

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DEIDRE HALL,	)	CV 13-8905 RSWL (PJWx)
	)	
Plaintiff,	)	<b>ORDER Re: DEFENDANT'S</b>
	)	<b>MOTION TO DISMISS FOR</b>
v.	)	<b>FAILURE TO STATE A CLAIM</b>
	)	[22]
	)	
SOUTH BEACH SKIN CARE,	)	
INC.,	)	
	)	
Defendant.	)	
	)	
_____	)	

20 Currently before the Court is Defendant South Beach  
21 Skin Care, Inc.'s ("Defendant"), Motion to Dismiss for  
22 Failure to State a Claim [22]. Defendant filed its  
23 Motion on February 4, 2014 [22]. Plaintiff Deidre Hall  
24 ("Plaintiff") filed her Opposition on March 4, 2014  
25 [26]. Defendant filed its Reply on March 11, 2014  
26 [28]. Plaintiff's Motion was set for hearing on March  
27 25, 2014 [22]. This matter was taken under submission  
28 on March 19, 2014 [29]. Having reviewed all papers and

1 arguments submitted pertaining to this Motion, **THE**  
2 **COURT NOW RULES AS FOLLOWS:**

3 The Court hereby **DENIES** Defendant's Motion to  
4 Dismiss.

5 **I. BACKGROUND**

6 Plaintiff is an actress who is known for her role  
7 as Dr. Marlena Evans on the NBC daytime soap opera Days  
8 of our Lives. Compl. ¶ 1. Plaintiff has played this  
9 role for over 30 years. Id. Consequently, Plaintiff  
10 has derived considerable commercial value from her  
11 likeness, such as through endorsement deals with  
12 Hallmark and Dexatrim and through her jewelry line.  
13 Id. Plaintiff also has a cosmetic skin care line under  
14 the name of "Deidre Cosmetics." Id.

15 Defendant is a Florida corporation which operates  
16 out of Hollywood, Florida. Id. at ¶ 10. Defendant  
17 operates websites including [www.lifeskin.com](http://www.lifeskin.com), on which  
18 it sells its LifeCell skin product. Id. at ¶ 2.  
19 Defendant has a registered trademark for LIFECELL and  
20 sells products under the LifeCell brand. Id. at ¶ 11.  
21 Since May 2009, Defendant has used Plaintiff's likeness  
22 and name to advertise its skin care products. Id. at ¶  
23 3. For example, there are images of and quotes  
24 attributed to Plaintiff contained throughout  
25 [www.lifecellskin.com](http://www.lifecellskin.com) and on other sites such as  
26 [www.youtube.com](http://www.youtube.com). Id. Plaintiff did not and does not  
27 authorize use of her name and likeness in this manner.  
28 Id.

1 Defendant has taken down some, but not all, of the  
2 images of and quotes attributed to Plaintiff from  
3 Defendant's websites and other marketing materials.  
4 Id. at ¶ 4. Defendant has refused to compensate  
5 Plaintiff. Id.

6 Plaintiff filed her Complaint against Defendant on  
7 December 3, 2013 [1].

## 8 II. LEGAL STANDARD

### 9 A. Motion to Dismiss Pursuant to Rule 12(b)(6)

10 Federal Rule of Civil Procedure 12(b)(6) allows a  
11 party to move for dismissal of one or more claims if  
12 the pleading fails to state a claim upon which relief  
13 can be granted. Dismissal can be based on a lack of  
14 cognizable legal theory or lack of sufficient facts  
15 alleged under a cognizable legal theory. Balistreri v.  
16 Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir.  
17 1990). However, a party is not required to state the  
18 legal basis for its claim, only the facts underlying  
19 it. McCalden v. Cal. Library Ass'n, 955 F.2d 1214,  
20 1223 (9th Cir. 1990). In a Rule 12(b)(6) motion to  
21 dismiss, a court must presume all factual allegations  
22 of the complaint to be true and draw all reasonable  
23 inferences in favor of the non-moving party. Klarfeld  
24 v. United States, 944 F.2d 583, 585 (9th Cir. 1991).  
25 In fact, "[w]hen ruling on a Rule 12(b)(6) motion to  
26 dismiss, if a district court considers evidence outside  
27 the pleadings, it must normally convert the 12(b)(6)  
28 motion into a Rule 56 motion for summary judgment, and

1 it must give the nonmoving party an opportunity to  
2 respond." United States v. Ritchie, 342 F.3d 903, 907  
3 (9th Cir. 2003) (citing Fed. R. Civ. P. 12(b); Parrino  
4 v. FHP, Inc., 146 F.3d 699, 706 n.4 (9th Cir. 1998)).

