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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

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11 Youngevity International, et al.,
12 Plaintiffs,
13 v.
14 Todd Smith, et al.,
15 Defendants.

Case No.: 16-CV-704-BTM-JLB

**ORDER DENYING PLAINTIFFS'
AND DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT AS
TO PLAINTIFFS' SEVENTH
CAUSE OF ACTION [ECF Nos.
308, 324]**

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17 Presently before the Court are Plaintiffs' and Defendants' motions for
18 summary judgment as to Plaintiffs' seventh cause of action for misappropriation
19 of likeness. (ECF Nos. 308 ("Defs.' MSJ VII"), 324 (Pls.' MSJ VII").) For the
20 reasons discussed below, the Court denies both motions.

21 **I. STANDARD**

22 Summary judgment is appropriate under Rule 56 of the Federal Rules of
23 Civil Procedure if the moving party demonstrates the absence of a genuine issue
24 of material fact and entitlement to judgment as a matter of law. *Celotex Corp. v.*
25 *Catrett*, 477 U.S. 317, 322 (1986). A fact is material when, under the governing
26 substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby,*
27 *Inc.*, 477 U.S. 242, 248 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir.
28

1 1997). A dispute as to a material fact is genuine if there is sufficient evidence for
2 a reasonable jury to return a verdict for the nonmoving party. *Anderson*, 477 U.S.
3 at 323.

4 On cross motions for summary judgment, a court “evaluate[s] each motion
5 separately, giving the nonmoving party in each instance the benefit of all
6 reasonable inferences.” *ACLU v. City of Las Vegas*, 466 F.3d 784, 790–91 (9th
7 Cir. 2006) (internal citations omitted). The burdens faced by the opposing parties
8 vary with the burden of proof they will face at trial. When the moving party bears
9 the burden of proof at trial, “his showing must be sufficient for the court to hold
10 that no reasonable trier of fact could find other than for the moving party.” *Indep.*
11 *Cellular Tel., Inc. v. Daniels & Assocs.*, 863 F. Supp. 1009, 1113 (N.D. Cal. 1994)
12 (quoting Schwarzer, *Summary Judgment Under the Federal Rules: Defining*
13 *Genuine Issues of Material Fact*, 99 F.R.D. 465, 487–488 (1984)). By contrast,
14 when the moving party does not bear the burden of proof at trial, “the [moving
15 party] need only point to the insufficiency of the [nonmoving party’s] evidence to
16 shift the burden to the [nonmoving party] to raise genuine issues of fact as to each
17 claim by substantial evidence. *Id.* If the nonmoving party then fails to raise a
18 genuine issue of fact, the court should grant summary judgment in favor of the
19 moving party. *Id.*

20 The court must view all inferences drawn from the underlying facts in the
21 light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v.*
22 *Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). “Credibility determinations, the
23 weighing of evidence, and the drawing of legitimate inferences from the facts are
24 jury functions, not those of a judge, [when] he [or she] is ruling on a motion for
25 summary judgment.” *Anderson*, 477 U.S. at 255.

26 **II. DISCUSSION**

27 Plaintiffs bring a claim against Defendants Total Nutrition Team (“TNT”)
28 and Blake Graham for misappropriation of likeness in violation of California Civil

1 Code section 3344. Plaintiffs seek both monetary damages and a permanent
2 injunction prohibiting Defendants Graham and TNT from making any further
3 commercial use of Dr. Joel Wallach's name and likeness. On December 1, 2016,
4 Judge Lorenz granted Plaintiffs a preliminary injunction prohibiting Defendants
5 from making further commercial use of Defendants' assets which include the
6 number 1-800-WALLACH and websites www.myyoungevity.com and
7 www.wallachonline.com, or a sale of the assets that is noncompliant with the
8 guidance provided by the Court in its December 9, 2016 order. (ECF Nos. 58,
9 63.) The injunction, however, is narrower than Plaintiffs' claim as it also includes
10 alleged uses of Dr. Wallach's likeness on yteamtools.com, signage outside the
11 TNT office, and in a post-card that was distributed to consumers.

