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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 PULSE ENTERTAINMENT CORP.,)

12 Plaintiffs,)

13 v.)

14 ALKIVIADES DAVID a/k/a ALKI)
15 DAVID; HOLOGRAM USA, INC.;)
FILMON.COM, INC., and DOES 1–10.)

16 Defendants.)
17

CASE NO. CV 14-4732-SVW-MRW

ORDER GRANTING DEFENDANTS'
MOTION TO DISMISS FIRST
AMENDED COMPLAINT
[14]

18 **I. INTRODUCTION**

19 This action arises from a dispute surrounding the lifelike animation of Michael Jackson
20 (the “Michael Jackson Animation”) that appeared during the 2014 Billboard Music Awards and
21 a related CNN interview segment. On August 4, 2014, plaintiff Pulse Entertainment Corp.
22 (“Pulse”) filed its First Amended Complaint (“FAC”) against defendants Alkiviades David
23 (“David”), Hologram USA, Inc. (“Hologram”), Filmon.com, Inc. (“Filmon.com”), and Does
24 1–10 (collectively, “Defendants”). Pulse asserts that Defendants’ representations regarding the
25 Michael Jackson Animation constitute (1) reverse passing off in violation of 15 U.S.C. §
26 1125(a)(1)(A) and (2) false advertising in violation of 15 U.S.C. § 1125(a)(1)(B).

27 Presently before the Court is Defendants’ motion to dismiss Pulse’s First Amended
28 Complaint. (Dkt. 14). For the reasons set forth below, the Court GRANTS the motion as to both

1 claims.

2 **II. FACTUAL BACKGROUND**

3 The Billboard Music Awards held on May 18, 2014, featured a lifelike animation of
4 Michael Jackson performing a previously unreleased song (the “Michael Jackson Animation”).
5 (FAC ¶ 1). Pulse alleges that its team of animators and technicians developed and produced the
6 Michael Jackson Animation over the course of eight months. (FAC ¶ 2). Pulse asserts that the
7 presentation of the Michael Jackson Animation was meant to coincide with and garner publicity
8 for the new company’s launch. (FAC ¶ 18).

9 David owns Hologram USA—Pulse’s competitor in the field of human animation. (FAC
10 ¶ 2). Pulse claims that David and the other Defendants had no involvement with the creation of
11 the Michael Jackson Animation. (FAC ¶ 2). Pulse further asserts that Defendants do not own or
12 control the animation technology used to create the Michael Jackson Animation. (FAC ¶ 13).

13 On May 15, 2014, Hologram sued Pulse and several other defendants in the District of
14 Nevada. (Defs.’ Mot. to Dismiss, 4). Hologram asserted that Pulse and the other defendants in
15 that action infringed Hologram’s patents in creating the Michael Jackson Animation. (Defs.’
16 Mot. to Dismiss, 3–4). As of August 18, 2014, Pulse had not yet filed an answer or
17 counterclaims in that action. (Defs.’ Mot. to Dismiss, 4).

18 On approximately May 19, 2014, defendant David gave an interview that was broadcast
19 on CNN. (FAC ¶ 18). The interview aired with the caption “MICHAEL JACKSON
20 HOLOGRAM: HOW’D THEY DO IT? Company behind hologram gives CNN demonstration.”
21 (FAC ¶ 14). In the interview, David allegedly represented that he and his company (Hologram)
22 created and produced the Michael Jackson Animation and the underlying animation techniques
23 and technology. (FAC ¶ 14). David also made several other allegedly misleading statements,
24 including statements in which he used “we” while describing the process employed to create the
25 Michael Jackson Animation. (FAC ¶¶ 14–15). During the segment, while the Michael Jackson
26 Animation played on screen, the interviewer stated that “[t]his MJ likeness used at the Billboard
27 Music Awards was created by Hologram USA.” (FAC ¶ 14).

28 CNN took the interview segment down from its website after it was informed that neither

David nor Hologram was involved in the creation of the Michael Jackson Animation. (FAC ¶¶ 2, 16). However, David allegedly republished the segment on his companies' websites and on his Twitter account. (FAC ¶ 16).

