

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 18-2544-GW(JPRx)	Date	March 26, 2019
Title	<i>Janice Dickinson v. Ryan Seacrest Enterprises, Inc., et al.</i>		

Present: The Honorable GEORGE H. WU, UNITED STATES DISTRICT JUDGE

Javier Gonzalez	None Present	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
None Present	None Present

**PROCEEDINGS: IN CHAMBERS - FINAL RULING ON DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT**

Attached hereto is the Court's Final Ruling. The first three federal causes of action contained in the Third Amended Complaint under 15 U.S.C. §§ 1125(a)(1)(A), 1125(a)(1)(B) and 1125(c) are dismissed without leave to amend; and the Court declines to exercise supplemental jurisdiction over the remaining state claims (causes of action four through ten) and dismisses them without prejudice.

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Initials of Preparer JG

***Dickinson v. Ryan Seacrest Enterprises, Inc.***; Case No. 2:18-cv-02544-GW-(JPRx)

Final Ruling on Defendants' Notice of Motion and Motion to Dismiss Plaintiff's Second/Third Amended Complaint

**I. Background**

**A. Factual Background**

Plaintiff Janice Dickinson ("Dickinson" or "Plaintiff") sues Ryan Seacrest Enterprises Inc.; Truly Original, LLC; Sun Productions, LLC; Tess Cannon; NBC Universal Media, LLC; Erik Rosette ("Rosette") aka Erik Rosete aka Mister Triple X; Ryan Seacrest Productions, LLC; Suns Productions LLC; and Does 3-20 (collectively, "Defendants")<sup>1</sup> for: (1) false endorsement in violation of 15 U.S.C. § 1125(a)(1)(A); (2) false advertising in violation of 15 U.S.C. § 1125(a)(1)(B); (3) dilution in violation of 15 U.S.C. § 1125(c); (4) violation of California Business & Professions Code §§ 17200 (the "UCL"), *et seq.*; (5) Defamation; (6) False Light (7) Invasion of Privacy; (8) Fraud; (9) Unjust Enrichment; and (10) Reasonable Value of Services. *See generally* Third Amended Complaint ("TAC"), Docket No. 70. The first three causes of action are brought pursuant to federal trademark/Lanham Act law and the remaining claims under state law.

The TAC alleges the following:

*1. Plaintiff's Background*

Plaintiff is a "famous" and "indeed legendary [] supermodel," a "fashion and popular culture icon" and a "well-recognized television and media personality." *See* TAC ¶ 13. In the past, Plaintiff has designated representatives to enter into agreements to authorize the use of her "appearance and celebrity," including in television. *See id.* ¶ 23. Plaintiff has been a producer, judge, contestant, and/or guest star in the following reality television series: *America's Next Top Model*, *The Janice Dickinson Agency*, *I'm a Celebrity . . . Get Me Out of Here!*, *Celebrity Rehab with Dr. Drew*, and *Celebrity Big Brother*. *See id.* ¶ 24. Plaintiff attends charity runway shows and photoshoots without a fee for the dual purpose of serving charity and "maintaining and building goodwill in her mark and brand." *See id.* ¶ 25. Plaintiff does not appear on reality television shows pro bono. *See id.*

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<sup>1</sup> On July 9, 2018, Plaintiff filed a notice of voluntary dismissal without prejudice as to Ryan Seacrest Enterprises, Inc. and Sun Productions, LLC. *See* Plaintiff Janice Dickinson's Notice of Voluntary Dismissal Without Prejudice of Defendants Ryan Seacrest Enterprises, Inc. and Sun Productions, LLC, Docket No. 33.

*2. Plaintiff's Work for Rosette at Los Angeles Fashion Week*

Plaintiff has known Rosette for many years. *See id.* ¶ 26. Rosette is a designer and the founder of Art Hearts Fashion, a “charitable organization that produces runway shows during New York Fashion Week, Los Angeles Fashion Week, and other fashion events. *See id.* Plaintiff appeared as a runway model pro bono during Los Angeles Fashion Week for Rosette each year between 2010 and 2016. *See id.* ¶ 27. Rosette knew that Plaintiff would not appear pro bono as a runway model if Rosette were planning to exploit Plaintiff’s “celebrity” without her consent to facilitate a reality television show. *See id.*

In Fall 2016, Plaintiff agreed to appear in Rosette’s runway show under his “Mister Triple X” label,” with the show scheduled for October 2016 during Los Angeles Fashion Week. *See id.* ¶ 28. Plaintiff understood that her appearance would go toward supporting the Mister Triple X label and young emerging artists and designers within the Art Hearts Fashion organization, not to promoting, marketing, or advertising a reality television series. *See id.* ¶ 29. Plaintiff did not and would not have agreed to appear in the show in a way that would be harmful to her celebrity and her brand. *See id.* Plaintiff is informed and believes that Rosette, without her knowledge, contracted with or otherwise agreed and arranged with one or more Defendants to exploit Plaintiff’s appearance on an episode of the Shags of Sunset Series (“Series”). *See id.* ¶ 30. If Plaintiff had known about these arrangements she would not have appeared pro bono, or necessarily at all. *See id.* ¶ 31. Plaintiff would not have agreed to participate in a narrative in the Series that would have a negative impact on her celebrity brand. *See id.* ¶ 33.

