UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

KADIAN NOBLE, Plaintiff, -against- HARVEY WEINSTEIN, BOB WEINSTEIN, AND THE WEINSTEIN COMPANY LLC Defendants.	:	Civil Action No. 1:17 Civ. 09260 RWS **DATE FOR ORAL ARGUMENT: APRIL 11, 2018 at 11:00 a.m.**

DEFENDANT THE WEINSTEIN COMPANY LLC'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Dated: New York, New York
January 30, 2018

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Defendant The Weinstein Company LLC ("Defendant" or "TWC"), by and through its attorneys Seyfarth Shaw LLP, and pursuant to Federal Rule of Civil Procedure 12(b)(6), requests this Court to dismiss Plaintiff Kadian Noble's complaint ("Compl.") against it with prejudice.

PRELIMINARY STATEMENT

Plaintiff, a British national, asks this Court to impose a tortured interpretation of an otherwise clear law addressing human slavery, so that she may seek redress in the United States for Harvey Weinstein allegedly sexually assaulting her in Cannes, France in February 2014. She brings her lawsuit pursuant to the Trafficking Victims Protection Reauthorization Act ("TVPRA" or "the sex trafficking statute"), a law designed to curtail human sex trafficking by protecting genuine victims forced into human slavery, and prosecuting those who victimized them. Plaintiff seeks to stretch the scope of this law to cover not only the alleged acts of Harvey Weinstein, but also his employer Defendant TWC and its Board Chair, Defendant Robert Weinstein. She makes unsupported allegations that TWC, by and through some unknown and unnamed agents, knew or recklessly disregarded Harvey Weinstein's conduct towards Ms. Noble during and after the alleged incident in France. There is simply no relevant case law in the Southern District of New York suggesting that this act of alleged assault in France states a viable claim pursuant to the TVPRA, and as such, this Court has no jurisdiction over her claims at all. The few decisions in other jurisdictions that have applied the sex trafficking statute in a civil context have done so in the limited circumstance where the victims, often vulnerable children, were lured into commercial sex trafficking enterprises. This is not at issue in this matter, as, Plaintiff alleges that Harvey Weinstein "forced" her to engage in a "sex act" when she traveled overseas for a meeting with him. She does not allege that she was involved with any other incidents with any other people, nor does she even suggest that Harvey Weinstein's purpose was "sex trafficking." Nevertheless, Plaintiff seeks to shoehorn her claims into a TVPRA action

against Harvey Weinstein, TWC and TWC's Board Chair, Robert Weinstein, because that is the only way she can create jurisdiction in the United States over this alleged assault that occurred in France. Furthermore, Plaintiff's attempt to stretch the boundaries of this law is a thinly veiled attempt to circumvent the statutes of limitations on the assault claims Plaintiff may have had against Harvey Weinstein as a result of this alleged incident, because Plaintiff has missed those deadlines for filing her claims.

Simply put, Plaintiff cannot use the TVPRA to impose liability against TWC and Robert Weinstein for Harvey Weinstein's alleged actions that occurred on a single occasion in another country. Even if her claims against Harvey Weinstein for sex trafficking were viable, this Court must dismiss her claims against TWC, Harvey Weinstein's employer, because she alleges insufficient facts to support her claims that TWC was engaged in a "venture" with Harvey Weinstein to engage in sex trafficking. Even accepting Plaintiff's allegations as true, and even if such a claim were viable as to Harvey Weinstein, at most she alleges that TWC's unnamed agents were aware (or should have known) that Harvey Weinstein engaged in *unsavory* behavior and, at worst, *sexually predatory* behavior against women. She does not allege in the complaint, however, that TWC was aware (or should have known) that Harvey Weinstein was engaged in *sex trafficking*, the actual conduct the TVPRA prohibits.

Even the most generous reading of Plaintiff's allegations in the complaint do not support her claim that Harvey Weinstein's alleged conduct was in furtherance of a larger "sex trafficking enterprise" with TWC. Indeed, Plaintiff fails to identify a single TWC employee by name who allegedly participated in the alleged venture, and therefore her claims lack the necessary specificity that the *Twombly* and *Iqbal* decisions require. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition, while Plaintiff's

complaint carefully tracks the language of the TVPRA statute, she provides no details concerning the TWC agents or employees who had knowledge or participated in the alleged venture. As such, her allegations against TWC are "mere conclusory statements" and are the very type of "threadbare recitals" prohibited by *Twombly* and *Iqbal*. *See Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.") (citing *Twombly*, 550 U.S. at 555); *Twombly*, 550 U.S. at 557 (noting a pleading that offers "labels and conclusions" or "naked assertion[s]" devoid of "further factual enhancement" does not satisfy Federal Rule of Civil Procedure 8). In sum, Plaintiff's complaint lacks any plausible, factual support that TWC could be liable for participating in a sex trafficking venture.