III. ANALYSIS

A. Legal Standard for Motion to Dismiss Under Rule 12(b)(6)

A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the claims stated in the complaint. Fed. R. Civ. Proc. 12(b)(6). To survive a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* A complaint that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Id.* (quoting *Twombly*, 550 U.S. at 555) (internal quotation marks omitted). "Allegations in the complaint, together with reasonable inferences therefrom, are assumed to be true for purposes of the motion." *Odom v. Microsoft Corp.*, 486 F.3d 541, 545 (9th Cir. 2007).

If a court dismisses the complaint, it will grant leave to amend unless futile. *DeSoto v. Yellow Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

B. Pulse's Reverse Passing Off Claim

Pulse asserts a claim for reverse passing off under § 43(a) of the Lanham Act. 15 U.S.C. § 1125(a)(1)(A).

1. Legal Standard

Section 43(a) of the Lanham Act prohibits using false designations of origin in commerce in connection with any goods or services. *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 29 (2003); 15 U.S.C. § 1125(a)(1)(A). The Supreme Court has held that this section encompasses reverse passing off. *Dastar*, 539 U.S. at 30. Reverse passing off occurs "expressly when the wrongdoer removes the name or trademark on another party's product and sells that product under a name chosen by the wrongdoer. Implied reverse passing off occurs

1 when the wrongdoer simply removes or otherwise obliterates the name of the manufacturer or
 2 source and sells the product in an unbranded state.” *Shaw v. Lindheim*, 919 F.2d 1353, 1364 (9th
 3 Cir. 1990) (quoting *Smith v. Montoro*, 648 F.2d 602, 605 (9th Cir. 1981) (internal quotation
 4 marks omitted). Section 43(A) only prohibits false designations of “the producer of the tangible
 5 goods that are offered for sale[.]” *Dastar*, 539 U.S. at 37. It does not prohibit false designations
 6 of “the author of any idea, concept, or communication embodied in those goods. *Id.*

7 2. Application

8 Pulse asserts that Defendants “publicly stated that David and Hologram USA are the
 9 source, origin, and owners of the Michael Jackson Animation.” (FAC ¶ 23). Pulse does not
 10 assert that Defendants marketed as their own a physical embodiment of the Michael Jackson
 11 Animation that was created by Pulse. As Pulse’s complaint makes clear, the Michael Jackson
 12 Animation “exists wholly separate and apart from any projection technique. . . [It] is not
 13 dependent on a method of projection, and it can be displayed in a variety of ways. In that regard,
 14 it may be likened to a cartoon animation or a CG character in a feature film or television
 15 program.” (FAC ¶ 13). Thus, the thrust of Pulse’s complaint is that Defendants falsely
 16 designated themselves as the authors of an intangible communication.¹ This is precisely the sort
 17 of claim foreclosed by *Dastar*. See *Dastar*, 539 U.S. at 37–38 (rejecting plaintiffs’ reverse
 18 passing off claim premised on defendant’s failure to attribute the content used to create
 19 defendant’s video series to plaintiffs); *Williams v. UMG Recordings, Inc.*, 281 F. Supp. 2d 1177,
 20 1183 (C.D. Cal. 2003) (applying *Dastar* and holding that although “Plaintiff would have a
 21 [reverse passing off] claim if Defendants purchased copies of Plaintiff’s goods (i.e. the film) and
 22 repackaged them as their own[.]” Plaintiff could not assert a claim for the failure to credit “his
 23 authorship and direction embodied in that film”).

24 For the aforementioned reasons, Pulse fails to state a claim for reverse passing off under
 25 § 43(a) of the Lanham Act. Defendants’ motion to dismiss under Rule 12(b)(6) is therefore

27 ¹ Though the FAC makes some reference to David’s claims of ownership of the technology
 28 underlying the animation, Plaintiff fails to specify what technology is at issue or who owns it. See
 (FAC ¶ 14). Moreover, the thrust of Plaintiffs’ argument is that Defendants improperly claimed to
 have created the Michael Jackson Animation, not the technologies underlying it.