Plaintiff alleges that Rosette, along with one or more agents for Seacrest Productions, Truly Cannon, and/or Suns Productions agreed and conspired to script an episode of the Series (“the Episode”) to include a false controversy in which they would make it appear that Plaintiff intentionally stole or bullied her way into wearing an outfit that had supposedly been previously selected for Golnesa Gharachedaghi (“Gharachedaghi”), a lead character on the Series. *See id.* ¶ 34. This group scripted the episode so that: (1) Plaintiff’s conduct in “stealing” the outfit would upset Gharachedaghi; (2) Gharachedaghi would falsely act as though she was experiencing “trauma and consternation,” and; (3) Gharachedaghi would “intentionally, maliciously and falsely disparage Plaintiff on camera.” *See id.* This group conspired and scripted the Episode with the intent of keeping the plan and script secret from Plaintiff, which they ultimately did. *See id.* ¶ 35. Defendants have and continue to falsely represent that the Series is a documentary program rather

than a scripted or fictional series, when in fact the Series is largely or entirely scripted. *See id.* ¶ 36. The group did so to market, advertise, and promote the Series by improperly trading off the goodwill, celebrity, and fame of Plaintiff, without paying any fee. *See id.*

Defendants knew that if Plaintiff was aware that the series was scripted to include her, she would have expected a “substantial fee” to participate. *See id.* ¶ 37. Defendants intentionally engaged in conduct to improperly usurp Plaintiff’s good will for their own business purposes with the knowledge that their actions would “effectively destroy or at least seriously damage” Plaintiff’s “own true affirmative goodwill-building narrative achieved by performing services at the event” in a positive and professional manner.” *See id.* By doing so Defendants destroyed Plaintiff’s own marketing and promotion effort. *See id.*

### *3. The Fall 2016 Mister Triple X Show at Los Angeles Fashion Week*

On or around October 11, 2016, Plaintiff participated in the Mister Triple X runway show at the Beverly Hilton during Los Angeles Fashion Week. *See id.* ¶ 41. In the backstage dressing area, a member of the Arts Hearts Fashion staff, with Rosette’s knowledge and approval, directed Plaintiff to a rack of Mister Triple X label clothing. *See id.* ¶ 42. The staff member then offered Plaintiff two choices of outfits from the rack, one of which was a shiny silver romper that the staff member strongly encouraged Plaintiff to choose to effectuate the pre-scripted conspiracy. *See id.* Rosette and the staff member intentionally manipulated Plaintiff into choosing the romper. *See id.*

Prior to the runway show, Rosette arranged and directed Plaintiff to participate in a photoshoot wearing the romper in the backstage area, which was part of the pre-scripted conspiracy kept from Plaintiff. *See id.* ¶ 43. Plaintiff then opened and closed the runway show wearing the romper. *See id.* At no time did Plaintiff sign any contract or release for her appearance on the Series or in the Mister Triple X runway show. *See id.* ¶ 44. Prior to the airing of the Episode, Plaintiff was unaware that Defendants were producing the Episode during Los Angeles Fashion Week and she was similarly unaware of the pre-scripted conspiracy. *See id.* Defendants contend that they obtained a signature from Plaintiff; and Plaintiff avers that, if they did so, it was by deception such that Plaintiff was unaware that she was signing anything at all, or believed she was signing something other than a release. *See id.* ¶ 45. In the alternative, Defendants or persons acting on their behalf falsely affixed a signature that was not Plaintiff’s and was not authorized by her, around the date of the fashion show. *See id.* Under this version, Defendants falsified Plaintiff’s signature to represent within the corporate hierarchy they had followed the legal

requirements, and requirements of insurers, and corporate policies in obtaining a release from Plaintiff. *See id.* ¶ 47.

#### 4. Plaintiff's Learning of Her Appearance on the Episode

On or around August 2017, Plaintiff learned that her appearance in Fall 2016 at the Mister Triple X runway show was exploited in the Episode, first aired on July 30, 2017 on Bravo TV. *See id.* ¶ 51. The Episode shows Plaintiff walking the runway during the Mister Triple X show, Plaintiff preparing backstage, and Plaintiff posing at the backstage photoshoot wearing the romper. *See id.* ¶ 52. Those scenes were filmed without Plaintiff's knowledge or consent and were intentionally manipulated to feature Plaintiff prominently in the Episode and accompanying promotion, marketing, and advertising to trade off of Plaintiff's fame and good will. *See id.* Those scenes were used to intentionally create a false narrative that Plaintiff "stole" or "jacked" the romper Rosette promised for Gharachedaghi, one of the lead characters in the Series. *See id.* ¶ 53.

In the Episode, Plaintiff wears the romper and Gharachedaghi looks at Plaintiff and tells Rosette "[w]hat's going on with that outfit," to which Rosette replies "[y]ou got jacked." *See id.* ¶ 54. Gharachedaghi then exhibits purported outrage at how Plaintiff stole the romper, when in fact Gharachedaghi was not "supposed to wear" the outfit and Plaintiff did not "take" it. *See id.* The Episode then shows Gharachedaghi reacting to Plaintiff's seemingly selfish conduct that was engineered by Rosette and his staff. *See id.* The intent of the exchange was to portray Plaintiff as an "arrogant, unprofessional and purportedly past-her-prime" celebrity attempting to interfere with Gharachedaghi's fashion show experience. *See id.* ¶ 55.