If this Court allows Plaintiff's claims to proceed as to TWC, any employer of any individual could be liable for violating the sex trafficking statute whenever the employee commits a sexual assault in the United States or internationally. By extension, if this Court allows Plaintiff's claims against TWC to proceed, an employer could be liable for its employee's conduct whether or not the employer participated in any commercial sex trafficking venture at all. That is a result that far exceeds the TVPRA's intended scope, and it would create an unwieldy precedent, for which Plaintiff has no legal support in the case law of the Southern District of New York.

Since Plaintiff has failed to plead the necessary elements of the TVPRA and, in essence, asks this Court to create new law based on a novel theory with no factual support, the Court must dismiss her complaint against TWC.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND

On November 27, 2017, Plaintiff Kadian Noble ("Plaintiff") filed her lawsuit[1] alleging a cause of action under 18 U.S.C. §§ 1591 and 1595 (§ 1595 gives Plaintiff a civil remedy/private cause of action to bring her § 1591 claim), which is part of the TVPRA, alleging that Defendant Harvey Weinstein sexually assaulted her in Cannes, France in February 2014. Plaintiff also named Harvey Weinstein's employer, The Weinstein Company, as a defendant by making conclusory allegations that TWC "knowingly facilitate[d]" a "venture" in which Harvey Weinstein traveled abroad to coerce female actors into "sexual encounters" with the promise of movie roles. (Compl. ¶ 38.)

Plaintiff is a citizen and resident of the United Kingdom. (*Id.* ¶ 1.) Plaintiff alleges that Harvey Weinstein, "a renowned film producer[,]" first "groomed" her on a trip from the United States to London, England that took place before February 2014, "by telling her that he had a role for her and that 'it will be good for you'." (*Id.* ¶¶ 7, 10.) Plaintiff claims that Harvey Weinstein introduced her to his executive assistant (name not identified in the complaint). (*Id.* ¶ 10.) Harvey Weinstein allegedly promised Plaintiff a role in the "TWC project" and to further her acting career. (*Id.* ¶ 11.) Prior to February 2014, Plaintiff claims that she visited Harvey Weinstein's office and gave his executive assistant a sample of her work, otherwise known as a "'reel,'" to forward to Harvey Weinstein. (*Id.* ¶ 13.)

Plaintiff then allegedly met Harvey Weinstein again in February 2014 in Cannes, France where he allegedly asked Plaintiff to come to the Le Majestic hotel where he would "review her reel and discuss further steps in securing the role he had previously targeted for her." (*Id.* ¶ 14.) Once inside the hotel room, Plaintiff alleges Harvey Weinstein "massag[ed]" her and "gripped

[1] For purposes of this motion to dismiss only, the factual allegations in the complaint are assumed to be true.

her shoulders." (*Id.* ¶ 16.) Harvey Weinstein then allegedly told Plaintiff that if she relaxed, "his people would have all of her details and would 'take care of everything' for her." (*Id.*) Plaintiff further alleges that Harvey Weinstein told her that for "'audition purposes[,]'" she needed to walk up and down the room for him, and she complied. (*Id.* ¶ 17.)

Plaintiff then states that Harvey Weinstein put an alleged TWC producer (name not identified in the complaint) on the telephone who allegedly told Plaintiff to comply with Harvey Weinstein's audition requests. (*Id.* ¶ 18.) Next, Plaintiff claims that during this one encounter at the hotel room in France, Harvey Weinstein pulled her closer and repeatedly touched her in an unwelcome way although she indicated that his advances were unwelcome. (*Id.* ¶¶ 19-25.) Plaintiff claims that she "felt compelled to comply because of the tangible and intangible benefits [Harvey Weinstein] offered to further her career . . . ." (*Id.*)

As Plaintiff left the hotel room, Harvey Weinstein allegedly told her that "'his people' will be in touch with her, which she understood to refer her to the role [Harvey Weinstein] had promised and other benefits offered." (*Id.* ¶ 26.)

