

No. _____

IN THE
Supreme Court of the United States

PEOPLECONNECT, INC.,
Petitioner,

v.

MEREDITH CALLAHAN AND LAWRENCE GEOFFREY
ABRAHAM, on behalf of themselves and all others
similarly situated,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Federal Arbitration Act, when a motion to compel arbitration is denied, the party seeking arbitration may file an immediate appeal of that decision. This case concerns the legal standard for stays of district court proceedings pending appeal of denials of motion to compel arbitration. The question presented is:

Does a non-frivolous appeal of a denial of a motion to compel arbitration divest district courts of jurisdiction, causing proceedings to be stayed automatically, as the Third, Fourth, Seventh, Tenth, and Eleventh Circuits have held, or does the appealing party have to satisfy the traditional discretionary test for a stay, as the Second, Fifth, and Ninth Circuits have held?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, PeopleConnect, Inc. (“PeopleConnect”) hereby states that it is a wholly-owned subsidiary of PeopleConnect Holdings, Inc., a non-public Delaware corporation, and PCHI Parent, Inc., a non-public Delaware corporation. No publicly held corporation owns 10% or more of PeopleConnect’s stock. PeopleConnect has no publicly held affiliates.

STATEMENT OF RELATED CASES

Pursuant to Supreme Court Rule 14, PeopleConnect
hereby states that there are no related cases.

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PETITION FOR WRIT OF CERTIORARI

PeopleConnect, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit’s decision denying a stay pending appeal (Pet. App. 1a–2a) is unreported. The district court’s order denying a stay pending appeal (Pet. App. 3a–58a) is reported at 2021 WL 5050079. The district court’s order denying the motion to compel arbitration (Pet. App. 59a–75a) is reported at 2021 WL 1979161.

JURISDICTION

The judgment of the Ninth Circuit was entered on December 9, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

INTRODUCTION

Under the Federal Arbitration Act, when a federal district court denies a motion to compel arbitration, the proponent of arbitration may file an immediate appeal. 9 U.S.C. § 16(a). But what happens to the district court proceedings while the appeal is pending? Do they continue, or do they halt?

The circuits are divided 5 to 3 on that question. The Third, Fourth, Seventh, Tenth, and Eleventh Circuits hold that when a non-frivolous appeal is filed of the denial of a motion to compel arbitration, the district court is divested of jurisdiction over the underlying litigation. Hence, proceedings in the district court halt automatically.

By contrast, the Second, Fifth, and Ninth Circuits hold that an appeal of the denial of a motion to compel arbitration does not divest the district court of jurisdiction over the underlying litigation. In those circuits, litigation continues in the district court unless the traditional, discretionary standard for a stay is satisfied.

This circuit split has been widely acknowledged. Indeed, aside from the Ninth Circuit (the first appellate court to consider the issue), every appellate decision has expressly noted the conflict of authority. *See, e.g., Weingarten Realty Invs. v. Miller*, 661 F.3d 904, 907 (5th Cir. 2011) (noting that question presented is “the subject of a circuit split”); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 54 (2d Cir. 2004) (“Other circuits are divided on this question.”); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004) (“The circuit courts that have considered the issue are split.”)

This petition presents an ideal vehicle to resolve the split. In the underlying dispute, respondents Meredith Callahan and Lawrence Geoffrey Abraham filed a putative class action against petitioner PeopleConnect, Inc. (“PeopleConnect”). PeopleConnect filed a motion to compel arbitration, which the district court denied. PeopleConnect appealed that ruling. That appeal is currently pending in the Ninth Circuit.

After filing its notice of appeal, PeopleConnect sought a stay of district court proceedings pending disposition of its appeal. Under circuit precedent, PeopleConnect was required to satisfy the traditional discretionary test for a stay. The district court denied a stay. The Ninth Circuit did too, and also denied

PeopleConnect’s alternative request for an administrative stay so the Ninth Circuit’s circuit precedent on stays could be considered en banc.

If this case had arisen in the Third, Fourth, Seventh, Tenth, and Eleventh Circuits, PeopleConnect would automatically have been entitled to a stay. But the Ninth Circuit denied a stay because of its less favorable legal standard.

The Court should grant certiorari to resolve the circuit split. This case meets all of the Court’s criteria for certiorari. The circuit split is longstanding. There are detailed opinions on both sides of the split. The issue recurs regularly—in literally all cases involving appeals of denials of motions to compel arbitration, the district court must decide whether the litigation should continue or stop.

Notably, this Court previously granted review of a different circuit split on the legal standard for stays pending appeal. *Nken v. Holder*, 556 U.S. 418 (2009) (resolving test for stays of removal pending disposition of appeals of adverse immigration appeals). Review is warranted to resolve this circuit split as well.

Finally, review is warranted because the Ninth Circuit’s decision is wrong. As the Third, Fourth, Seventh, Tenth, and Eleventh Circuits have held, this case merely requires a straightforward application of the bedrock principle that an appeal divests a district court of jurisdiction over the case being appealed. Although there is an exception to that principle for matters that are collateral to the issue on appeal, that exception does not apply here. The purpose of the

appeal is to determine whether the case should proceed to arbitration, or whether district court proceedings should instead occur. Those very proceedings are thus at the core of—not collateral to—the appeal.

Moreover, the Ninth Circuit’s approach would nullify Congress’s decision to authorize immediate appeals of denials of motions to compel arbitration. Immediate appeals serve to avoid the prospect of litigating a case to judgment, only to be sent to arbitration following an appeal. Yet permitting litigation to proceed while an appeal is pending risks precisely that outcome.¹

STATEMENT OF THE CASE

A. PeopleConnect’s Motion to Compel Arbitration.

PeopleConnect owns and operates Classmates.com, which includes an online library of over 450,000 school yearbooks viewable by its 70 million members. Respondents filed a putative class action against PeopleConnect, alleging that it presented excerpts from their school yearbooks on Classmates.com that include their “names, photographs, and likenesses” in violation of California law.²

No names or photos are displayed on Classmates.com

¹ PeopleConnect previously filed a petition for certiorari raising the same question, but withdrew that petition after the respondent’s counsel in that case (who is different from respondents’ counsel here) mooted the case by voluntarily agreeing to PeopleConnect’s requested stay. *PeopleConnect, Inc. v. Knapke*, No. 21-725.

² Complaint ¶2, *Callahan v. PeopleConnect, Inc.*, No. 20-cv-09203-EMC (N.D. Cal. Dec. 18, 2020), ECF No. 2.

unless and until a user enters such information into a search bar. So to create respondents' claim, their counsel registered for a free Classmates.com account and performed searches for respondents on the website.³ At each step, the website prompted counsel with the following message: "By accessing and using the Websites and Services you are agreeing to the following Terms of Service."⁴ The Terms of Service, which are hyperlinked to that message, contain a mandatory arbitration provision stating the parties agree to arbitrate "any and all disputes."⁵ The Terms of Service grant all users a right to opt out of the contractual arbitration agreement within 30 days of registration.⁶

Respondents' counsel did not opt out. Instead, counsel included in respondents' Complaint screenshots available only to a user that accepted the Terms of Service.⁷

PeopleConnect moved to dismiss respondents' claim in favor of arbitration. PeopleConnect argued, among other things, that respondents' lawyer acted as respondents' agent when the lawyer registered for an account on Classmates.com, searched for respondents'

³ Declaration of Tara McGuane in Support of Defendant's Motion to Dismiss ¶¶12–14, 16, *Callahan v. PeopleConnect, Inc.*, No. 20-cv-09203-EMC (N.D. Cal. Mar. 19, 2021), ECF No. 27.

⁴ McGuane Declaration, *supra* n.3, ¶7.

⁵ Defendant's Motion to Dismiss at 3-4, *Callahan v. PeopleConnect, Inc.*, No. 20-cv-09203-EMC (N.D. Cal. Mar. 19, 2021), ECF No. 26.

⁶ Exhibit 1 to McGuane Declaration, *supra* n.3, §13(D).

⁷ McGuane Declaration, *supra* n.3, ¶16.

names, and took screenshots of the resulting website.

The district court, however, declined to compel arbitration. The district court held that under *Blanton v. Womancare, Inc.*, 696 P.2d 645 (Cal. 1985), Plaintiffs were not bound by the arbitration agreement. Pet. App. 73a–75a.

PeopleConnect immediately noticed an appeal, as authorized by the Federal Arbitration Act. 9 U.S.C. §16(a)(1). That appeal remains pending. *Callahan v. PeopleConnect, Inc.*, No. 21-16040 (9th Cir.).

PeopleConnect respectfully disagrees with the district court’s decision denying arbitration and believes it has a strong chance of prevailing on appeal. *Blanton* is not on point. In *Blanton*, the client told her attorney not to agree to binding arbitration, and, when the attorney agreed nonetheless to an egregiously disadvantageous arbitration provision on the eve of trial, the client immediately terminated him. 696 P.2d at 647–48. Here, by contrast, respondents have never claimed they directed their attorney not to agree to arbitrate. The agreement to arbitrate occurred before litigation commenced. And respondents ratified the agreement by accepting the benefit of access to Classmates.com by incorporating screenshots into their Complaint and referencing screenshots in their opposition to the motion to dismiss.

Worse, the district court’s approach is foreclosed by the Federal Arbitration Act. As the district court saw it, the usual rules of agency law under which an agent may bind a principal based on implied actual authority, rather than express actual authority, do not apply if an

agreement “waive[s] the right to a judicial forum.” Pet. App. 75a. If the usual rules of agency do not apply to arbitration agreements, however, then California law is preempted by the Federal Arbitration Act (“FAA”) because it embraces a defense that “derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue.” *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)).

B. PeopleConnect’s Motion to Stay Pending Appeal.

After PeopleConnect filed its notice of appeal, PeopleConnect moved the district court for a stay of litigation pending appeal. On November 1, 2021, the district court denied the stay motion. Pet. App. 9a.

On November 17, 2021, PeopleConnect moved the Ninth Circuit to stay the district court action. PeopleConnect sought a stay under the Ninth Circuit’s legal standard in *Britton v. Co-op Banking Group*, 916 F.2d 1405 (9th Cir. 1990). However, PeopleConnect’s stay motion expressly noted the circuit conflict on the legal standard for a stay. It urged the Court to revisit *Britton* and join the view of the majority of courts of appeals that stays of district court proceedings are mandatory pending appeals of denials of motions to compel arbitration.

On December 9, 2021, the Ninth Circuit denied PeopleConnect’s motion for stay pending appeal. Pet. App. 1a. The court also denied PeopleConnect’s request for an administrative stay to permit en banc reconsideration of *Britton*. *Id.*

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve the well-recognized circuit split over whether a district court is ousted of jurisdiction pending appeal of the denial of a motion to compel arbitration.

I. THE CIRCUITS ARE SPLIT ON WHETHER DISTRICT COURT PROCEEDINGS MUST BE STAYED PENDING APPEAL OF A DENIAL OF A MOTION TO COMPEL ARBITRATION.

There is an entrenched circuit split over whether district courts are ousted of jurisdiction pending appeal of the denial of a motion to compel arbitration. In the Second, Fifth, and Ninth Circuits, when an appeal is filed, the district court maintains jurisdiction over the case, and a stay is granted only if a movant can satisfy the traditional test for a stay. By contrast, in the Third, Fourth, Seventh, Tenth, and Eleventh Circuits, the filing of a non-frivolous appeal ousts the district court of jurisdiction, and district court proceedings must automatically halt.

A. Three circuits hold that district courts maintain jurisdiction while an appeal of the denial of a motion to compel arbitration is pending.