Defendants' actions "seriously damaged" Plaintiff's reputation with consumers and caused her to lose the "goodwill value of her charity work" for the event. *See id.* Plaintiff's name, image, likeness and reputation were "blatantly" used to promote the Episode and the Series in television and online advertising, as well as in print media leading up to the Episode's release without Plaintiff's approval. All of the promotional materials portrayed her as a "fashion runway 'thief'" who stole Gharachedaghi's outfit, and alleged a false narrative that the storyline was "reality." *See id.* ¶ 61. Defendants' also caused the press to repeat their false narrative about the Episode. *See id.* Members of the public understood and believed the episode to portray the true story of how Plaintiff conducted herself at the charity event. *See id.* ¶ 62. Members of the public decided that they "did not like" or "hated" Plaintiff as a result of viewing the Episode and advertising. *See id.* Public commenters on a Youtube clip of the episode made disparaging comments about Plaintiff

based upon the content of the episode. *See id.*

*5. Plaintiff's Confrontation with Defendants and the Forging of the Release*

After becoming aware of the Episode, Plaintiff and/or her representatives communicated with producers of the Series about how the Episode came to pass. *See id.* ¶ 63. The producers claimed Plaintiff had authorized the above in a written signed release. *See id.* Plaintiff did not sign such a release, and it took weeks for the producers to produce the release. *See id.* ¶¶ 63.

On or around September 6, 2017, Plaintiff received an email from Cannon ("Cannon Email") attaching a document that purports to be a printout of an electronic release signed by Plaintiff on a mobile device ("Purported Release"). *See id.* ¶ 64-65; TAC Ex. A (copy of the Cannon Email and the Purported Release), Docket No. 70-1 at CM/ECF pgs. 2-5. The Purported Release reflects a release between Janice "Dickenson" (spelling incorrect in Purported Release) and Suns Productions, LLC, in which Plaintiff released Suns Productions, NBC Universal, and all their affiliates from a broad range of liability for Plaintiff's appearance in the Series. *See id.*

Subject to the alternative versions regarding Plaintiff's signature on the release, Plaintiff never signed the Purported Release and the signature does not match Plaintiff's signature. *See* TAC ¶ 51. The signature on the Purported Release is different from a sample of Plaintiff's signatures. *See id.*; TAC Ex. B (sample of Plaintiff's signature), Docket No. 70-2 at CM/ECF pg. 2. As such, upon information and belief at least some of Defendants forged Plaintiff's signature on the Purported Release. *See* TAC ¶ 66. Cannon presented the forged release to Plaintiff to defraud her and did so at the direction of or with the encouragement of each of the Defendants. *See id.* ¶ 67. Plaintiff requested the electronic original of the Purported Release to conduct a forensic examination, but Defendants have refused. *See id.* ¶ 68. Defendants have made no denial as to forging the Purported Release. *See id.* ¶ 69.

The Episode at issue continues to be distributed on BravoTV's cable broadcast, through BravoTV.com, through BravoTV's mobile application, and through download or streaming on Amazon Prime Video, Google Play, Hulu, and other platforms. *See id.* at ¶ 70. Plaintiff's appearance in the Episode continues to be used in advertising and promotion as of the writing of the TAC. *See id.*

*6. Defendants' False Statements About the Content of the Series, the Episode and Plaintiff*

Defendants' succeeded in their "fraudulent and unethical scheme" by making false statements to consumers, including explicitly false and/or explicitly misleading statements about

the source, and the content of the Series and the Episode. *See id.* ¶ 71. Defendants have perpetrated a fraud on consumers with their messaging promoting the Series as a true story. *See id.* ¶ 72-73. Defendants do not deny that the series is largely scripted. *See id.* ¶ 72. Large segments of consumers believe that the Series and its episodes are unscripted, true stories. *See id.* ¶ 74. Defendants have put out explicit statements indicating that the show is unscripted for the purpose of giving consumers this false impression. *See id.*

The Series and its episodes are produced by a combination of activities carried out by Cannon, Truly, Suns Productions and Seacrest Productions, as programming for Bravo. *See id.* ¶ 76. Bravo is a television station owned and operated by NBCUniversal, and carried on basic cable. *See id.* NBCUniversal licenses Bravo as a channel to cable television providers, who include it in their packages. *See id.* ¶ 77. NBCUniversal also licenses Bravo video content to online retailers with the right to “sell” episodes to consumers for a fee. *See id.* ¶ 78. Defendants profit from consumers viewing the series through cable programming license fees, advertising revenue and download revenue. *See id.* ¶ 79. All of the monetization models depend, at least in part, on the popularity of the series and its episodes among consumers. *See id.* ¶ 80. Defendants (other than Rosette) have inserted false statements into the stream of commerce claiming that the Series episodes are “true stories” in order to attract viewers. *See id.* ¶ 81.

Defendants have used the following Misstatements about content to perpetuate the fraud that the television series is unscripted, true content:

1. “Docuseries” and “Unscripted” Labels. On or about January 23, 2012 NBCUniversal issued a press release describing the series as a “docu-series.” *See id.* ¶ 83. This is an explicitly false statement. *See id.* ¶ 84. The “docu-series” description influences consumers purchasing decisions. *See id.* ¶ 84. At the point of sale for the series and its episodes, including the Episode at issue in this litigation, the series is touted as “unscripted” because Defendants and NBCUniversal approved and/or encouraged such a description. *See id.* ¶ 89.
2. “True Entertainment” Label. Many episodes of the Series available for download from online video retailers include a credit to a production entity associated with the series, called “True Entertainment.” *See id.* ¶ 90. Featuring this credit on the screen at the end of the programming is intended to make viewers believe that the Series tells “true stories.” This label induces consumers to purchase other episodes of the show

and reinforces the false belief that the Series tells “true stories.” *See id.* at 91.

