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Court of Appeal, Second
District, Division 5, California.

FAITH NO MORE, et al.,
Plaintiffs and Respondents,
v.
MANIFESTO RECORDS, INC., et al., Defendants and Appellants.

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APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Johnson, Judge. Affirmed.; (Los Angeles County Super. Ct. No. BC603330)

Attorneys and Law Firms

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Phillips, Erlewine, Given & Carlin, David M. Given and Brian S. Conlon, for Plaintiffs and Respondents.

Opinion

BAKER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

***1** This is an appeal from the denial of an anti–SLAPP motion, one in which a question of copyright preemption figures prominently. As often happens it seems, a dispute arose between the members of a musical band. The dispute was resolved via a settlement agreement between one of the members of the band that left the group, Charles Mosley (Mosley), and the other remaining band members. As part of the settlement, Mosley agreed to relinquish any interest in the band's name and assets. Years later, Mosley signed a contract with the lawyer who represented him in settling the earlier dispute, Evan Cohen (Cohen). In that contract, Manifesto Records, Inc. (Manifesto), a company controlled by Cohen, paid Mosley to assign Manifesto his ostensible rights in one of the band's albums. When the other members of the band learned of that assignment, because they discovered Manifesto was selling the album without their knowledge, they sued Manifesto and Cohen (collectively "defendants") for intentionally interfering with the prior settlement agreement. Defendants countered by filing an anti–SLAPP motion, which the court below denied, and that brings us to the issues presented: is Manifesto's marketing and sale of the album protected free speech activity, and if so, is there no probability the intentional interference with contract claim will succeed because it is preempted by the Copyright Act of 1976.

I. BACKGROUND

A. The Band, the Album, and the Relevant Agreements

Faith No More, the aforementioned musical band, was formed by William Gould (Gould), Roswell Bottum III, and Michael Bordin in or about July 1983. Mosley and Jim Martin joined the band shortly thereafter. The band operated as a California general partnership from its inception, and the band members agreed to share all profits equally and make all business decisions via the partnership by majority rule.

In 1985, Faith No More contracted with a record company, Mordam Records, to release its first album entitled *We Care a Lot* (the Album). From that time until the events that gave rise to this lawsuit, the Album was owned, controlled, and managed as a partnership asset of Faith No More—meaning, for instance, that the agreement with Mordam Records was made by and through the partnership and the partnership was responsible for authorizing later releases of the Album and receiving the income from those releases.[1]

1 We set forth the facts consistent with the rules, discussed *post*, that govern a court's consideration of evidence when deciding an anti–SLAPP motion.

Approximately three years after the release of the Album, Mosley "was terminated from" Faith No More and replaced by Michael Patton. Mosley then filed a lawsuit against Faith No More's individual partners, asserting a breach of the band's partnership agreement, conversion, constructive fraud, a claim for an accounting of partnership assets, a

claim requesting a declaration of the parties' rights under the partnership agreement, and damages.

The parties resolved the lawsuit by entering into a Settlement Agreement and Release (the Settlement Agreement) in June 1989. Cohen served as Mosley's attorney and signed the Settlement Agreement himself, stating "I have fully explained this Settlement Agreement and Release to my client, Charles Mosley, III, who in turn acknowledged to me an understanding of this document and the legal effect thereof." Under the terms of the Settlement Agreement, and in exchange for (among other things) a $10,250 payment, Mosley released "any right, title and interest in the group and/or partnership 'Faith No More' and in its assets, goodwill and partnership name." In addition, Mosley acknowledged "that the remaining members of 'Faith No More' may continue to carry on the business of 'Faith No More' " and agreed that "[a]ny such right, title and interest of [Mosley], if any, in the assets, goodwill, partnership and partnership name 'Faith No More' now and in the future is hereby irrevocably waived and relinquished, and irrevocably assigned, transferred and set over to the [other members of the band]." Mosley further agreed he would not use the name "Faith No More" for any purpose whatsoever, nor would he "authorize, license or permit anyone to use the name 'Faith No More' in any manner or for any purpose whatsoever." Mosley explicitly retained, however, a "continuing right to receive his share of publishing monies and one-fifth (1/5) of the record royalties from the master recordings embodied on [Faith No More's] album entitled 'We Care A Lot', which is presently distributed by Mordam Records."