In the decision below, the **Ninth Circuit** followed its binding precedent in *Britton v. Co-op Banking Group*, 916 F.2d 1405 (9th Cir. 1990). In *Britton*, the Ninth Circuit concluded that a district court was not ousted of jurisdiction pending the appeal of a denial of a motion to compel arbitration. The court acknowledged “the

general rule that the filing of a notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the appellate court.” *Id.* at 1411. But the court also noted that “where an appeal is taken from a judgment which does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters not involved in the appeal.” *Id.* (quotation marks omitted). The court observed: “Absent a stay, an appeal seeking review of collateral orders does not deprive the trial court of jurisdiction over other proceedings in the case, and an appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal.” *Id.* at 1412. The court deemed the “issue of arbitrability” to be collateral to the merits, and hence held that notwithstanding the appeal, “the district court was not divested of jurisdiction to proceed with the case on the merits.” *Id.* The court further observed that a contrary rule “would allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration.” *Id.*

The Ninth Circuit instead held that the traditional discretionary test for a stay applies. In the Ninth Circuit’s view, a court should “evaluate the merits of the movant’s claim, and if, for instance, the court finds that the motion presents a substantial question, to stay the proceedings pending an appeal from its refusal to compel arbitration.” *Id.* “This is a proper subject for the exercise of discretion by the trial court.” *Id.*

The **Second Circuit** took the same view as the Ninth Circuit in *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir. 2004). In that case, the Second Circuit denied the

defendant's motion for a stay of district court proceedings pending appeal. The court recognized that “[o]ther circuits are divided on this question.” *Id.* at 54. In the Ninth Circuit, “either the district court or the court of appeals may—but is not required to—stay the proceedings upon determining that the appeal presents a substantial question.” *Id.* By contrast, in other circuits, “a district court may not proceed after the filing of a nonfrivolous appeal from an order denying arbitration.” *Id.* The Second Circuit “explicitly adopt[ed] the Ninth Circuit’s position that further district court proceedings in a case are not ‘involved in’ the appeal of an order refusing arbitration, and that a district court therefore has jurisdiction to proceed with a case absent a stay from this Court.” *Id.*

Finally, the **Fifth Circuit** adopted the same position as the Second and Ninth Circuits in *Weingarten Realty Investors v. Miller*, 661 F.3d 904 (5th Cir. 2011). The Fifth Circuit recognized that “[w]hether an appeal from a denial of a motion to compel arbitration divests the district court of jurisdiction to proceed to the merits is the subject of a circuit split.” *Id.* at 907. “The Second and Ninth Circuits have held that a stay is not automatic.” *Id.* By contrast, “[t]he Seventh Circuit, later joined by the Third, Fourth, Tenth, and Eleventh, has held that a notice of appeal automatically stays proceedings in the district court.” *Id.* at 908.

The court explained that the debate turned on “whether the merits of an arbitration claim are an aspect of a denial of an order to compel arbitration.” *Id.* Under the Ninth Circuit’s approach, “because answering the question of arbitrability does not determine the merits

of the case, the merits are not an aspect of the case that is involved in the appeal on arbitrability.” *Id.* Under the Seventh Circuit’s approach, “because an appeal on arbitrability concerns whether the case will be heard in the district court at all, the merits in district court are an aspect of the case that is involved in the appeal.” *Id.* The court adopted the Ninth Circuit’s approach, holding that “[a]n appeal of a denial of a motion to compel arbitration does not involve the merits of the claims pending in the district court.” *Id.* at 909. In the Fifth Circuit’s view, “[a] determination on the arbitrability of a claim has an impact on what arbiter — judge or arbitrator — will decide the merits, but that determination does not itself decide the merits.” *Id.*

B. Five circuits hold that district courts do not maintain jurisdiction while an appeal of the denial of motion to compel arbitration is pending.

Five circuits have reached the opposite conclusion from the Second, Fifth, and Ninth Circuits. Those circuits have held that a non-frivolous appeal of a denial of a motion to compel arbitration divests the district court of jurisdiction, and district court proceedings must therefore halt.

In *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504 (7th Cir. 1997) (Easterbrook, J.), the **Seventh Circuit** concluded that a district court is automatically divested of jurisdiction over a case while a motion to compel arbitration is pending. The court applied the principle that “a federal district court and a federal court of appeals should not

attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Id.* at 505 (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)). The Seventh Circuit acknowledged that “[t]he qualification ‘involved in the appeal’ is essential—it is why the district court may award costs and attorneys’ fees after the losing side has filed an appeal on the merits, why the court may conduct proceedings looking toward permanent injunctive relief while an appeal about the grant or denial of a preliminary injunction is pending.” *Id.* But the court explained that “[w]hether the case should be litigated in the district court is not an issue collateral to the question presented by an appeal under § 16(a)(1)(A), however; it is the mirror image of the question presented on appeal.” *Id.* “Continuation of proceedings in the district court largely defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals.” *Id.*

The Seventh Circuit expressly rejected the Ninth Circuit’s reasoning in *Britton*. As the Seventh Circuit noted, the Ninth Circuit gave two reasons for its conclusion, “neither of which persuades.” *Id.* at 506. “The first is that arbitrability is distinct from the merits of the litigation, which the ninth circuit took to imply that an appeal concerning arbitrability does not affect proceedings to resolve the merits.” *Id.* According to the Seventh Circuit, “[t]he premise may be correct, but the conclusion does not follow.” *Id.* (citation omitted). The

Seventh Circuit observed that “[w]hether the litigation may go forward in the district court is precisely what the court of appeals must decide.” *Id.* “The ninth circuit’s second reason is that an automatic stay would give an obstinate or crafty litigant too much ability to disrupt the district judge’s schedule by filing frivolous appeals.” *Id.* In the Seventh Circuit’s view, “[t]hat is a serious concern, but one met by the response that the appellee may ask the court of appeals to dismiss the appeal as frivolous or to affirm summarily.” *Id.*

The **Eleventh Circuit** adopted the Seventh Circuit’s approach in *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249 (11th Cir. 2004). The Eleventh Circuit observed that “[w]hether a party is entitled to a stay of all proceedings in the district court until resolution of an appeal from a denial of arbitration is an issue of first impression for this Court. The circuit courts that have considered the issue are split.” *Id.* at 1251. The court was “persuaded by the reasoning of the Seventh Circuit.” *Id.* In the Eleventh Circuit’s view, “[t]he only aspect of the case involved in an appeal from an order denying a motion to compel arbitration is whether the case should be litigated at all in the district court.” *Id.* “The issue of continued litigation in the district court” is not “collateral to” the appeal: it is “the mirror image of the question presented on appeal.” *Id.* (quotation marks omitted).

The Eleventh Circuit further noted that “the Federal Arbitration Act grants a party the right to file an interlocutory appeal from the denial of a motion to compel arbitration.” *Id.* “By providing a party who seeks arbitration with swift access to appellate review,

Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums. If the court of appeals reverses and orders the dispute arbitrated, then the costs of the litigation in the district court incurred during appellate review have been wasted and the parties must begin again in arbitration.” *Id.* “Thus, the underlying reasons for allowing immediate appeal of a denial of a motion to compel arbitration are inconsistent with continuation of proceedings in the district court, and a non-frivolous appeal warrants a stay of those proceedings.” *Id.* at 1252. The court was “unpersuaded by the two reasons articulated by the Ninth Circuit in refusing to stay proceedings in the district court pending appeal,” instead endorsing the Seventh Circuit’s reasoning in rejecting the Ninth Circuit’s justifications. *Id.* The court noted that its rule is subject to an exception for frivolous appeals. *Id.*

The **Tenth Circuit** addressed the same issue in *McCauley v. Halliburton Energy Services, Inc.*, 413 F.3d 1158 (10th Cir. 2005). The court recognized that “[w]hether an interlocutory appeal from the denial of a motion to compel arbitration divests a district court of jurisdiction to proceed on the merits of the underlying claim while the appeal is pending is a question of first impression in this circuit.” *Id.* at 1160. Moreover, the “circuits that have addressed” this issue “are split.” *Id.* The court was “persuaded by the reasoning” of the circuits holding “that upon the filing of a non-frivolous § 16(a) appeal, the district court is divested of jurisdiction until the appeal is resolved on the merits.”

Id. The court reasoned that “the failure to grant a stay ... results in a denial or impairment of the appellant’s ability to obtain its legal entitlement to avoidance of litigation,” in this case derived from “the contractual entitlement to arbitration.” *Id.* at 1162. The court “recognize[d] the Ninth Circuit’s legitimate concerns regarding potential exploitation of the divestiture rule through dilatory appeals,” but stated that those concerns could be addressed via an exception for frivolous appeals. *Id.*

In *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007), the **Third Circuit** reached the same conclusion. Initially, the court issued an unpublished order staying district court proceedings pending appeal of the denial of a motion to compel arbitration. *Id.* at 215 n.6. In its subsequent published opinion, the court noted that “[t]here is a circuit split on the question of whether the filing of an interlocutory appeal pursuant to Section 16(a) of the FAA automatically deprives the trial court of jurisdiction to proceed until such time as the appeal is fully litigated or determined to be frivolous or forfeited.” *Id.* The court stated that in its stay order, it “expressed [its] agreement with the majority rule of automatic divestiture where the Section 16(a) appeal is neither frivolous nor forfeited.” *Id.*

Finally, in *Levin v. Alms & Associates, Inc.*, 634 F.3d 260 (4th Cir. 2011), the **Fourth Circuit** “join[ed] the position adopted by the majority of the circuits.” *Id.* at 263. As the court explained, “[t]he core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims.” *Id.* at 264. “Therefore, because the district

court lacks jurisdiction over those aspects of the case involved in the appeal, it must necessarily lack jurisdiction over the continuation of any proceedings relating to the claims at issue.” *Id.* (quotation marks omitted). The court explained that this principle applied with full force in the context of a request to stay discovery: “Discovery is a vital part of the litigation process and permitting discovery constitutes permitting the continuation of the litigation, over which the district court lacks jurisdiction.” *Id.* at 264. “Furthermore, allowing discovery to proceed would cut against the efficiency and cost-saving purposes of arbitration.” *Id.* “Also, allowing discovery to proceed could alter the nature of the dispute significantly by requiring parties to disclose sensitive information that could have a bearing on the resolution of the matter. If we later hold that the claims were indeed subject to mandatory arbitration, the parties will not be able to unring any bell rung by discovery, and they will be forced to endure the consequences of litigation discovery in the arbitration process.” *Id.* Like other circuits taking the majority position, the Fourth Circuit stated that its approach would be subject to a “frivolousness exception to the divestiture of jurisdiction.” *Id.* at 265.

There is therefore a 5-3 circuit split on whether a non-frivolous appeal of the denial of a motion to compel arbitration divests a district court of jurisdiction.

II. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE TO RESOLVE THE SPLIT.

This case warrants this Court’s review. There is a clear circuit split on the question presented. The circuit

split has existed since 1997, when the Seventh Circuit rejected the Ninth Circuit’s approach. Given that there are five circuits on one side and three on the other, there is no possibility that the split will go away without this Court’s intervention.

