

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Chief Judge Philip A. Brimmer

Civil Action No. 20-cv-02771-PAB-STV

ESCOBAR, INC., a Puerto Rico corporation,

Plaintiff,

v.

BARWEST GROUP, LLC, a Colorado limited liability company,
RYAN CHADWICK, an individual,
ESCOBAR SPIRITS, LLC, a Colorado limited liability company,
ESCOBAR ASPEN, an unknown entity, and
DOES 1 THROUGH 10,

Defendants.

ORDER

This matter is before the Court on Defendants' Fed. R. Civ. P. 12(b)(6) Motion to Dismiss [Docket No. 10]. Plaintiff responded, Docket No. 15, and defendants replied. Docket No. 16.

I. BACKGROUND¹

Plaintiff's purpose is to "promote, enhance, disseminate[,] and protect [Pablo] Escobar's cultural and intellectual works and to preserve ad protect the integrity of his life, name[,] and image." Docket No. 1 at 5, ¶ 21. Pablo Escobar died on December 2, 1993, and plaintiff has the "exclusive authority to manage and enforce the intellectual property rights arising from Pablo Escobar's personality right and any other intangible

¹ The facts are taken from plaintiff's complaint [Docket No. 1] and are presumed to be true for the purposes of this order.

rights.” *Id.*, ¶ 22–23. Plaintiff has invested time, effort, and money in developing and promoting its products and services under “names that consist of or include the word[s] PABLO ESCOBAR and ESCOBAR” (the “Escobar names”) in the United States. *Id.*, ¶¶ 24–25. As a result, the Escobar names have “come to identify the [p]laintiff exclusively and uniquely” and represent “enormous goodwill.” *Id.*, ¶ 25. Plaintiff also registered in California as “successor-in-interest to Pablo Escobar’s postmortem right of publicity” under California Civil Code § 3344.1. *Id.*, ¶ 26.

Defendants opened a nightclub in Aspen, Colorado under the name “Escobar Aspen” and have a logo that uses the name “Escobar” and an “image of Escobar’s face.” *Id.* at 6, ¶ 27. Defendants use their brand, the “image of Escobar,” and “Escobar’s name” to advertise and promote their nightclub on their website and social media accounts, and, on information and belief, have also “reproduced” the brand on apparel that they sell, advertise, and promote. *Id.*, ¶¶ 28–30. On information and belief, defendants have created a line of vodka called “Escobar Vodka,” which has a logo that uses the name “Escobar” and an “image of Escobar’s face,” and which is advertised and promoted on defendants’ website and social media accounts and sold at the nightclub. *Id.*, ¶¶ 31–32. Upon information and belief, defendants use Pablo Escobar’s name and likeness to market the Escobar Aspen, Escobar apparel, and Escobar Vodka brands. *Id.*, ¶ 33. They also advertise, promote, and offer these brands to “confuse[s] consumers into believing that they are the official Pablo Escobar brand” or are licensed by plaintiff. *Id.*, ¶¶ 33–34.

Defendants, however, are not associated with plaintiff and have not been

authorized or licensed by plaintiff to use the name or likeness of Pablo Escobar in connection with their businesses. *Id.* at 6–7, ¶ 35. Rather, upon information and belief, defendants selected and used Pablo Escobar’s name and likeness with actual and constructive knowledge of plaintiff’s ownership of and exclusive rights to use the name and likeness of Pablo Escobar with the intent to trade off of the significant reputation of Pablo Escobar and the goodwill symbolized by his name and image, which has continued to grow over the years. *Id.* at 7, ¶¶ 36–37. Upon information and belief, defendants know the goodwill associated with Pablo Escobar’s name and image and have benefitted by acting intentionally, wilfully, and wantonly. *Id.*, ¶¶ 40–41.

Defendants’ unauthorized use of Pablo Escobar’s name and likeness for commercial purposes in connection with the nightclub, vodka, and apparel brands is damaging “Escobar.”² *Id.*, ¶ 42. The consuming public is likely to be confused, deceived, and misled into believing that plaintiff offered, licensed, authorized, endorsed, or sponsored the use of Pablo Escobar’s name and likeness to defendants, and the goodwill that plaintiff has built in the name, image, and likeness of Pablo Escobar is at risk by defendants’ appropriation. *Id.*, ¶ 43. This is because defendants have acted without authorization and have “unfairly and unlawfully wrest[ed] from [plaintiff] control over Pablo Escobar’s name, image[,] and likeness,” which has resulted in plaintiff’s “extremely valuable” reputation being “irreparably damaged.” *Id.* at 7–8, ¶¶ 43–45. Defendants also have actual knowledge that their conduct is “unlawful,” as plaintiff has

² The complaint is not clear to whom “Escobar” refers in this allegation. Plaintiff, which is named “Escobar, Inc.,” refers to itself as “Escobar Holdings” and as “plaintiff.” See *id.* at 2, ¶ 2. It does not, however, define “Escobar.”

informed defendant Ryan Chadwick of plaintiff's "well-established rights" and has asked Mr. Chadwick to cease using the name, image, or likeness of Pablo Escobar in any of its brands, yet Mr. Chadwick has not agreed to do so. *Id.* at 8, ¶ 46.

II. LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint must allege enough factual matter that, taken as true, makes the plaintiff's "claim to relief . . . plausible on its face." *Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "The 'plausibility' standard requires that relief must plausibly follow from the facts alleged, not that the facts themselves be plausible." *RE/MAX, LLC v. Quicken Loans Inc.*, 295 F. Supp. 3d 1163, 1168 (D. Colo. 2018) (citing *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir. 2008)). Generally, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (per curiam) (quoting *Twombly*, 550 U.S. at 555) (alterations omitted). However, a plaintiff still must provide "supporting factual averments" with his allegations. *Cory v. Allstate Ins.*, 583 F.3d 1240, 1244 (10th Cir. 2009) ("[C]onclusory allegations without supporting factual averments are insufficient to state a claim on which relief can be based." (citation omitted)). Otherwise, the Court need not accept conclusory allegations. *Moffet v. Halliburton Energy Servs., Inc.*, 291 F.3d 1227, 1232 (10th Cir. 2002). "[W]here 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 shown – that the pleader is

entitled to relief.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (quotations and alterations omitted); see also *Khalik*, 671 F.3d at 1190 (“A plaintiff must nudge [his] claims across the line from conceivable to plausible in order to survive a motion to dismiss.” (quoting *Twombly*, 550 U.S. at 570)). If a complaint’s allegations are “so general that they encompass a wide swath of conduct, much of it innocent,” then plaintiff has not stated a plausible claim. *Khalik*, 671 F.3d at 1191 (quotations omitted). Thus, even though modern rules of pleading are somewhat forgiving, “a complaint still must contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.” *Bryson*, 534 F.3d at 1286 (alterations omitted).

Plaintiff brings five claims for relief, (1) violation of the “common right to publicity” under California Code § 3344(a) and Colorado common law, (2) violation of the “right of publicity,” (3) copyright infringement under 17 U.S.C. § 501, (4) unfair competition under Colorado common law, and (5) accounting under 17 U.S.C. § 504. Docket No. 1 at 8–13.

III. ANALYSIS

A. Federal Law Claims

The Court first considers plaintiff’s federal law claims for copyright infringement and accounting.

1. Copyright Infringement – Plaintiff’s Third Claim

Plaintiff alleges that defendants have used an original work of art painted by Robert de Jesús Escobar Gavia (“Robert Escobar”), that is “displayed on all of

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