NBCUniversal actively markets and advertises the Series and its episodes on Bravo TV’s website. *See id.* ¶ 98; TAC Exhibit G (“Exhibit G”), Docket No. 70- 7, CM/ECF pgs. 2-8. The website invites consumers to engage in commercial behavior by encouraging viewers to watch episodes through links on the page that direct them to log into a cable television subscription, or to download the episode for a fee. *See* TAC ¶ 99-100. To encourage viewers to watch episodes of the Series, Bravo TV’s website includes “preview” clips for each episode with a written “teaser” about each clip for the purpose of enticing consumers to watch or buy an episode. *See id.* ¶ 101. Two of the marketing clips for the Episode shown on Bravo TV’s website use Plaintiff’s mark to make false statements about the content of the episode to encourage consumers to commercially engage with the episode. *See id.* ¶ 102; Exhibit G. One of the Bravo TV Website clips advertising the Episode (“Clip 1”) includes this statement: “Did Janice Dickinson Just Steal GG’s Look?! Evidently she took the outfit GG was supposed to wear on the runway, and GG is pissed . . . .” *See id.* at 1,3; TAC ¶ 103. This is an explicit statement that the episode shows Plaintiff “stealing” Gharachedaghi’s “look” by taking the outfit Gharachedaghi was supposed to wear at the fashion show. *See id.* ¶ 103. The episode’s content does not show Plaintiff “stealing” the outfit or having any confrontation with Gharachedaghi. *See id.* Combined with the “pre-established false status of the Series as a docu-series, these statements explicitly mislead viewers to falsely believe that Plaintiff actually “stole” Gharachedaghi’s outfit. *See id.* When Clip 1 is played, it shows Plaintiff walk by Gharachedaghi, and a dialogue between Gharachedaghi and other cast members implying that Plaintiff stole the outfit. *See id.* ¶ 104. In a July 20, 2017 YouTube Piece, the same clip (Clip 1) was featured with an identical “teaser”statement. *See id.* ¶ 113-114. Closed captioning is included so that viewers can read the false statements included in the exchange. *See id.* ¶ 104. Another teaser clip on the Bravo TV website promoting the Episode (“Clip 2”) includes the following text: “Did we mention Janice Dickinson makes an appearance?” *See id.* ¶ 105. Given Plaintiff’s star power, consumers would assume that Plaintiff would only “appear” on the series voluntarily, and that as such, she endorsed the show. *See id.*

During telecasts of the Episode on the Bravo channel, NBCUniversal ran interstitial advertisements during the Episode to tease viewers about upcoming content. *See id.* ¶109. The interstitials suggest Plaintiff bullied Gharachedaghi out of her outfit. *See id.* These interstitials explicitly convey false statements to consumers about the content by implying that if consumers

continue to tune in they will be shown documentary footage of a controversy between Plaintiff and Gharachedaghi. *See id.* One of the interstitials includes a clip where a cast member says “It’s about to go disown” meaning that there is about to be an on screen fight between Gharachedaghi and Plaintiff. *See id.* The episode never shows any confrontation between Plaintiff and Gharachedaghi, because no confrontation ever occurred. *See id.*

Two days before the Episode release on July 20, 2017, Natalie Stone published an article on PeopleTVWatch headlined “Call the Fashion Police: Janice Dickinson just stole Golnesa ‘GG’ Gharachedaghi’s romper!” *See id.* ¶ 106. Discovery will show that Defendants provided a copy of the episode, and/or relevant clips to Stone as well as false statements about the content of the Episode for the purpose of generating “unpaid” media to increase commercial engagement with the episode. *See id.* ¶ 107-108.

### **B. Procedural Background**

Defendants initially filed a motion to dismiss the FAC which only alleged the three federal causes of action under 15 U.S.C. subsections 1125(a)(1)(A), 1125(a)(1)(B) and 1125(c) plus a state unfair competition claim under California Business and Professions Code §§ 17200 et seq. *See* Memorandum of Points and Authorities in Support of Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint (“First MTD”), Docket No. 38.<sup>2</sup> In response, Plaintiff filed an opposition to the MTD. *See* Plaintiff’s Memorandum of Points and Authorities in Opposition to Defendants’ Motion to Dismiss First Amended Complaint (“First Opp’n”), Docket No. 41. Defendants filed a reply. *See* Reply Memorandum of Points and Authorities in Support of

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<sup>2</sup> Defendants also submitted a request for judicial notice. *See* Request for Judicial Notice in Support of Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint (“Defs.’ RJN”), Docket No. 40. Defendants request that the Court take judicial notice of the Episode, the three articles referenced in the FAC, the YouTube page referenced in the FAC, and the press release referenced in the FAC. *See id.*; Declaration of Wook Hwang in Support of Defendants’ Motion to Dismiss (“Hwang Decl.”) Exs. 1-6, Docket No. 39. The Court would find those materials suitable for judicial notice because they are incorporated by reference in the FAC. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 323 (2007) (noting that “courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference . . . .”); *see also Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010) (noting that the Ninth Circuit has “extended the doctrine of incorporation by reference to consider documents in situations where the complaint necessarily relies upon a document or the contents of the document are alleged in a complaint, the document’s authenticity is not in question and there are no disputed issues as to the document’s relevance.”).

On a separate note, Plaintiff lodged objections to evidence submitted along with Defendants’ First MTD. *See generally* Plaintiff’s Evidentiary Objections to Evidence Submitted in Connection with Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint (“Pl.’s Objections”), Docket No. 42. Plaintiff objects to the inclusion of examples of her signature on page 3 footnote 1 of the MTD and other examples of Plaintiff’s signature including Defendants’ link to search results on eBay. *See id.* These samples do not come into play in the below analysis, and thus the Court need not rule on that objection.

