UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 22-cv-22972

CURTIS JACKSON, III p/k/a 50 CENT

Plaintiff,

v.

ANGELA KOGAN and
PERFECTION PLASTIC SURGERY, INC.,
d/b/a PERFECTION PLASTIC SURGERY & MEDSPA,

Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS

Defendants, Angela Kogan And Perfection Plastic Surgery, Inc., D/B/A Perfection Plastic Surgery & MedSpa (each individually, a "Defendant," and collectively, "Defendants"), by and through undersigned counsel, hereby file this Motion to Dismiss Plaintiff's, Curtis Jackson, III p/k/a 50 Cent ("Plaintiff"), Complaint, and, in support thereof, state as follows:

OVERVIEW

1. Plaintiff filed his Complaint on September 16, 2022. Therein, Plaintiff alleges the following causes of action: (i) Count I (Right of Publicity – Unauthorized Misappropriation of Name/Likeness Pursuant to Fla. Stat. §540.08); (ii) Count II (Common Law Invasion of Privacy); (iii) Count III (Violation of the Lanham Act, 15 U.S.C. §1125(a): False Endorsement); (iv) Count IV (Violation of the Lanham Act, 15 U.S.C. §1125(a): False Advertising); (v) Count V (Conversion); and (vi) Count VI (Unjust Enrichment).

2. Plaintiff's Complaint fails to state a cause of action for which relief may be granted. For such reasons, as more fully explained below, Plaintiff's Complaint must be dismissed against Defendants.

ARGUMENT

A. Legal Standard

A motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6) should be granted when it appears that a plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *See Linder v. Portocarrero*, 963 F.2d 332, 334 (11th Cir. 1992). A court considering a Rule 12(b)(6) motion generally is limited to the facts contained in the complaint and attached exhibits. *See Wilchombe v. TeeVee Toons, Inc.*, 555 F.3d 949, 959 (11th Cir. 2009). Notwithstanding, the Court has discretion to consider matters outside of the pleadings in a Fed. R. Civ. P. 12(b)(6) motion to dismiss for the purpose of converting such motion into a motion for summary judgment. *See* Fed. R. Civ. P. 12(b); *see also Trustmark Ins. Co. v. ESLU*, Inc. 299 F.3d 1265, 1267 (11th Cir.2002); provided when such conversion occurs, the adverse party is "given express, ten-day notice of the summary judgment rules, of his right to file affidavits or other material in opposition to the motion, and of the consequences of default." *Griffith v. Wainwright*, 772 F.2d 822, 825 (11th Cir.1985).

In order to state a claim for relief, the pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The U.S. Supreme Court explained that the purpose of the rule is to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). While a court is required to accept as true the allegations contained in the complaint when considering a Rule 12 motion, courts "are not bound to accept as true a legal conclusion couched

as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Factual allegations must contain more than "labels and conclusions;" a formulaic recitation of the elements of a cause will not do." *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Factual allegations must be enough to raise a right to relief above the speculative level." *Id*. (citations omitted). "Facts that are 'merely consistent with' the plaintiff's legal theory will not suffice when, 'without some further factual enhancement [they] stop short of the line between possibility and plausibility of "entitle[ment] to relief."'" *Weissman v. National Association of Securities Dealers, Inc.*, 500 F.3d 1293, 1310 (11th Cir. 2007) (quoting T*wombly*, 127 S. Ct. at 1966) (quoting *DM Research, Inc. v. College of American Pathologists*, 170 F. 3d 53, 56 (1st Cir. 1999)).

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." *Id.* (quoting *Twombly*, 550 U.S. at 570). Furthermore, as noted by the Supreme Court, the pleading party must "nudge[] [their] claims across the line from conceivable to plausible[; otherwise, their claims] must be dismissed." *Twombly*, 127 S. Ct. at 1974.

B. Plaintiff's Complaint Fails to State a Claim For Relief Against Defendants.

Each of the six counts alleged by Plaintiff against Defendants fails to establish a claim for which relief may be granted. Particularly, the entirety of Plaintiff's Complaint is based upon the assertion that: (i) Defendants did not have the authority to use Plaintiff's name and/or image without Plaintiff's prior consent, and (ii) at no point in time has Plaintiff ever been a client of Defendants, including, without limitation, for the purpose of obtaining plastic surgery services or penile enhancement surgery.