Plaintiff alleges no other encounters with Harvey Weinstein after the alleged February 2014 incident.

Specific Allegations Against TWC

As against TWC specifically, Plaintiff makes the bold and conclusory allegation, without more detail that TWC "knowingly" or "in reckless disregard" of her interest, "facilitate[ed]" this "venture" in which Harvey Weinstein allegedly traveled abroad to "coerce[]" female actors into "sexual acts" with the promise of movie roles. (*Id.* ¶ 39.) TWC allegedly "aided the commercial sex acts by facilitating the auditions" for the women knowing they would be "forced" or "coerced" into "sexual encounters" with Harvey Weinstein. (*Id.* ¶¶ 38, 41.) Plaintiff alleges TWC employees used the code word, "'FOH'," meaning "'Friend of Harvey'," which referred to

women who "participated in sex" acts in exchange for movie roles. (*Id.* ¶ 42.) TWC employees allegedly knew to "'take care' of the FOHs." (*Id.*) Plaintiff alleges that "[m]ultiple TWC employees" (but with names not identified in the complaint) participated in enticing Plaintiff to become a victim of a commercial sex act. (*Id.* ¶ 43.) Additionally, an unnamed alleged TWC producer allegedly told Plaintiff that she needed to be "'a good girl and do whatever [Harvey Weinstein] wished', and if she did, then 'they will work with [her] further.'" (*Id.*) Another alleged TWC employee and executive assistant to Harvey Weinstein (both unnamed) spoke to Plaintiff about her reel to be forwarded to him. (*Id.* ¶ 44.) Plaintiff further alleges that the unidentified TWC employees benefitted from the "venture" by allegedly facilitating and covering up Harvey Weinstein's commercial sex acts, in exchange, they "progressed in their careers and received financial benefits." (*Id.* ¶¶ 45, 46.) Likewise, Plaintiff claims that the reason TWC "facilitate[ed]" the "commercial sex acts" was because Harvey Weinstein brought exposure and prestige to TWC films thereby benefitting TWC financially. (*Id.* ¶ 47.) Furthermore, Plaintiff claims TWC was aware of Harvey Weinstein's alleged sexual conduct before February 2014 and continued to pay for and facilitate his travel abroad. (*Id.* ¶ 40.)

ARGUMENT

I. MOTION TO DISMISS STANDARD

A. The Complaint Fails To State A "Plausible" Claim Under *Twombly* And *Iqbal*

It is well established that in order to survive a motion to dismiss and state a viable claim, a complaint must allege sufficient facts, which, if accepted as true, "state a claim [for] relief that is plausible on its face." *Twombly*, 550 U.S. at 570. Importantly, it is not enough to allege facts that merely raise the "sheer possibility that a defendant has acted unlawfully," nor rely on "labels and conclusions" or "naked assertion[s]" devoid of "further factual enhancement." *Iqbal*, 556

U.S. at 678 (citations and quotations omitted) (alteration in original). Rather, the complaint must allege facts that move a claim "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570 (citation and quotations omitted). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 556 U.S. at 678 (citation and quotations omitted). Though the Court must accept the factual allegations of a complaint as true, it is "not bound to accept as true a legal conclusion couched as a factual allegation . . . ." *Twombly*, 550 U.S. at 555 (citation and quotations omitted). Where, as here, the complaint fails to state a "plausible" claim, the complaint should be dismissed early and "at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U. S. at 557-58 (citation and quotations omitted).

Plaintiff's complaint is precisely the type of baseless pleading that the Supreme Court rejected in *Twombly* and *Iqbal* and this Court should dismiss it for failure to state a claim. Here, as explained in more detail *infra*, Plaintiff's complaint does not allege sufficient facts to support sex trafficking because the conduct she alleges is a single act of gender-based sexual assault and not the type of human sex trafficking the TVPRA contemplated. Second, Plaintiff makes only conclusory and unsupported allegations against TWC, and she fails to meet her burden of alleging specific, plausible facts to support her claim that TWC participated in a sex trafficking venture with Harvey and the other Defendants. Based on applicable case law, the Court should dismiss Plaintiff's complaint against TWC for failure to state a claim.

