

1 Michael F. Ram (SBN 104805)
 2 mram@forthepeople.com
 3 Marie N. Appel (SBN 187483)
 4 mappel@forthepeople.com
 5 MORGAN & MORGAN
 6 COMPLEX LITIGATION GROUP
 7 711 Van Ness Avenue, Suite 500
 8 San Francisco, CA 94102
 9 Telephone: (415) 358-6913
 10 Telephone: (415) 358-6293

11 Benjamin R. Osborn (*Pro Hac Vice*)
 12 102 Bergen St.
 13 Brooklyn, NY 11201
 14 Phone: (347) 645-0464
 15 Email: ben@benosbornlaw.com

16 *Attorneys for Plaintiffs
 17 and the Proposed Class*

18 THE UNITED STATES DISTRICT COURT
 19 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 20 SAN FRANCISCO DIVISION

21 MEREDITH CALLAHAN and LAWRENCE
 22 GEOFFREY ABRAHAM, individually and on
 23 behalf of all others similarly situated,

24 Plaintiffs,

25 vs.

26 ANCESTRY.COM OPERATIONS INC., a
 27 Virginia Corporation; ANCESTRY.COM, INC.,
 28 a Delaware Corporation; ANCESTRY.COM
 LLC, a Delaware Limited Liability Company;
 and DOES 1 through 50, inclusive,
 Defendants.

Case No.: 3:20-cv-8437-LB

MOTION FOR INDICATIVE RULING
 RECOGNIZING INTERVENING CHANGE
 IN LAW

Hearing Date: October 28, 2021
 Hearing Time: 9:30 am
 Location: San Francisco Courthouse,
 Courtroom B

Magistrate Judge Laurel Beeler

1 PLEASE TAKE NOTICE that, on October 28, 2021, at 9:30 am, or as soon thereafter as
2 counsel may be heard, Plaintiffs Meredith Callahan and Lawrence Geoffrey Abraham, by and
3 through their attorneys, hereby move the Court to issue an indicative ruling pursuant to Fed. R.
4 Civ. P. 62.1.

5 Plaintiffs move for an indicative ruling on grounds that the Supreme Court’s decision in
6 *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021) represents an intervening change in
7 controlling law. Plaintiffs respectfully request this Court issue an indicative ruling stating that it
8 would grant a Rule 60(b)(6) motion to reconsider its June 15 Order regarding Plaintiffs’ Article
9 III standing to pursue claims under Cal. Civ. Code § 3344. Alternatively, Plaintiffs respectfully
10 request an indicative ruling that Plaintiffs’ Rule 60(b)(6) argument represents a “substantial
11 issue” and that this Court would accept remand from the Ninth Circuit to hear it.
12
13

14 This motion is based on the following points and authorities.
15

16 I. PRELIMINARY STATEMENT

17 On June 15, 2021, this Court entered an Order dismissing Plaintiffs’ First Amended
18 Complaint on grounds that “the plaintiffs do not have Article III standing.” Dkt. No. 46, at *2
19 (“June 15 Order”).¹ On June 25, the Supreme Court of the United States decided *TransUnion*
20 *LLC v. Ramirez*, 141 S. Ct. 2190 (2021). *TransUnion* explained that “concrete injury” under
21 Article III requires that “the injury to the plaintiff ha[ve] a close relationship to a harm
22 traditionally recognized as a basis for a lawsuit in American courts.” *Id.* at *9, quoting *Spokeo v.*
23 *Robins*, 578 U.S. 330, 341 (2016). The Supreme Court held that class members “whose reports
24 were disseminated to third parties suffered a concrete injury” because their harm bore a “close
25 relationship to the harm associated with the tort of defamation.” *Id.* at *17.
26

27 _____
28 ¹ This Court also ruled that “Ancestry is immune from liability under the Communications
Decency Act.” This motion does not address this Court’s ruling on the applicability of the CDA
to Ancestry.com.

1 On September 16, Judge Gloria M. Navarro of the District Court of Nevada denied
2 Ancestry’s motion to dismiss parallel statutory right of publicity claims. *Sessa v. Ancestry.com*
3 *Operations*, No. 2:20-cv-022292-GMN-BNW, 2021 WL 4245359 (Sept. 16, 2021).² The *Sessa*
4 court ruled that, under *TransUnion*, “Plaintiffs have standing to sue under the Nevada Right of
5 Publicity Act” because “the right of publicity has existed at common law, and the legislature
6 codified that right.” *Id.* at *5 (*citations omitted*). Judge Navarro “decline[d] to follow” this
7 Court’s conclusion regarding standing “because its order did not address whether the plaintiffs’
8 statutory injury had a common law analog as required by *Spokeo* and *TransUnion*.” *Id.* at *6.
9 Statutory right of publicity claims originate in common law. *Id.*

10 Under Fed. R. Civ. P. 62.1, a district court may issue an indicative ruling while an appeal
11 is pending. *TransUnion* represents an intervening change in controlling law, which justifies relief
12 from the June 15 Order under Fed. R. Civ. P. 60(b). Accordingly, Plaintiffs respectfully request
13 an indicative ruling stating that were the Ninth Circuit to remand for reconsideration under Rule
14 60(b), this Court would grant a motion to reconsider the June 15 Order. Alternatively, Plaintiffs
15 respectfully request an indicative ruling stating that Plaintiffs’ standing represents a substantial
16 issue in light of *TransUnion*.