Additional percolation would serve no purpose. Eight courts of appeals have issued published opinions weighing in.⁸ The arguments on both sides of the split have been fully aired. Indeed, 16 years ago, the Tenth Circuit observed that “the courts on each side of the divide have provided legal justifications as well as supporting prudential rationales related to the

⁸ The D.C. Circuit has also issued an unpublished opinion following the Seventh Circuit’s approach. *Bombardier Corp. v. Nat'l R.R. Passenger Corp.*, No. 02-7125, 2002 WL 31818924, at *1 (D.C. Cir. Dec. 12, 2002) (“Because the appeal is non-frivolous and because a non-frivolous appeal from the district court’s order divests the district court of jurisdiction over those aspects of the case on appeal, this court has exclusive jurisdiction to resolve the threshold issue whether the dispute is arbitrable, and the district court may not proceed until the appeal is resolved.”); *see also Bombardier Corp. v. Nat'l R.R. Passenger Corp.*, 333 F.3d 250, 252 (D.C. Cir. 2003) (“Amtrak’s appeal of the motion to dismiss was facially non-frivolous and thus the district court was divested of jurisdiction over the underlying action until we could determine the threshold issue of whether the dispute between the parties is arbitrable under the FAA.”). District courts in the First, Sixth, Eighth, and D.C. Circuits have also followed the majority rule. *See Combined Energies v. CCI, Inc.*, 495 F. Supp. 2d 142, 143 (D. Me. 2007); *Christmas Lumber Co. v. NWH Roof & Floor Truss Sys., LLC*, No. 3:19-CV-55, 2020 WL 3052222, at *2 (E.D. Tenn. June 8, 2020); *Engen v. Grocery Delivery E-Services USA Inc.*, No. 19-cv-2433, 2020 WL 3072316, at *1-2 (D. Minn. June 10, 2020); *Kelleher v. Dream Cather, LLC*, No. 1:16-cv-02092, 2017 WL 7279397, at *2 (D.D.C. July 24, 2017).

competing interests and concerns about potential abuse of litigation and appeals.” *McCauley*, 413 F.3d at 1160. “It is evident from this case law that the opposing circuit positions have each presented a reasoned response to the other’s prudential rationales.” *Id.* Since *McCauley*, additional circuits have issued published opinions on both sides of the circuit split. Rarely will the Court see a split as well-ventilated as this.

The question presented is important. This issue arises in literally every case in which a litigant appeals the denial of a motion to compel arbitration. In every single such case, the district court must decide whether the parties should continue litigating or whether they should stop. It is remarkable that, over 30 years after *Britton*, there is still nationwide uncertainty over this basic question of federal arbitration law. This issue cries out for resolution by this Court.

Notably, this Court has previously granted certiorari to resolve a circuit split on the legal standard for stays pending appeal. *Nken v. Holder*, 556 U.S. 418 (2009). Like this case, *Nken* presented a dispute over whether the traditional discretionary test for stays applied, or instead a different legal standard applied. This circuit split is no less worthy of resolution by this Court.

This case is the perfect vehicle to decide the question. The district court and Ninth Circuit denied PeopleConnect’s stay application. PeopleConnect sought a stay pending a petition for rehearing en banc to reconsider *Britton*, but the Ninth Circuit denied that too. Discovery is therefore proceeding in the district court. Indeed, on December 9, 2021, within hours of the Ninth Circuit’s order denying PeopleConnect’s stay

application, respondents served far-reaching document requests on PeopleConnect, confirming that respondents will aggressively seek discovery, including class discovery, while PeopleConnect’s appeal is pending in the Ninth Circuit. In the Third, Fourth, Seventh, Tenth, and Eleventh Circuits, the district court would have been divested of jurisdiction, and discovery would not be proceeding. This case is therefore an ideal vehicle to determine which side of the split is right.

Moreover, the facts of this case well illustrate why staying district court proceedings pending appeal is such a crucial protection for proponents of arbitration. If the parties conducted an individualized arbitration, as contemplated by the arbitration agreement, the scope of discovery would be narrow. Any information exchanges require the arbitrator’s permission, the arbitrator may only allow “specific documents and other information [including identities of witnesses] to be shared between the consumer and business,” and exchanges must comport with “a fast and economical process.”⁹

If the case proceeds in federal district court, discovery will be anything but “fast and economical.” Respondents’ suit is a putative class action. Hence, rather than engage in the low-cost individualized arbitration procedures that it bargained for, PeopleConnect will be compelled to participate in full-blown class certification discovery. This Court has repeatedly recognized that class proceedings are dramatically more complex and burdensome than

⁹ Exhibit 1 to McGuane Declaration, *supra* n.3, § 13(B)(i); *see also* AAA Consumer Arb. R. R-22-(a).

individualized arbitration. *See, e.g., Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 141 (2019) (“[S]hifting from individual to class arbitration is a fundamental change that sacrifices the principal advantage of arbitration and greatly increases risks to defendants” (quotation marks and citations omitted)); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011) (class procedures “makes the process slower, more costly, and more likely to generate procedural morass than final judgment”). Without a stay, PeopleConnect faces the prospect of dealing with the very costly morass it bargained to avoid, all while waiting for the Ninth Circuit to rule on whether it has a right to arbitrate.

This case therefore provides an ideal vehicle to resolve whether the Ninth Circuit’s minority rule on stays pending appeal is correct.

III. THE NINTH CIRCUIT’S DECISION IS WRONG.

In the decision below, the Ninth Circuit was bound by *Britton* to apply the traditional test for a stay. But *Britton* is wrongly decided. To understand why, the Court need look no further than the published circuit opinions that have expressly repudiated every aspect of *Britton*’s reasoning.

In *Britton*, the Ninth Circuit relied on the principle that “[a]bsent a stay, an appeal seeking review of collateral orders does not deprive the trial court of jurisdiction over other proceedings in the case, and an appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal.”

916 F.2d at 1412. The court deemed the “issue of arbitrability” to be collateral to the merits, and hence held that notwithstanding the appeal, “the district court was not divested of jurisdiction to proceed with the case on the merits.” *Id.*

That reasoning is faulty. The appeal is not collateral to the merits. It has *everything* to do with the merits. The Seventh Circuit put it well: “Whether the case should be litigated in the district court is not an issue collateral to the question presented by an appeal under § 16(a)(1)(A), however; it is the mirror image of the question presented on appeal. Continuation of proceedings in the district court largely defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals.” *Bradford-Scott*, 128 F.3d at 505.

The *Britton* court further observed that a contrary rule “would allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration.” 916 F.2d at 1412. Yet as the Seventh Circuit observed, “the appellee may ask the court of appeals to dismiss the appeal as frivolous or to affirm summarily.” *Bradford-Scott*, 128 F.3d at 505. *Bradford-Scott* was decided 24 years ago, and there is no evidence of a flood of frivolous arbitration appeals in the Seventh Circuit. Indeed, other courts of appeals have more explicitly carved out exceptions for frivolous appeals, and there is no evidence those courts have endured any difficulty with frivolous appeals, either. District courts should not be permitted to exercise jurisdiction during the pendency of an appeal in *every* case merely because some fraction of those appeals will prove frivolous.

The Ninth Circuit’s rule would also defeat the purpose of the Federal Arbitration Act’s special rules governing appeals. Under the Federal Arbitration Act, when the district court denies a request for arbitration, the party seeking arbitration may immediately appeal rather than await final judgment. *See* 9 U.S.C. § 16(a). The policy rationale for this rule is straightforward: “By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums. If the court of appeals reverses and orders the dispute arbitrated, then the costs of the litigation in the district court incurred during appellate review have been wasted and the parties must begin again in arbitration.” *Blinco*, 366 F.3d at 1251.

Yet if litigation proceeds in court while the appeal is pending, the benefit of an interlocutory appeal may be lost. It may take years for an appeal to be fully resolved—sufficient time for the parties to complete discovery and conduct a full trial on the merits. If the order denying arbitration is then reversed, then the parties will face the precise outcome that the FAA’s authorization of interlocutory appeals is designed to avoid: discovery and trial in federal district court, followed by arbitration of the same case. That outcome can be avoided merely by applying the standard rule that an appeal divests a district court of jurisdiction.

IV. IF CERTIORARI IS GRANTED, THE COURT SHOULD ENSURE THAT THIS CASE IS HEARD EXPEDITIOUSLY.

This case concerns the legal standard for a stay pending appeal. Hence, this case—and any other case raising the same question—will become moot once the court of appeals issues its mandate. If the Court grants certiorari, it should ensure that the case is decided before it becomes moot.

While PeopleConnect awaited decisions from the district court and Ninth Circuit on its motions for stay pending appeal, the appeal progressed significantly. It will be fully briefed as of December 22, 2021, and the Ninth Circuit has stated that the case would be considered for oral argument in March, April, or June 2022. Taking into account the potential for a petition for rehearing after a decision issues, PeopleConnect believes that this case is unlikely to be fully resolved in the Ninth Circuit by the end of the current Supreme Court Term (*i.e.*, June 2022), but the case is likely to be fully resolved prior to the end of the next Term (*i.e.*, June 2023).

To avoid mootness, the Court should ensure that the case is decided this Term, and ideally by the spring. To ensure that this case is heard expeditiously, the Court has two options.

First, PeopleConnect has also filed an application for stay pending disposition of this petition for certiorari. PeopleConnect’s preferred option would be for the Court to treat that application as a petition for certiorari, grant the stay, grant certiorari, and issue a briefing

schedule. If the Court does so, PeopleConnect would dismiss this petition.

Alternatively, the Court should grant the stay application and then expedite consideration of this petition for certiorari. PeopleConnect has filed a motion to expedite consideration of this petition for certiorari that would allow the petition to be considered at the Court's January 7, 2022 Conference.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Filed Dec. 9, 2021

MEREDITH CALLAHAN; LAWRENCE GEOFFREY ABRAHAM, on behalf of themselves and all others similarly situated, Plaintiff-Appellees, v. PEOPLECONNECT, INC., a Delaware Corporation, Defendant-Appellant.	No. 21-16040 D.C. No. 3:20-cv-09203-EMC Northern District of California San Francisco ORDER
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Before O'SCANLAIN and THOMAS, Circuit Judges.

Appellant's motion for a stay of district court proceedings pending appeal (Docket Entry No. 18) is denied. The request for an administrative stay to permit en banc reconsideration of *Britton v. Co-op Banking Group*, 916 F.2d 1405 (9th Cir. 1990) is denied.

2a

The opening brief and answering brief have been filed. The optional reply brief remains due within 21 days after service of the answering brief.

Appendix B**UNITED STATES DISTRICT COURT****NORTHERN DISTRICT OF CALIFORNIA**

MEREDITH CALLAHAN, et al.	Case No. 20-cv-09203-EMC
Plaintiffs,	ORDER DENYING DEFENDANT'S MOTION TO STAY PENDING APPEAL; GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS AND STRIKE; AND DENYING DEFENDANT'S MOTION TO STAY DISCOVERY
v.	
PEOPLECONNECT, INC.	
Defendant.	

Docket Nos. 26, 28, 49

Plaintiffs Meredith Callahan and Lawrence Geoffrey Abraham have filed a class action against Defendant PeopleConnect, Inc.¹ According to Plaintiffs, PeopleConnect misappropriated Plaintiffs' names, photographs, and likenesses and used the same in advertising its products and services, "including

¹ Plaintiffs initially sued three affiliated entities but subsequently they voluntarily dismissed two of the companies, thus leaving PeopleConnect as the sole defendant.

reprinted yearbooks and subscription memberships to the website Classmates.com.” Compl. ¶ 2. Currently pending before the Court are three motions filed by PeopleConnect: (1) a motion to stay pending appeal; (2) a motion to dismiss and strike²; and (3) a motion to stay discovery. Having considered the parties’ briefs and accompanying submissions, as well as the oral argument of counsel, the Court hereby **DENIES** the motion to stay pending appeal; **GRANTS** in part and **DENIES** in part the motion to dismiss and strike; and **DENIES** the motion to stay discovery.

I. FACTUAL & PROCEDURAL BACKGROUND

In their complaint, Plaintiffs allege as follows.