II. CONGRESS DID NOT INTEND THE SEX TRAFFICKING STATUTE TO APPLY HERE

The clear language in the legislative history makes patently clear that Congress did not intend the TVPRA to apply to allegations that, as here, one person opportunistically assaulted

another seeking employment. This scenario clearly has nothing to do with the human sex trafficking the statute was meant to address.

By way of background, on October 28, 2000, Congress passed the Trafficking Victims Protection Act ("TVPA"), Pub. L. No. 106-386, §§ 101-113, 114 Stat. 1464 (2000) (codified as amended in sections throughout Titles 8, 18, and 22 of the United States Code), "to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." 22 U.S.C. § 7101(a). The legislation was enacted because "Congress recognized that human trafficking, particularly of women and children in the sex industry 'is a modern form of slavery, and it is the largest manifestation of slavery today.'" *United States v. Walls*, 784 F.3d 543, 548 (9th Cir. 2015) (quoting 22 U.S.C. § 7101(b)(1)), *cert. denied*, 136 S. Ct. 226 (2015). Accordingly, through the TVPA, Congress adopted "a comprehensive regulatory scheme that criminalizes and attempts to prevent slavery, involuntary servitude, and human trafficking for commercial gain." *Walls*, 784 F.3d at 548. This comprehensive scheme proscribes "severe forms of tracking in persons," including "sex trafficking in which a commercial sex act is induced by force, fraud, or coercion," and "sex trafficking . . . in which the person induced to perform such act has not attained 18 years of age." 22 U.S.C § 7102(9)(A).

As the Eastern District of New York underscored in *United States v. Thompson*, 141 F. Supp. 3d 188, 199 (E.D.N.Y. 2015), "[p]ositioning § 1591 — itself titled 'Sex trafficking of children or by force, fraud, or coercion' — within [the] Chapter [of Title 18 headed Peonage, Slavery, and Trafficking in Persons] signals that the [TVPA] statute was not intended to apply to . . . [a] parade of hypothetical third parties who may be touched by the statute." Thus underscoring the purpose of the statute, Congress found that "[t]raffickers lure women and girls

into their networks through false promises of decent working conditions . . . as nannies, maids, dancers, factory workers, restaurant workers, sales clerks or models" and "often transport victims from their home communities to unfamiliar destinations." P.L. 106–386 at § 102(4), (5).

Section 1591(a) of the statute was amended several times, first becoming the Trafficking Victims Protection Reauthorization Act ("TVPRA") in 2003. Congress passed the TVPRA, amending the TVPA[2], in order to "enhance provisions on prevention of trafficking, protection of victims of trafficking, and prosecutions of traffickers." H.R. Rep. No. 108-264(I), at 8 (2003). Additionally, Congress created a private right of civil action for victims of trafficking under § 1595.

In 2008, Congress amended the TVPRA again, in several substantial aspects, all of which make it easier for victims of trafficking violations to bring civil suits. The 2008 Amendment vastly expanded the civil liability from individuals merely found to have been perpetrators of an act described in § 1591, among other sections, to: (1) those individuals deemed to be perpetrators of any part of the TVPRA; or (2) someone who knowingly benefited from the human trafficking proscribed therein. 18 U.S.C. § 1595(a) (2008). Originally, the victim could recover only from the perpetrator; the TVPRA expanded the statute's deterring effect. Significantly, the 2008 expansion of 18 U.S.C. § 1595(a)(1) expressly and broadly authorizes "the courts of the United States [to] have extra-territorial jurisdiction over any offense . . . if . . . an alleged offender is a national of the United States . . . ."

Congress subsequently amended the TVPRA in 2015, but the 2008 version is applicable to this case given that the alleged conduct occurred in 2014. The relevant statute thus reads:

[2] For clarity's sake, Defendant refers to the statute as the TVPRA for the remainder of the brief except on pages 10 and 13 of this brief where a portion of the TVPA statute is cited.

> (a) Whoever knowingly--
>
> > (1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, or maintains by any means a person; or
> >
> > (2) benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),
> >
> > knowing, or in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished [by fine or imprisonment].

18 U.S.C. § 1591 (2008).

The law defines a "commercial sex act" as "any sex act, on account of which anything of value is given to or received by any person." 18 U.S.C. § 1591(e)(3).

The term "sex trafficking" is defined in the related TVPA as "the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act." 22 U.S.C. § 7102(10).