***2** Over a decade after execution of the Settlement Agreement, Cohen, as president of his record company Manifesto, paid Mosley $4,000 to have Mosley assign his claimed "right, title and interest ... to the worldwide copyrights of the sound recordings contained on the Album" to Manifesto. The assignment was consummated via a "Master Assignment Agreement" (Assignment Agreement) executed by Cohen and Mosley in January 2014. The Assignment Agreement states Manifesto will receive the "non-exclusive right in perpetuity" to "use and/or publish [Faith No More's] name(s), trademark(s), service mark(s) and logo(s) (both legal and professional, whether heretofore or hereafter adopted), and any or all of [Faith No More's] approved likenesses, approved photographs, approved caricatures, voices, sound effects and other aspects ... for purposes of advertising, promotion, and trade, in connection with any Masters, or any Phonorecords at anytime derived therefrom, and any of Manifesto's music-related business." The Assignment Agreement also provided Manifesto would pay royalties of 20 percent of any revenues it received from sale of the recordings on the Album, and the agreement included the following provision to describe how those royalties would be paid: "It is understood that because you are one of five members of Faith No More that recorded the Album, and one of five joint copyright owners, Manifesto shall pay to you [Mosley] one-fifth of the total royalties generated from the Album, and that Manifesto shall pay the other four member[s] equal amounts, directly."[2]

2 The Assignment Agreement also included a provision stating Cohen was not acting as Mosley's attorney in the negotiation of the agreement. Mosley, however, later signed a declaration stating: "I signed the [Assignment Agreement] because I trusted Evan Cohen. I never appreciated that Evan was not acting as my lawyer and solely with my best interests at heart when he asked me to sign the [Assignment Agreement]. I later learned that there was a provision in the [Assignment Agreement] that Evan was not acting as my lawyer, but I never read that provision. In fact, I really never read the entire contract before I signed it. Evan essentially offered me $4,000.00 if I signed the [Assignment Agreement]. I desperately needed to have that money so I signed it. I did not believe I was doing anything wrong."

Manifesto released the Album via digital distribution channels (iTunes, Amazon, Spotify, et cetera) the same month the Assignment Agreement was executed. It was not until October 2015, however, that Faith No More and its members became aware the Album had been re-released, and upon learning of the release, attorneys for the band and its members sent cease and desist letters to Cohen and those it discovered had been distributing (or planned to distribute) the Album. Cohen responded to the cease and desist letter by transmitting a copy of the Assignment Agreement.

B. The Lawsuit, the Anti–SLAPP Motion, and the Trial Court's Decision

In December 2015, Faith No More (a California general partnership) and band members Gould, Roswell Bottum III, Michael Bordin, and Michael Patton (collectively, plaintiffs) sued Manifesto, Cohen, and Mosley. The complaint asserted causes of action for breach of contract and breach of the covenant of good faith and fair dealing against Mosley, and a cause of action for intentional interference with contractual relations against defendants (Manifesto and Cohen). Mosley was later dismissed from the lawsuit with prejudice, and only

the third cause of action for intentional interference alleged against defendants remains pending.

As pled in the complaint, plaintiffs' intentional interference with contractual relations cause of action emphasizes defendants interfered with the Settlement Agreement by virtue of executing the Assignment Agreement. Plaintiffs allege defendants knew of the Settlement Agreement because Cohen served as Mosley's attorney for purposes of negotiating and executing that agreement. And in three key paragraphs, plaintiffs specifically allege the following: "72. Cohen and his company [Manifesto] committed intentional acts designed to induce the breach or disruption of the Settlement Agreement by drafting, negotiating, and entering into the [Assignment Agreement] with Defendant Cohen's former client, Mosley, with full knowledge that the [Assignment Agreement] by its very terms materially breached the Settlement Agreement, which Cohen also negotiated. [¶] 73. The [Assignment Agreement] itself constitutes a material breach of the Settlement Agreement and a disruption in the contractual relationship between Mosley and Plaintiffs, insofar as Mosley asserts and assigns rights which he irrevocably relinquished in the Settlement Agreement, thereby breaching his agreement with Plaintiffs and disrupting his contractual relations with them. [¶] 74. Manifesto ... and Cohen further disrupted the contractual relationship between the parties under the Settlement Agreement by failing to inform Plaintiffs of the agreement or pay Plaintiffs what they are owed even under the illegal [Assignment Agreement]." The intentional interference cause of action further alleges that defendants' conduct was willful, oppressive, fraudulent, and malicious (predicate allegations for punitive damages), and that defendants' conduct was extreme and outrageous, causing them to suffer emotional distress.

