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 BRAVE NEW FILMS 501(c)(4)

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13 UNITED STATES DISTRICT COURT  
 14 NORTHERN DISTRICT OF CALIFORNIA  
 15 SAN FRANCISCO DIVISION

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17 BRAVE NEW FILMS 501(C)(4),  
 18 Plaintiff,  
 19 v.  
 20 MICHAEL WEINER aka MICHAEL SAVAGE,  
 and ORIGINAL TALK RADIO NETWORK,  
 21 INC.,  
 22 Defendants.

No. CV 08-04703 SI

**[PROPOSED] ORDER DENYING  
 DEFENDANT MICHAEL WEINER  
 AKA MICHAEL SAVAGE'S  
 MOTION TO DISMISS**

Date: April 3, 2009  
 Time: 9:00 a.m.  
 Place: Courtroom 10  
 Judge: Honorable Susan Illston

23 Defendant Michael Weiner aka Michael Savage's Motion To Dismiss came on regularly  
 24 for hearing on April 3, 2009 before the Honorable Susan Illston. All parties received notice and  
 25 were represented by counsel. The Court, having considered all papers filed in connection with  
 26 this Motion To Dismiss, and the arguments of counsel, and FOR GOOD CAUSE SHOWN,  
 27 hereby DENIES Defendant Michael Weiner aka Michael Savage's motion.

28

CV 08-04703 SI

[PROPOSED] ORDER DENYING DEFENDANT'S MOTION TO DISMISS

1 Defendant's Motion To Dismiss should be denied for the following reasons:

2 1. The Court hereby takes judicial notice of the items requested by Plaintiff  
3 Brave New Films. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th  
4 Cir. 2006).

5 2. California law is controlling over the issues regarding agency. *See*  
6 *C.A.R. Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 479 (9th Cir. 2000) (citing  
7 *Mallott & Peterson v. Director, Office of Workers' Comp. Programs*, 98 F.3d 1170, 1173 n.2.  
8 (9th Cir. 1996) for the proposition that generally, an agent's authority derives from state law,  
9 even where the substantive dispute concerns federal law).

10 3. Dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure is  
11 appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to  
12 support a cognizable legal theory. *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097,  
13 1104 (9th Cir. 2008). Brave New Films has properly pleaded (1) a claim for knowing  
14 misrepresentation under 17 U.S.C. § 512(f); and (2) factual allegations sufficient to reasonably  
15 infer an agency relationship between defendants Savage and OTRN. *See* Cal. Civ. Code §  
16 2317. Moreover, the issue of agency is a question of fact. *See C.A.R.*, 213 F.3d at 480  
17 ("existence of an agency and the extent of an agent's authority is a question of fact").  
18 Questions of fact are not suited for determination on a motion to dismiss. *See Rennie &*  
19 *Laughlin, Inc. v. Chrysler Corp.*, 242 F.2d 208, 212 (9th Cir. 1957).

20 Accordingly, Defendant's motion should be DENIED.

21 IT IS SO ORDERED

22 DATED: \_\_\_\_\_  
23  
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25 \_\_\_\_\_  
26 Honorable Susan Illston  
27 United States District Court Judge  
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