Plaintiff has not alleged sufficient facts that the alleged conduct amounts to sex trafficking as prohibited by the TVPRA. Notably absent from her pleadings, Plaintiff has not alleged any plausible facts that she was recruited, harbored, transported, or solicited for the purposes of a commercial sex act. What she alleges, at most, is a single gender-based assault that was not connected to a sex trafficking scheme — the very conduct Congress intended to prohibit under the TVPRA.

If a one-time sexual assault was the impetus behind the statute, then individuals would be liable for violating the statute every single time a sexual assault occurred anywhere, inside the United States or internationally. Indeed, the legislative history surrounding the TVPRA makes

clear that Congress was concerned that victims were being lured "away from family and friends, religious institutions, and other sources of protection and support." 22 U.S.C. § 7102(5). That did not happen here nor is that alleged in the complaint. It is understood from the complaint that after the alleged incident, Plaintiff left and had no other interaction with Harvey Weinstein or any other Defendant. Such an alleged, isolated gender-based assault is not typical of sex trafficking cases which are usually economic in nature. *See Todd v. United States*, No. C-11-0470, 2012 WL 2952084, at *6 (W.D. Wash. June 26, 2012) (noting that the TVPRA relates to commercial sex acts that are necessarily economic in nature and is distinguishable from laws governing gender-motivated crimes).

The limited case law applying the sex trafficking statute to civil claims highlights the stark contrast between "human trafficking" cases, and Plaintiff's hyperbolic allegations here, demonstrating that the behavior complained of by Plaintiff is not the conduct the statute aims to redress. *Cf. Lunkes v. Yannai*, 882 F. Supp. 2d 545, 547 (S.D.N.Y. 2012) (discussing sex trafficking claim under § 1591 where the defendants, a man and woman who shared a residence, deceived plaintiffs into entering the United States illegally with promises of employment and then enslaved them by demanding unpaid services and subjecting them to physical and sexual abuse); *Ditullio v. Boehm*, 662 F.3d 1091, 1095 (9th Cir. 2011) (analyzing sex trafficking claim under § 1591 where plaintiff claimed that at age 15, defendant gave her crack cocaine on a daily basis, had sex with her and others, and that she lived with defendant in order to obtain drugs on a regular basis).

As shown by that history, Congress did not intend the TVPRA to apply to the type of conduct alleged here, and certainly did not intend for it to extend to third parties, such as TWC, with no involvement in the alleged conduct.

A. *The Alleged Conduct Does Not Amount To A Commercial Sex Act*

Plaintiff's claims also fail because the alleged conduct does not amount to a commercial sex act. Under the TVPRA, the sex act must be commercial in nature and affect interstate commerce. *See* 18 U.S.C. § 1591(a)(2) and (e)(3). Here, Plaintiff alleges that Harvey Weinstein traveled internationally to Cannes, France where he promised her a film role and allegedly assaulted her. (Compl. ¶¶ 12-13.) Even accepting these allegations as true, the alleged incident did not affect interstate commerce as required by the TVPRA because it was not part of a sex trafficking scheme. *Cf. United States v. Paris*, No. 03:06–CR–64, 2007 WL 3124724, at *6-8 (D. Conn. 2007) (upholding criminal defendant's conviction for sex trafficking arising out of his prostitution business, and finding that his activity was inextricably linked to interstate commerce, as there was a clear nexus between his intrastate procurement of women and the interstate aspects of his business as well as the interstate market for commercial sex in general, such as making 20,000 business cellular telephone calls (2,000 out-of-state); accepting credit cards as payment for commercial sex acts (credit card machines use interstate wire connections); operating prostitution business out of hotels frequented by out-of-state guests; and providing the victims with condoms that were manufactured out-of-state). Here, Plaintiff does not make a single allegation that Harvey Weinstein was involved in a sex trafficking business or was engaged in the interstate procurement of women. She alleges only that Harvey Weinstein assaulted her and speculates that he likely engaged in the same conduct with other women while traveling abroad. (Compl. Introduction, ¶ 7.) Those allegations are speculative assertions and cannot support her TVPRA claim.

Even more fatal to her claims, Plaintiff fails to use the word "sex trafficking" to describe Harvey Weinstein's alleged behavior and the actions she attributes to him likewise do not amount to "sex trafficking" because she does not allege anything amounting to "the recruitment,

harboring, transportation, provision, obtaining, patronizing, or soliciting of [herself] for the purpose of a commercial sex act." *See* 22 U.S.C. § 7102 (defining "sex trafficking").