***3** Defendants filed a special motion to strike the intentional interference cause of action pursuant to Code of Civil Procedure section 425.16,[3] i.e., an "Anti–SLAPP" motion. "The analysis of an anti–SLAPP motion proceeds in two steps: First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from [constitutionally] protected [free speech or petitioning] activity. If the court finds such a showing has been made, it then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Barry v. State Bar of California* (2017) 2 Cal.5th 318, 321, internal quotation marks and citations omitted (*Barry*).)

3 Undesignated statutory references that follow are to the Code of Civil Procedure.

With respect to the first step of the anti–SLAPP analysis, defendants argued plaintiffs' claims arose out of protected activity, that is, "conduct in furtherance of the exercise of the constitutional right ... of free speech in connection with a public issue or an issue of public interest." Specifically, defendants asserted it was their act of releasing music to the public (in the form of the Album) that gave rise to plaintiffs' claims against them. Distribution of the Album constituted a matter of public interest, defendants argued, because of the importance and popularity of Faith No More, a group that had been nominated for Grammy awards and had platinum-selling and gold-selling albums.

As to the second step of the analysis, defendants advanced only one argument: plaintiffs had "zero probability of prevailing" on the third cause of action because the cause of action was preempted in its entirety by the Copyright Act of 1976 (the Copyright Act), codified at Title 17 United States Code sections 101 et seq. Plaintiffs' cause of action was preempted, defendants argued, because the sound recordings that comprise the Album are subject to federal copyright protection and because the intentional interference with contractual relations cause of action is the mere equivalent of a claim for copyright infringement. That is, defendants argued the cause of action "rests upon the basic allegation that defendants ... impermissibly exploited the Album for their own commercial gain." Defendants maintained claims for tortious interference with a contract are "routinely preempted" by the Copyright Act, and that plaintiffs' cause of action included no "extra element" of the type relied on by courts in other cases when holding the Copyright Act did not preempt state law claims.

Plaintiffs opposed defendants' anti–SLAPP motion and supported their opposition with declarations from Mosley and Gould. According to plaintiffs, defendants' motion failed at both steps of the anti–SLAPP analysis.

As to the first step, plaintiffs argued their intentional interference with contractual relations claim arose not from conduct in furtherance of activity protected by section 425.16, but from "the purely private activity of drafting, negotiating, and entering into private contracts by private parties," namely the alleged interference with the Settlement Agreement by virtue of the execution of the Assignment Agreement (as well as defendants' failure to inform plaintiffs of the Assignment Agreement or to pay them what they were owed even under

that agreement). In plaintiffs' view, that defendants furthered the alleged intentional interference by distributing the Album and using the band's name and goodwill were incidental facts that did not give rise to the intentional interference with contract cause of action.

***4** Regarding the second step, plaintiffs contended the evidence established they had a probability of prevailing on their intentional interference cause of action. Citing cases that hold the Copyright Act does not preempt state law claims that include an "extra element" that makes the right asserted by the claim qualitatively different than the rights protected by the act, plaintiffs argued the allegations pled in the complaint sought liability predicated on defendants' "inducement of Mosley to enter into the [Assignment Agreement] and breach the Settlement Agreement," as well as (among other things) defendants' failure to notify plaintiffs of the Assignment Agreement and to pay plaintiffs as stated in that agreement. Plaintiffs explained these elements would not be necessary to state a copyright infringement claim, which meant the intentional interference cause of action "does not simply consist of a violation of Plaintiffs' copyright interest to reproduce and distribute the Album."