PeopleConnect is a company that collects yearbooks, scans the yearbooks, and extracts information from the yearbooks (such as names, photographs, schools attended, and so forth) to be put into a database. *See* Compl. ¶ 53. It “aggregates the extracted information into digital records associated with specific individuals,” and then the digital records are exploited commercially—to promote and sell PeopleConnect’s products—but without the individuals’ consent. Compl. ¶ 53. PeopleConnect sells products through its website (Classmates.com). The products sold on the website are (1) reprinted yearbooks and (2) a subscription membership.

² The Court grants the parties’ motions for leave to file additional briefs related to the motion to dismiss and strike. *See* Docket Nos. 60, 64, 71 (motions).

Plaintiffs give examples of how PeopleConnect has allegedly exploited their names, likenesses, and so forth for commercial purposes. For example, Plaintiffs allege as follows regarding Geoffrey Abraham. PeopleConnect has digital records related to Mr. Abraham that come from yearbooks. *See Compl. ¶ 22.* Users of Classmates.com can type Mr. Abraham's name into a search bar. *See Compl. ¶ 23.* The search results provide a list of sixteen records associated with Mr. Abraham. *See Compl. ¶ 24.* "When users click to view any of the records corresponding to Mr. Abraham, . . . Classmates displays a page showing the photograph of Mr. Abraham and his name, accompanied by a link marked 'Own this yearbook today,' which leads to a page soliciting the purchase of the yearbook for \$99.95." Compl. ¶ 25.

As another example, when the search results provide the records associated with Mr. Abraham, "adjacent to the list of records containing [his] name, photograph, and likeness" is an advertisement promoting the subscription membership. Compl. ¶ 27.

According to Plaintiffs, "[b]y misappropriating and misusing millions of Californian's names, photographs, and likenesses without consent, [PeopleConnect] has harmed Plaintiffs and the class by denying them the economic value of their likenesses, violating their legally protected rights to exclusive use of their likenesses, and violating their right to seclusion. [PeopleConnect] has also earned ill-gotten profits and been unjustly enriched." Compl. ¶ 10.

Plaintiffs have asserted the following claim for relief:

- (1) Violation of California Civil Code § 3344 (*i.e.*, the right of publicity). *See* Cal. Civ. Code § 3344(a) (providing that “[a]ny person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent. . . shall be liable for any damages sustained by the person or persons injured as a result thereof”).
- (2) Violation of California Business & Professions Code § 17200 (both the unlawful and unfair prongs).
- (3) Intrusion upon seclusion.
- (4) Unjust enrichment.

II. MOTION TO STAY PENDING APPEAL

Previously, PeopleConnect moved to compel the instant case to arbitration, but the Court denied the motion. *See* Docket No. 40 (order, filed on May 18, 2021). PeopleConnect has since appealed that decision. *See* Docket No. 47 (notice of appeal). Now, PeopleConnect moves to stay proceedings pending the Ninth Circuit’s disposition of that appeal.

A. Legal Standard

[A] district court faced with a motion to stay a case pending an appeal of a denial to compel arbitration has discretion to grant or deny the stay “depend[ing] on the case’s particular facts

[and] circumstances.” “In making this decision, many lower courts have applied the traditional test that is used to determine whether there should be a stay pending an appeal.” This test involves four factors:

- (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.³

The first two factors are the most critical.

In weighing these factors, the Ninth Circuit has applied a “sliding scale” approach whereby the factors are balanced “so that a stronger showing of one . . . may offset a weaker showing of another.” Under this sliding scale approach, a moving party who cannot show a strong likelihood of success on the merits may nonetheless be entitled to a stay where he shows that his appeal “raises serious legal questions, or has a reasonable probability or fair prospect of success.” However, a party satisfying this lower threshold . . . “must then demonstrate that the balance of hardships under the second and third factors tilts sharply in its favor.”

³ See *Nken v. Holder*, 556 U.S. 418, 426 (2009).

Jimenez v. Menzies Aviation Inc., No. 15-cv-02392-WHO, 2015 U.S. Dist. LEXIS 127875, at *3-5 (N.D. Cal. Sep. 23, 2015); *see also Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990) (stating that the “Federal Arbitration Act allows the district court to evaluate the merits of the movant’s claim, and if, for instance, the court finds that the motion presents a substantial question, to stay the proceedings pending an appeal from its refusal to compel arbitration”) (emphasis added).

The Court concludes that, in the instant case, PeopleConnect has failed to show a likelihood of success on the merits. Although PeopleConnect has cited two federal district court cases in support of its position, neither addressed *Blanton v. Womancare, Inc.*, 38 Cal. 3d 396 (1985).

Furthermore, even if the two cases were enough to raise serious questions on the merits, PeopleConnect would still have to show that the balance of hardships tips sharply in its favor in order for a stay to be justified. PeopleConnect has failed to make that showing. For example, PeopleConnect asserts that, if the Court were to deny a stay and proceed to rule on its motion to dismiss and strike, that would be an adjudication on the merits; then, if the Ninth Circuit were to reverse on the arbitration decision, this Court’s order on the motion to dismiss and strike “would either become a non-binding advisory opinion or prejudice PeopleConnect’s position in arbitration.” Reply at 1. Although PeopleConnect’s argument is not without any merit, it is not persuasive. Even assuming that the Court were to deny the motion to dismiss and strike in

its entirety, that would not *deprive* PeopleConnect of the arbitral forum. The denial of the motion to dismiss would not resolve the case or obviate an arbitration should it be so ordered. PeopleConnect therefore would not suffer irreparable harm warranting a stay.

Accordingly, PeopleConnect's motion to stay pending appeal is denied.

III. MOTION TO DISMISS AND STRIKE

Because the Court denies the motion to stay pending appeal, it addresses PeopleConnect's motion to dismiss and strike on the merits. In the motion to dismiss, PeopleConnect argues that: (1) Plaintiffs' claims are barred by federal law (specifically, the Communications Decency Act and the Copyright Act); (2) Plaintiffs have failed to state a claim for relief for all four causes of action; and (3) PeopleConnect's conduct is protected by the First Amendment. In the motion to strike, PeopleConnect argues that the California anti-SLAPP statute bars Plaintiffs' complaint. The Court addresses PeopleConnect's arguments below.

A. Immunity Under the Communications Decency Act

As noted above, Plaintiffs have asserted four causes of action: (1) violation of § 3344 (the right of publicity); (2) violation of § 17200 (unlawful and unfair prongs); (3) intrusion on seclusion; and (4) unjust enrichment. According to PeopleConnect, all claims are barred by the Communications Decency Act ("CDA").

The CDA provides in relevant part as follows: "No provider or user of an interactive computer service

shall be treated as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1). The Ninth Circuit has explained that the statute “immunizes providers of interactive computer services against liability arising from content created by third parties.” *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1265 (9th Cir. 2016). That is, the statute “protects from liability (1) a provider or user of an interactive computer service⁴] (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider.” *Id.* at 1268. “Information content provider” is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3).

1. Collateral Estoppel

In the instant case, PeopleConnect relies heavily on decisions issued by Judge Beeler in *Callahan v. Ancestry.com Inc.*, No. 20-cv-08437-LB, to support its claim of CDA immunity. See *Callahan v. Ancestry.com Inc.*, No. 20-cv-08437-LB, 2021 U.S. Dist. LEXIS 37811 (N.D. Cal. Mar. 1, 2021) (hereinafter “Ancestry I”); *Callahan v. Ancestry*, No. 20-cv-08437-LB, 2021 U.S. Dist. LEXIS 112036 (N.D. Cal. June 15, 2021) (hereinafter “Ancestry II”). In fact, PeopleConnect contends that the Court must give Judge Beeler’s decisions collateral estoppel effect because the

⁴ “[T]he most common interactive computer services are websites.” *Kimzey*, 836 F.3d at 1268.

plaintiffs in the Ancestry case are the same as Plaintiffs herein. *See generally Collins v. D.R. Horton, Inc.*, 505 F.3d 874, 884 (9th Cir. 2007) (stating that defensive collateral estoppel “occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant”).

The Court rejects the collateral estoppel argument. Judge Beeler’s Ancestry case was a federal court case, but predicated on diversity jurisdiction. “[F]ederal common law governs the claim-preclusive effect of a judgment rendered ‘by a federal court sitting in diversity.’” *NTCH-WA, Inc. v. ZTE Corp.*, 921 F.3d 1175, 1180 (9th Cir. 2019) (quoting *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001)). However, under the federal common law, where the prior judgment was predicated on diversity jurisdiction, state law on preclusion applies rather than federal law because “there is no need for a uniform federal rule.” *Semtek*, 531 U.S. at 508 (stating that, “indeed, nationwide uniformity in the substance of the matter is better served by having the same claim-preclusive rule (the state rule) apply whether the dismissal has been ordered by a state or a federal court”); *see also Taco Bell Corp. v. TBWA Chiat/Day Inc.*, 552 F.3d 1137, 1144 (9th Cir. 2009) (stating that “[f]ederal common law requires application of ‘the law that would be applied by state courts in the State in which the federal diversity court sits’”). Under California law, “a judgment is not final for purposes of collateral estoppel while open to direct attack, e.g., by appeal.” *Abelson v. Nat’l Union Fire Ins. Co.*, 28 Cal.

App. 4th 776, 787 (1994). In the instant case, there is no dispute that the Ancestry plaintiffs have appealed Judge Beeler’s decisions to the Ninth Circuit; therefore, collateral estoppel cannot apply under California law because there is no final judgment.

In its papers, PeopleConnect protests the application of California law on collateral estoppel. It notes that, in *Semtek*, the Supreme Court explicitly stated that the “federal reference to state law will not obtain . . . in situations in which the state law is incompatible with federal interests.” *Semtek*, 531 U.S. at 508. The Supreme Court provided an example: “If . . . state law did not accord claim-preclusive effect to dismissals for willful violation of discovery orders, federal courts’ interest in the integrity of their own processes might justify a contrary federal rule.” *Id.* PeopleConnect contends that “this is a case where federal interests compel the application of federal preclusion principles,” apparently because a federal issue—CDA immunity—is at stake. Docket No. 60-2 (Def.’s Supp. Br. at 5). The Court is not persuaded. State collateral estoppel law cannot be said to be incompatible with federal interests here, particularly as CDA immunity is not an issue on which only federal courts can opine. *See, e.g., Prager Univ. v. Google LLC*, 2019 Cal. Super. LEXIS 2034, at *19 (Cal. Sup. Ct. Nov. 19, 2019) (addressing CDA immunity). The Court acknowledges the authority cited by PeopleConnect, *see, e.g., Dow Agrosciences, LLC v. Bates*, No. 5:01-CV-331-C, 2003 U.S. Dist. LEXIS 20389, at *57-58 (N.D. Tex. Oct. 14, 2003) (applying federal preclusion law in determining whether a federal court judgment based

on diversity jurisdiction should be given preclusive effect; indicating that there are federal interests in applying federal preclusion law because the federal court judgment was based on federal preemption of state law claims—*i.e.*, there is an interest in “a nationally uniform policy enforcing a federal preemptive regime”), but it is not binding authority and the Court does not find it persuasive. Application of state law on collateral estoppel (in particular to the finality requirement) will not impair in any systemic way the application of CDA immunity.

