶¶ 53-56. Defendants had access to the Novel. *See id.* ¶ 53. That film constitutes a derivative work of the Novel and Defendants were well acquainted with the Novel from the production and distribution of the earlier 2005 Amityville Horror Film. *See id.* ¶ 51. TWC, Dimension, and Lionsgate distributed promotional trailers for the 2017 Amityville Horror Film that also infringed on Plaintiff's copyright in the Novel. *See id.* ¶ 44. At no point did TWC, Dimension, Miramax, or Blumhouse contact Plaintiff to attain rights to the Novel in making the 2017 Amityville Horror Film. *See id.* ¶ 51.

B. Procedural History

Before the Court are three motions to dismiss the TAC. The first motion is that of Miramax. *See* Motion by Defendant Miramax, LLC to Dismiss Plaintiff's Third Amended Complaint ("Miramax MTD"), Docket No. 126. Plaintiff filed an opposition to the Miramax MTD. *See* Plaintiff's Opposition to Defendant Miramax, LLC's Motion to Dismiss Third Amended Complaint ("Miramax MTD Opp'n"), Docket No. 140. Miramax filed a reply. *See* Reply in Support of Motion by Defendant Miramax, LLC to Dismiss Plaintiff's Third Amended

² In the TAC, Plaintiff includes an expansive list of "some of the more obvious similarities." *See* TAC ¶ 56. The Court will not regurgitate those alleged similarities here, but will incorporate them by reference. *See id.*

Complaint (“Miramax MTD Reply”), Docket No. 144. The second motion to dismiss is that of E1. *See* Defendant Entertainment One Ltd.’s Motion to Dismiss Plaintiff’s Third Amended Complaint (“E1 MTD”), Docket No. 127. Plaintiff filed an opposition to the E1 MTD. *See* Plaintiff’s Opposition to Defendant Entertainment One Ltd.’s Motion to Dismiss Third Amended Complaint (“E1 MTD Opp’n”), Docket No. 146. E1 filed a reply. *See* Reply Memorandum in Support of Motion to Dismiss Third Amended Complaint (“E1 Reply”), Docket No. 151. The third motion to dismiss is that of Harvey Weinstein. *See* Defendant Harvey Weinstein’s Memorandum of Points and Authorities in Support of Motion to Dismiss (“Weinstein MTD”), Docket No. 133. Plaintiff filed an opposition to the Weinstein MTD. *See* Plaintiff’s Opposition to Defendant Harvey Weinstein’s Motion to Dismiss Third Amended Complaint (“Weinstein MTD Opp’n”), Docket No. 145. Harvey Weinstein filed a reply. *See* Defendant Harvey Weinstein’s Reply in Support of Motion to Dismiss (Weinstein MTD Reply”), Docket No. 152.

II. Legal Standard

Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A complaint may be dismissed for failure to state a claim for one of two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) (“Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.”).

In deciding a 12(b)(6) motion, a court “may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007); *see also Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (indicating that a court may consider a document “on which the complaint ‘necessarily relies’ if: (1) the complaint refers to the document; (2) the document is central to the plaintiff’s claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion”). The court must construe the complaint in the light most favorable to the plaintiff, accept all allegations of material fact as true, and draw all reasonable inferences from well-pleaded factual allegations. *Gompper v. VISX, Inc.*, 298 F.3d 893, 896 (9th Cir. 2002); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended on denial of reh’g*, 275 F.3d 1187 (9th Cir. 2001); *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court is not

required to accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where a plaintiff facing a 12(b)(6) motion has pled “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” the motion should be denied. *Id.*; *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1191 (9th Cir. 2013). But if “the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] . . . the pleader is entitled to relief.” *Iqbal*, 556 U.S. at 679 (citations omitted).

III. Motions to Dismiss

A. First Claim for Relief: Direct Copyright Infringement

In the first claim for relief, Plaintiff alleges direct copyright infringement against all Defendants except for E1 and Lantern. *See* TAC ¶¶ 63-74. Harvey Weinstein and Miramax move to dismiss that claim as alleged against them, despite the Court already denying their earlier motions to dismiss this claim. *See* Ruling I at 5-7. Considering that the Court already denied motions to dismiss the first claim for relief, the Court would decline to revisit that claim now. *See, e.g., Wilson v. Frito-Lay N. Am., Inc.*, 961 F. Supp. 2d 1134, 1146 (N.D. Cal. 2013) (declining to reconsider in a subsequent motion to dismiss a claim that survived an earlier motion to dismiss); *see also Adobe Sys. Inc. v. A & S Elecs., Inc.*, 153 F. Supp. 3d 1136, 1144 (N.D. Cal. 2015) (declining to reconsider arguments in connection with an earlier motion to dismiss, holding that the “Court previously considered and rejected this argument in connection with Defendants’ prior motion to dismiss.”).