In reply, defendants asserted the intentional interference cause of action was at most "a mix of unprotected activities ('drafting and negotiating a contract') and protected activities (distribution of musical works)." But defendants argued that where a single cause of action "alleges both acts protected under the statute and unprotected acts, the entire cause of action may be stricken."

The trial court denied defendants' anti–SLAPP motion. The trial court acknowledged "[c]laims concerning creative works and celebrities can be protected under the anti–SLAPP law," but the court found plaintiffs' intentional interference with contractual relations claim "does not arise from creative musical works or a matter of public interest" but rather "from two business contracts," i.e. the Settlement Agreement and the Assignment Agreement. The trial court further found that while Faith No More and the Album were "involved" in plaintiffs' claim, the band and the record "play a merely incidental role as part of the factual backdrop of the claim" and do not transform the dispute into a claim subject to a special motion to strike. Having concluded defendants had not met their burden to establish the claims against them arose from conduct in furtherance of activity protected by the anti–SLAPP statute, the court accordingly found it unnecessary to reach the question presented by the "second prong of the anti–SLAPP analysis," i.e., whether plaintiffs' had shown their intentional interference claim had minimal merit.

II. DISCUSSION

The trial court's rationale for why plaintiffs' claims do not arise from protected activity has much to recommend it. But *Baral v. Schnitt* (2016) 1 Cal.5th 376 (*Baral*) arguably complicates the analysis at step one of the anti–SLAPP inquiry. In that case (decided after the trial court's ruling), our Supreme Court held that where a cause of action arises from both protected and unprotected activity, a court hearing an anti–SLAPP motion should excise or strike the allegations of protected activity from the complaint if the plaintiff cannot demonstrate his or her claim based on those allegations is legally sufficient and factually substantiated. (*Id.* at p. 396; but see *id.* at p. 394 ["Allegations of protected activity that merely provide context, without supporting a claim for recovery, cannot be stricken under the anti–SLAPP statute"].)

We find it unnecessary to resolve what impact the *Baral* decision has here. We assume for argument's sake defendants have satisfied the first step of the anti–SLAPP analysis. We nevertheless hold defendants' anti–SLAPP motion was properly denied because plaintiffs have satisfied their burden at step two of the analysis, i.e., to demonstrate a probability of prevailing. The sole argument defendants offer to the contrary —that plaintiffs cannot prevail because the Copyright Act preempts their intentional interference cause of action—fails. As pled, plaintiffs' intentional interference claims are not the mere equivalent of a claim for copyright infringement.

A. The Law Governing Anti–SLAPP Motions and the Standard of Review on Appeal

***5** "Only a cause of action that satisfies *both* prongs of the anti–SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 89; accord, *Baral, supra*, 1 Cal.5th at p. 384 ["The anti–SLAPP statute does not insulate defendants from *any* liability for claims arising from the protected rights of petition or speech. It only provides a procedure for weeding out, at an early stage, *meritless* claims arising from protected activity"].)

"A defendant who files a special motion to strike bears the initial burden of demonstrating that the challenged cause of

action arises from protected activity." (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 669.) If such a showing is made (or, as here, assumed to have been made), a plaintiff opposing an anti–SLAPP motion must demonstrate a probability of success on the challenged claim. (*Baral, supra*, 1 Cal.5th at p. 384; see also *Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 820 (*Oasis*).) In judging a probability of success, a "court does not weigh evidence or resolve conflicting factual claims. Its inquiry is limited to whether the plaintiff has stated a legally sufficient claim and made a prima facie factual showing sufficient to sustain a favorable judgment. It accepts the plaintiff's evidence as true, and evaluates the defendant's showing only to determine if it defeats the plaintiff's claim as a matter of law." (*Baral, supra*, at pp. 384–385.) Thus, a plaintiff opposing an anti–SLAPP motion need not go so far as to prove the defendant would be found liable; rather, a plaintiff carries his or her burden by showing the cause of action or claim at issue has "minimal merit." (*Baral, supra*, at pp. 385, 391; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 63 [plaintiff need only state and substantiate a legally sufficient claim]; *Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1123.)