As to the merits, Plaintiffs argues persuasively that Ancestry should not be given preclusive effect given that other district courts have reached differing conclusions on CDA immunity in similar cases. *See, e.g., Knapke v. Peopleconnect Inc.*, No. C21-262 MJP, 2021 U.S. Dist. LEXIS 150249, at *10-11 (W.D. Wash Aug. 10, 2021) (concluding that PeopleConnect’s “customized advertisement” involving the use of a yearbook photograph was not protected by the CDA; PeopleConnect was not just the publisher of content provided by someone else but rather was “the publisher of its own content, which is unprotected by the CDA”)⁵; *Sessa v. Ancestry.com Ops. Inc.*, No. 2:20-cv-02292-GMN-BNW, 2021 U.S. Dist. LEXIS 177337,

⁵ Initially, Plaintiffs argued that the Court should give collateral estoppel effect to *Knapke* on the CDA immunity issue, *see generally* Docket No. 68 (opposition), but, subsequently, they modified their position. *See* Docket No. 71-1 (Reply at 3) (stating that, “because *Ancestry II* and *Knapke* conflict, it would be inequitable to apply either offensive or defensive collateral estoppel with respect to the CDA”).

at *29-32 (D. Nev. Sept. 16, 2021) (concluding that defendant acted as information content provider and adding that, even if it were not, “the Court cannot grant dismissal based on the facts alleged in the Complaint because it is unclear whether the yearbook providers [i.e., publishers]—the ‘information content providers’ who are ‘responsible . . . for the creation or development’ of the yearbooks—consented to the information’s publication on the internet”).

In other words, “[e]ven where the technical requirements are all met, the doctrine is to be applied “only where such application comports with fairness and sound public policy.”” *Direct Shopping Network, LLC v. James*, 206 Cal. App. 4th 1551, 1562 (2012). In *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), the Supreme Court stated, in addressing offensive collateral estoppel, that a trial court has discretion to determine when the doctrine should be applied and that a trial court should not allow the use of offensive collateral estoppel where application would be unfair to the defendant—*e.g.*, “if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.” *Id.* at 330. A California state court has noted that, even though Parklane involved a federal court trial, “we believe the principles articulated therein concerning the effect of inconsistent verdicts on the application of collateral estoppel are equally pertinent to state court actions.” *Sandoval v. Superior Court*, 140 Cal. App. 3d 932, 944 (1983) (addressing offensive collateral estoppel). Similar concerns should inform defensive collateral estoppel as well. *See, e.g., Missud v. City &*

Cty. of S.F., No. 15-cv-05596-JCS, 2017 U.S. Dist. LEXIS 40799, at *56 (N.D. Cal. Mar. 21, 2017) (stating that a factor that “may be considered to determine whether the assertion of defensive collateral estoppel is equitable [is] the potential for inconsistent outcomes”); Restat. 2d of Judgments, § 29(4) (providing that “[a] party precluded from relitigating an issue with an opposing party . . . is also precluded from doing so with another person unless . . . circumstances justify affording him an opportunity to relitigate the issue”—*e.g.*, “[t]he determination relied on as preclusive was itself inconsistent with another determination of the same issue”); *id.*, comment (f) (stating that “[g]iving a prior determination of an issue conclusive effect in subsequent litigation is justified not merely as avoiding further costs of litigation but also by underlying confidence that the result reached is substantially correct,” but, “[w]here a determination relied on as preclusive is itself inconsistent with some other adjudication of the same issue, that confidence is generally unwarranted”; “[t]hat such a doubtful determination has been given effect in the action in which it was reached does not require that it be given effect against the party in litigation against another adversary”).

2. Batzel

Turning to the merits of PeopleConnect’s CDA argument, the Court finds that it is not persuasive. As noted above, the CDA “protects from liability (1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information

provided by another information content provider.”” *Id.* at 1268. The third element has two subcomponents: (a) the information at issue must come from an “information content provider” and (b) the information must be “provided by” the information contention provider.

Regarding the first subcomponent, the CDA defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3). Here, the information at issue consists of the yearbooks. And the only third parties who are plausibly creators or developers of the yearbooks are the yearbook authors/publishers. *See Sessa*, 2021 U.S. Dist. LEXIS 177337, at *31 (holding that “the yearbook publishers, not those who sent Ancestry yearbooks, are the relevant information content providers”). Yearbooks users/purchasers clearly do not create the yearbooks. Nor can they be said to be developers of the yearbooks given the plain meaning of the term “develop” as well as the construction that the Ninth Circuit has endorsed in addressing whether a service provider is also an information content provider. *Cf., e.g., Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1167-68 (9th Cir. 2008) (indicating that a person or entity does not “develop” content simply by “augmenting the content generally”; rather, the person or entity must “materially contribut[e] to the content”).

As for the term “provided by,” the Ninth Circuit gave important guidance for the term in *Batzel v.*

Smith, 333 F.3d 1018 (9th Cir. 2003). The Ninth Circuit stated that the term

suggests, at least, some active role by the “provider” in supplying the material One would not say, for example, that the author of a magazine article “provided” it to an interactive computer service provider or user by allowing the article to be published in hard copy off-line. Although such an article is available to anyone with access to a library or a newsstand, it is not “provided” for use on the Internet.

Id. at 1032-33 (emphasis added). The Ninth Circuit recognized, however, that a website operator could be chilled from posting information if it “could not tell whether posting was contemplated” by the provider. *Id.* To address this concern, the court held that

the focus should be not on the information provider’s intentions or knowledge when transmitting content but, instead, on the service provider’s or user’s reasonable perception of those intentions or knowledge. We therefore hold that a service provider or user is immune from liability under § 230(c)(1) *when a third person or entity that created or developed the information in question furnished it to the provider or user under circumstances in which a reasonable person in the position of the service provider or user would conclude that the information was provided for publication on the Internet or other “interactive computer service.”*

Id.; see also *Roommates.com, LLC*, 521 F.3d at 1171 (stating that, under *Batzel*, “if the editor publishes material that he does not believe was tendered to him for posting online, then he is the one making the affirmative decision to publish, and so he contributes materially to its allegedly unlawful dissemination[;][he] is thus properly deemed a developer and not entitled to CDA immunity”). In *Batzel* itself, the court noted that further development of the record might be needed “to determine whether, under all the circumstances, a reasonable person in [the defendant’s] position would conclude that the information was sent for internet publication, or whether at least a triable issue of fact is presented on that issue.” *Batzel*, 333 F.3d at 1035.

In the instant case, the Court concludes that, at the very least, there is a question of fact as to whether a reasonable person in the position of PeopleConnect (the service provider) would conclude that the yearbook authors/publishers (the information content providers) intended the yearbooks to be published on the internet. As Plaintiffs point out, the yearbooks at issue were published in the 1990s and early 2000s when “[t]he Internet was in its infancy and social media did not exist.” Opp’n at 5. Moreover, there is a difference between publishing a yearbook for a school or local community and publishing a yearbook on the internet where the audience is far broader. Thus, it would be hard to conclude that, as a matter of law, PeopleConnect is a publisher of information provided by another information content provider and is thus entitled to immunity under the CDA.

PeopleConnect’s reliance on Judge Beeler’s *Ancestry* decisions is unavailing. In *Ancestry II*, Judge Beeler indicated that, under *Batzel*, it was reasonable for Ancestry to believe that the yearbooks at issue were being provided to it for publication on the Internet, but Judge Beeler’s ruling appears to turn on her view that an information content provider could be people or entities *other* than the yearbook author/publisher. *See Ancestry II*, 2021 U.S. Dist. LEXIS 112036, at *17-18 (stating that, “whether the yearbooks were donated by other former students or obtained from other sources, Ancestry is demonstrably not the content creator and instead is publishing third-party content provided to it for publication”; “[n]othing in *Batzel* requires the original creator’s permission for publication”). But that view is not consistent with the express definition of “information content provider” under the CDA; an information content provider is one who created or developed the information at issue. In the instant case, the yearbook authors/publishers are the only ones who meet that criteria.

At the hearing, PeopleConnect suggested that a service provider should be allowed to assume that the person or entity who provided the information to the service provider was the creator or developer of the information.⁶ Such an approach, however, would be

⁶ At the hearing, PeopleConnect cited *Caraccioli v. Facebook*, 700 F. App’x 588 (9th Cir. 2017), in support of its position. But *Caraccioli* is not on point. In *Caraccioli*, the plaintiff brought suit against the defendant for its refusal to remove private images and videos of the plaintiff posted on its website by a third party. *See id.* at 589 (noting that claims brought by the plaintiff included

contrary to *Batzel* which focuses on the reasonable perception of the service provider. PeopleConnect fails to explain why a service provider should not be held accountable if, *e.g.*, it is *obvious* that the person or entity providing information to the service provider is not the creator or developer of the information. In such a situation, if it is obvious that the person or entity providing the information is not the creator or developer of the information, then the service provider “is the one making the affirmative decision to publish, and so . . . contributes materially to [the] allegedly unlawful dissemination” of the information[;] [it] is thus properly deemed a developer and not entitled to CDA immunity.” *Roommates.com*, 521 F.3d at 1171.

In the instant case, it is obvious that the yearbook users/purchasers were not the creators or developers of the yearbooks. Instead, the yearbook authors/publishers were the content providers. PeopleConnect cannot claim the benefit of CDA immunity, absent a reasonable basis to believe that the yearbook authors/publishers intended for there to be publication on the Internet. This presents a question of

defamation, public disclosure of private facts, and intentional and negligent infliction of emotional distress). The Ninth Circuit held that the defendant had CDA immunity because it was a republisher of material posted by the third party; the defendant did not become an information content provider simply by reviewing the content of the third party’s account and deciding not to remove the content. The court did not address the issue of whether the third party was properly deemed the creator or developer of the images and videos in the first instance.

fact that cannot be resolved at the 12(b)(6) phase of proceedings.⁷

B. Copyright Preemption

According to PeopleConnect, even if there is a question of fact on CDA immunity, the Copyright Act bars most of Plaintiffs' claims—in particular, their § 3344, § 17200, and unjust enrichment claims (but not their intrusion-on-seclusion claim).

1. Collateral Estoppel

Plaintiffs argue first that PeopleConnect is precluded from raising the copyright preemption defense based on a decision from a Washington district court in *Knapke*. In *Knapke*—where PeopleConnect was sued for the same basic conduct as that at issue in the case at bar—the court rejected the copyright preemption defense because “a publicity-right claim is not preempted when it targets nonconsensual use of

⁷ There would also appear to be a question of fact as to whether PeopleConnect should be deemed a developer of information itself—*i.e.*, not just a mere service provider—to the extent it was not simply republishing yearbook photographs and/or information. *See Knapke*, 2021 U.S. Dist. LEXIS 150249, at *10-11 (holding that PeopleConnect was not protected by CDA immunity because it was the publisher of its own content in creating an advertisement); *Cf. Lukis v. Whitepages, Inc.*, 454 F. Supp. 746, 763 (N.D. Ill. 2020) (stating that, “[i]n the present record, Whitepages did not act as a mere passive transmitter or publisher of information that was ‘provided by another information content provider’[;] [r]ather, it is alleged to have actively compiled and collated, from several sources, information regarding Lukis [and therefore] [t]he CDA . . . does not shield Whitepages from liability”).

one's name or likeness *on merchandise or in advertising.*" *Id.* at *12 (emphasis added).

In its papers, PeopleConnect contends first that *Knapke* should not be given collateral estoppel effect because federal law on collateral estoppel should apply. That argument, like the one above, is not persuasive. State courts often opine on copyright preemption even though it is a federal defense, and the application of state law on collateral estoppel is not incompatible with federal interests.