5 The question presented by a motion to dismiss is  
6 not whether the plaintiff will prevail in the action,  
7 but whether the plaintiff is entitled to offer evidence  
8 in support of its claim. Swierkiewica v. Sorema N.A.,  
9 534 U.S. 506, 511 (2002). "While a complaint attacked  
10 by a Rule 12(b)(6) motion to dismiss does not need  
11 detailed factual allegations, a plaintiff's obligation  
12 to provide the 'grounds' of his 'entitle[ment] to  
13 relief' requires more than labels and conclusions, and  
14 a formulaic recitation of a cause of action's elements  
15 will not do." Bell Atl. Corp. v. Twombly, 550 U.S.  
16 544, 555 (2007) (internal citation omitted). Although  
17 specific facts are not necessary if the complaint gives  
18 the defendant fair notice of the claim and the grounds  
19 upon which the claim rests, a complaint must  
20 nevertheless "contain sufficient factual matter,  
21 accepted as true, to state a claim to relief that is  
22 plausible on its face." Ashcroft v. Iqbal, 556 U.S.  
23 662, 678 (2009) (internal quotation marks omitted).

24 If dismissed, a court must then decide whether to  
25 grant leave to amend. The Ninth Circuit has repeatedly  
26 held that a district court should grant leave to amend  
27 even if no request to amend the pleadings was made,  
28 unless it determines that the pleading could not

1 possibly be cured by the allegation of other facts.  
2 Lopez v. Smith, 203 F.3d 1122, 1130 (9th Cir. 2000).

### 3 III. ANALYSIS

#### 4 A. Whether to Treat the Motion as a Motion for Summary 5 Judgment

6 As a preliminary matter, it appears that both  
7 Parties fundamentally misunderstand the nature and  
8 purpose of a Rule 12(b)(6) motion to dismiss.

9 The question presented by a motion to dismiss is  
10 not whether the plaintiff will ultimately prevail in  
11 the action, but whether the plaintiff is entitled to  
12 offer evidence in support of its claim. Swierkiewica  
13 v. Sorema N.A., 534 U.S. at 511. "When evaluating a  
14 Rule 12(b)(6) motion, the district court must accept  
15 all material allegations in the complaint as true, and  
16 construe them in the light most favorable to the non-  
17 moving party." Chubb Custom Ins. Co. v. Space Sys.,  
18 710 F.3d 946, 956 (9th Cir. 2013) (citing Moyo v.  
19 Gomez, 32 F.3d 1382, 1384 (9th Cir. 1994)). In keeping  
20 with that instruction, with few exceptions, "a district  
21 court may not consider any material beyond the  
22 pleadings" when ruling on a Rule 12(b)(6) motion. Lee  
23 v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir.  
24 2001) (quoting Branch v. Tunnell, 14 F.3d 449, 453 (9th  
25 Cir. 1994)). "[I]f a district court considers evidence  
26 outside the pleadings, it must normally convert the  
27 12(b)(6) motion into a Rule 56 motion for summary  
28 judgment, and it must give the nonmoving party an

1 opportunity to respond." Richie, 342 F.3d at 907.

2 Here, Defendant discusses throughout its Motion,  
3 and without any reference to the operative Complaint,  
4 Plaintiff's supposed visit to the gifting suite at the  
5 2009 Sundance Film Festival. See e.g., Mot. 1:5-7.  
6 Defendant further offers affidavits and accompanying  
7 exhibits describing Plaintiff's visit to the gifting  
8 suite. See e.g., Suarez Decl. ¶¶ 3-11; Dkt. #22-3.  
9 Defendant apparently presents this evidence to show  
10 Plaintiff consented to Defendant's use of her likeness.

11 Bafflingly, Plaintiff plays along. Not only does  
12 Plaintiff appear to accept Defendant's premise that the  
13 relevant photograph Defendant allegedly wrongfully used  
14 was taken in a gifting suite at the 2009 Sundance Film  
15 Festival (see Opp'n 4:14-26), but she goes on to  
16 present evidence of her own to rebut Defendant's  
17 arguments (see Illouliau Decl. ¶ 3, Ex. A).

