

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

San Francisco Division

MEREDITH CALLAHAN, et al., on behalf  
of themselves and all others similarly  
situated,

Plaintiffs,

v.

ANCESTRY.COM INC., et al.,

Defendants.

Case No. 20-cv-08437-LB

**ORDER GRANTING MOTION TO  
DISMISS AND DENYING MOTION TO  
STRIKE.**

Re: ECF No. 13

**INTRODUCTION**

The plaintiffs are California residents who object to Ancestry.com's inclusion of their decades-old yearbook photographs and information in Ancestry's Yearbook Database. They sued Ancestry — individually and on behalf of a putative California class — for using their information to solicit paying subscribers, claiming (1) a violation of their right of publicity under Cal. Civ. Code § 3344, (2) unlawful and unfair business practices, in violation of California's Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200, (3) intrusion upon seclusion, in violation of California common law, and (4) unjust enrichment resulting from Ancestry's selling their personal information.<sup>1</sup>

<sup>1</sup> Compl. – ECF No. 1. Citations refer to material in the Electronic Case File (“ECF”); pinpoint

Ancestry moved to dismiss the claims in part on the grounds that (1) the plaintiffs lack Article III standing to challenge its use of public data, and (2) it is immune from liability under the Communications Decency Act, 47 U.S.C. § 230(c)(1). The court dismisses the claims. First, the plaintiffs have not plausibly alleged standing. More is needed — beyond Ancestry’s use of the data to solicit paying subscribers — such as an inference that the profiled persons personally endorsed Ancestry’s product (or an equivalent interest). Second, Ancestry did not create the third-party content and thus is immune from liability under the Communications Decency Act.

Ancestry also moved to strike (1) the plaintiffs’ prayer for statutory damages and claim for restitution under the UCL and (2) all claims under California’s Anti-SLAPP statute, Cal. Civil Proc. § 425.16, on the ground that the content on its website is protected free speech and a public issue. The court denies the anti-SLAPP motion because Ancestry’s inclusion of the yearbook information is not a public issue. Ancestry’s motion to strike is otherwise moot.

### STATEMENT

Ancestry has databases of personal and historical information — including information from “school yearbooks, birth records, marriage records, death records, U.S. census records, immigration records, military records, and photographs of grave sites” — that it sells to subscribers.<sup>2</sup>

The plaintiffs’ yearbook pictures and information were in the Ancestry Yearbook database. Each record in the Yearbook database — about 730 million collected from more than 450,000 yearbooks — has “at least” the following information: the person’s name, photograph, school name, yearbook year, and city or town (at the time of the yearbook). A record can contain other information such as estimated age at the time of the photograph, estimated birth year, and school activities. Ancestry “does not disclose how it created” the Yearbook database, but a section of its website “encourage[es] visitors to donate their old yearbooks.” It does not try to obtain consent

from the donors or the persons depicted in the yearbooks to display their information. It does ask the donor to sign a disclaimer about copyright restrictions.<sup>3</sup>

Ancestry's main selling point to paying subscribers to the Yearbook database is that the records "uniquely identify specific individuals." It offers access to the database (including searching, viewing, and downloading records) in several paid subscription plans, including the U.S. Discovery, World Explorer, and All Access plans. It gives free access in a 14-day promotion and through a limited-access website that has some of the Yearbook database records and that uses pop-up ads (when a user hovers over a yearbook record) to solicit paying subscribers. It also solicits subscribers through emails that contain yearbook records (such as photographs and names).<sup>4</sup>

The named plaintiffs are Lawrence Abraham and Meredith Callahan, California residents who are not Ancestry subscribers (and thus are not subject to Ancestry's terms of service). Their yearbook records — pictures and personal information such as name, estimated age, city, and school activities — are in a subdirectory of the Yearbook database called the U.S. School Yearbooks, 1900–1999. Ancestry users who hover over the plaintiffs' records receive pop-up ads offering more access to the plaintiffs' information to paying subscribers. Ancestry also solicited paying subscribers by sending emails that included the plaintiffs' names and photographs. The plaintiffs did not consent to Ancestry's use of their information, and Ancestry never paid them for it.<sup>5</sup>

The plaintiffs assert the following claims individually and on behalf of a putative California class: (1) a violation of their right of publicity under Cal. Civil Code § 3344; (2) unlawful and unfair business practices, in violation of the UCL; (3) intrusion upon seclusion, in violation of California common law; and (4) unjust enrichment.<sup>6</sup> The class definition is as follows:

[A]ll California residents who (a) are not currently subscribers of any Ancestry services, (b) have never donated a yearbook to Ancestry, and (c) whose names, photographs, and/or likeness were uploaded by Ancestry into its Ancestry Yearbook Database and offered for sale as part of Ancestry's paid subscription plans, and/or used by Ancestry to advertise,

<sup>3</sup> Compl. – ECF No. 1 at 2 (¶ 3), 23–24 (¶¶ 46–50).

