

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

MEREDITH CALLAHAN, et al.,
Plaintiffs,
v.
ANCESTRY.COM INC., et al.,
Defendants.

Case No. 20-cv-08437-LB

**ORDER DISMISSING FIRST
AMENDED COMPLAINT**

Re: ECF No. 33

INTRODUCTION

The plaintiffs are California residents who sued Ancestry.com — individually and on behalf of a putative California class — for using their decades-old yearbook records to solicit paying subscribers. The plaintiffs claim (1) misappropriation of their likenesses, in violation of California’s Right of Publicity Law, Cal. Civ. Code § 3344, (2) unlawful and unfair business practices, in violation of California’s Unfair Competition Law, 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.

The court dismissed the first complaint for lack of Article III standing because use of data to solicit customers — without something more, such as an inference that the profiled persons personally endorsed Ancestry’s product — is not injury in fact. Also, Ancestry did not create the

third party content and thus was immune from liability under the Communications Decency Act. The

1 plaintiffs amended their complaint, raising the same claims and adding allegations of harm that they
 2 suffered: emotional harm from Ancestry's profiting from their records, lost time spent investigating
 3 Ancestry's use of their records, and theft of their intellectual property. Ancestry moved to dismiss,
 4 again for lack of standing and under the Communications Decency Act. The plaintiffs' new
 5 allegations do not change the analysis in the court's earlier order: the plaintiffs do not have Article III
 6 standing, and Ancestry is immune from liability under the Communications Decency Act. The court
 7 dismisses the amended complaint.

8 STATEMENT

9 Ancestry makes money by selling subscription plans to its databases of personal and historical
 10 information, including its Yearbook database, which has yearbook records. Ancestry solicits new
 11 subscribers by sending promotional emails. For example, to solicit paying subscribers to the
 12 Yearbook database, Ancestry might send a user an email that has yearbook information of
 13 someone that Ancestry identifies as a potential former classmate.¹ The amended complaint adds
 14 new allegations of the plaintiffs' injuries: anger and distress from Ancestry's profiting from the
 15 records, their lost time investigating Ancestry's use (such as the five hours that named plaintiff
 16 Geoffrey Abraham spent), and theft of their intellectual property.² The court held a hearing on
 17 Ancestry's renewed motion to dismiss on June 10, 2021. All parties consented to magistrate-judge
 18 jurisdiction under 28 U.S.C. § 636. The court has subject-matter jurisdiction under the Class
 19 Action Fairness Act, 28 U.S.C. § 1332(d).³

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 25 ¹ Order – ECF No. 30 at 2–4 (summarizing Ancestry's business model). This order incorporates the
 26 summary by this reference because many allegations in the initial and amended complaints are the same.
 27 *See* Blackline – ECF No. 32-1. Citations refer to material in the Electronic Case File (ECF); pinpoint
 citations are to the ECF-generated page numbers at the top of documents.

² First Am. Compl. (FAC) – ECF No. 32 at 8 (¶¶ 24–25), 18 (¶ 37), 19 (¶ 45), 27 (¶¶ 57, 59), 32 (¶ 76).

1 **STANDARD OF REVIEW**

2 **1. Rule 12(b)(1)**

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

7 A defendant’s Rule 12(b)(1) jurisdictional attack can be facial or factual. *White v. Lee*, 227 F.3d
8 1214, 1242 (9th Cir. 2000). “A ‘facial’ attack asserts that a complaint’s allegations are themselves
9 insufficient to invoke jurisdiction, while a ‘factual’ attack asserts that the complaint’s allegations,
10 though adequate on their face to invoke jurisdiction, are untrue.” *Courthouse News Serv. v. Planet*,
11 750 F.3d 776, 780 n.3 (9th Cir. 2014). This is a facial attack. The court thus “accept[s] all allegations
12 of fact in the complaint as true and construe[s] them in the light most favorable to the plaintiff[.]”
13 *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

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

17 Dismissal of a complaint without leave to amend should be granted only if the jurisdictional
18 defect cannot be cured by amendment. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048,
19 1052 (9th Cir. 2003).