Our review of a trial court's ruling on a section 425.16 special motion to strike is de novo. (*Oasis, supra*, 51 Cal.4th at p. 820; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.) "If the trial court's decision denying an anti–SLAPP motion is correct on any theory applicable to the case, we may affirm the order regardless of the correctness of the grounds on which the lower court reached its conclusion." (*Reed v. Gallagher* (2016) 248 Cal.App.4th 841, 853; *Personal Court Reporters, Inc. v. Rand* (2012) 205 Cal.App.4th 182, 188–189.)

B. Plaintiffs Have Stated and Substantiated a Legally Sufficient Claim for Intentional Interference with Contractual Relations

Defendants do not contest the sufficiency of the evidentiary showing plaintiffs make to demonstrate their intentional interference with contractual relations cause of action has minimal merit. Rather, the step-two anti–SLAPP analysis in this case turns on a single argument made by defendants, namely, that the cause of action cannot succeed because it is entirely preempted by the Copyright Act. Defendants are wrong about that, for reasons we now explain.

The Copyright Act governs the treatment of certain rights in "original works of authorship fixed in any tangible medium of expression." (17 U.S.C. § 102.) Specifically, the act grants to the owner of a copyright the exclusive rights to reproduce, adapt, distribute, perform, and display covered works. (17 U.S.C. § 106 ["Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: [¶] (1) to reproduce the copyrighted work in copies or phonorecords; [¶] (2) to prepare derivative works based upon the copyrighted work; [¶] (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending ... and [¶] (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission"].)

***6** The Copyright Act also includes provisions that preempt certain state law legal claims involving copyright. Title 17 United States Code section 301 provides that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103" are governed exclusively by the provisions of the Copyright Act. (17 U.S.C. § 301(a).) The Copyright Act restates this preemption rule by its converse as well, explaining it does not limit "any rights or remedies under the common law or statutes of any State" concerning "activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106." (17 U.S.C. § 301(b).)

Thus, "[i]n order for preemption to occur under the ... Act, two conditions must be satisfied. First, the content of the protected right must fall within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103. Second, the right asserted under state law must be equivalent to the exclusive rights contained in section 106 of the Copyright Act." (*Downing v. Abercrombie & Fitch* (9th Cir. 2001) 265 F.3d 994, 1003; accord, *Sturdza v. United Arab Emirates* (D.C. Cir. 2002) 281 F.3d 1287, 1304 ["[P]reemption has both 'subject matter' and 'equivalency' requirements: the copyrighted work must be the type of work protected by copyright law and the state law right must be equivalent to a right protected by the Copyright Act"] (*Sturdza*).)

"In this case, the state claim[is] based on musical works within the subject matter of copyright. We are [thus] concerned with only the 'right equivalent to copyright' condition. 'In essence, a right that is "equivalent to copyright" is one that is infringed by the mere act

of reproduction, performance, distribution, or display.' (1 Nimmer on Copyright (2002) § 1.01[B][1], p. 1–12, fns. omitted ....)" (*Kabehie v. Zoland* (2002) 102 Cal.App.4th 513, 520 (*Kabehie*); accord, *Fleet v. CBS, Inc.* (1996) 50 Cal.App.4th 1911, 1924 ["[A] right is equivalent to rights within the exclusive province of copyright when it is infringed by the mere act of reproducing, performing, distributing, or displaying the work at issue. A claim asserted to prevent nothing more than the reproduction, performance, distribution, or display of a dramatic performance captured on film is subsumed by copyright law and preempted"].) Put differently, if the alleged state law claim incorporates an extra element unnecessary to prove copyright infringement, the claim is not preempted. (See, e.g., *Balboa Ins. Co. v. Trans Global Equities* (1990) 218 Cal.App.3d 1327, 1340 ["To survive preemption, Balboa's complaint must allege an element beyond 'unauthorized duplication or transfer.' Moreover, that element must make the state claim 'qualitatively different from a copyright infringement claim' "]; accord, *Summit Mach. Tool Mfg. Corp. v. Victor CNC Systems, Inc.* (9th Cir. 1993) 7 F.3d 1434, 1439–1440 ["Preemption analysis involves determining whether the state law claim contains an element not shared by the federal law; an element which changes the nature of the action so that it is *qualitatively* different from a copyright [or patent] infringement claim"], citation and internal quotation marks omitted (*Summit*).)