PeopleConnect asserts that *Knapke* cannot be given collateral estoppel effect because no final judgment has been reached in that case. In response, Plaintiffs contend that a final judgment need not be a formal final judgment closing the case in its entirety; rather, the question is whether the *Knapke* court essentially reached a final decision in rejecting copyright preemption. Plaintiffs are correct that a formal final judgment or decision is not necessary. *See, e.g., Ensley v. Pitcher*, 152 Wash. App. 891, 901 (2009) ("While the record does not include an entry of final judgment under CR 54(b) as to the summary judgment dismissing Red Onion, there are no other indicia in the record that the summary judgment decision was not final as a practical matter."); *Lee v. Ferryman*, 88 Wash. App. 613, 622 (1997) ("The second requirement is also satisfied because a grant of summary judgment in favor of Ferryman in the Oregon action constitutes a final judgment on the merits and has the same preclusive effect as a full trial of the issue. As one court noted, '[i]t would be strange indeed if a summary judgment could not have collateral estoppel effect. This

would reduce the utility of this modern device to zero.”). However, Plaintiffs have not pointed to any Washington state court authority holding that a decision made at the pleadings stage is sufficiently final to give rise to a preclusive effect. (Plaintiffs primarily relied on a Seventh Circuit case, *Gilldorn Savings Ass’n v. Commerce Savings Ass’n*, 804 F.2d 390, 393 (7th Cir. 1986) (applying federal law on collateral estoppel).) More important, even though it is clear that the *Knapke* court rejected the copyright preemption defense in its decision, it is not clear that the court was thereby foreclosing PeopleConnect from raising the defense again (*i.e.*, after discovery has been taken and a factual record has been developed). The Court, therefore, declines to apply collateral estoppel and considers the merits of PeopleConnect’s copyright preemption argument.

2. “Standing” to Assert Copyright Preemption

According to Plaintiffs, putting collateral estoppel aside, PeopleConnect still cannot invoke copyright preemption because only a copyright holder or licensee has “standing” to assert copyright preemption. *See Opp’n* at 8. (There is no dispute that PeopleConnect does not own the copyrights to the yearbooks at issue, nor is it a licensee of the yearbooks.) In support of this position, Plaintiffs rely on a California state case, *KNB Enterprises v. Matthews*, 78 Cal. App. 4th 362 (2000). In *KNB*, the plaintiff owned the copyright to certain erotic photographs. The photographs were displayed without authorization on the defendant’s website. The plaintiff did not sue for copyright infringement but

rather asserted a violation of § 3344 because the models in the photographs had assigned their § 3344 rights to the plaintiff. *See id.* at 364-65. The issue for the court was “whether the noncelebrity models’ section 3344 claims, which plaintiff asserts by right of assignment, are preempted by federal copyright law.” *Id.* at 368. The court concluded that there was no preemption, noting, in relevant part, that “this [was] not a situation where the models are asserting a right of publicity claim against the exclusive copyright holder in an effort to halt the authorized distribution of their photographs. . . . [Rather,] plaintiff is asserting the models’ statutory right of publicity claim to halt the unauthorized display of the photographs.” *Id.* at 372-73 (emphasis in original). “We do not believe a section 3344 claim is preempted . . . where, as here, the defendant has no legal right to publish the copyrighted work.” *Id.* at 374 (emphasis added).

Plaintiffs acknowledge that, in *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146 (9th Cir. 2010), the Ninth Circuit expressed disagreement with this part of *KNB*, stating as follows:

Whether a claim is preempted . . . does not turn on what rights the alleged infringer possesses, but on whether the rights asserted by the plaintiff are equivalent to any of the exclusive rights within the general scope of the copyright. The question is whether the rights are works of authorship fixed in a tangible medium of expression and come within the subject matter of the Copyright Act. If a plaintiff asserts a claim that is the equivalent of a claim for

infringement of a copyrightable work, that claim is preempted, regardless of what legal rights the defendant might have acquired.

Id. at 1154-55. Nevertheless, Plaintiffs contend that Jordan is distinguishable because, there, the plaintiff did own copyrights in the copied DVDs. In other words, under Plaintiffs' position, a defense of copyright preemption may be raised only when (1) the defendant is a copyright owner or licensee or (2) the plaintiff is. *See Opp'n* at 8 (arguing that, "in this case, neither Plaintiffs nor [PeopleConnect] own copyright[s] in Plaintiffs' yearbooks[;] Plaintiffs do not and could not obtain redress of their injuries by asserting a copyright claim").

The problem for Plaintiffs is that the language from *Jordan* above does not focus on the *status* of the plaintiff but rather on the *rights* being asserted by the plaintiff. Furthermore, at least one court—admittedly, a state court—has rejected a similar argument

Plaintiff disagrees that federal copyright law preempts claims asserted by anyone other than the copyright holder. It cites *Silvers v. Sony Pictures Entertainment, Inc.* (9th Cir. 2005) 402 F.3d 881 at page 884, which includes the following quote from a treatise on commercial litigation in federal court: "If a claimant is not a proper owner of copyright rights, then it cannot invoke copyright protection stemming from the exclusive rights belonging to the owner, including infringement of the copyright." (Accord, *Smith v. Jackson* (9th Cir. 1996) 84 F.3d 1213, 1218 ["To establish a successful

copyright infringement claim, a plaintiff must show that (1) she owns the copyright, and (2) defendant copied protected elements of the copyrighted work.”].)

The fact that one may not *successfully* sue for copyright infringement because he or she is not the copyright holder does not mean he or she is not preempted from attempting to sue on a claim that amounts to copyright infringement. As argued by the Youssefi defendants, it is the nature of the action not the identity of the plaintiff that controls. If one sues another for making unauthorized copies of a protected work, and the alleged basis for precluding such copying is that the work is protected by copyright, then that action is subject to copyright preemption. The federal court has exclusive jurisdiction to decide who is entitled to enforce the copyright.

Civic Partners Stockton, LLC v. Youssefi, 218 Cal. App. 4th 1005, 1016-17 (2013) (emphasis in original).⁸

Finally, Plaintiffs’ position—taken to the extreme—suggests that, even if it were clear that a claim would be preempted if brought by the copyright holder, that claim could still escape preemption if brought by someone else. That result would seem to make little sense as that would be “a de facto veto over the [copyright holder’s] rights under the Copyright Act.”

⁸ The court ultimately held that the plaintiff’s claim did “not fall within the exclusive ambit of federal copyright law” but for different reasons. *Civic Partners*, 218 Cal. App. 4th at 1017.

Maloney v. T3Media, Inc., 853 F.3d 1004, 1019 (9th Cir. 2017).

3. Use of Name or Likeness in Advertising

Plaintiffs contend next that, even if the Court finds in favor of PeopleConnect on the issue of “standing,” they should still ultimately prevail on the issue of copyright preemption because a publicity-right claim is not subject to preemption where a “photograph [is used] as part of an advertising scheme.” Opp’n at 9.

On this argument, the critical case is *Maloney*. The plaintiffs in *Maloney* were former NCAA student athletes. The NCAA owned or controlled the copyright to certain photographs depicting the plaintiffs playing basketball. The NCAA licensed the photographs to the defendant. The defendant made the photographs available on its website where a person could “obtain for \$20 to \$30 a non-exclusive license permitting them to download a copy of a chosen photograph” for noncommercial use. *Id.* at 1007. The plaintiffs asserted, *inter alia*, claims for violation of the right to publicity (both statutory and common law).

The Ninth Circuit began its preemption analysis by noting that

“[w]e have adopted a two-part test,” in accordance with [17 U.S.C.] section 301, “to determine whether a state law claim is preempted by the Act.” First, we decide “whether the ‘subject matter’ of the state law claim falls within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103.”

Second, assuming it does, we determine “whether the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106, which articulates the exclusive rights of copyright holders.”

Id. at 1010.

The issue in *Maloney* was whether the subject matter of the state law claims fell within the subject matter of copyright. The court held that it did.

Here, the publicity-right claims arise from the licensing of photographs, which plaintiffs concede are expressive “pictorial” works to which “[a] photographer contributes some original elements.” There is also no doubt that a photograph is “sufficiently permanent” to permit it to be perceived “for more than transitory duration.” The “subject matter” of the state law claim[s]—the photographs—therefore appears to fall within the subject matter of copyright.

Id. at 1011.

The Ninth Circuit acknowledged the plaintiffs’ contention that there could not be copyright preemption because they were simply challenging the defendant’s exploitation of their likeness or persona—“attributes [that] ‘exist independent of any single photograph.’” *Id.* Nevertheless, the court was not persuaded. “Contrary to plaintiffs’ argument, [we have not] mint[ed] a categorical rule that publicity-right claims ‘relating to a likeness in a photograph’ are not subject to preemption.” *Id.* at 1012. Instead, the court

explained, “preemption turns on *how* a copyrighted photograph is used.” *Id.* at 1013 (emphasis in original).

[A] publicity-right claim is not preempted when it targets non-consensual use of one’s name or likeness on merchandise or in advertising. But when a likeness has been captured in a copyrighted artistic visual work and the work itself is being distributed for personal use, a publicity-right claim interferes with the exclusive rights of the copyright holder, and is preempted by section 301 of the Copyright Act.

Id. at 1011. The court added:

The fact that the non-exclusive licenses were sold [by the defendant] for profit and their price does not alter our analysis. . . . [The defendant’s] decision to license expressive works for a fee does not change the fact that the publicity-right claims target the *display* and *distribution* of copyrighted photographs for personal use. Moreover, copyright holders are allowed to commercially exploit their copyrights by exercising their exclusive rights under the Copyright Act.

Id. at 1016 n.9 (emphasis in original).

Under the criteria above, the Ninth Circuit confirmed that the subject matter of the plaintiff’s claims in *Maloney* fell within the subject matter of copyright.

[The plaintiffs] Maloney and Judge do not allege that their names and likenesses were ever used

in connection with the sale of any merchandise. Nor do they contend that their likenesses were ever used in any advertising. Instead, the copyrighted images themselves were licensed to individuals for “non-commercial art use.” Moreover, the licensees of the Maloney and Judge photos did not obtain “any right or license to use the name or likeness of any individual . . . in connection with or as an express or implied endorsement of any product or service.”

Plaintiffs’ publicity-right claims and the derivative UCL claim challenge “control of the artistic work itself.” . . . [T]he subject matter of the state law claims therefore falls within the subject matter of copyright.

We believe that our holding strikes the right balance by permitting athletes to control the use of their names or likenesses on merchandise or in advertising, while permitting photographers, the visual content licensing industry, art print services, the media, and the public, to use these culturally important images for expressive purposes. Plaintiffs’ position, by contrast, would give the subject of every photograph a de facto veto over the artist’s rights under the Copyright Act, and destroy the exclusivity of rights that Congress sought to protect by enacting the Copyright Act.

Id. at 1018-19 (emphasis added).

The question is how *Maloney* should be applied in the instant case. In their opposition, Plaintiffs argue

that there is no preemption because PeopleConnect is using their names and likenesses for advertising purposes—*i.e.*, to advertise reprinted yearbooks and the subscription membership. Part of Plaintiffs' argument has merit. Specifically, Plaintiffs' argument has merit to the extent they have alleged that PeopleConnect is using their names and likenesses to advertise the subscription membership. Indeed, PeopleConnect does not appear to have addressed this part of Plaintiffs' argument, either in its opening brief or in its reply. *Cf. Sessa*, 2021 U.S. Dist. LEXIS 177337, at *44-45 (declining to find copyright preemption because defendant did not simply “display[] or publish[] photographs depicting Plaintiffs”; “[w]here, as here, the platform containing a plaintiff’s photograph sells information about the plaintiff and not limited rights to his image alone, the Copyright Act will not preempt a claim concerning the use of the image”).

However, Plaintiffs' argument is problematic to the extent they contend no preemption where PeopleConnect was using their names and likenesses from the reprinted yearbooks to advertise those yearbooks. Plaintiffs seem to be of the view that, once any advertising is implicated—even advertising of the copyrighted work or a portion thereof—there can no preemption. Although a close call, the Court concludes that case law weighs against Plaintiffs' position that a defendant's *advertising of the copyrighted work itself* would take the plaintiff's § 3344 claim outside of copyright preemption. At bottom, a portion of the

copyright work itself is being displayed, a fundamental attribute of a copyright.

