

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

O'SHEA JACKSON,
Plaintiff,

v.

ROBINHOOD MARKETS, INC. et al.,
Defendants.

Case No. 21-cv-02304-LB

**ORDER GRANTING MOTION TO
DISMISS AND DENYING MOTION TO
STRIKE AS MOOT**

Re: ECF Nos. 11 & 12

INTRODUCTION

The plaintiff O'Shea Jackson, known professionally as Ice Cube, sued Robinhood, a financial-services company, after Robinhood used his image and a paraphrase of a line from his song "Check Yo Self" to illustrate an online article that it published about a market correction for tech stocks. The line is "Check yo self before you wreck yo self," which Robinhood paraphrased as "Correct yourself before you wreck yourself." "Check yo self" is Ice Cube's "catchphrase." He claims that by using his image and catchphrase, Robinhood (1) created the false and deceptive commercial impression that Ice Cube is associated with or endorses Robinhood's services, in violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A), (2) misappropriated his likeness without his consent, in violation of Cal. Civ. Code § 3344(a) and California common law, and (3) engaged in unfair competition, in violation of California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200. The court dismisses

1 the complaint for lack of standing because the plaintiff did not plausibly plead that Robinhood’s use
2 of his identity suggested his endorsement of Robinhood’s products.

3 4 STATEMENT

5 Ice Cube is a well-known rapper, actor, entrepreneur, and social activist. His 1992 album *The*
6 *Predator* had a certified-platinum single “Check Yo Self,” which featured the line “check yo self
7 before you wreck yo self.” The phrase “Check Yo Self” is his “signature catchphrase.”¹

8 Robinhood is a financial-services company that allows commission-free trades of stocks and
9 exchange-traded funds on a mobile app. It also operates a website called “Robinhood Snacks” that
10 publishes short newsletters on financial issues. On March 8, 2021, its newsletter (titled “Why are
11 tech stocks falling?”) had three articles. The first was titled “Tech stocks move toward ‘correction’
12 territory: we break it down.” The article discussed stock market highs (led by tech stocks), the
13 market correction, and possible explanations: an overvalued tech sector, rising interest rates,
14 inflation, a concern that the Fed will raise interest rates, the vaccine rollout, and economic recovery.
15 It concluded that corrections are normal.²

16 The newsletter has a breezy, colloquial tone. For example, the article on the market correction
17 begins with this: “**Do you remember?** . . . the 21st of December (cue: Earth, Wind, and Fire jam).”
18 It ends with the observation that “[m]arkets were frothy at their peak — a correction is kind of like
19 a barista skimming off foam.” It has varied content that includes the three articles (the other two
20 are “Who’s up” and “. . . and who’s down”), links to other content (with categories titled Check,
21 Learn, Sweat, Act, Do, Achieve), a description of the Snacks Daily Podcast, the Snack Fact of the
22 Day, and a description of the week ahead.³

23
24
25 ¹ Compl. – ECF No. 1 at 5 (¶¶ 17–21). The court considers the line from the song under the incorporation-
26 by-reference doctrine. *Knievel v. ESPN*, 393 F.3d 1068, 1076–77 (9th Cir. 2005). Citations refer to
27 material in the Electronic Case File (ECF); pinpoint citations are to the ECF-generated page numbers at
28 the top of documents.

² Robinhood Snacks Newsletter, Ex. A to Compl. – ECF No. 1-1 at 1–3.

1 At the top of the newsletter — right after the title “Why are tech stocks falling?” and right
2 before the market-correction article — was this image from Ice Cube’s movie *Are We Done Yet?*⁴



16 *Correct yourself, before you wreck yourself*

17 The newsletter (characterized in the complaint as an advertisement) “creates the false impression
18 that Ice Cube supports and endorses Robinhood’s products and services.”⁵ This “is supported by the
19 fact that “Robinhood has a demonstrable pattern and practice of using established celebrities, such as
20 Nas and Jay-Z, to endorse its products and services.”⁶ Ice Cube did not authorize the use of his image
21 or catchphrase and sent a cease-and-desist letter to Robinhood. Robinhood continues to use the
22 likeness without permission, and the plaintiff has suffered financial and reputational harm.⁷

23
24
25 ⁴ DVD for *Are We Done Yet?*, Ex. A to Req. Judicial Notice – ECF No. 13 at 1–2. The court judicially
26 notices facts that the parties do not dispute, such as the movie. Fed. R. Evid. 201(b); *United States v.*
Mariscal, 285 F.3d 1127, 1131 (9th Cir. 2002); *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th
27 Cir. 2001).