12 There is no dispute that Defendants had Plaintiffs' consent to use Dr.
13 Wallach's and Youngevity's likeness throughout their business relationship.
14 However, Plaintiffs revoked their consent on March 21, 2016 when Plaintiffs
15 terminated their business relationship and demanded cessation of Defendants'
16 use of Plaintiffs' likeness. (Pls.' MSJ VII, Ex. B, 72-74.) Defendants continued
17 to use Dr. Wallach's likeness until the Court issued the preliminary injunction in
18 December 2016. (Pls.' MSJ VII, Ex. D, 109:1-110:1.)

19 To succeed on a claim for misappropriation of likeness, a plaintiff must
20 prove: "(1) the defendant's use of the plaintiff's identity; (2) the appropriation of
21 plaintiff's name or likeness to defendant's advantage, commercially or otherwise;
22 (3) lack of consent; and (4) resulting injury." *Laws v. Sony Music Entm't, Inc.*,
23 448 F.3d 1134, 1138 (9th Cir. 2006); Cal Civ. Code § 3344. Additionally, a
24 plaintiff must prove a knowing use by the defendant as well as a direct
25 connection between the alleged use and the commercial purpose. *Downing v.*
26 *Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001).

27 **A. Defendants' MSJ**

28 Defendants move for summary judgment as to Plaintiffs' seventh cause of

1 action arguing that Plaintiffs' claim fails as a matter of law.

2 **1. Single Publication Rule**

3 First, Defendants renew their argument that Plaintiffs' claim is barred by
4 California's single publication rule as codified in Civil Code section 3425.3¹. "The
5 single-publication rule limits tort claims premised on mass communications to a
6 single cause of action that accrues upon the first publication of the
7 communication, thereby sparing the courts from litigation of stale claims when an
8 offending book or magazine is resold years later." *Yeager v. Bowlin*, 693 F.3d
9 1076, 1080–81 (9th Cir. 2012). Within the context of websites, the Ninth Circuit
10 has held that "once a defendant publishes a statement on a website, the
11 defendant does not republish the statement by simply continuing to host the
12 website." *Id.* at 1082. "[A] statement on a website is not republished unless the
13 statement itself is substantively altered or added to, or the website is directed to
14 a new audience." *Id.*

15 Defendants first raised this argument before Judge Lorenz in their
16 opposition to Plaintiffs' motion for a preliminary injunction. (ECF No. 51, 16.)
17 Judge Lorenz found the argument unpersuasive because "Defendants' position
18 would require a plaintiff to bring a claim before having a legal basis to do so."
19 (ECF No. 58, 4.) The Court agrees with Judge Lorenz's conclusion, as the cause
20 of action did not accrue until March 21, 2016 when Plaintiffs revoked their
21 consent to Defendants' use of Dr. Wallach's likeness. See *Howard Jarvis*
22 *Taxpayers Ass'n v. City of La Habra*, 25 Cal. 4th 809, 815 (2001) ("[A] cause of
23 action accrues upon the occurrence of the last element essential to the cause of
24 action." (internal citations omitted)). Therefore, the Court also rejects

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27 ¹ California Civil Code section 3425.3 states: "No person shall have more than one cause of action for damages
28 for . . . invasion of privacy . . . founded upon any single publication or exhibition or utterance, such as one issue of
a newspaper or book or magazine or any one presentation to an audience or any one broadcast over radio or
television or any one exhibition of a motion picture. Recovery in any action shall include damages for any such
tort suffered by the plaintiff in all jurisdictions."

1 Defendants' argument and finds that Plaintiffs have satisfied their obligation in
2 demonstrating lack of consent.

3 **2. Misappropriation of the 1-800 Number**

4 Second, Defendants argue that Plaintiffs cannot claim misappropriation of
5 likeness arising from Defendants' use of the "1-800-925-5524" number because
6 they have ceased referring to the number as "1-800-WALLACH," and only
7 advertise the number by its digits. Defendants have not cited to any case holding
8 that a plaintiff cannot premise his/her claim of misappropriation on the alleged
9 use of a business telephone number. The Court's independent research has
10 also not revealed such a case. Instead, Defendants rely on *Los Defensores, Inc.*
11 *v. Gomez*, 223 Cal. App. 4th 377, 396 (2014), to argue that Plaintiffs cannot
12 claim that the use of the number misappropriates Dr. Wallach's likeness because
13 they have failed to set forth evidence of "secondary meaning."