Defendants' Motion to Dismiss Plaintiff's First Amended Complaint ("First Reply"), Docket No. 45. The Court entered a Tentative Ruling on the First MTD on October 1, 2018, dismissing all four causes of action without prejudice. *See* Civil Minutes; Defendants Motion to Dismiss Plaintiff's First Amended Complaint, Docket No. 46. The court adopted the Tentative Ruling as its Final Decision on October 3, 2018. *See* In Chambers – Ruling on Defendants' Motion to Dismiss Plaintiff's First Amended Complaint ("First MTD Ruling"), Docket No. 47.

Plaintiff subsequently filed a second amended complaint. *See* Second Amended Complaint ("SAC"), Docket No. 53. Defendants filed a motion to Dismiss the SAC. *See* Defendants' Notice of Motion and Motion to Dismiss Plaintiff's Second Amended Complaint ("MTD"), Docket No. 59. Plaintiff filed an opposition to the MTD. *See* Memorandum in Opposition to Notice of Motion and Motion to Dismiss Case ("Opp'n"), Docket No. 62. Defendant filed a reply in support of the MTD. *See* Reply in Support of Notice of Motion and Motion to Dismiss Case ("Reply"), Docket No. 64. Prior to the hearing on the MTD as to the SAC, the parties stipulated to Plaintiff's filing a third amended complaint with the present ten causes of action. *See* Third Amended Complaint ("TAC"), Docket No. 70. Defendants filed a stipulation for an order approving a procedure to consider the current MTD as a motion to dismiss the first four claims for relief set forth in the TAC (*i.e.* the three federal § 1125 causes of action plus the state unfair competition claim). *See* Stipulation for Order Approving Procedure Proposed by Parties in Stipulation Re: Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint, Docket No. 71. The Court issued an order on March 12, 2019 approving the procedure proposed by stipulation. *See* Order Approving Procedure Proposed by Parties in Stipulation Re: Defendants' Motion to Dismiss Plaintiff's Third Amended Complaint, Docket No. 72.

## **II. Legal Standard**

Typically, plaintiffs in federal court need only give "a short and plain statement of the claim showing [entitlement] to relief." Fed. R. Civ. P. 8(a)(2). Under Rule 12(b)(6), a defendant may move to dismiss for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). A complaint may be dismissed for failure to state a claim for one of two reasons: (1) lack of a cognizable legal theory; or (2) insufficient facts under a cognizable legal theory. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008) ("Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal

theory.”).

In deciding a 12(b)(6) motion, a court “may generally consider only allegations contained in the pleadings, exhibits attached to the complaint, and matters properly subject to judicial notice.” *Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th Cir. 2007); *see also Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (indicating that a court may consider a document “on which the complaint ‘necessarily relies’ if: (1) the complaint refers to the document; (2) the document is central to the plaintiff’s claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion”). The court must construe the complaint in the light most favorable to the plaintiff, accept all allegations of material fact as true, and draw all reasonable inferences from well-pleaded factual allegations. *Gompper v. VISX, Inc.*, 298 F.3d 893, 896 (9th Cir. 2002); *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended on denial of reh’g*, 275 F.3d 1187 (9th Cir. 2001); *Cahill v. Liberty Mutual Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir. 1996). The court is not required to accept as true legal conclusions couched as factual allegations. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where a plaintiff facing a 12(b)(6) motion has pled “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” the motion should be denied. *Id.*; *Sylvia Landfield Trust v. City of Los Angeles*, 729 F.3d 1189, 1191 (9th Cir. 2013). But if “the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not show[n] . . . the pleader is entitled to relief.” *Iqbal*, 556 U.S. at 679 (citations omitted).

### **III. Analysis**

#### **A. First Claim for Relief - False Endorsement in Violation of 15 U.S.C. § 1125(a)(1)(A)**

Plaintiff’s first cause of action alleges a claim for false endorsement in violation of 15 U.S.C. § 1125(a)(1)(A) against all Defendants. *See* TAC ¶¶ 115-130. Defendants move to dismiss that claim. *See* MTD at 2. Plaintiff admits that this claim is precluded but has included it as part of the TAC to preserve the claim for appeal. *Opp’n* at 13. The Court, therefore, would dismiss this claim with prejudice.

#### **B. Second Claim for Relief - False Advertising in Violation of 15 U.S.C. § 1125(a)(1)(B)**

Plaintiff’s second cause of action alleges a claim for false advertising in violation of 15 U.S.C. § 1125(a)(1)(B) against all Defendants. *See* TAC ¶¶ 142-171. Defendants move to dismiss this claim. *See* MTD at 2. Defendants argue that Plaintiff’s claim fails for several reasons.

Defendants assert that the Episode and related promotional materials are “expressive works” and do not constitute “commercial speech.” *See id.* at 12. Relatedly, Defendants argue that Plaintiff has failed to plead facts sufficient to overcome the two-prong test of *Rogers v. Grimaldi*, 875 F.2d 994 (2nd Cir. 1989), as adopted by the Ninth Circuit in *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1239 (9th Cir. 2013). *See id.* at 1. Therefore, Defendants claim that the Episode and related advertising are protected First Amendment speech not subject to Lanham Act claims. *See id.* at 7. Finally, Defendants argue that Plaintiff has not alleged facts which would establish statutory standing to assert a false advertising claim under the Lanham Act. *See id.* at 16. Plaintiff responds by raising several assertions. First, she contends that the Series’ advertisements are commercial speech. *See* TAC ¶ 149; Opp’n at 17-20. Second, Plaintiff argues that the content and advertisements for the Episode explicitly mislead consumers as to content, and therefore are not protected under the *Rogers* test. *See id.* at 14; TAC ¶ 164. As to standing Plaintiff asserts that she falls within the “zone of interest” of the Lanham Act and that her reputational injury was proximately caused by Defendants’ actions, as required by *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). *See* Opp’n at 20-24.