Since the conduct alleged could not in any way have a substantial effect on interstate commerce, the complaint does not state a plausible claim under the TVPRA. To hold otherwise, would be to undermine Congressional intent to specifically curtail conduct that amounts to "slavery, involuntary servitude, and human trafficking for commercial gain." *See* TVPA, Pub. L. No. 106-386, §§ 101-113, 114 Stat. 1464 (2000); *Todd*, 2012 WL 2952084, at *6 (noting that the TVPRA relates to commercial sex acts that are necessarily economic in nature and is distinguishable from laws governing gender-motivated crimes).

B. *Plaintiff Has Not Sufficiently Plead A Quid Pro Quo To Support A Commercial Sex Act*

Equally fatal to her claim, Plaintiff has not sufficiently plead a *quid pro quo* to support her § 1591 claim that a commercial sex act occurred. As mentioned, § 1591 defines "commercial sex act" as "any sex act, on account of which anything of value is given to or received by any person." [T]he use of the phrase 'on account of which' suggests that there . . . needs to be a causal relationship between the sex act and an exchange of an item of value." *United States v. Marcus*, 487 F. Supp. 2d 289, 306-07 (E.D.N.Y. 2007), *rev'd on other grounds*, 538 F.3d 97 (2d Cir. 2008).

While Plaintiff alleges that Harvey Weinstein promised to give her a role in the "TWC project" (Compl. ¶ 12), she does not allege that she in fact received any role in exchange for sex. *Cf. Kolbek v. Twenty First Century Holiness Tabernacle Church, Inc.*, No. 10-CV-4124, 2013 WL 6816174, at *16 (W.D. Ark. Dec. 24, 2013) ("Defendants rightfully point out that Plaintiffs have not offered any evidence showing that Plaintiffs' living expenses were paid as some sort of *quid pro quo* for the sex acts that occurred with Alamo. Nor have Plaintiffs offered evidence to

show that Defendants were compensated 'on account of' the sex acts. In sum, Plaintiffs offer no evidence of a causal relationship between the sex acts and the payment of expenses. The fact that sexual abuse was committed by the ministry's leader and that members of the ministry had their expenses paid for through ministry funds is simply not sufficient to establish a violation of 18 U.S.C. § 1591.") (quotations omitted). Therefore, without a *quid pro quo*, Plaintiff has not asserted a viable claim.

III. TWC DID NOT PARTICIPATE OR BENEFIT FROM HARVEY WEINSTEIN'S ALLEGED SEX TRAFFICKING TO ESTABLISH A CLAIM FOR PARTICIPATION IN A "VENTURE"

Plaintiff alleges that TWC knowingly participated in a "venture" with Harvey Weinstein in violation of the TVPRA by benefitting from, and knowingly facilitating, the venture in which Harvey Weinstein traveled abroad to recruit and entice women into forced "sexual encounters" on the promise of movie roles. (Compl. ¶ 38.) Plaintiff further claims that TWC "knew, or w[as] in reckless disregard of the facts" that Harvey Weinstein engaged in these practices, but went along with his conduct in order to benefit itself financially. (*Id.* ¶ 39.) Plaintiff claims that TWC was aware of "multiple claims" alleged against Harvey Weinstein prior to February 2014, but nevertheless continued to pay and facilitate his trips abroad. (*Id.* ¶ 40.) Plaintiff also claims that alleged unnamed TWC employees used the "FOH" code word and "multiple" alleged unnamed TWC employees participated in the recruitment of Plaintiff, including an alleged unnamed producer who told her that she needed to be "a good girl and do whatever [Harvey Weinstein] wished, and if she did, "they will work with [her] further." (*Id.* ¶ 43.) Plaintiff also alleges that another unnamed TWC employee spoke with her about her reel and, in addition, the other alleged unnamed TWC employees who participated in the venture received better assignments and compensation. (*Id.* ¶¶ 44, 45.)