14 In *Los Defensores*, the respondent brought a claim against appellants
15 under the common law for unfair competition for their use of telephone numbers
16 that closely resembled respondent's toll-free number. *Id.* at 383. The court
17 concluded that claims of unfair competition may be founded on the use of
18 business telephone numbers, provided that facts sufficient to establish unfair
19 competition are present. *Id.* at 395. Unfair competition most commonly involves
20 the existence of a secondary meaning, which the court defined as a "mental
21 association in the buyer's mind between the mark used in connection with the
22 product in a single source of origin—and a deceptive scheme that exploits that
23 secondary meaning." *Id.* at 396 (internal citations omitted). The Court noted that
24 the respondent's claim was not premised on its ownership or control of the phone
25 number, but rather on its attempt to prevent deceptive conduct aimed at
26 consumers by exploiting a numerical number after it had acquired a "secondary
27 meaning." *Id.* at 397. The court reasoned that "[t]he gist of such an action is not
28 the appropriation and use of another's trademark, but the fraudulent injury to and

1 appropriation of another’s trade.” *Id.*

2 The Court finds the case instructive. Though Plaintiffs’ claim here is one
3 for misappropriation of likeness, and not unfair competition, the aim is similar—
4 “to prevent others from misappropriating the economic value generated . . .
5 through merchandising of the ‘name, voice, signature, photograph, or likeness of
6 the [publicity holder].” *Timed Out, LLC v. Youbian, Inc.*, 229 Cal. App. 4th 1001,
7 1006 (2014). After all, Defendants originally developed these tools to take
8 advantage of Dr. Wallach’s goodwill while promoting the sale of Youngevity’s
9 products. Plaintiffs have submitted sufficient evidence to at least create a
10 genuine issue of material fact as to whether the 1-800 number has acquired a
11 secondary meaning that is synonymous and inexplicably intertwined with Dr.
12 Wallach’s name and likeness. Notably, Defendants have used the 1-800 number
13 for about seventeen years, building on the goodwill of TNT within the Youngevity
14 network of distributors. (Defs.’ MSJ VII, Ex. A, ¶¶ 8–20.) Thus, Plaintiffs’ claim
15 as to the 1-800 number does not fail as a matter of law.

16 **3. Damages**

17 Lastly, Defendants argue that Plaintiffs’ claim fails as a matter of law
18 because they cannot demonstrate any injury resulting from the alleged
19 misappropriation of Dr. Wallach’s name and likeness.

20 California Civil Code § 3344 provides that a party in violation of the statute
21 “shall be liable to the injured party or parties in an amount equal to the greater of
22 [\$750] or the actual damages suffered by him or her as a result of the
23 unauthorized use,” and shall disgorge “any profits from the unauthorized use that
24 are attributable to the use and are not taken into account in computing the actual
25 damages.”

26 At a minimum, Plaintiffs have demonstrated that Dr. Wallach suffered harm
27 which § 3344(a)’s minimum statutory damages were intended to remedy. See
28 *Miller v. Collectors Universe, Inc.*, 159 Cal. App. 4th 988, 1005 (2008).

1 Dr. Wallach testified that he received hundreds of calls asking whether he had
2 purchased Wakaya. (Pls.' Opp'n to Defs.' MSJ VII, ECF No. 363-2, Ex. B, 50:4-
3 24.) He further states that the association greatly disturbed him because he has
4 dedicated his career to improving public health, and believes that Wakaya's
5 products are very unhealthy and would not want consumers to believe he is
6 endorsing those products. (Pls.' Opp'n to Defs.' MSJ VII, ECF No. 363-1, ¶ 5.)
7 Additionally, Plaintiffs have submitted enough evidence to create a genuine issue
8 of material fact as to whether Plaintiffs have suffered commercial loss. Plaintiffs
9 cite to Mr. Brian Bergmark's damages report. (See ECF No. 340-2, Ex. JJ.)
10 Though Mr. Berkmark does not specifically address Plaintiffs' misappropriation of
11 likeness claim, the report still reveals that Youngevity failed to meet its projected
12 revenue goals precisely during the time in which Defendants continued to make
13 use of Dr. Wallach's likeness. At this stage, viewing the facts in the light most
14 favorable to Plaintiffs, the Court cannot find as a matter of law that Plaintiffs could
15 not prove actual damages.