<sup>4</sup> *Id.* at 4–5 (¶ 12), 24–25 (¶¶ 51–54).

<sup>5</sup> *Id.* at 7–22 (¶¶ 22–44).

<sup>6</sup> *Id.* at 22–23 (¶¶ 46–50).

sell, and solicit the purchase of Ancestry's paid subscription plans, without Ancestry obtaining their consent.<sup>7</sup>

Ancestry moved to dismiss the claims on the following grounds: (1) the plaintiffs lack standing to challenge its use of public data; (2) Cal. Civil Code § 3344 exempts it from liability for the right-of-publicity and UCL claims for its use of the yearbook information "in connection with . . . public affairs;" (3) it is immune from liability under § 230(c)(1) of the Communications Decency Act; (4) the Copyright Act, 17 U.S.C. § 301, preempts the right-of-publicity and the UCL claims; (5) the plaintiffs did not plausibly state a claim for intrusion upon seclusion because the yearbook information is public; and (6) there is no standalone claim for unjust enrichment. Ancestry also moved to strike (1) the plaintiffs' prayer for statutory damages under § 3344 because they did not allege mental anguish, which is a predicate for statutory damages, (2) any claim for restitution under the UCL because § 3344 provides an adequate remedy at law, and (3) all claims under California's Anti-SLAPP statute, Cal. Civil Proc. § 425.16, on the ground that the content on its website is protected free speech.<sup>8</sup> The court held a hearing on February 25, 2021.

The court has subject-matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. § 1332(d). All parties consented to magistrate jurisdiction.<sup>9</sup>

## STANDARD OF REVIEW

### 1. Rule 12(b)(1)

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 plaintiffs have 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 either facial or factual. *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). "A 'facial' attack asserts that a complaint's allegations are

<sup>7</sup> *Id.* at 26 (¶ 58).

<sup>8</sup> Mot. – ECF No. 13 at 14–32.

<sup>9</sup> ECF No. 13 at 5–6 (¶ 15); ECF No. 13 at 15.

1 themselves insufficient to invoke jurisdiction, while a ‘factual’ attack asserts that the complaint’s  
 2 allegations, though adequate on their face to invoke jurisdiction, are untrue.” *Courthouse News Serv.*  
 3 *v. Planet*, 750 F.3d 776, 780 n.3 (9th Cir. 2014). This is a facial attack. The court thus “accept[s] all  
 4 allegations of fact in the complaint as true and construe[s] them in the light most favorable to the  
 5 plaintiff[.]” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

6 Ancestry contends that the plaintiffs lack standing. Standing pertains to the court’s subject-  
 7 matter jurisdiction and thus is properly raised in a Rule 12(b)(1) motion to dismiss. *Chandler v.*  
 8 *State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1121–22 (9th Cir. 2010) (citation omitted).

9 Dismissal of a complaint without leave to amend should be granted only if the jurisdictional  
 10 defect cannot be cured by amendment. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048,  
 11 1052 (9th Cir. 2003).

## 12 13 **2. Rule 12(b)(6)**

14 A complaint must contain a “short and plain statement of the claim showing that the pleader is  
 15 entitled to relief” to give the defendant “fair notice” of what the claims are and the grounds upon  
 16 which they rest. Fed. R. Civ. P. 8(a)(2); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A  
 17 complaint does not need detailed factual allegations, but “a plaintiff’s obligation to provide the  
 18 grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic  
 19 recitation of the elements of a cause of action will not do. Factual allegations must be enough to  
 20 raise a claim for relief above the speculative level.” *Twombly*, 550 U.S. at 555 (cleaned up).

21 To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which  
 22 when accepted as true, “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556  
 23 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when  
 24 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the  
 25 defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a  
 26 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted  
 27 unlawfully.” *Id.* (citing *Twombly*, 550 U.S. at 557). “Where a complaint pleads facts that are  
 28

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