First, Plaintiff's claims here fail under the *Twombly*/*Iqbal* standard because she does not plead with specificity the names of the "multiple" TWC employees who allegedly participated in this "venture" and the actions she attributes to these anonymous TWC employees are speculative and conclusory with no foundational support that their alleged actions are even capable of binding the company. In addition, her vague references that TWC was aware of Harvey Weinstein's conduct "prior to February 2014" and either "knew" or acted in "reckless disregard" is speculative and insufficient to support her claims. *See Kleehammer v. Monroe County*, 743 F. Supp. 2d 175, 186-87 (W.D.N.Y. 2010) ("Plaintiff's vague reference to 'prior similar incidents,' 'reckless disregard or gross indifference,' or the 'gross negligence of those [unnamed] Deputies who stood in a managerial role to Plaintiff,' does not meet the requirements of *Twombly*. Plaintiff was obligated to, 'provide the grounds of [her] entitlement to relief' which 'requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action . . . .'") (quoting *Twombly*, 550 U.S. at 555) (alteration in original). In addition, the allegations relating to unnamed TWC employees referring to young women who engaged in sex acts in exchange for roles as FOHs (Compl. ¶ 42) and the alleged unnamed TWC employee who allegedly told Plaintiff "to be 'a good girl and do whatever he [Harvey Weinstein] wished'," (*id.* ¶ 43) are not sufficient facts to prove that Harvey Weinstein was engaged in sex trafficking. Likewise, the allegation that unnamed TWC employees benefitted financially from participating in the venture is mere speculation. *See Twombly*, 550 U.S. at 555 (noting conclusory and speculative allegations insufficient to withstand 12(b)(6) motion).

To that end, the knowledge that Plaintiff imputes to TWC (or information TWC allegedly recklessly disregarded) is that Harvey Weinstein traveled abroad and had "forced" sex with women and TWC continued to pay for his trips abroad (*id.* ¶ 40) — is not the same as alleging

with sufficient facts that TWC was aware that Harvey Weinstein was engaged in *sex trafficking*, the actual conduct prohibited by the TVPRA. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) ("To survive dismissal, the plaintiff must provide the grounds upon which his claim rests through factual allegations sufficient 'to raise a right to relief above the speculative level.'") Plaintiff's allegations here do not raise anything more than vague conclusions and speculation and do not meet the necessary pleading requirements of *Twombly* and *Iqbal*; therefore, her complaint must be dismissed.

Second, Plaintiff's allegations against TWC merely track the language of the statute without providing plausible facts and such threadbare recitals of a cause of action are prohibited by *Twombly* and *Iqbal*. *See Iqbal* 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *see also Twombly*, 550 U.S. at 557 (noting a pleading that offers "labels and conclusion" or "naked assertion[s]" devoid of "further factual enhancement" does not satisfy Federal Rule of Civil Procedure 8).

Lastly, as to the substance, in order for Plaintiff's claims to succeed, she must be able to establish that TWC engaged in a "venture" with Harvey Weinstein and the other Defendants to violate the sex trafficking statute. Section 1591(e)(5) defines "venture" as "any group of two or more individuals associated in fact," and § 1591(a)(2) defines "venture," in the context of "a venture which has engaged in an act described in violation of paragraph (1)," *i.e.*, sex trafficking. In addition, § 1595 provides a civil remedy against "whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter." 18 U.S.C. § 1595(a).

The "knowledge or reckless disregard[3] of the fact" element of establishing a venture requires at least, in part, that TWC was aware or recklessly disregarded the fact that Harvey Weinstein was engaged in sex trafficking. Since the alleged conduct did not amount to sex trafficking, TWC could not have participated in a sex trafficking venture with Harvey Weinstein or any other Defendant. Rather, Plaintiff alleges, at most, that TWC was aware or recklessly disregarded the fact that Harvey Weinstein had engaged in *unsavory* behavior prior to 2014, and at worst, *sexually predatory* behavior against women, but there is no plausible allegation that TWC was aware or should have known that Harvey Weinstein was engaging in *sex trafficking*, the actual conduct prohibited by the TVPRA. In her own words, Plaintiff claims that TWC was aware (or should have known) that Harvey Weinstein was engaging in "forced" "sexual acts" (Compl. ¶ 39), but she tellingly does not allege that the conduct amounts to *sex trafficking* or even state *how* it amounts to sex trafficking; therefore, Plaintiff cannot prove that TWC engaged in a venture to facilitate sex trafficking. *Cf. Ricchio v. McLean*, 853 F.3d 553, 555 (1st Cir. 2017) (holding that alleged victim adequately alleged that motel owner and operators knowingly benefited from venture with hotel guest who was holding her against her will in that operators knew, or at least recklessly disregarded, that force or threats of force would be used to cause alleged victim to engage in commercial sex act, where *motel operators* ignored alleged victim's plea for help, showed indifference to her obvious physical deterioration, and watched guest grab, kick, and force her back to room when she tried to escape; and where it could have been inferred that the hotel guest was engaging in sex trafficking and it was likewise inferable that the *motel operators* were engaged in a venture with their hotel guest because they received rent from their