### 1. Standing

The Court will begin its analysis with the primary consideration of whether Plaintiff has standing to assert a claim for false advertising under the Lanham Act. There is no question that Plaintiff has Article III standing, nor does any party make that argument. *See Lexmark*, 572 U.S. at 125 (Constitutional minimum standing requires a plaintiff to have suffered or be imminently threatened with a concrete and particularized “injury in fact” fairly traceable to the challenged action and redressable by a favorable judicial decision.). Defendants assert that Plaintiff has not alleged facts to sufficiently plead statutory standing under the Lanham Act. To assert statutory standing for a false advertising claim, a plaintiff must come within the “zone of interest” protected by the Lanham Act and must allege an injury proximately caused by Defendants’ alleged illegal conduct. *See id.* at 129-32.

To come within the zone of interest for a false advertising suit under the Lanham Act a plaintiff “must allege an injury to a commercial interest in reputation or sales.” Assessing the facts alleged in the light most favorable to Plaintiff, this requirement has been met. Plaintiff alleges that Defendants’ “false statements” contained in advertising for the Episode have harmed her reputation, thereby diminishing the “desirability of Dickinson’s appearance on other media

projects, and her \$75,000 appearance fee value.” *See* Opp’n at 21; TAC ¶ 152.

A plaintiff suing under § 1125(a) typically must show “economic or reputational injury flowing directly from the deception wrought by the Defendants’ advertising.” Plaintiff’s alleges that the “false narrative” perpetuated by Defendants in the Episode deceived consumers into believing that Plaintiff is unprofessional, and thus diminished the value of her celebrity brand. *See* TAC ¶ 152(c)-(f). Whether Plaintiff’s allegations meet this standard is a closer call. Plaintiff seems to argue that the advertising for the Episode and Series perpetuated the “false narrative” that the Series portrays a “true story,” and thus consumers to believe that the allegedly scripted scenes portraying her in an unprofessional light were in fact representative of Plaintiff’s true character. *Id.* ¶ 148. But Plaintiff fails to allege facts showing that any of the alleged false advertisements, rather than the content of the episode itself, were *themselves* the cause of her reputational injury. *Id.* ¶ 152 (a)-(f). In the TAC Plaintiff alleges that she “has been or is likely to be injured as a result of the false advertising.” *Id.* ¶ 152. However, all of the facts Plaintiff alleges to support this legal conclusion relate to the content of the Episode itself, not the advertising for the episode. Therefore, the Court finds that Plaintiff has not alleged that false advertising by Defendants was the proximate cause of her injury. *See Lexmark*, 522 U.S. at 132-34. As such, the Court would find that Plaintiff has not alleged facts to allow statutory standing for a false advertising claim under the Lanham Act. However, it is possible that Plaintiff could assert factual allegations to remedy this deficiency, so the Court will consider the other arguments Defendants’ assert in their MTD related to Plaintiff’s second claim for relief.

## 2. Commercial Speech

False advertising is only actionable under the Lanham Act’s False Advertising provisions where plaintiffs allege false or misleading representations in “commercial advertising or promotion.”<sup>3</sup> 15 U.S.C. § 1125(a)(1)(B). Speech is generally considered “commercial” when it “does no more than propose a commercial transaction.” *Hoffman v. Capital Cities/ABC, Inc.*, 255 F.3d 1180, 1184 (9th Cir. 2001) (quoting *Bolger v. Youngs Drug Prod’s Corp.*, 463 U.S. 60, 66 (1983)). Plaintiff argues that advertisements for the Episode constitute commercial speech based on the Supreme Court’s guidance in *Bolger* because the alleged speech: (1) is an advertisement; (2) makes reference to a specific product, and (3) Bravo TV has an economic motivation for the

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<sup>3</sup> As noted in *Lexmark*, 522 U.S. at 122: “Section 1125(a) thus creates two distinct bases of liability: false association, §1125(a)(1)(A), and false advertising, §1125(a)(1)(B).”

communication. *See* Opp'n at 18.

In *Bolger*, the court was considering pamphlets advertising contraceptives, which also contained information of public interest, such as discussions of family planning. *See Bolger*, 463 U.S. at 68. The facts of this case are distinguishable. Here, the issue is not that the advertisements contain both promotional and non-promotional speech, it is that the advertisements are promoting expressive works. Plaintiff depends heavily on *Charles v. City of Los Angeles*, 697 F.3d 1146 (9th Cir. 2012) to support her argument that the *Bolger* factors should be dispositive. *See* Opp'n at 18-19. In *Charles*, the Ninth Circuit held that a billboard for E! News containing only images of the hosts and the name of the program, with no other message was commercial speech. *Charles*, 697 F.3d at 1152. The court in *Charles*, however, made clear that its holding, related to regulatory restrictions on billboard advertising and did not extend to private suits over advertisements for expressive works. *See id.* at 1155 (“The principle unifying the exceptions to the commercial speech doctrine for advertisements for protected works is the need to protect advertisers from tort actions that would otherwise threaten the ability of publishers to truthfully promote particular works.”). For private actions, such as tort suits, advertisements that are “adjunct” to a protected work are entitled to the same immunity from as the underlying work. *See id.* This exception clearly applies to the alleged false advertisements in this litigation. All of the advertisements that Plaintiff cites to in her complaint are clips from the Episode itself, a few with very short textual descriptions. *See* TAC at 145(c)-(g). These are clearly adjunct to the protected work, and therefore would be considered non-commercial speech for the purposes of an action under the Lanham Act.