18 Nevertheless, the Court declines the Parties'  
19 apparent invitation to convert the instant Motion into  
20 one for summary judgment. Although Plaintiff has taken  
21 an opportunity to present evidence (see Illouliau Decl.  
22 ¶ 3, Ex. A), such evidence arguably could be considered  
23 under the incorporation by reference doctrine because  
24 Plaintiff's claim depends on the contents of  
25 Defendant's advertisements. See Knievel v. ESPN, 393  
26 F.3d 1068, 1076 (9th Cir. 2005) (considering copies of  
27 web pages attached to a defendant's motion to dismiss  
28 when the court found that the plaintiff's defamation

1 claim necessarily depended upon the contents of those  
2 web pages). In other words, while Defendant has  
3 ignored the standard for a motion to dismiss, Plaintiff  
4 arguably has not. In this respect, Plaintiff, as the  
5 nonmoving party, has not been afforded any real  
6 opportunity to respond to Defendant's *de facto* summary  
7 judgment motion. For this reason, the Court does not  
8 convert the instant Motion to a motion for summary  
9 judgment.

10 **B. Defendant's Arguments Regarding Plaintiff's Consent**  
11 **or Actual Endorsement**

12 Defendant argues that Plaintiff cannot plausibly  
13 allege claims for false endorsement or misappropriation  
14 of her right of publicity because Plaintiff consented  
15 to Defendant's use of her likeness and because  
16 Plaintiff actually endorsed Defendant's product. Mot.  
17 4:9-5:2; Reply 2:25-3:7, 4:10-20. The facts relied  
18 upon by Defendant in making these arguments, however,  
19 are nowhere contained in the operative Complaint. In  
20 fact, Plaintiff's Complaint explicitly states that  
21 "[Plaintiff] did not and does not authorize use of her  
22 name and likeness." Compl. ¶ 3.

23 The determinative issue in a false endorsement  
24 claim is whether the defendant's use of the plaintiff's  
25 likeness has a likelihood of confusing customers into  
26 believing that the plaintiff has endorsed a product.  
27 Cairns v. Franklin Mint Co., 292 F.3d 1139, 1149-50  
28 (9th Cir. 2002) (citing Dr. Seuss Enters., L.P. v.

1 Penguin Books USA, Inc., 109 F.3d 1394, 1403 (9th Cir.  
2 1997)). Likelihood of confusion, in turn, is a factual  
3 determination. Fortune Dynamic, Inc. v. Victoria's  
4 Secret Stores Brand Mgmt., 618 F.3d 1025, 1031 (9th  
5 Cir. 2010) (quoting Thane Int'l v. Trek Bicycle Corp.,  
6 305 F.3d 894, 901 (9th Cir. 2002)); Downing v.  
7 Abercrombie & Fitch, 265 F.3d 994, 1008 (9th Cir.  
8 2001). In other words, without considering evidence,  
9 the Court cannot find that there is no likelihood of  
10 confusion under the facts alleged, particularly when  
11 Plaintiff has alleged that such confusion is occurring  
12 (see Compl. ¶ 13).

13 Similarly, whether an individual consented to the  
14 use of her likeness is a question of fact for claims  
15 brought under California Civil Code § 3344. See Cal.  
16 Civ. Code § 3344(e) ("it shall be a question of fact  
17 whether or not the use of a person's name, voice,  
18 signature, photograph, or likeness was so directly  
19 connected with the commercial sponsorship or with the  
20 paid advertising as to constitute a use for which  
21 consent is required"); see also Newton v. Thomason, 22  
22 F.3d 1455, 1460-61 (9th Cir. 1994) (considering the  
23 evidence in concluding that the plaintiff consented to  
24 defendant's use of his name); Fraley v. Facebook, Inc.,  
25 830 F. Supp. 2d 785, 805-806 (N.D. Cal. 2011)  
26 (declining to dismiss plaintiffs' claim under Cal. Civ.  
27 Code § 3344 because the issue of whether plaintiffs  
28 consented to defendant's use of their names, images,



1 and likenesses was "a disputed question of fact" and  
2 therefore "not proper grounds for dismissal").

3 Defendant's arguments, in other words, would  
4 require this Court to consider evidence - evidence the  
5 Court cannot consider on a motion to dismiss.

6 As this is Defendant's sole argument with respect  
7 to Plaintiff's false endorsement claim, the Court  
8 **DENIES** Defendant's Motion with respect to that claim.  
9 To the extent Defendant intends to offer evidence with  
10 respect to Plaintiff's alleged consent or endorsement,  
11 such evidence is more properly presented on a motion  
12 for summary judgment.