17 II. LEGAL STANDARD

18 “To seek Rule 60(b) relief during the pendency of an appeal, the proper procedure is to
19 ask the district court whether it wishes to entertain the motion, or to grant it.” *Williams v.*
20 *Woodford*, 384 F.3d 567, 586 (9th Cir. 2004). Under Rule 62.1, the district court has three
21 options: it may “(1) defer considering the motion; (2) deny the motion; or (3) state either that it
22 would grant the motion if the court of appeals remands for that purpose or that the motion raises
23 a substantial issue.” *Knight v. Trimble*, 10-cv-00276-SBA, 2013 WL 6140743 at *2 (N.D. Cal.
24 Nov. 21, 2013) (*quoting* Fed. R. Civ. P. 62.1).

25 “Rule 60(b)(6) provides that . . . the court may relieve a party . . . from a final judgment,
26 order, or proceeding for . . . any . . . reason that justifies relief.” *Henson v. Fid. Nat’l Fin., Inc.*,

27
28

² A copy of Judge Navarro’s Order is attached.

1 943 F.3d 434, 443-44 (9th Cir. 2019). “Clause (6) should be liberally applied to all situations not
2 covered by the preceding five clauses.” *Id.* (*quotation omitted*). Courts regularly grant Rule
3 60(b)(6) motions based on an intervening change in the controlling law. *See, e.g., id.* (granting
4 Rule 60(b) motion based on intervening Supreme Court decision).

5 The Ninth Circuit has adopted a seven-factor test for when a change in intervening law
6 merits the granting of a Rule 60(b)(6) motion for reconsideration. Courts must consider:

- 7 (1) “[T]he nature of the intervening change in the law.”
- 8 (2) “Plaintiffs’ diligence in pursuing relief.”
- 9 (3) “[T]he parties’ reliance interest in the finality of the case.”
- 10 (4) “Delay between the judgment and the motion for Rule 60(b)(6) relief.”
- 11 (5) The “relationship between the original judgment and the change in the law.”
- 12 (6) “[C]oncerns of comity.”
- 13 (7) “Additional considerations” including “the importance of heeding the intent of the
14 rulings of federal appellate courts.”

15 *Henson v. Fid. Nat’l Fin., Inc.*, 943 F.3d 434, 446-54 (9th Cir. 2019) (*quoting Phelps v.*
16 *Alameida*, 569 F.3d 1120 (9th Cir. 2009)).

17 III. ARGUMENT

18 Here, six of the seven of the *Henson/Phelps* factors support relief under Rule 60(b)(6).
19 The remaining factor is irrelevant because no state court decision is involved.

20 First, the intervening change in law is directly applicable. *TransUnion* requires that when
21 district courts evaluate Article III standing, they “should assess whether the alleged injury to the
22 plaintiff has a close relationship to a harm traditionally recognized as providing the basis for a
23 lawsuit in American courts.” *TransUnion*, at *9. In the June 15 Order, this Court did not perform
24 the analysis that is now required by *TransUnion. Sessa*, at *10; *see also* June 15 Order.

25 The first factor “favor[s] granting relief” when “the change in the law adopted the legal
26 position that [the plaintiff] had unsuccessfully advocated all along.” *Henson*, at 446 (*citing*
27 *Phelps*, at 1131). That is what happened here. Plaintiffs advocated they had standing because
28 Cal. Civ. Code § 3344 codifies a common law right that “traditionally has been regarded as

1 providing a basis for a lawsuit.” Plaintiffs’ Opposition to Defendants’ Motion to Dismiss
2 (“Opposition”), ECF No. 38, at *3-4. In its June 15 Order this Court did not address the
3 connection between Cal. Civ. Code § 3344 and the common law right of publicity. *See* June 15
4 Order (reasoning that “the rights protected by § 3344 are not analogous to the fundamental and
5 historical privacy rights” implicated by CIPA, the Wiretap Act, and Stored Communications Act,
6 but not addressing the historical common law basis for the right of publicity).

7 Second, Plaintiffs have been diligent in pursuing relief. Plaintiffs filed this motion within
8 a week of Judge Navarro’s decision in *Sessa* and within three months of the Supreme Court’s
9 *TransUnion* decision.

10 Third, Ancestry has no relevant “reliance interest in the finality” of the June 15 Order.
11 *See Henson*, at 450. Ancestry has not “change[d] [its] legal position in reliance on that
12 judgment,” nor has Ancestry invested in building improvements on property that would change
13 hands if the judgment were reversed. *See Henson*, at 450.

14 Fourth, there has been no delay between the “finality of the judgment” and the present
15 motion seeking relief under Rule 60(b). *See Henson*, at 451. Under *Henson* and *Phelps*, delay is
16 measured from “when the original judgment . . . became final after appeal.” *Id.* at 452 (*quoting*
17 *Phelps*, at 1138 n. 21). Where, as here, an appeal is still pending at the time of the Rule 60(b)
18 motion, there is no delay and this factor “weighs in favor of granting Rule 60(b)(6) relief.” *Id.*

19 Fifth, there is a “close connection” between this Court’s June 15 Order and *TransUnion*
20 because *TransUnion* modifies the standing analysis upon which this Court based its ruling. *See*
21 June 25 Order, at *6. The *TransUnion* decision makes clear that district courts analyzing
22 statutory standing must evaluate whether the statute is rooted in a common law right.
23 *TransUnion*, at *9.

24 Sixth, the “comity” factor does not apply because there is no interaction “between the
25 independently sovereign state and federal judiciaries.” *See Henson*, at 453. Both this Court’s
26 June 25 Order and *TransUnion* are federal.

27 Seventh, the “additional factor” identified by *Henson* weighs in favor of granting relief
28 under Rule 60(b)(6) because this motion implicates “the importance of heeding the intent of the

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.