### 3. *Rogers v. Grimaldi Two-Factor Test*

Because the Court would find that both the Episode and alleged promotional content are non-commercial expressive works, it will apply the *Rogers* test to determine whether the First Amendment bars Plaintiff’s false advertising claim under the Lanham Act. *See generally Rogers*, 875 F.2d 994. As stated in *Gordon v. Drape Creative, Inc.*, 909 F.3d 257, 260-61 (9th Cir. 2019):

We use the *Rogers* test to balance the competing interests at stake when a trademark owner claims that an expressive work infringes on its trademark rights. The test construes the Lanham Act to apply to expressive works “only where the public interest in avoiding consumer confusion outweighs the public interest in free expression.” [875 F.2d] at 999. “[T]hat balance will normally not support application of the Act, unless the [use of the mark] has no artistic relevance to the underlying work whatsoever, or . . . explicitly misleads [consumers] as to the source or the content of the work.” *Id.*

Under the *Rogers* test, “[a]n artistic work’s use of a trademark that otherwise would violate the

Lanham Act is not actionable unless [1] the [use of the mark] has no artistic relevance to the underlying work whatsoever, or, [2] if it has some artistic relevance, unless [it] explicitly misleads as to the source or the content of the work.” *E.S.S. Entm’t 2000, Inc. v. Rock Star Videos, Inc.*, 547 F.3d 1095, 1099 (9th Cir. 2008) (citation and internal quotation marks omitted). Courts have applied this test to expressive works in cases alleging trademark infringement, false endorsement, and false advertising claims arising under the Lanham Act. *See e.g. Gordon* 909 F.3d 257 (alleging infringement based on the unauthorized use of trademarked catchphrases on greeting cards)<sup>4</sup>; *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1241 (9th Cir. 2013) (applying *Rogers* test to false endorsement claim).

Under the first prong of the *Rogers* test, “only the use of a trademark with ‘no artistic relevance to the underlying work whatsoever’ does not merit First Amendment protection. In other words, the level of relevance merely must be above zero.” *E.S.S.*, 547 F.3d at 1100. “A mark that has no meaning beyond its source-identifying function is more likely to be used in a way that has ‘no artistic relevance to the underlying work whatsoever,’ [citation] because the work may be ‘merely borrow[ing] another’s property to get attention,’ [citation].” *Id.* at 1198 (quoting *Mattel, Inc. v. MCA Records, Inc.*, 296 F.3d 894, 902 (9th Cir. 2002) and citing *Dr. Seuss Ents., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394, 1401 (9th Cir. 1997)). Courts have held that the use of a celebrity’s name and/or likeness was artistically relevant to expressive works that included that celebrity’s name, image, and/or likeness. *See Brown*, 724 F.3d at 1243-45, 1248 (holding that “the likeness of a great NFL player is artistically relevant to a video game that aims to recreate NFL games.”); *ETW Corp. v. Jireh Publ’g, Inc.*, 332 F.3d 915, 937 (6th Cir. 2003) (holding that “the presence of [Tiger] Woods’s image in [a golf painting] does have artistic relevance to the underlying work.”).

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<sup>4</sup> At the hearing, Plaintiff’s counsel noted that the Circuit in *Gordon* remanded the case back to the district court for a determination on the *Rogers* factors. If that observation was raised to suggest that this Court should conduct further proceedings as to that issue, it is rejected. The present case is very different from *Gordon*. Indeed, as held in *Gordon*:

The *Rogers* test is not an automatic safe harbor for any minimally expressive work that copies someone else’s mark. Although on every prior occasion in which we have applied the test, we have found that it barred an infringement claim as a matter of law, this case presents a triable issue of fact. Defendants have not used *Gordon*’s mark in the creation of a song, photograph, video game, or television show, but have largely just pasted *Gordon*’s mark into their greeting cards. A jury could determine that this use of *Gordon*’s mark is explicitly misleading as to the source or content of the cards.

909 F.3d at 261.

The Court would find that the inclusion of Plaintiff's likeness, image, and name in the Episode, and concomitant promotional materials, even if included without her consent, bore artistic relevance above zero. From the Court's review of the Episode, part of the Episode focused on the Los Angeles Fashion Show, and a significant sub-plot included the narrative that Plaintiff stole the romper earmarked for Gharachedaghi. *See generally* Hwang Decl. Ex. 1 (the Episode). Because of Plaintiff's role in that narrative, false or not, the use of Plaintiff's name and likeness are artistically relevant to the Episode. In addition, the Opposition does not seem to meaningfully dispute artistic relevance. *See generally* Opp'n. Therefore, the Court would find that Plaintiff does not overcome the first prong of the *Rogers* test.