[3] In civil cases, reckless disregard has been described as "an extreme version of ordinary negligence." *United States ex rel. K & R Limited Partnership v. Mass. Hous. Fin. Agency*, 530 F.3d 980, 983 (D.C. Cir. 2008).

hotel guest who mistreated the victim but they nonetheless associated with him to serve their business objective). Here, there is not a single allegation that TWC received any benefit from allegedly engaging in this venture.

Moreover, Congress did not intend for the TVPRA to have such an expansive reach to hold an employer liable for an alleged assault by its employee. *See Thompson*, 141 F. Supp. 3d at 199 (noting that Congress did not intend the TVPRA "to apply to . . . [a] parade of hypothetical third parties who may be touched by the statute"). Even in the analogous intentional tort context[4], New York law does not permit imposition of vicarious liability on an employer for alleged assaults committed by its employees, finding such actions are done for personal motives and are beyond the scope of employment. *See, e.g.*, *Benacquista v. Spratt*, 217 F. Supp. 3d 588, 604 (N.D.N.Y. 2016) ("'No decision in New York has been cited to date in which the doctrine of respondeat superior was held to apply to sexual assault'.") (quoting *Doe v. Alsaud*, 12 F. Supp. 3d 674, 677 (S.D.N.Y. 2014)); *Mary KK v. Jack LL*, 203 A.D.2d 840, 841, 611 N.Y.S.2d 347, 348 (3d Dep't 1994) (finding employer not vicariously liable for teacher who molested student during school hours and on school property); *Scott v. Bell Atl. Mobile*, No. 98 Civ. 7245, 2002 WL 550969, at *6 (S.D.N.Y. Apr. 11, 2002) ("Acts of sexual harassment committed for personal motives are not within the scope of an employee's employment."); *Judith M. v. Sisters of Charity Hosp.*, 93 N.Y.2d 932, 933, 693 N.Y.S.2d 67, 715 N.E.2d 95 (1999) (noting sexual abuse is a departure of employee's duties for personal motives unrelated to employer's business); *Wait v. Beck's N. Am, Inc.*, 241 F. Supp. 2d 172, 181 (N.D.N.Y. 2003) (finding employer not vicariously liable when the supervisor's conduct consisted of an alleged

[4] This is an illustrative point, only. Plaintiff could not bring an intentional tort claim for assault or battery in a New York Court given that the alleged conduct occurred in France and even if so, the claims would be time-barred by the one-year statute of limitations for assault and battery claims. *See* N.Y.C.P.L.R. § 215(3).

sexual battery, offensive touching, unwarranted reprimands, and attempts to undermine plaintiff's work even when the alleged acts occurred during business hours). Given this context, TWC cannot be liable for Harvey Weinstein's alleged conduct.

Accordingly, this Court must dismiss Plaintiff's complaint against TWC because she has failed to state a viable claim under the TVPRA. Moreover, she has failed to plead her claim against TWC with sufficient particularity under *Twombly* and *Iqbal*. In short, Plaintiff's attempt to apply the TVPRA in this context is not grounded in the law and defies common sense. As Justice Holmes stated: "[T]here is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen v. Ward*, 279 U.S. 337, 339 (1929). The TVPRA obviously does not mean that any time one person suffers an alleged gender-based assault, he/she may sue for sex trafficking, and may also sue the alleged perpetrator's employer for aiding and abetting that "sex trafficking." Plaintiff has asserted no viable claim against TWC (or any other Defendant) and this Court should dismiss her complaint with prejudice.

CONCLUSION

For each of the foregoing reasons, Defendant The Weinstein Company LLC respectfully requests that the Court grant its Motion To Dismiss Plaintiff's complaint with prejudice as set forth herein, and award such other and further relief as the Court deems just and proper.

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SEYFARTH SHAW LLP

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