1 GRANTED as to this claim.

2 Because the Court cannot say that amendment would be entirely futile, Pulse is granted
3 leave to amend. Nevertheless, the Court cautions Pulse that it is skeptical about the viability of a
4 reverse passing off claim based on Defendants claiming to be the creators of the Michael Jackson
5 Animation.²

6 **C. Pulse's False Advertising Claim**

7 Pulse also asserts a false advertising claim under § 43(a) of the Lanham Act. 15 U.S.C. §
8 1125(a)(1)(B).

9 1. Legal Standard

10 The Lanham Act prohibits false advertisements. 15 U.S.C. § 1125(a)(1)(B). To establish
11 a Lanham Act false advertising claim, a plaintiff must show: “(1) the defendant made a false
12 statement either about the plaintiff's or its own product; (2) the statement was made in [a]
13 commercial advertisement or promotion; (3) the statement actually deceived or had the tendency
14 to deceive a substantial segment of its audience; (4) the deception is material; (5) the defendant
15 caused its false statement to enter interstate commerce; and (6) the plaintiff has been or is likely
16 to be injured as a result of the false statement, either by direct diversion of sales from itself to the
17 defendant, or by a lessening of goodwill associated with the plaintiff's product.” *Newcal Indus.,*
18 *Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1052 (9th Cir. 2008) (quoting *Jarrow Formulas, Inc.*
19 *v. Nutrition Now, Inc.*, 304 F.3d 829 (9th Cir. 2002). A statement is material if it is likely to
20 influence consumers' purchasing decision. *EcoDisc Tech. AG v. DVD Format/Logo Licensing*
21 *Corp.*, 711 F. Supp. 2d 1074, 1084 (C.D. Cal. 2010).

22 A statement of fact is a commercial advertisement or promotion if it is: “(1) commercial
23 speech; (2) [made] by the defendant who is in commercial competition with the plaintiff; (3) for
24

25 ² Pulse's reliance on *Landrau v. Solis Betancourt*, 554 F. Supp. 2d 102 (D. Puerto Rico 2007), is
26 misplaced. *Landrau* is distinguishable because the plaintiffs there alleged that the false
27 designation of a house's architect in a magazine would divert consumers from plaintiff's
28 architectural services to defendants' services. *Id.* at 110. Here Pulse asserts only that the
misrepresentation diverted media attention from itself to defendants. (FAC ¶ 18). More
fundamentally, the Court is not persuaded by *Landrau's* reasoning. *Landrau* fails to mention
Dastar and relies instead on pre-*Dastar* authority to support its conclusion that plaintiff stated a
claim for reverse passing off. *See id.*

1 the purpose of influencing consumers to buy defendant's goods or services. . . [and] (4) must be
 2 disseminated sufficiently to the relevant purchasing public to constitute 'advertising' or
 3 'promotion' within that industry." *Id.* at 1054 (quoting *Coastal Abstract Service, Inc. v. First*
 4 *Am. Title Ins. Co.*, 173 F.3d 725, 735 (9th Cir. 1999). Courts consider three factors in deciding
 5 whether a statement is commercial speech: "(1) whether the statements are in a typical
 6 advertising format; (2) whether the statements refer to a commercial product; and (3) whether the
 7 defendant had an economic or commercial motivation for making the statements." *Nat'l Servs.*
 8 *Grp., Inc. v. Painting & Decorating Contractors of Am., Inc.*, No. SACV06-563CJC(ANX),
 9 2006 WL 2035465, at * 5 (C.D. Cal. July 18, 2006) (quoting *New.Net, Inc. v. Lavasoft*, 356 F.
 10 Supp. 2d 1090, 1111 (C.D. Cal. 2004)); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60,
 11 66–68 (1983).

12 Claims of fraud must be pleaded with particularity. Fed. R. Civ. P. 9(b). Where a claim
 13 alleges a course of fraudulent conduct as its basis, the claim is said to be "grounded in fraud" and
 14 must satisfy Rule 9(b). *Vess v. Ciba-Giegy Corp. USA*, 317 F.3d 1097 (9th Cir. 2003). While
 15 the Ninth Circuit has not yet decided the issue, other courts have found that Lanham Act false
 16 advertising claims are grounded in fraud and thus subject to Rule 9. *See, e.g., EcoDisc Tech.*
 17 *AG*, 711 F. Supp. 2d at 1085 (applying Rule 9 to a Lanham Act false advertising claim); *LT Int'l*
 18 *Ltd. v. Shuffle Master, Inc.*, No. 2:12-CV-1216-JAD-GWF, 2014 WL 1248270, at *4–5 (D. Nev.
 19 Mar. 26, 2014) (same).