This point is illustrated in *Jordan*, where the plaintiffs were an adult movie company and the owner of that company (as well as an actor in the company's movies). The plaintiffs sued the defendants for copying and selling counterfeits of the plaintiffs' copyrighted adult DVDs. In the attempt to avoid copyright preemption, the plaintiff argued "for the first time" that his right to publicity was violated because his name and likeness were used on the *covers* of the counterfeit DVDs. *Jordan*, 617 F.3d at 1154. But the Ninth Circuit found the argument "misguided" because "the pictures on the covers of the DVDs are 'still shots' of the copyrighted video performance." *Id.* In so holding, the Ninth Circuit implicitly held that using a portion of the copyrighted work to promote the copyrighted work does not take a publicity-right claim outside of copyright preemption. *Cf.* 17 U.S.C. § 106 (providing that a copyright owner has the exclusive right to display the copyrighted work publicly "in the case of literary, musical, dramatic, and choreographic works . . . , including the individual images of a motion picture or other audiovisual work").⁹

⁹ See also *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1914-15, 1920 n.6 (1996) (where CBS released a film on videotape in which plaintiffs were actors, stating that "[i]t is unclear" whether plaintiffs were claiming "CBS wrongly used stills from the motion picture for advertising or promotional purposes"; "[i]f so, we note that section 106 specifically gives to the holder of the copyright the right to display publicly 'individual images of a motion picture'").

The Ninth Circuit indicated as much in *Maloney*, describing *Jordan* as follows: “the actor was objecting to the unauthorized distribution and republication of a copyrighted work, not the exploitation of his likeness *on an unrelated product* [i.e., a product different from the copyrighted work] or in advertising.” *Maloney*, 853 F.3d at 1016 (emphasis added); *see also In re Jackson*, 972 F.3d 25, 48-49 (2d Cir. 2020) (asking whether “the defendant’s use of a work involving the plaintiff’s likeness seeks advantage for the defendant on the basis of the plaintiff’s identity . . . which argues against preemption—or whether . . . the advantage sought by the defendant flows from the reproduction or dissemination of the work itself (as opposed to the persona of the plaintiff), which argues in favor of preemption”); *Dent v. Renaissance Mktg. Corp.*, No. 14 C 02999, 2015 U.S. Dist. LEXIS 70248, at *12 (N.D. Ill. June 1, 2015) (noting that “[c]ourts have held that right-of-publicity claims are not preempted by the Copyright Act when the alleged unauthorized use of the plaintiff’s identity extends *beyond* the copyrighted work[;] [i]n some of these cases, the copyrighted work is used to advertise *another* product or service”) (emphasis added); *cf. Cher v. Forum Int’l, Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982) (stating that, if a publication is protected by the First Amendment, “[c]onstitutional protection extends to the truthful use of a public figure’s name and likeness in advertising which is merely an adjunct of the protected publication and promotes only the protected publication”).

Neither the *Knapke* court nor the *Sessa* court addressed this aspect of *Jordan* in their copyright preemption analysis.

As indicated above, there is a two-part test to determine whether a state law claim is preempted by the Copyright Act: (1) does the subject matter of the state law claim fall within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103, and (2) if so, are the rights asserted under state law equivalent to the rights contained in § 106, which articulates the exclusive rights of copyright holders? *See Laws v. Sony Music*, 448 F.3d 1134, 1137-38 (9th Cir. 2006). The parties have focused on the first part of the test only. Plaintiffs have not challenged the second part of the test. Even if they had, their position would lack merit based on *Laws*. *See* at 1143-44 (in discussing the second part of the test, stating that the “mere presence of an additional element (‘commercial use’) in section 3344 is not enough to qualitatively distinguish [plaintiff’s] right of publicity claim from a claim in copyright” because “[t]he extra element must transform the nature of the action” and, “[a]lthough the elements of [the] state law claims may not be identical to the elements in a copyright action, the underlying nature of [the] state law claims is part and parcel of a copyright claim”); *accord Jackson*, 972 F.3d at 52-53 (noting that “commercial interests have always played an enormous role in copyright law” and therefore, “[e]ven if a commercial purpose is a necessary element of a Connecticut right of publicity claim, this does not necessarily take the right of publicity outside of equivalency with the ‘rights within the general scope of copyright’”). Here, the display of the photos from the yearbook—the copyrighted work—requires no new transformative element to satisfy Plaintiffs’ § 3344, § 17200, and unjust enrichment claims.

Accordingly, the Court concludes that Plaintiffs' § 3344, § 17200, and unjust enrichment claims are preempted by the Copyright Act, but only in part. The § 3344, § 17200, and unjust enrichment claims are preempted to the extent they are based on the use of Plaintiffs' names and likenesses taken from the yearbooks themselves to advertise those reprinted yearbooks. To the extent those claims are based on the use of Plaintiffs' names and likenesses to advertise the subscription membership, there is no preemption.

C. Failure to State a Claim for Relief

PeopleConnect argues that, for the remaining claims, dismissal is warranted for failure to state a claim for relief under Federal Rule of Civil Procedure 12(b)(6). Federal Rule of Civil Procedure 8(a)(2) requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). A complaint that fails to meet this standard may be dismissed pursuant to Rule 12(b)(6). To overcome a Rule 12(b)(6) motion to dismiss after the Supreme Court's decisions in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a plaintiff's "factual allegations [in the complaint] 'must . . . suggest that the claim has at least a plausible chance of success.'" *Levitt v. Yelp! Inc.*, 765 F.3d 1123, 1135 (9th Cir. 2014). The court "accept[s] factual allegations in the complaint as true and construe[s] the pleadings in the light most favorable to the nonmoving party." *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). But "allegations in a complaint . . . may not simply recite the elements of a

cause of action [and] must contain sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively.” *Levitt*, 765 F.3d at 1135 (internal quotation marks omitted). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at 678. “The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (internal quotation marks omitted).

1. Violation of § 3344

Section 3344 is a statutory publicity-right claim. It provides in relevant part as follows:

Any person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent, . . . shall be liable for any damages sustained by the person or persons injured as a result thereof. In addition, in any action brought under this section, the person who violated the section shall be liable to the injured party or parties in an amount equal to the greater of seven hundred fifty dollars (\$750) or the actual damages suffered by him or her as a result of the unauthorized use, and any profits from the unauthorized use that are attributable to the use and are not taken into account in

computing the actual damages. In establishing such profits, the injured party or parties are required to present proof only of the gross revenue attributable to such use, and the person who violated this section is required to prove his or her deductible expenses. Punitive damages may also be awarded to the injured party or parties. The prevailing party in any action under this section shall also be entitled to attorney's fees and costs.

Cal. Civ. Code § 3344(a).

PeopleConnect challenges the § 3344 claim on various grounds: (1) that Plaintiffs have failed to plead an injury; (2) that Plaintiffs have failed to plead unlawful advertising; and (3) that the “public affairs” exception applies.

a. Injury

Injury is clearly an element of a § 3344 claim. The statute itself refers to liability to “person or persons injured” or to “injured party or parties.” Case law also recognizes injury as an element. *See Maloney*, 853 F.3d at 1008 n.2 (noting that a § 3344 claim includes as an element “resulting injury”).

PeopleConnect argues that, although Plaintiffs have asserted an economic injury, *see, e.g.*, Compl. ¶ 10 (alleging that PeopleConnect has denied Plaintiffs “the economic value of their likenesses”), there are no facts alleged to support the claim that their names and likenesses have economic value. PeopleConnect acknowledges that statutory damages are a remedy specified in § 3344 but maintains that statutory

damages are not awarded in the situation where the plaintiff is not able to prove economic value; rather, according to PeopleConnect, statutory damages are awarded only when a plaintiff asserts, instead of an economic injury, an emotional injury.

i. Economic Injury

PeopleConnect's first argument is, in essence, that Plaintiffs have pled economic injury in conclusory terms only. The argument is without merit. If a defendant uses a plaintiff's name and/or likeness to advertise, then it can reasonably be inferred that the name and/or likeness has some economic value, even if small. And PeopleConnect does not dispute that a § 3344 claim can be brought even by noncelebrities. *See KNB*, 78 Cal. App. 4th at 367 (noting that the appropriation of an "obscure plaintiff's" name or likeness "would not inflict as great an economic injury as would be suffered by a celebrity plaintiff" but § 3344 "is not limited to celebrity plaintiffs"); *see also Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 808 (N.D. Cal. 2011) (Koh, J.) (recognizing that "previous non-celebrity plaintiffs have typically been models, entertainers, or other professionals who have cultivated some commercially exploitable value through their own endeavors," but "find[ing] nothing requiring that a plaintiff's commercially exploitable value be a result of his own talents or efforts in order to state a claim for damages under § 3344").

Judge Koh's *Fraley* decision also supports Plaintiffs. There, the plaintiffs claimed "economic injury because they were not compensated for Facebook's commercial use of their names and likenesses in targeted

advertisements to their Facebook friends.” *Id.* at 806. The defendant argued that, because the plaintiffs were not celebrities, they had to “demonstrate some preexisting commercial value to their names and likenesses, such as allegations that they ‘previously received remuneration for the use of their name or likeness, or that they have ever sought obtain such remuneration.’” *Id.* Judge Koh rejected the defendant’s position:

[N]othing in the text of the statute or in case law . . . supports Defendant’s interpretation of § 3344 as requiring a plaintiff pleading economic injury to provide proof of preexisting commercial value and efforts to capitalize on such value in order to survive a motion to dismiss. The plain text of § 3344 provides simply that “[a]ny person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner . . . for purposes of advertising or selling. . . without such person’s consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof.” Cal. Civ. Code § 3344. The statutory text makes no mention of preexisting value, and in fact can be read to presume that a person whose name, photograph, or likeness is used by another for commercial purposes without their consent is “injured as a result thereof.” . . .

Nor does the Court find any reason to impose a higher pleading standard on non-celebrities than on celebrities. California courts have clearly held that “the statutory right of publicity exists for

celebrity and non-celebrity plaintiffs alike.” *KNB Enterprises*, 78 Cal. App. 4th at 373 n. 12. As the Ninth Circuit recognized long ago, although “[g]enerally, the greater the fame or notoriety of the identity appropriated, the greater will be the extent of the economic injury suffered . . . the appropriation of the identity of a relatively unknown person may result in economic injury or *may itself create economic value in what was previously valueless.*” *Motschenbacher*, 498 F.2d at 825 n. 11 (emphasis added). Thus, courts have long recognized that a person’s “name, likeness, or other attribute of identity can have commercial value,” even if the individual is relatively obscure. *Id.* at 825 n. 10.

Id. at 806-07 (emphasis added).

The Court acknowledges that there are some authorities to support PeopleConnect’s position. *See, e.g., Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011) (Seeborg, J.) (stating that “[r]esulting injury is the sine qua non of a cause of action for misappropriation of name” and, “[h]ere, plaintiffs’ sole allegation relating to injury is the conclusory assertion, repeated at least twice in the complaint, that they ‘have suffered injury-in-fact by having the name[s] and likeness[es] misappropriated without their knowledge or consent’”); *Ancestry I*, 2021 U.S. Dist. LEXIS 37811, at *13 (Beeler, J.) (in discussing standing, holding that plaintiffs did not adequately plead an injury in fact—*e.g.*, plaintiffs “did not show that they had a commercial interest in their images that precluded [the defendant’s] use of them”). Nevertheless, it finds the

authorities cited above more persuasive. Economic value may reasonably be inferred from PeopleConnect's use of the images to advertise, and this is sufficient to defeat a motion under Rule 12(b)(6).

ii. Statutory Damages

Because Plaintiffs have adequately alleged an economic injury, the Court need not address PeopleConnect's second argument, which concerns statutory damages. However, because the issue is likely to arise again in the future, the Court addresses it now. PeopleConnect argues statutory damages are available only where a plaintiff claims mental anguish, as opposed to economic injury.