20
21 **2. Rule 12(b)(6)**

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

1 To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which
 2 when accepted as true, “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556
 3 U.S. 662, 678 (2009). “A claim has facial plausibility when the plaintiff pleads factual content that
 4 allows the court to draw the reasonable inference that the defendant is liable for the misconduct
 5 alleged.” *Id.* “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for
 6 more than a sheer possibility that a defendant has acted unlawfully.” *Id.* “Where a complaint
 7 pleads facts that are merely consistent with a defendant’s liability, it stops short of the line
 8 between possibility and plausibility of ‘entitlement to relief.’” *Id.* (cleaned up).

9 If a court dismisses a complaint, it should give leave to amend unless the “pleading could not
 10 possibly be cured by the allegation of other facts.” *United States v. United Healthcare Ins. Co.*,
 11 848 F.3d 1161, 1182 (9th Cir. 2016) (cleaned up).

12 ANALYSIS

13 The court dismisses the claims for lack of Article III standing and, alternatively, because
 14 Ancestry is immune from liability under § 230(c)(1) of the Communications Decency Act.
 15

16 1. Article III Standing

17 “The ‘irreducible constitutional minimum’ of standing consists of three elements.” *Spokeo,*
 18 *Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555,
 19 560 (1992)). “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to
 20 the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable
 21 judicial decision.” *Id.* “The plaintiff, as the party invoking federal jurisdiction, bears the burden of
 22 establishing these elements.” *Id.* (citing *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990)).
 23 “Where, as here, a case is at the pleading stage, the plaintiff must clearly allege facts
 24 demonstrating ‘each element.’” *Id.* (cleaned up). “[S]tanding in federal court is a question of
 25 federal law, not state law.” *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013).
 26

27 Ancestry contends that the plaintiffs have not established injury in fact. “To establish injury in
 28 fact, a plaintiff must show that he or she suffered (or is injured by) a legally-protected interest that

1 is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Spokeo*,
 2 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560). “For an injury to be ‘particularized,’ it ‘must
 3 affect the plaintiff in a personal and individual way.’” *Id.* (quoting *Lujan*, 504 U.S. at 560 n.1). For
 4 an injury to be concrete, it “must be ‘de facto’; that is, it must actually exist . . . [and be] ‘real,’
 5 and not ‘abstract.’” *Id.* (citing dictionaries). “‘Concrete’ is not . . . necessarily synonymous with
 6 ‘tangible.’ Although tangible injuries are perhaps easier to recognize, . . . intangible injuries can
 7 nevertheless be concrete.” *Id.* at 1549 (cleaned up).

8 The plaintiffs allege the following injuries: (1) Ancestry’s use of their records violated their
 9 right to privacy under California Civil Code § 3344, which prohibits use of their names,
 10 photographs, and likenesses without their written permission; (2) Ancestry harmed them by using
 11 their records to obtain paid subscribers, which is more than mere disclosure and has provable
 12 commercial value; and (3) their emotional distress from Ancestry’s profiting from the records,
 13 their lost time investigating Ancestry’s use, and theft of their intellectual property.⁴ The court
 14 previously held that Ancestry’s use of the records for profit was not injury that conveyed Article
 15 III standing. The new grounds do not establish injury either.

16 **1.1 Use of Records**

17 First, the court previously rejected the plaintiffs’ argument that Ancestry’s use of the public
 18 profiles to solicit paying subscribers establishes injury. This use — standing alone — does not
 19 establish injury, even though Ancestry profits from the use.⁵ There needs to be more than the
 20 statutory injury. In *Fraley* and *C.M.D.*, for example, Facebook marketed products by suggesting
 21 that users who “liked” a product were endorsing it. *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785,
 22 791–92, 797–99 (N.D. Cal. 2011); *C.M.D. v. Facebook, Inc.*, No. C 12-1216 RS, 2014 WL
 23 1266291, at *1–*2 (N.D. Cal. Mar. 26, 2014). Nothing here approximates the *Fraley* plaintiffs’
 24 property interest in the value of their endorsement. And as the court held previously, the plaintiffs
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27 ⁴ FAC – ECF No. 32 at 8 (¶¶ 24–25), 17–18 (¶¶ 36–38), 19 (¶ 45), 26–27 (¶¶ 56–59), 32 (¶ 76).

28 ⁵ See, e.g., *Fraley*, 830 F. Supp. 2d at 785–786.

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