B. Second Claim for Relief: Contributory Infringement

In the second claim for relief, the TAC alleges contributory copyright infringement against all Defendants except E1 and Lantern. *See* TAC ¶¶ 75-82. Miramax moves to dismiss that claim. *See* Miramax MTD at 8-11. Miramax argues that the TAC’s allegations are insufficient to plead contributory infringement against it. *See id.* To that end, Miramax asserts that the “nine non-descript agreements set forth in paragraph 37 of the TAC” do not demonstrate that Miramax “contributed” to the infringement of Plaintiff’s copyright in part because Plaintiff does not allege the subject matter and terms of the agreements, nor does Plaintiff alleged the entities involved in each agreement. *See id.* at 8-10. Miramax also asserts that Plaintiff fails to identify the subject of the direct infringement giving rise to the contributory infringement claim against it. *See id.* at 10-11. Unsurprisingly, Plaintiff argues that the TAC sufficiently alleges contributory infringement

against Miramax because she has alleged a third party's direct infringement, Miramax's actual or constructive knowledge of that infringement, and material contribution to that infringement. *See* Miramax MTD Opp'n at 15-19.

“[A] defendant is a contributory infringer if it: (1) has knowledge of a third party's infringing activity, and (2) induces, causes, or materially contributes to the infringing conduct.” *Perfect 10, Inc. v. Visa Int'l Serv. Ass'n*, 494 F.3d 788, 795 (9th Cir. 2007). After reviewing the amendments in the TAC, the Court would conclude that there are sufficient allegations identifying the third-party infringement that Miramax materially contributed to in this action, and Plaintiff has added significant allegations regarding the agreements Miramax entered into that allegedly give rise to contributory liability. Indeed, the TAC alleges that between 2010 and 2013, Miramax entered into a series of licensing, assignment, collaboration, and financing agreements with TWC, Dimension, and or the Weinsteins including: (i) “License Agreement,” dated April 26, 2010; (ii) “Amendment to Acquisition Agreement,” dated August 16, 2010; (iii) “License Agreement,” dated August 31, 2010; (iv) “License Agreement,” dated December 1, 2010; (v) “Option, Co-Financing and Participation Agreement,” dated December 3, 2010; (vi) “Letter Agreement,” dated March 10, 2011; (vii) “Extension Letter No. 2,” dated June 1, 2012; (viii) “Short Form Option and Amendment No. 1 to Short Form Option,” dated December 3, 2010 and June 5, 2012, respectively; (ix) “Amendment No. 1 to Option, Co-Financing and Participation Agreement,” dated June 5, 2012; and (x) “Development Financing and Collaboration Agreement,” dated May 10, 2013. *See* TAC ¶ 37. The TAC alleges that by virtue of those agreements, Miramax participated in the development and production of the 2017 Amityville Horror Sequel Film, by licensing or purporting to license to TWC and/or Dimension intellectual property from Miramax's film catalog, including the 2005 Amityville Horror Film, and by co-financing, approving, and collaborating with TWC, Dimension, and/or the Weinsteins on the development and production of works derived from the 2005 Amityville Horror Film. *See id.* ¶ 38. According to the TAC, through those agreements Miramax materially contributed to TWC's, Dimension's, and the Weinsteins' infringement of the Novel. *See id.* In making these allegations, Plaintiff has adequately pleaded “knowledge of a third party's infringing activity, and (2) induces, causes, or materially contributes to the infringing conduct.” *See Visa Int'l Serv. Ass'n*, 494 F.3d at 795. Thus, the Court would deny the Miramax MTD on this front and allow the second claim for relief to proceed against Miramax.