However, it is clear from the Photo itself that the taking thereof was not a random happenstance or unsolicited occasion. The content of the Photo shows Plaintiff in Defendants' office, next to Defendant in her role as a businesswoman/aesthetician (i.e. in professional attire). Thus, it is disingenuous for Plaintiff to claim or allege that Plaintiff – who wishes for the Court to believe randomly stumbled into a medspa without purpose or specific intent – agreed to take the Photo under the "sole impression that [Defendant] was a fan seeking the photograph for her private and personal enjoyment." *See* D.E. 1, ¶ 65. The Photo is not representative of Plaintiff running into a random fan in the middle of the street; rather, it specifically highlights Plaintiff in a specific situation, for a specific purpose, in exchange of a specific transaction, each as further explained below.

In sum, Plaintiff's claims suffer for the following reasons: (1) Plaintiff was, in fact, a client of Defendants, as evidenced by the Exhibits detailing Defendants' records and other forms of documentation[1], and Affidavit attached hereto; (2) in exchange for medspa services, Plaintiff agreed to take the Photo and allow it to be shared by Defendants on Defendants' social media profiles, and (3) at no point in time have Defendants ever stated or implied that Plaintiff received plastic surgery services or penile enhancement surgery from Defendants.

i. Count One – Right of Publicity – Unauthorized Misappropriation of Name/Likeness Pursuant to Fla. Stat. §540.08

Fla. Stat. §540.08 prohibits the unauthorized publication of a person's name or likeness. Specifically, the statute states:

> *No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use given by ... [s]uch person*

[1] Plaintiff's Complaint cites to Defendants' status as a provider of health care services and ability to know whether an individual was treated by them based on "records and other forms of documentation" on numerous occasions. *See e.g.,* D.E. 1, ¶¶4, 100

In order to state a cause of action for violation of §540.08, the plaintiff must properly allege that his or her name or likeness was used to directly promote a commercial product or service. *See Fuentes v. Mega Media Holdings, Inc*., 721 F. Supp. 2d 1255, 1258 (S.D. Fla. 2010). If such use is not made for any trade, commercial, or advertising purpose, then a claim for unauthorized misappropriation cannot exist. *See Valentine v.* CBS, Inc., 698 F.2d 430, 433 (11th Cir.1983) (recognizing that the proper interpretation of Fla. Stat. §540.08 requires the plaintiff to prove that the defendants used a name or likeness to directly promote a product or service); *Tyne v. Time Warner Entm't Co., L.P*., 204 F.Supp.2d 1338 (M.D.Fla.2002) (recognizing that Fla. Stat. §540.08 only prohibits the use of a name or image when such use directly promotes a commercial product or service); *Epic Metals Corp. v. CONDEC, Inc*., 867 F. Supp. 1009, 1016 (M.D.Fla.1994) ("Florida Statute §540.08 prevents the unauthorized use of a name or personality to directly promote the product or service of the publisher."); *National Football League v. The Alley, Inc*., 624 F. Supp. 6, 7 (S.D.Fla.1983) ("Section 540.08 of the Florida Statutes prohibit unconsented use of an individual's name and likeness only when such directly promotes a commercial product or service"); *Loft v. Fuller*, 408 So.2d 619, 622 (Fla. 4th DCA 1981) ("In our view, Section 540.08, by prohibiting the use of one's name or likeness for trade, commercial, or advertising purposes, is designed to prevent the unauthorized use of a name to directly promote the product or service of the publisher"). As such, the initial issue presented is whether Defendants' use of the Photo was done to directly promote a commercial product or service.

The Photo shows Plaintiff standing with his arm around Defendant (with Defendant dressed in professional attire), in the middle of Defendants' office, and was posted on Defendants' social media profiles with the caption, "Thank you @50cent for stopping by the number one med spa @bh_perfection_medspa." However, neither the Photo itself, nor the caption thereof, purports

DOCKET ALARM

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.