

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

ANTHONY SESSA, *et al.*,)
)
Plaintiffs,)
vs.)
)
ANCESTRY.COM OPERATIONS INC., *et*)
7 *al.*,)
)
Defendants.)

Case No.: 2:20-cv-02292-GMN-BNW

ORDER

Pending before the Court is the Motion to Dismiss, (ECF No. 19), filed by Defendants Ancestry.com Operations Inc., Ancestry.com, Inc., and Ancestry.com, LLC (collectively, “Ancestry”). Plaintiffs Anthony and Mark Sessa (collectively, “Plaintiffs”) filed a Response, (ECF No. 26), and Ancestry filed a Reply, (ECF No. 27).

Also pending before the Court are Ancestry’s Motions for Leave to File Notice of Related Decision, (ECF Nos. 32–33). Plaintiffs did not file a Response.¹

For the reasons discussed below, the Court **GRANTS in part** and **DENIES in part** the Motion to Dismiss.

I. BACKGROUND

This case arises from Ancestry’s alleged use of Plaintiffs’ names, images, and likenesses to market paid subscriptions to Ancestry’s database of school yearbooks (the “Yearbook Database” or “the Database”). (*See* Compl. ¶¶ 2–3, ECF No. 1). Subscribers to Ancestry’s Yearbook Database gain access to information derived from “billions of records belonging to hundreds of millions of Americans,” including “over 1.7 million records from Nevada schools and universities.” (*Id.* ¶ 3). To build the database, Ancestry allegedly, “extracted personal information from school yearbooks, then aggregated the extracted information into digital

¹ Pursuant to Local Rule 7-2(d), the Court **GRANTS** the Motions as unopposed.

1 records that correspond to and identify specific individuals.” (*Id.*). Plaintiffs allege that
2 Ancestry’s Yearbook Database includes, “the names, photographs, cities of residence, and
3 schools attended” of individuals within the Database. (*Id.*). Plaintiffs contend that they, and a
4 prospective class of other similarly situated Nevadans whose names, images, and likenesses are
5 in the database, neither received notice of nor consented to Ancestry’s use thereof. (*Id.* ¶¶ 4,
6 23–25, 35–37).

7 Ancestry sells access to the Yearbook Database through paid subscriptions ranging from
8 \$24.99 to \$49.99 per month. (*Id.* ¶ 6). Subscribers, depending on the level of their subscription,
9 may perform a range of functions within the Database, including the ability to search, view, and
10 download records. (*Id.*). Within the Yearbook Database, subscribers may access information
11 including, “the names, photographs, cities of residence, schools attended, estimated ages,
12 likenesses, and identities Ancestry has amassed in its Ancestry Yearbook Database[.]” (*Id.*).
13 Ancestry allegedly uses Plaintiffs’ names, images, and likenesses to “advertise, sell, and solicit
14 the purchase” of subscriptions in three ways: (1) providing free trials through which users can
15 access Plaintiffs’ profiles; (2) providing all visitors to the Database with limited access that
16 generates pop-up advertisements with Plaintiffs’ names and images; and (3) sending targeted
17 promotional emails to prospective customers bearing Plaintiffs’ names and images. (*Id.* ¶¶ 8–
18 12, 26, 29–30, 32, 37–38, 41–44).

19 **A. Free Trial**

20 Plaintiffs argue that prospective subscribers may enroll in a 14-day free trial that
21 “provides temporary access to search, view, and download records from Ancestry’s databases”
22 to induce users to pay for a monthly subscription. (*Id.* ¶¶ 8–9). Ancestry allegedly encourages
23 users to search the Yearbook Database for the names of “people they may know or be curious
24 about.” (*Id.*). When searching for a particular individual within the Database, subscribers may
25 view, “the individual’s name, yearbook photo, estimated age, city of residence, school attended,

1 and year of attendance.” (*Id.*). Free subscribers may also “view and download full-resolution
2 version[s] of yearbook photos of the individuals they have searched.” (*Id.*).

3 **B. Limited Access**

4 Any visitor to Ancestry.com may view the Yearbook Database, but visitors only receive
5 limited access unless they sign up for a free trial or paid subscription. (*Id.* ¶ 10). Limited-
6 access users may search an individual by name and “receive a list [sic] records, each of which
7 corresponds to a specific identifiable person, and includes the individual’s name, city of
8 residence, and a low-resolution version of a yearbook photo.” (*Id.*). However, “Users cannot
9 view the full-resolution version of the photograph or view additional information about the
10 person such as estimated age, name of school, and yearbook year.” (*Id.*). If users attempt to
11 click-through to any of the listed information, they are redirected to a page encouraging them to
12 sign up for a paid subscription. (*Id.*). Alternatively, if users scroll over the “View Record” link
13 on individuals’ profiles, they are presented with a pop-up advertisement bearing the name and
14 image of the person whom they have searched. (*Id.* ¶¶ 31–32, 42–43). The advertisement says,
15 “There’s more to see,” with a low-resolution thumbnail photo of the individual and a preview
16 of the type of information accessible through a subscription, including the person’s estimated
17 age, yearbook date, school location, birth year, and school of attendance. (*Id.*).