Plaintiff's complaint appears to focus on the second prong of the *Rogers* test, alleging in particular, that the advertising for the Series and the Episode mislead as to content. *See generally id.* Plaintiff's accusations rest upon two basic assertions. First, Plaintiff alleges that advertising for the series in general is misleading in that it markets the show as a "docuseries" rather than scripted television. *See* TAC ¶ 73-91. A title or advertisement for an expressive work will be misleading as to content when it explicitly deceives consumers as to the content of the underlying work. *See Parks v. LaFace Records*, 329 F.3d 437, 458-459 (6th Cir. 2003) ("Where a title with at least some artistic relevance to the work is not explicitly misleading as to the content of the work, it is not false advertising under the Lanham Act."). Taking Plaintiff's complaint at face value, it is possible that Plaintiff could prove that the advertisements promoting the Series as a "true story" are misleading as to content. Those allegations, however, are not enough to overcome the second prong of the *Rogers* test. The test is not whether any advertisement is misleading, it is whether Defendants' use of Plaintiff's mark misleads consumers as to the source or content of the work. *Brown*, 724 F.3d at 1239. Plaintiff's mark has no bearing on whether or not Bravo advertises their show as a scripted series or reality television. Therefore, Plaintiff's contention fails.

Plaintiff also alleges that the advertisements for the Episode explicitly mislead as to the content of the Episode itself. Even viewing the facts alleged in the light most favorable to Plaintiff, this argument fails. The advertisements that Plaintiff points to in the TAC are all clips of the Episode itself. A clip of a television episode could not possibly mislead as to the content of the episode, as it is itself a portion of the content. Only two of the alleged advertisements contain any

speech other than the actual audio of the Episode (or closed captioning).<sup>5</sup> The Clip 1 teaser includes the following descriptive statement: “Did Janice Dickinson Just Steal GG’s Look?! Evidently she took the outfit GG was supposed to wear on the runway and GG is pissed . . . .” TAC ¶103. These are not explicitly misleading statements. First, neither is an equivocal statement. The first is a question, and the second begins with “evidently.” Furthermore, both accurately preview the controversy portrayed on the Episode, whether the controversy itself was contrived by Defendants or not. *See generally* Episode. The Clip 2 teaser also contains a short description, saying: “See GG’s Carrie Bradshaw Moment on the Runway S6/EP3: Luckily she recovered from nearly tripping. (Did we mention Janice Dickinson makes an appearance?)” TAC ¶105. This is also not a misleading statement. Plaintiff does not deny that she appeared in the Episode. *See generally id.* Therefore, the Court would find that Plaintiff has not alleged any facts which could overcome prong two of the *Rogers* test.

Based upon the above analysis, the Court would dismiss Plaintiff’s federal trademark/Lanham Act causes of action with prejudice. Plaintiff has alleged the facts related to the Series, the Episode, and its promotional materials in great detail in the TAC, and accepting those allegations as true, they establish that the Episode and concomitant advertisements come within the scope of First Amendment protection. At the hearing, Plaintiff was allowed to address if she could overcome that protection to state a viable federal claim under 15 U.S.C. §1125(a)(1)(B) but failed to do so.

### **C. Third Claim for Relief - Dilution in Violation of 15 U.S.C. § 1125(c) Against All Defendants**

In the third cause of action Plaintiff alleges a claim for dilution in violation of 15 U.S.C. § 1125(c) against all Defendants. *See* TAC ¶ 172-194. Defendants move to dismiss this claim. *See* MTD at 2. Defendants argue that Plaintiff’s claim fails for three reasons. To start, Defendants allege that Plaintiff’s third claim fails because it involves non-commercial speech and is barred by *Rogers* two-factor test. The Federal Trademark Dilution Act does not provide a remedy for “noncommercial use of a mark.” 15 U.S.C. § 1125(c)(3)(C). As discussed at length in the Court’s analysis of Plaintiff’s second claim for relief, the Court would find that the Episode and adjunct advertisements are not commercial speech. Furthermore, the Court’s *Rogers* test analysis related

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<sup>5</sup> The Court does not consider YouTube videos or new publications related to the Episode to be actionable advertising on the part of Defendants who did not post such materials.

to Plaintiff's 15 U.S.C. §1125(a)(1) claims is equally applicable here. Therefore, the Court would also find that Plaintiff has not stated facts to overcome the *Rogers* test in relation to their third claim for relief.

Defendants also argue that Plaintiff's claims for trademark dilution are barred by the nominative fair use doctrine. *See id.* at 14-16. Plaintiff responds that a determination as to nominative fair use is fact intensive and cannot be resolved at this stage. The Court would decline to rule on Defendants' nominative fair use defense, given that Plaintiff's dilution claim fails to sufficiently plead the cause of action on other grounds.

At the hearing, Plaintiff was allowed to argue on the issue and the Court is not persuaded that its ruling should be changed.

**D. Fourth Claim for Relief - Violation of Cal. Business & Professions Code §§ 17200, et. seq., Against All Defendants**

Because the Court dismisses all of Plaintiff's federal claims with prejudice, it would decline to exercise supplemental jurisdiction over Plaintiff's fourth claim for relief under California's unfair competition law.<sup>6</sup> *See United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1996) ("Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."). As such, the Court would dismiss claims four through nine without prejudice.

**IV. Conclusion**

For the foregoing reasons, the Court would **DISMISS** the first three federal causes of action contained in the TAC without leave to amend; and it would decline to exercise supplemental jurisdiction over the remaining state claims and dismiss them without prejudice.

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<sup>6</sup> The court would also decline to exercise supplemental jurisdiction over the state law claims alleged as the fifth, sixth, seventh, eighth and ninth causes of action in the TAC, but not addressed in the MTD.