C. Third Claim for Relief: Vicarious Infringement

In the third claim for relief, the TAC alleges vicarious copyright infringement against all Defendants except Entertainment One. *See* TAC ¶¶ 83-91. Miramax moves to dismiss that claim. *See* Miramax MTD at 11-12. In moving to dismiss, Miramax again argues that this claim should fail for relying on the same purported agreements already relied upon to support Plaintiff's contributory infringement claim. *See id.*

“To succeed in imposing vicarious liability, a plaintiff must establish that the defendant [1] exercises the requisite control over the direct infringer and [2] that the defendant derives a direct financial benefit from the direct infringement.” *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1173 (9th Cir. 2007). As to the requisite control, “[a] vicarious infringer exercises control over a direct infringer when he has both a legal right to stop or limit the directly infringing conduct, as well as the practical ability to do so.” *Williams v. Gaye*, 895 F.3d 1106, 1132 (9th Cir. 2018) (internal citation and quotation marks omitted). As to the requisite direct financial benefit, a “[f]inancial benefit exists where the availability of infringing material acts as a draw for customers.” *Ellison v. Robertson*, 357 F.3d 1072, 1078 (9th Cir. 2004) (internal quotation marks and citations omitted). “[T]he size of the ‘draw’ relative to a defendant’s overall business is immaterial. Indeed, [t]he essential aspect of the ‘direct financial benefit’ inquiry is whether there is a causal relationship between the infringing activity and any financial benefit a defendant reaps, regardless of how substantial the benefit is in proportion to a defendant’s overall profits.” *Perfect 10, Inc. v. Giganews, Inc.*, 847 F.3d 657, 673 (9th Cir.), *cert. denied*, 138 S. Ct. 504, (2017) (internal quotation marks and citation omitted).

As with the claim for contributory copyright infringement, Plaintiff has now adequately alleged vicarious copyright infringement against Miramax. In addition to the allegations discussed above, Plaintiff alleges that Miramax also had the right and ability to supervise the other defendants’ development and production of the 2017 Amityville Horror Film, in part because that production was done pursuant to a purported license from Miramax to use intellectual property belonging to Miramax. *See* TAC ¶ 36. The TAC alleges that those agreements provided Miramax with a financial benefit from the development, production, and distribution and in the form of a contingent participation. *See id.* These allegations, in conjunction with the allegations described in the contributory infringement section above, are sufficient for Plaintiff’s claim against Miramax to survive. They establish, if taken as true as they must for purposes of this motion, that Miramax

exercised the requisite control over at least some of the other defendants' infringing activities and that Miramax derived a direct financial benefit from the direct infringement. *See Amazon.com*, 508 F.3d at 1173.

E. Fourth Claim for Relief: False Advertising

In Plaintiff's fourth claim for relief, the TAC alleges false advertising under 15 U.S.C. § 1125(a)(1)(B). *See* TAC ¶¶ 92-101. Harvey Weinstein moves to dismiss that claim as alleged against him. *See* Weinstein MTD at 6-10. More specifically, Harvey Weinstein argues that Plaintiff fails to identify any actionable false or misleading statements made by him. *See id.* at 6-8. Harvey Weinstein goes even further in arguing that the allegations in the TAC do not include an actionable statement by *any* defendant. *See id.* at 8-10. In response, Plaintiff argues that the TAC includes sufficient allegations to establish Harvey Weinstein's liability for false and misleading advertising and/or promotion under the Lanham Act. *See* Weinstein MTD Opp'n at 7-10.

The elements of a Lanham Act § 43(a) false advertising claim are: "(1) a false statement of fact by the defendant in a commercial advertisement about its own or another's product; (2) the statement actually deceived or has the tendency to deceive a substantial segment of its audience; (3) the deception is material, in that it is likely to influence the purchasing decision; (4) the defendant caused its false statement to enter interstate commerce; and (5) the plaintiff has been or is likely to be injured as a result of the false statement" *Southland Sod Farms v. Stover Seed Co.*, 108 F.3d 1134, 1139 (9th Cir. 1997). Though the Ninth Circuit has not definitively held that Rule 9(b) applies to all Lanham Act claims, this District has frequently found false advertising claims under the Lanham Act grounded in fraud such that the claims are subject to the heightened pleading standard under Rule 9(b). *See, e.g., EcoDisc Tech. AG v. DVD Format/Logo Licensing Corp.*, 711 F. Supp. 2d 1074, 1085 (C.D. Cal. April 22, 2010) (dismissing a licensor's Lanham Act false advertising claim because plaintiff did not "specify[] which statements are allegedly false or set[] forth what is false or misleading about such statements," and thus failed to meet its Rule 9(b) burden); *ProSolutions Software, Inc. v. DemandForce, Inc.*, Case No. 12-8342, 2013 WL 12139120, at *1 (C.D. Cal. Mar. 7, 2013) (dismissing Lanham Act false advertising claim because "plaintiff still has not pleaded its Lanham Act claim with enough particularity to meet its Rule 9(b) burden," given that plaintiff only broadly alleged that the defendant made certain misrepresentations regarding its relationship with the plaintiff "in promotions, advertising, and