"To determine whether a state law claim is qualitatively different from a copyright claim—that is, whether the state claim has an 'extra element'—courts generally examine both the elements of the state law cause of action and the way the plaintiff has actually pled that cause of action." (*Sturdza, supra*, 281 F.3d at p. 1304; see also, e.g., *Kabehie, supra*, 102 Cal.App.4th at pp. 528–530 [analyzing how intentional interference with obligation of contract and breach of contract causes of action pled in complaint to determine whether causes of action preempted by Copyright Act]; *Summit, supra*, 7 F.3d at pp. 1441–1442 [same, regarding alleged cause of action for misappropriation]; *Harper & Row Publishers, Inc. v. Nation Enterprises* (2d Cir. 1983) 723 F.2d 195, 201, revd. on other grounds (1985) 471 U.S. 539 [deciding preemption by reviewing how tortious interference with contractual relations cause of action was pled in complaint and determining whether the "gravamen" of the claim is unauthorized publication] (*Harper & Row*).)

***7** As plaintiffs have pled their intentional interference with contract cause of action in this case, the alleged right (i.e., the right not to have the contractual settlement of the earlier intra-band dispute disturbed) is not impaired by the "mere act" of reproduction, distribution, or display of the Album.[4] Rather, the focus of the intentional interference cause of action as alleged is defendants' conduct in procuring and executing a second contract, the Assignment Agreement, that interfered with and indeed breached the Settlement Agreement. (Plaintiffs further allege the interfering conduct also included the failure to notify plaintiffs of the existence of the Assignment Agreement or to pay plaintiffs even the amounts called for under that agreement.) The intentional interference with contract cause of action alleged in this case is therefore not the mere equivalent of a copyright infringement claim.

4 Notably, the contract alleged to have been interfered with in this case (the Settlement Agreement) is not the contract that gave rise to what plaintiffs would claim are their exclusive rights to market and distribute the Album.

Of course, that does not mean Copyright Act preemption may be avoided merely by artful pleading. The cause of action as alleged must be sufficient, without consideration of any allegations predicated on reproduction, distribution, or display of the Album, to state a prima facie case as to each of the established elements of an intentional interference with contract claim. (*Sturdza, supra*, 281 F.3d at p. 1305 ["True, Sturdza also alleges that the design Demetriou contracted to use infringes hers. But Count Six does not rise or fall on this allegation. Even if Demetriou's design were entirely his own, Sturdza could proceed on her tortious interference with contract claim based on her other allegations"].) Those elements are: "(1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126.) Defendants have made no argument that the evidence put forward by plaintiffs is insufficient to establish these elements under the applicable minimal merit standard. And our review of that evidence leaves us convinced it crosses the low threshold required at this stage as to all five elements, including damages (which could be nominal or exemplary (or both), not just compensatory), without regard to facts concerning defendants' marketing and distribution of the Album.

Indeed, defendants' express concession that the intentional interference cause of action at issue is a "mixed" cause of

action for purposes of their analysis at step one of the anti–SLAPP inquiry reinforces, at step two, our determination there is no basis to hold the cause of action is preempted. The "protected activity" defendants rely on is reproduction and distribution of the Album, i.e., the very same conduct they claim to be the reason why the intentional interference cause of action is equivalent to a claim for copyright infringement. But by agreeing that the cause of action also includes (and we would say primarily includes) allegations of "unprotected activity," defendants confirm the intentional interference cause of action is not solely directed at the infringement of a right equivalent to copyright and instead incorporates an extra element. That confirmation is consistent with, and goes a long way toward supporting, our view that the cause of action as pled principally arises out of facts related to the Assignment Agreement's interference with the Settlement Agreement, which makes the claim qualitatively different from a copyright infringement claim and places it outside the scope of the Copyright Act's preemption provisions.