⁵ Compl. – ECF No. 1 at 6 (¶ 27).

⁶ *Id.* at 6 (¶ 28).

⁷ *Id.* at 6 (¶ 29).

1 The plaintiff claims that by using his image and catchphrase, Robinhood (1) created the false
 2 and deceptive commercial impression that Ice Cube is associated with or endorses Robinhood's
 3 services, in violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A), (2) misappropriated his
 4 likeness without his consent, in violation of Cal. Civ. Code § 3344(a) and California common law,
 5 and (3) engaged in unfair competition, in violation of the UCL.⁸

6 Robinhood moved to dismiss the complaint for lack of standing under Federal Rule of Civil
 7 Procedure 12(b)(1). It moved to dismiss all claims under Rule 12(b)(6) for the following reasons:
 8 (1) the article was a noncommercial report of news, and the claims protect only commercial
 9 interests; (2) the First Amendment bars the claims, again because the article was newsworthy; (3)
 10 the Lanham Act claim fails because Robinhood's use of the likeness and catchphrase was creative;
 11 (4) federal copyright law preempts the state claims; (5) the Lanham Act claim fails because only
 12 the copyright owners of the film have rights in the images; (6) it is immune under section
 13 230(c)(1) of the Communications Decency Act, 47 U.S.C. § 230(c)(1), because it is an interactive-
 14 computer-service provider that did not create the image; and (7) the phrase "check yo self" is not a
 15 distinctive part of Ice Cube's identity and thus is not actionable under the Lanham Act. Robinhood
 16 also moved to strike the state-law claims under California's Anti-SLAPP statute, Cal. Civ. Proc. §
 17 425.16, on the ground that the content in the newsletter is protected free speech on a matter of
 18 public interest.⁹ The court held a hearing on the motions on June 10, 2021.

19 The court has federal-question subject-matter jurisdiction over the Lanham Act claim under 28
 20 U.S.C. §§ 1331 and 1338 and supplemental jurisdiction over state law claims under 28 U.S.C. §
 21 1367(a). All parties consented to magistrate-judge jurisdiction under 28 U.S.C. § 636.¹⁰

26 _____
 27 ⁸ *Id.* at 7–11 (¶¶ 33–61).

⁹ Mot. to Dismiss – ECF No. 12; Mot. to Strike – ECF No. 11.

¹⁰ Mot. to Dismiss – ECF No. 12; Mot. to Strike – ECF No. 11.

STANDARD OF REVIEW

A complaint must contain a short and plain statement of the ground for the court's jurisdiction. Fed. R. Civ. P. 8(a)(1). The plaintiff has the burden of establishing jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990).

A defendant's Rule 12(b)(1) jurisdictional attack can be facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "A 'facial' attack asserts that a complaint's allegations are themselves insufficient to invoke jurisdiction, while a 'factual' attack asserts that the complaint's allegations, though adequate on their face to invoke jurisdiction, are untrue." *Courthouse News Serv. v. Planet*, 750 F.3d 776, 780 n.3 (9th Cir. 2014). This is a facial attack. The court thus "accept[s] all allegations of fact in the complaint as true and construe[s] them in the light most favorable to the plaintiff[]." *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) (citation omitted).

Robinhood contends that the plaintiff lacks standing. Standing pertains to the court's subject-matter jurisdiction and thus is properly raised in a Rule 12(b)(1) motion to dismiss. *Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121–22 (9th Cir. 2010).

Dismissal of a complaint without leave to amend should be granted only if the jurisdictional defect cannot be cured by amendment. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003).

ANALYSIS

The court dismisses the complaint for lack of standing because the plaintiff did not plausibly plead that Robinhood's use of his identity suggested his endorsement of Robinhood's products.

"The 'irreducible constitutional minimum' of standing consists of three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements." *Id.* (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)).

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.