marketing in commerce”). Indeed, the Ninth Circuit has concluded that district courts can dismiss claims for failure to satisfy Rule 9(b) when the claims alleged are grounded in fraud. *See Vess*, 317 F.3d at 1107. As such, with Plaintiff’s Lanham Act claim and derivative UCL claim based on alleged false statements and/or misrepresentations (in other words, based on fraudulent representations), those claims are grounded in fraud and are thus subject to Rule 9(b). *See Fed. R. Civ. P. 9(b); Vess*, 317 F.3d at 1105 (noting that under California law, fraud claims involve, among other things “a false representation, knowledge of its falsity, [and] intent to defraud”). The Court therefore must examine whether Plaintiff’s false advertising and unfair competition claims meet the heightened standard under Rule 9(b), and Plaintiff must state the “time, place, and specific content of the false representations.” *Schreiber Distrib. Co. v. Serv-Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

The fourth claim for relief fails as alleged against Harvey Weinstein under Rule 9(b). Though the TAC adds allegations of potential false statements made by other entities (*see* TAC ¶¶ 43-46, 49, 54), it does not add sufficient allegations that Harvey Weinstein made a specific false statement of any kind or how exactly he was involved in those third parties’ specific false statements. It is not enough that the TAC alleges in conclusory fashion that Harvey Weinstein “was actively involved in and supervised the development, production, and promotion of the 2017 Amityville Horror Film” (*see* TAC ¶ 42), that “HARVEY WEINSTEIN participated in and supervised the promotion and advertising of the 2017 Amityville Horror Sequel Film” (*see id.* ¶ 45), or that Defendants collectively engaged in “*commercial marketing, promotion and advertising*, that the 2017 Amityville Horror Film is a bona fide *sequel* to their 2005 Amityville Horror Film and to the 1979 Amityville Horror Film” (*see id.* ¶ 94). None of these allegations, or any other in the TAC, allege with Rule 9(b) particularity a specific identifiable false statement or advertisement (rather than promotion or advertising more generally) that Harvey Weinstein personally put forward, directed, or involved himself in promoting. Thus, the Court would conclude that these and other allegations in the TAC are insufficient to properly plead false advertising against Harvey Weinstein. The Court would give Plaintiff one more chance to allege this claim against Harvey Weinstein.

F. Fifth Claim for Relief: UCL Claim

In the fifth claim for relief, the TAC alleges a UCL claim that seems to hinge on false advertising. *See* TAC ¶¶ 102-11. “The Ninth Circuit has consistently held that state common law

claims of unfair competition and actions pursuant to California Business and Professions Code § 17200 are ‘substantially congruent’ to claims made under the Lanham Act.” *Cleary v. News Corp.*, 30 F.3d 1255, 1262-63 (9th Cir. 1994); *see also Japan Telecom, Inc. v. Japan Telecom Am. Inc.*, 287 F.3d 866, 875 (9th Cir. 2002) (plaintiff’s “California unfair competition claim fails because its related Lanham Act claims fail”); *Denbicare U.S.A., Inc. v. Toys “R” Us, Inc.*, 84 F.3d 1143, 1152-53 (9th Cir. 1996), *abrogated on other grounds* (dismissal of plaintiff’s § 17200 and § 17500 claims were proper because plaintiff’s Lanham Act claim was properly dismissed); *Cosmos Jewelry, Ltd. v. Po Sun Hon Co.*, No. 06-56338, 2009 WL 766517, at *2 (9th Cir. Mar. 24, 2009) (“Because we affirm the finding of trademark infringement, we also affirm the finding of unfair competition”). Because the Court has found insufficient Plaintiff’s false advertising claim under the Lanham Act against Harvey Weinstein, the Court would dismiss the UCL claim against him for the same reasons under Rule 9(b).