18 **C. Email Solicitation**

19 Plaintiffs also allege that Ancestry advertises subscriptions to the Yearbook Database
20 through promotional emails. (*Id.* ¶ 12). Plaintiffs allege that their names and images have been
21 used in promotional emails for the Yearbook Database, which Ancestry has targeted at people
22 who may be related to Plaintiffs. (*Id.* ¶¶ 12, 32, 44).

23 Plaintiffs raise the following claims based upon Ancestry’s alleged use of Plaintiffs’
24 names, images, likenesses, and personal information for the purpose of advertising, selling, and
25 soliciting subscriptions to the Yearbook Database: (1) violation of the Nevada Right of

1 Publicity Act, NRS §§ 597.770, *et seq.*; (2) violation of the Nevada Deceptive Trade Practices
2 Act, NRS §§ 598.0903, *et seq.*; (3) intrusion upon seclusion; and (4) unjust enrichment. (*Id.*
3 ¶¶ 68–87). Ancestry now moves to dismiss the Complaint. (*See generally*, Mot. Dismiss
4 (“MTD”), ECF No. 19).

5 **II. LEGAL STANDARD**

6 **A. 12(b)(1)**

7 Rule 12(b)(1) of the Federal Rules of Civil Procedure permits motions to dismiss for
8 lack of subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). When subject matter jurisdiction is
9 challenged, the burden of proof is placed on the party asserting that jurisdiction exists. *Scott v.*
10 *Breeland*, 792 F.2d 925, 927 (9th Cir. 1986) (holding that “[t]he party seeking to invoke the
11 court’s jurisdiction bears the burden of establishing that jurisdiction exists”). Accordingly, the
12 court will presume lack of subject matter jurisdiction until the plaintiff proves otherwise in
13 response to the motion to dismiss. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375,
14 377 (1994).

15 A motion to dismiss under Rule 12(b)(1) may be construed in one of two ways.
16 *Thornhill Publ’g Co., Inc. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). It
17 may be described as ‘facial,’ meaning that it attacks the sufficiency of the allegations to support
18 subject matter jurisdiction. *Id.* Alternatively, it may be described as ‘factual,’ meaning that it
19 “attack[s] the existence of subject matter jurisdiction in fact.” *Id.* When, as here, a court
20 considers a ‘facial’ attack made pursuant to Rule 12(b)(1), it must consider the allegations of
21 the complaint to be true and construe them in the light most favorable to the plaintiff. *Love v.*
22 *United States*, 915 F.2d 1242, 1245 (9th Cir. 1989).

23 **B. 12(b)(2)**

24 Pursuant to Rule 12(b)(2) of the Federal Rules of Civil Procedure, a defendant may
25 move to dismiss for lack of personal jurisdiction. Fed. R. Civ. P. 12(b)(2). Once a defendant

1 raises the defense, the burden falls on the plaintiff to prove sufficient facts to establish that
2 jurisdiction is proper. *Boschetto v. Hansing*, 539 F.3d 1011, 1015 (9th Cir. 2008). A plaintiff
3 can carry its burden only by presenting sufficient evidence to establish that (1) personal
4 jurisdiction is proper under the laws of the state where it is asserted; and (2) the exercise of
5 jurisdiction does not violate the defendant's right to due process secured by the United States
6 Constitution. *Ziegler v. Indian River Cty.*, 64 F.3d 470, 473 (9th Cir. 1995).

7 When no federal statute governs personal jurisdiction, the district court applies the law
8 of the forum state. *See Panavision Int'l L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998).
9 Nevada has authorized its courts to exercise jurisdiction over persons "on any basis not
10 inconsistent with . . . the Constitution of the United States." NRS 14.065. Thus, the Due
11 Process Clause of the Fourteenth Amendment is the relevant constraint on Nevada's authority
12 to bind a nonresident defendant to a judgment of its own courts. *World Wide Volkswagen Corp.*
13 *v. Woodson*, 444 U.S. 286, 291 (1980).

14 The Due Process Clause requires that the nonresident must have "certain minimum
15 contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair
16 play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting
17 *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). To survive a motion to dismiss for lack of
18 personal jurisdiction, a plaintiff need only make "a prima facie showing of jurisdictional facts."
19 *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006) (quoting *Doe v. Unocal*, 248
20 F.3d 915, 922 (9th Cir. 2001)). When analyzing such a 12(b)(2) motion, "the court resolves all
21 disputed facts in favor of the plaintiff." *Id.*

22 C. 12(b)(6)

23 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
24 that fails to state a claim upon which relief can be granted. *See N. Star Int'l v. Ariz. Corp.*
25 *Comm'n*, 720 F.2d 578, 581 (9th Cir. 1983). When considering a motion to dismiss under Rule

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