20 To satisfy Rule 9(b), the complaint "must adequately specify the statements it claims
 21 were false or misleading, give particulars as to the respect in which plaintiff contends the
 22 statements were fraudulent, state when and where the statements were made, and identify those
 23 responsible for the statements." *In re GlenFed Inc. Sec. Litig.*, 42 F.3d 1541, 1548 n.7 (9th Cir.
 24 1994) (en banc). In all, the plaintiff must provide a "substantial amount of particularized
 25 information about the plaintiff's claim in order to enable [the defendant] to understand it and
 26 effectively prepare a response pleading and an overall defense of the actions." 5A Wright &
 27 Miller, *Federal Practice and Procedure: Civil 3d* § 1296 (3d ed. 2004).

28 2. Application

1 Pulse's false advertising claim is based on Defendants' alleged misrepresentation that
 2 they created the Michael Jackson Animation. This claim is grounded in fraud and is thus subject
 3 to Rule 9(b)'s heightened pleading standard. *See Lt Int'l Ltd.*, 2014 WL 1248270, at *4–5.

4 Pulse alleges that on or around May 19, 2014, David "launched a false media campaign,"
 5 including giving an interview that was broadcast on CNN with the caption: "MICHAEL
 6 JACKSON HOLOGRAM: HOW'D THEY DO IT? Company behind hologram gives CNN
 7 demonstration." (FAC ¶ 14). Without specifying David's exact statements, Pulse alleges that on
 8 the segment David falsely took credit for the Michael Jackson Animation. (*Id.*). Pulse also
 9 identifies other purportedly misleading statements made by David: (1) "What you saw at the
 10 Billboard, you saw a digital head connected to an actor. We capture the body and the head in
 11 real time. And, we have the sync marks and we can attach the two together[.]" (*id.*); (2) "What
 12 you saw at the Billboard was 'Super Michael.' You saw Michael beyond the controversy,
 13 beyond the problems that he faced in his real life[.]" (*id.*); (3) that the animation could be
 14 adapted for "education, military, politics—it can apply—be applied across the board[.]" (FAC ¶
 15 15); and (4) that "there is no end to how you can apply this, all we really need to do is apply our
 16 imagination[.]" (*id.*). Pulse also complains that the interviewer stated that "[t]his MJ likeness
 17 used at the Billboard Music Awards was created by Hologram USA." (FAC ¶ 14). Pulse asserts
 18 that some time after CNN removed the segment from its website, Defendants republished the
 19 segment, with the complained-of caption and interviewer's statements, on their websites and on
 20 David's Twitter account. (FAC ¶ 16).

21 To the extent that Pulse's false advertising claim relies on the original CNN broadcast,
 22 Pulses fail to state a claim for relief and fails to satisfy Rule 9(b). Most of the obviously false
 23 and deceptive statements were made by CNN (or its interviewer) rather than by Defendants.
 24 Even though Defendants participated in the interview, Pulse fails to plead sufficient facts to
 25 show that Defendants either knew of the false caption and interviewer's statement before the
 26 broadcast aired or otherwise participated in their creation. The only specific statements
 27 attributed to Defendant were not materially deceptive. These statements related only to the
 28 methods used to create the Michael Jackson Animation, descriptions of the Animation, and

1 statements relating to the potential uses for the technology used to create the Animation. With
 2 the exception of the last category, these statements are unlikely to influence purchasers'
 3 decisions. Moreover, there is no evidence that the statements relating to the technology's
 4 potential uses are false. Finally, Pulse fails to specify the particular manner in which each of
 5 these statements is deceptive. Pulse also fails to assert when the broadcast aired to the public.
 6 Accordingly, to the extent that Pulse's false advertising claim relies on the original CNN
 7 broadcast, it fails under Rules 12(b)(6) and 9(b).³

8 To the extent that Pulse's false advertising claim relies on Defendants' republication of
 9 the interview segment, it comes closer to meeting the mark. By reposting the segment with the
 10 interviewer's statement and caption, Defendants arguably adopted these false statements.
 11 Nevertheless, this claim fails under Rule 9. Pulse does not specify exactly when the segment
 12 was reposted, all of the websites to which it was reposted, for how long it was made available, or
 13 provide any other contextual facts that would allow Defendants to prepare a responsive pleading.
 14 Thus, to the extent that Pulse's false advertising claim relies on Defendants' republication of the
 15 interview segment, it fails to satisfy Rule 9.