G. Sixth Claim for Relief: Declaratory Relief

In the sixth cause of action, the TAC alleges a claim for declaratory relief. *See* TAC ¶¶ 112-15. Harvey Weinstein, E1, and Miramax all separately argue that Plaintiff’s claim for declaratory relief must be dismissed, but for different reasons. *See* Weinstein MTD at 11-13; E1 MTD at 3-8; Miramax MTD at 16-17. The claim for declaratory relief makes three separate requests, as follows:

- (i) the validity and enforceability of the foreign distributor Defendant ENTERTAINMENT ONE’s license(s) and/or agreement(s) with TWC for the distribution and/or sub-licensing of the 2017 Amityville Horror Sequel Film, and of ENTERTAINMENT ONE’s sublicenses of the 2017 Amityville Horror Sequel Film; (ii) whether any Defendant has any rights to make another derivative work based in whole or in part on the Novel, and/or the 1979 Amityville Horror Film or 2005 Amityville Horror Film (which were derived from the Novel); and (iii) whether any Defendant has any right, by virtue of the 2017 Amityville Horror Film, or otherwise, to limit or encumber Plaintiff’s rights in the Novel.

See TAC ¶ 113.

1. Whether the Declaratory Relief Claim is Duplicative

Miramax and Harvey Weinstein argue that the declaratory relief claim is duplicative of the copyright infringement claims. *See* Miramax MTD at 16-17; *see also* Weinstein MTD at 11. The three requests above, though they relate to the copyright at issue, are not duplicative of the copyright infringement claims in the TAC. Unlike other cases where district courts found

declaratory relief claims duplicative of copyright infringement claims, these three requests would not “necessarily be determined through the adjudication of [Plaintiff’s] copyright infringement claim” *Cf. Stavrinides v. Vin Di Bona*, No. 2-18-CV-00314-CAS-(JPRx), 2018 WL 1311440, at *6 (C.D. Cal. Mar. 12, 2018) (dismissing a claim for declaratory relief “[b]ecause these rights [in the declaratory relief claim] would necessarily be determined through the adjudication of plaintiffs’ copyright infringement claim, [so] declaratory relief is duplicative and unnecessary.”); *Hosp. Mktg. Concepts, LLC v. Six Continents Hotels, Inc.*, No. SACV-15-01791-JVS-(DFMx), 2016 WL 9045621, at *8 (C.D. Cal. Jan. 28, 2016) (“When the issues invoked in a request for declaratory relief already were fully engaged by other causes of action . . . then declaratory relief is unnecessary and superfluous and must be dismissed.”) (citation and internal quotation marks omitted). When a plaintiff, as here, seeks a declaration beyond infringement³ such a declaratory relief claim is not duplicative. *See Kinney v. Oppenheim*, No. CV-10-6287-SVW-(RZx), 2011 WL 13217573, at *11 (C.D. Cal. Mar. 3, 2011) (holding that a declaratory relief claim was not duplicative because the plaintiff sought a “specific and separate declaration that he ‘can mount and/or film his version of the production HSU at any time without having to license the play from [Defendant Oppenheim] or pay any fees in connection thereof.’”).⁴ Therefore, the Court would not dismiss the sixth claim for relief on the basis of redundancy.

2. Whether the Declaratory Relief Claim Stands as Alleged Against E1

As to the first request in the declaratory relief claim, E1 argues that the Court lacks jurisdiction to hear it because the Court already declined supplemental jurisdiction over the foreign copyright claims and because Plaintiff has no stake in the licenses or agreements mentioned therein. *See* E1 MTD at 3-5. Indeed, E1 is correct that the Court declined supplemental jurisdiction over the foreign copyright claims pleaded in the FAC and that the TAC now bears no claim against E1 other than the declaratory relief claim. To the extent that Plaintiff requests declaratory relief regarding the foreign copyright claims that the Court already declined supplemental jurisdiction

³ In Ruling I, the Court considered the declaratory relief claim duplicative of the copyright infringement claims, but Plaintiff has significantly altered that claim to go beyond the question of copyright infringement. *See* Ruling I at 13-14.