***8** The arguments defendants advance to persuade us to the contrary are unavailing. Defendants cite *Harper & Row* and the Nimmer treatise for the proposition that the elements of knowledge and intent inherent in every claim of intentional interference with contractual relations (i.e., knowledge of the contract and an intent to interfere with it) cannot be the extra element that establishes the qualitative non-equivalence between the state and federal rights implicated. (*Harper & Row, supra*, 723 F.2d at p. 201; 1 Nimmer on Copyright (2015) § 1.01[B][1][a][ii], pp. 1–19, 1–20; see also *Maheu v. CBS, Inc.* (1988) 201 Cal.App.3d 662, 677–678 [citing Nimmer].) The point is sound, but it is also inapposite; the knowledge and intent allegations in plaintiffs' complaint are not what create the non-equivalence with copyright in this case.

Defendants additionally observe that "courts have routinely held that claims for tortious interference with contract are preempted." This sort of generalization is not very helpful; we do not decide individual cases by reference to what may generally be the case, nor by tallying cases on either side of an issue and choosing the outcome supported by the greater number. Rather, consistent with the authority we have already cited, the preemption question requires an analysis of the particular cause of action in this case, one that, in our view, does not allege impairment of a right equivalent to the exclusive rights described in section 106 of the Copyright Act. And even if we were inclined to just survey the overall body of law concerning copyright preemption and tortious interference with contract claims, the authority is not quite as one-sided as defendants make it out to be. (See, e.g., *MDY Industries, LLC v. Blizzard Entertainment, Inc.* (9th Cir. 2010) 629 F.3d 928, 957 (*MDY*); *Altera Corp. v. Clear Logic, Inc.* (9th Cir. 2005) 424 F.3d 1079, 1089–1090 [state law intentional interference claims not preempted] (*Altera*); *Telecom Technical Services Inc. v. Rolm Co.* (11th Cir. 2004) 388 F.3d 820, 833 [state law tortious interference with contract claim not preempted]; *Sturdza, supra*, 281 F.3d at p. 1305 [claim not preempted]; *Summit, supra*, 7 F.3d at p. 1442 ["Summit has stated a claim for intentional interference with contract. Such a claim includes the requisite extra element and therefore is not preempted by federal law"]; *Brackett v. Hilton Hotels Corp.* (N.D.Cal. 2008) 619 F.Supp.2d 810, 821–822 [intentional interference with contractual relations claim not preempted].)[5]

5 The parties argue about whether two of these cases, *MDY* and *Altera,* bear any similarities to this case. Defendants' view is that these cases are distinguishable because they involved inducement to violate license agreements and were therefore "more contractually-based than cases involving the unauthorized reproduction of works." We are not convinced these cases are entirely inapposite. The Settlement Agreement in this case arguably functions in a way the licenses functioned in those cases, such that plaintiffs' claim that defendants persuaded Mosley to act in excess of what the Settlement Agreement permitted bears some resemblance to the arguments made in *Altera* and *MDY*—i.e., that the defendants there persuaded license holders to exceed the scope of the licenses granted. (*MDY, supra*, 629 F.3d at p. 957; *Altera, supra*, 424 F.3d at p. 1089.) But regardless of whether *MDY* and *Altera* are on all fours with the facts here, plaintiffs' intentional interference cause of action is not preempted for the reasons we have already explained.

Having held the Copyright Act does not preempt plaintiffs' intentional interference with contractual relations cause of action, we accordingly hold plaintiffs have satisfied their burden to show a probability of prevailing. Defendants' anti–SLAPP motion was therefore correctly denied.

DISPOSITION

***9** The trial court's order is affirmed. Plaintiffs are to recover their costs on appeal.

We concur:

KRIEGLER, Acting P.J.

KIN, J.*

All Citations

Not Reported in Cal.Rptr., 2017 WL 1231387, 2017 Copr.L.Dec. P 31,080

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