16 For the aforementioned reasons, Pulse's false advertising claim is DISMISSED under
 17 Rule 9(b) and Rule 12(b)(6). Because amendment would not be futile, Pulse is granted leave to
 18 amend.⁴

19 **D. Compulsory Counterclaims Under Rule 13(a)**

20 Defendants assert that Pulse's claims are compulsory counterclaims that should have
 21

22 ³ Pulse also failed to show that CNN's initial broadcast of the interview segment is a commercial
 23 advertisement or promotion. David's statements were made in an ordinary interview format on a
 24 national news program regarding an event that received widespread publicity. There are no facts
 25 alleged indicating that Defendants had an economic motivation or that the statements were
 26 intended to influence consumers to buy defendants' goods or services. *See Boule v. Hutton*, 328
 27 F.3d 84, 91 (2d Cir. 2003) (holding that statements about fraud in the art world made in an art
 28 magazine in response to an unsolicited inquiry were not commercial speech); *Nat'l Servs. Grp.*,
 2006 WL 2035465, at *5–6 (holding that statements in an article discussing issues affecting
 industry and not promoting defendant's specific services were not commercial speech).

⁴ In light of the Court's holding that the entire complaint should be dismissed, the Court need not
 address Defendants' argument that Pulse fails to plead its alter ego claim against Filmon with the
 requisite particularity.

1 been, and still can be, brought in the patent infringement action related to the Michael Jackson
2 Animation that is currently pending in the District of Nevada.

3 1. Legal Standard

4 A pleading must state any counterclaim that the pleader has against an opposing party
5 that: “(A) arises out of the transaction or occurrence that is the subject matter of the opposing
6 party's claim; and (B) does not require adding another party over whom the court cannot acquire
7 jurisdiction.” Fed. R. Civ. P. 13(a)(1). To determine whether a counterclaim is compulsory, the
8 Ninth Circuit applies the “logical relationship” test. *Mattel, Inc. v. MGA Entertainment, Inc.* 705
9 F.3d 1108, 1110 (9th Cir. 2013). “A logical relationship exists when the counterclaim arises
10 from the same aggregate set of operative facts as the initial claim, in that the same operative facts
11 serve as the basis of both claims or the aggregate core of facts upon which the claim rests
12 activates additional legal rights otherwise dormant in the defendant.” *Id.* (quoting *In re Pegasus*
13 *Gold Corp.*, 394 F.3d 1189, 1196 (9th Cir. 2005).

14 2. Application

15 The pending Nevada suit is a claim by Hologram USA (and other parties not named in
16 this action) that Pulse (and other parties not named in this action) infringed on plaintiffs’ patents
17 in creating and projecting the Michael Jackson Animation. (Defs.’ Mot. to Dismiss, 19). While
18 the Nevada lawsuit and the instant action both relate to the Michael Jackson Animation, they do
19 not share the same operative facts. The Nevada suit relates to patent infringement occurring
20 before and during the Billboard awards. The instant suit relates to alleged representations made
21 in an interview taped and aired after the Billboard awards. The instant suit does not depend on
22 issues of patent ownership, licensing, or use. Similarly, the patent infringement allegations in
23 the Nevada suit do not depend on whether Defendants made false designations of origin, the
24 materiality of Defendants’ misrepresentations, or other related issues posed by this action.

25 For the aforementioned reasons, Pulse’s claims are not compulsory counterclaims in the
26 Nevada lawsuit and thus may properly be brought before this court.

1 **IV. ORDER**

2 1. For the foregoing reasons, Defendant's motion to dismiss is GRANTED.

3 2. Because the Court cannot say that amendment would be futile, the complaint is
4 DISMISSED WITHOUT prejudice. Pulse shall have leave to file an amended complaint.

5 **IT IS SO ORDERED.**

6
7 Dated: September 17, 2014

A handwritten signature in dark ink, appearing to read "Stephen V. Wilson", is written over a horizontal line.

8
9 STEPHEN V. WILSON
United States District Judge