⁴ In addition, the Court would reject Harvey Weinstein’s preemption argument regarding the declaratory relief claim. *See* Weinstein MTD at 11-13. Harvey Weinstein has failed to sufficiently assert how the sixth claim for relief stems from any *state law claim* preempted by the Copyright Act. *See Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115, 1132 (N.D. Cal. 2001) (holding that “the defendants’ motion to dismiss is GRANTED IN PART to the extent the claims arise from preempted state-law causes of action but DENIED IN PART to the extent the claims arise from state-law claims that are not preempted.”).

over, Plaintiff cannot artfully plead those claims vis-à-vis this claim for declaratory relief. As to E1's other argument that Plaintiff lacks standing to make the first request in the declaratory relief claim, the Court would agree. Ordinarily, "[a] person who is not a party to a contract does not have standing either to seek its enforcement or to bring tort claims based on the contractual relationship." *Ambers v. Wells Fargo Bank, N.A.*, No. 13-cv-03940 NC, 2014 WL 883752, at *4 (N.D. Cal. Mar. 3, 2014) (citing *Mega Life & Health Ins. Co. v. Super. Ct.*, 172 Cal. App. 4th 1522, 1528-32 (2009)). Though Plaintiff is correct that a non-party to a contract may still have standing to seek declaratory relief if the plaintiff has "a stake in the controversy," Plaintiff has not sufficiently pleaded *how* Plaintiff has a stake in the controversy between TWC and E1 that does not involve the foreign copyright claims over which the Court declined supplemental jurisdiction. *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1056 (9th Cir. 2008). The TAC does not allege that Plaintiff is a party to E1's licenses and agreements with TWC and no other "stake in the controversy" is apparent to the Court. *See generally* TAC. Thus, as pleaded Plaintiff lacks standing to make the first request in the declaratory relief claim to the extent that it implicates E1. *See generally* TAC. The Court would dismiss that part of the claim as alleged against E1 but allow Plaintiff an opportunity to plead E1's requisite stake (even if not as a party) in the relevant licenses and agreements.

As to the second request in the declaratory relief claim, E1 argues that the reference to an unspecified future derivative work does not reference an actual and justiciable controversy. *See* E1 MTD at 6-7. The Court recognizes that a plaintiff only has standing to bring a declaratory relief claim if he or she is able to show " 'a very significant possibility' of future harm." *Coral Constr. Co. v. King Cnty.*, 941 F. 2d 910, 929 (9th Cir. 1991) (internal citations omitted). Abstract or hypothetical harm coupled with past injury does not suffice. *See id.*; *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1126 (9th Cir. 1996). Here, there are no allegations in the TAC that E1 has made or imminently plans to involve itself with another derivative work based on the Novel or any of the related films, and the second request merely references an abstract and amorphous future derivative work. Without more, the Court would consider those allegations insufficient and it would thus dismiss the second request in the declaratory relief claim as alleged against E1. Nonetheless, the Court would give Plaintiff an opportunity to amend.

E1 argues that the Court should dismiss the declaratory relief claim's third request because there is no actual and justiciable controversy as to the right of any defendant to limit or encumber

Plaintiff's rights. *See* E1 MTD at 7. More specifically, E1 argues that there is no allegation that E1 has any plan to encumber Plaintiff's right to use her copyright. *See* E1 MTD Reply at 5. Under Ninth Circuit precedent, an action for declaratory judgment involving a copyright presents a justiciable case or controversy if defendants' actions have caused the declaratory judgment plaintiffs to harbor a "real and reasonable apprehension that [they] will be subject to liability if [they] continues to manufacture [their] product." *See Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1555-56 (9th Cir. 1989); *see also Enreach Technology, Inc. v. Embedded Internet Solutions, Inc.*, 403 F. Supp. 2d 968, 978 (N.D. Cal. 2005) ("A copyright action for declaratory judgment 'presents a justiciable case or controversy if the defendant's actions have caused the declaratory judgment plaintiff to harbor a real and reasonable apprehension that he will be subject to liability if he continues to manufacture his product,' " (citation omitted). The Court would agree that the TAC bears no allegation that Plaintiff has any real and reasonable apprehension of liability at the hands of E1. *See generally* TAC. Thus, Plaintiff is not under reasonable apprehension that E1 will sue her for infringement at any point or limit her rights in the copyright, and the Court would thus dismiss the third request as alleged against E1 in the claim for declaratory relief. Plaintiff will have an opportunity to amend.

IV. Conclusion

For the foregoing reasons, the Court would **DENY** the Miramax MTD with respect to the first claim for relief, the second claim for relief, the third claim for relief, and the sixth claim for relief. As to the Weinstein MTD, the Court would **DENY** that motion with respect to the first claim for relief and sixth claim for relief. It would **GRANT** the Weinstein MTD without prejudice as to the fourth and fifth claims for relief. It would allow leave to amend those claims. The Court would **GRANT** the E1 MTD without prejudice as to the sixth claim for relief, but it would allow leave to amend that claim.