13 **C. Defendant's Statute of Limitations Arguments with**  
14 **Respect to Plaintiff's Statutory Publicity Rights**  
15 **Claim**

16 Defendant also argues that Plaintiff's claim for  
17 misappropriation of right of publicity pursuant to  
18 California Civil Code § 3344 is time-barred. Mot.  
19 6:15-16; 8:12-18. Plaintiff argues that the single  
20 publication rule does not apply in the instant case  
21 because Defendant continued to alter Plaintiff's image  
22 and attribute quotes to her up through its most recent  
23 publication of Plaintiff's image. Opp'n 7:11-18.

24 Plaintiff's California statutory claim for  
25 misappropriation of her right of publicity is subject  
26 to a two year statute of limitations. Yeager v.  
27 Bowlin, 693 F.3d 1076, 1081 (9th Cir. 2012) (citing  
28 Christoff v. Nestle USA, Inc., 47 Cal. 4th 468 (2009));

1 Cusano v. Klein, 264 F.3d 936, 950 (9th Cir. 2001);  
2 Cal. Code Civ. Proc. § 339. In California, the single  
3 publication rule "limits tort claims premised on mass  
4 communications to a single cause of action that accrues  
5 upon the first publication of the communication."  
6 Roberts v. McAfee, Inc., 660 F.3d 1156, 1166 (9th Cir.  
7 2011) (quoting Christoff, 47 Cal. 4th at 479); Cal.  
8 Civ. Code § 3425.3. The single publication rule  
9 applies to statements published on internet websites.  
10 Id. at 1167.

11 The Court finds Estate of Fuller v. Maxfield &  
12 Oberton Holdings, LLC, 906 F. Supp. 2d 997 (N.D. Cal.  
13 2012) instructive. In that case, the plaintiff brought  
14 suit against a defendant for, *inter alia*,  
15 misappropriation of the name and likeness of  
16 Buckminster Fuller. Estate of Fuller, 906 F. Supp. 2d  
17 at 1002-03. In discussing plaintiff's California  
18 misappropriation of name and likeness claim, the court  
19 adopted the test elaborated by Justice Werdegar in  
20 Christoff in determining whether a continuous use  
21 constituted a single publication. Id. at 1009.  
22 Specifically, the court focused on whether the later  
23 uses of the plaintiff's name or likeness were  
24 "predetermined by a single initial decision or whether  
25 defendant . . . made at any relevant time a conscious,  
26 deliberate choice to continue, renew or expand" those  
27 uses. Id. (quoting Christoff, 47 Cal. 4th at 486  
28 (Werdegar, J., concurring)); see also Alberghetti v.

1 Corbis Corp., 713 F. Supp. 2d 971, 979-80 (C.D. Cal.  
2 2010) (adopting Justice Werdegar's test in determining  
3 application of the single publication rule) aff'd in  
4 part, rev'd in part 476 F. App'x 154 (9th Cir. 2012).  
5 Reasoning that the question of the defendant's decision  
6 making process could not be resolved without evidence,  
7 the court denied the defendant's motion to dismiss.  
8 Id.

9 In this case, Plaintiff has alleged that Defendant  
10 used her likeness without authorization since May 2009.  
11 Compl. ¶ 3. Furthermore, Plaintiff has alleged that  
12 "Defendant has consistently altered and edited the  
13 advertisements using [Plaintiff's] image multiple times  
14 per year from 2009 through 2013." Id. at ¶ 22. At  
15 least some of Defendant's actions could have occurred  
16 within the two year limitations period.<sup>1</sup> If such  
17 republications were made as part of a conscious or  
18 deliberate choice to continue, renew, or expand  
19 Defendant's alleged misuse of Plaintiff's likeness, the  
20 single publication rule would not apply. Consequently,  
21 without evidence of Defendant's decision making  
22 process, this Court does not dismiss Plaintiff's claim.

#### 23 IV. CONCLUSION

24 Because Defendant strays beyond the pleadings in  
25

---

26 <sup>1</sup> In fact, Plaintiff proffers examples of  
27 Defendant's alleged misappropriation occurring as late  
28 as 2013. Iloulian Decl., Ex. A. The Court declines to  
consider such evidence on the instant Motion to  
Dismiss.

1 attacking Plaintiff's claims and because evidence is  
2 necessary to determine whether the single publication  
3 rule applies to Plaintiff's misappropriation of right  
4 of publicity claim, this Court **DENIES** Defendant's  
5 Motion to Dismiss [22].

6

7 **IT IS SO ORDERED.**

8 DATED: April 2, 2014

9

10 RONALD S.W. LEW

11 

---

**HONORABLE RONALD S.W. LEW**  
12 Senior U.S. District Judge

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28