16 Accordingly, Defendants' motion for summary judgment is denied.

17 **B. Plaintiffs' MSJ**

18 Plaintiffs also move for summary judgment on this claim seeking to
19 permanently enjoin TNT from using Dr. Wallach's name or likeness in commerce
20 and for damages resulting from the misappropriation. Plaintiffs argue that they
21 have provided enough evidence as to each element that no reasonable juror
22 would find for Defendants.

23 **1. Use of Dr. Wallach's Name or Likeness**

24 As to the first element, Plaintiffs argue that up until December 2016,
25 Defendants were making commercial use of Dr. Wallach's name on
26 wallachonline.com, yteamtools.com, myyoungevity.com, on signage outside the
27 TNT office building, in a post-card, and through the phone number 1-800-
28 WALLACH. (Pls.' MSJ VII, Ex. B, F, H, 351). However, there are genuine issues

1 of fact that exist as to these alleged uses. As noted above, there is a dispute as
2 to whether the 1-800-925-5224 number, without any reference to Dr. Wallach's
3 name, has acquired "secondary meaning" so as to constitute a "use" of his name
4 or likeness. Thus, at least as to the 1-800 number, the court cannot conclude as
5 a matter of law that a jury would not find for Defendants.

6 **2. Lack of Consent**

7 With regard to whether Defendants lacked consent to use Dr. Wallach's
8 likeness, as already discussed by the Court, Defendants' argument that the
9 single publication rule bars this claim is unpersuasive. Defendants' flawed
10 argument would permit them to perpetually use Dr. Wallach's name and likeness
11 even though Plaintiffs have unequivocally revoked their consent. The undisputed
12 facts show that as of March 21, 2016, Defendants lacked consent to use Dr.
13 Wallach's name or likeness. (Pls.' MSJ VII, Ex. B, 72–74.) Nevertheless, there
14 is a genuine issue of fact at least as to the post-cards. Particularly because it is
15 unclear when Defendants published those postcards. Defendants argue that
16 those postcards were created during a time when they had consent to use Dr.
17 Wallach's likeness. (Def.s' MSJ VII, Ex. A, ¶ 41.) Plaintiffs argue that
18 Defendants distributed the post-card in late March, but do not specify whether
19 this was before or after they revoked their consent. Therefore, genuine issues of
20 fact exist as to whether Defendants lacked consent to use Dr. Wallach's likeness
21 on the post-cards.

22 **3. Damages**

23 As discussed above, Defendants challenge Plaintiffs' proof of commercial
24 damages. Plaintiffs rely on Mr. Bergmark's report to argue that because
25 Youngevity failed to meet its projected revenue during the time in which
26 Defendants misappropriated Dr. Wallach's name or likeness, they have met their
27 burden to prove commercial damages. However, at this stage, the Court must
28 view the facts in the light most favorable to Defendants. Therefore, based on Mr.

1 Bergmark's report, the Court cannot find that no reasonable juror would find for
2 Defendants.

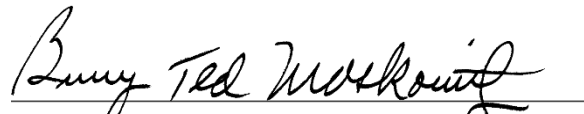
3 Therefore, given the numerous genuine issues of fact, the Court denies
4 Plaintiffs' motion for summary judgment, as these issues should be left to a jury.

5 **III. CONCLUSION**

6 For the reasons discussed above, the Court denies both Defendants'
7 motion for summary judgment (ECF No. 308) and Plaintiffs' motion for summary
8 judgment (ECF No. 324).

9 **IT IS SO ORDERED.**

10 Dated: 10/10/2018

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12 Barry Ted Moskowitz, Chief Judge
13 United States District Court
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