Although the argument seems strained on its face, there is authority to support it, including decisions from Judge Seeborg and Judge Koh. *See Cohen*, 798 F. Supp. 2d at 1097 (Seeborg, J.) (indicating that, to get statutory damages, a plaintiff must show some harm; “statutory minimum damages were meant to compensate non-celebrity plaintiffs who suffer ... mental anguish yet no discernible commercial loss”) (emphasis omitted); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1242 (N.D. Cal. 2014) (Koh, J.) (recognizing that “[t]he text of section 3344 ... contains no express requirement that a plaintiff plead mental harm in order to claim the minimum statutory damages figure” but a state appellate court “has inferred such a requirement from section 3344 ’s legislative history”; adding that “[t]his Court should follow *Miller*’s interpretation of a California statute absent convincing evidence ‘that the California Supreme Court would reject it’”). Judge Seeborg and Judge Koh’s decisions

relied primarily on *Miller v. Collectors Universe, Inc.*, 159 Cal. App. 4th 988 (2008).

In *Miller*, the state appellate court noted as follows:

The statute's legislative history reveals section 3344(a) was intended to fill "a gap which exist[ed] in the common law tort of invasion of privacy" as applied to noncelebrity plaintiffs whose names lacked "commercial value on the open market." (Assemblymember Vasconcellos, letter to Governor Reagan, re Assem. Bill No. 826 (1971 Reg. Sess.) Nov. 10, 1971, p. 1.) Unlike an entertainment or sports star, noncelebrity plaintiffs often could not prove damages under the common law; therefore, section 3344(a) as originally enacted in 1971 "established a concrete remedy for the little man with a minimum of \$ 300 payment," "a simple, civil remedy for the injured individual." (Letter to Gov. Reagan, *supra*, at pp. 1-2.) A legislative analysis of the bill quotes the following passage from *Fairfield*, *supra*, 138 Cal. App. 2d at pages 86-87: "Unlike [an] action for defamation, 'The gist of the cause of action in a privacy case is not injury to the character or reputation, but a direct wrong of a personal character resulting in injury to the feelings without regard to any effect which the publication may have on the property, business, pecuniary interest, or the standing of the individual in the community.... The right of privacy concerns one's own peace of mind, while the right of freedom from defamation concerns primarily one's

reputation. . . . The injury is mental and subjective. It impairs the mental peace and comfort of the person and may cause suffering much more acute than that caused by a bodily injury” (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 826 (1971 Reg. Sess.) June 14, 1971, p. 1.) Thus, by enacting section 3344(a), the Legislature provided a practical remedy for a noncelebrity plaintiff whose damages are difficult to prove and who suffers primarily mental harm from the commercial misappropriation of his or her name.

Id. at 1002.

Plaintiffs’ response to *Miller* is that, although the case “recognizes statutory damages in § 3344 were meant to compensate plaintiffs who suffer mental anguish, nothing in *Miller* or § 3344 suggests statutory damages are available *exclusively* for that purpose.” Opp’n at 12 (emphasis added). The Court agrees with Plaintiffs. Section 3344 on its face does not require that a plaintiff have suffered mental anguish in order to be awarded statutory damages. Nevertheless, § 3344 does require that a plaintiff have suffered injury in order to be awarded damages, including statutory. Thus, as a practical matter, it is not difficult to imagine that a plaintiff seeking statutory damages will often have to rely on mental anguish as the hook for statutory damages, assuming that she cannot prove actual damages or at least actual damages in excess of \$750. Cf. *Perkins*, 53 F. Supp. 3d at 1246 (stating that “the real injury compensated in *Miller* was not the reputational harm itself; it was the effect of that

reputational harm on Miller’s feelings and mental well-being”).

b. Advertising

PeopleConnect argues that another deficiency with the § 3344 claim is Plaintiffs’ failure to adequately allege unlawful advertising. According to PeopleConnect, there is unlawful advertising only where (1) the advertisement implies that the plaintiff *endorses* the product advertised and (2) the name and likeness of the plaintiff is actually *part* of the advertisement, and not just next to a separate advertisement (which would not imply an endorsement or use to enhance the advertisement).

The first argument lacks merit. Nothing in the text of the statute suggests that endorsement is required—only that the name or likeness be used. Case law also weighs against PeopleConnect’s position. *See, e.g., Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 418-19 (1983) (stating that “California law has not imposed any requirement that the unauthorized use or publication of a person’s name or picture be suggestive of an indorsement or association with the injured person”; adding that “the appearance of an ‘indorsement’ is not the sine qua non of a claim for commercial appropriation”); *see also Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778 F.3d 1059, 1072 (9th Cir. 2015) (noting that “[s]tate publicity right claims protect a plaintiff when the defendant uses the plaintiff’s identity for commercial advantage, without permission”).

In its reply, PeopleConnect seems to backtrack somewhat. According to PeopleConnect, it is not arguing that “endorsement is required for each type of § 3344 claim”; instead, it is simply contending that endorsement is necessary “where a § 3344 claim contests use of a likeness in advertising or solicitation.” Reply at 9. But all § 3344 claims seem to involve an advertising element (*i.e.*, promotional aspect). *See* Cal. Civ. Code § 3344 (referring to a “person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent”).

Furthermore, the cases that PeopleConnect has cited in support—*i.e.*, *Local TV, LLC v. Superior Court*, 3 Cal. App. 5th 1 (2016), and cases cited therein—are distinguishable. These cases involve a different factual scenario: where a *news organization* is advertising to promote itself. *See, e.g., Cher v. Forum Int’l, Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982) (stating that “[a]dvertising to promote a news medium . . . is not actionable under an appropriation or publicity theory so long as the advertising does not falsely claim that the public figure endorses that news medium”); *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 797 (1995) (noting that newspaper sold posters to advertise its quality and content, that the posters contained exact reproductions of pages from the newspaper, that the posters did not contain any other information not included on the newspaper pages themselves, and that

the posters did not “state or imply that [football player] Montana endorsed the newspaper”). This line of authority is more relevant to a different argument made by PeopleConnect—*i.e.*, regarding the public affairs exception. *See infra.*

As for PeopleConnect’s second argument, it raises at most a factual dispute—*i.e.*, were Plaintiffs’ names and likenesses sufficiently a part of the advertisements for PeopleConnect’s products, or were they separate from and simply “next to” these advertisements (and thus implied no endorsement or connection thereto). *See generally Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 211 (2017) (where Facebook page was created by persons critical of plaintiff and used plaintiff’s name and likeness on the page, and where Facebook displayed ads on the page, court rejected plaintiff’s publicity-right claim; “the evidence [plaintiff] submitted . . . demonstrated either that no advertisements appeared alongside the pages at issue, or that the advertisements that did appear adjacent to the content posted by third parties made no use of his name or likeness”).

c. Public Affairs Exception

Finally, PeopleConnect argues that Plaintiffs do not have a viable § 3344 claim because the statute contains an exception for public affairs. Section 3344(d) provides as follows: “For purposes of this section, a use of a name, voice, signature, photograph or likeness in connection with any news, public affairs, or sports broadcast or account, or any political campaign, shall not constitute a use for which consent is required under subdivision (a).” Cal. Civ. Code § 3344(d). The Ninth Circuit has noted that the exception is “based on First

Amendment concerns” but is “not coextensive with [the First Amendment].” *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 724 F.3d 1268, 1282 (9th Cir. 2013). The exception “is designed to avoid First Amendment questions . . . by providing extra breathing space for the use of a person’s name in connection with matters of public interest.” *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 310 n.10 (9th Cir. 1992). There is a distinction between “news” and “public affairs” for purposes of the statute.

Civil Code Section 3344, subdivision (d) distinguishes between news and public affairs. We presume that the Legislature intended that the category of public affairs would include things that would not necessarily be considered news. Otherwise, the appearance of one of those terms in the subsection would be superfluous, a reading we are not entitled to give to the statute. We also presume that the term “public affairs” was intended to mean something less important than news. Public affairs must be related to real-life occurrences. As has been established in the cases involving common law privacy and appropriation, the public is interested in and constitutionally entitled to know about things, people, and events that affect it. For that reason, we cannot limit the term “public affairs” to topics that might be covered on public television or public radio. To do so would be to jeopardize society’s right to know, because publishers and broadcasters could be sued for use of name and likeness in

documentaries on subjects that do not relate to politics or public policy, and may not even be important, but are of interest.

Dora v. Frontline Video, Inc., 15 Cal. App. 4th 536, 545-46 (1993).

As an initial matter, the Court takes note this argument is applicable only to the extent PeopleConnect has used Plaintiffs' names and likenesses to promote reprinted yearbooks—and not the subscription membership. In other words, only reprinted yearbooks potentially have a public affairs connection; the subscription membership clearly does not. *Cf. Lukis v. Whitepages Inc.*, 454 F. Supp. 3d 746, 760-61 (N.D. Ill. 2020) (in addressing a claim brought against Whitepages pursuant to the Illinois Right of Publicity Act, noting that "Whitepages used Lukis's identity to advertise not a background report regarding Lukis, but a monthly subscription service giving the purchaser access to background reports on anybody in Whitepages's database"). And in fact, PeopleConnect does not seem to address the subscription membership in its papers. Because the Court has held that there is copyright preemption for the § 3344 claim based on reprinted yearbooks, it is not necessary for the Court to address the public affairs argument.

d. Summary

Plaintiffs have adequately stated a § 3344 claim based on PeopleConnect's use of their names and likenesses to (allegedly) promote its subscription membership: (1) Plaintiffs have sufficiently alleged an economic injury; (2) they need not allege that the

advertising suggested they endorsed the product; (3) it is a question of fact as to whether their names and likenesses were used to advertise the subscription membership; and (4) the public affairs exception has no application to the subscription membership.

2. Violation of § 17200

In their complaint, Plaintiffs asserted a violation of § 17200 based on unlawful conduct and on unfair conduct. PeopleConnect argues in its motion to dismiss that both theories are not viable. In their opposition, Plaintiffs do not make any argument in response to PeopleConnect's contention that there is no unfair conduct. *See Opp'n at 17.* Accordingly, the Court finds the § 17200 claim based on unfairness waived and focuses only on the unlawfulness claim.

The unlawfulness claim is derivative of the § 3344 claim. However, the unlawfulness claim is not exactly the same as the § 3344 claim because the statutory scheme related to § 17200 requires that a plaintiff who brings such a claim must have “suffered an injury in fact and . . . lost money or property as a result of the unfair competition.” Cal. Bus. & Prof. Code § 17204. Section 17204 is, in essence, a statutory standing requirement. *See Kwikset Corp. v. Superior Court*, 51 Cal. 4th 313, 320-21 (2011). To satisfy the standing requirement, a plaintiff must “(1) establish a loss or deprivation of money or property sufficient to qualify as injury in fact, *i.e.*, economic injury, and (2) show that that economic injury was the result of, *i.e.*, caused by, the unfair business practice or false advertising that is the gravamen of the claim.” *Id.* at 322 (emphasis

omitted). On the first element, the California Supreme Court has noted that

[t]here are innumerable ways in which economic injury from unfair competition may be shown. A plaintiff may (1) surrender in a transaction more, or acquire in a transaction less, than he or she otherwise would have; (2) have a present or future property interest diminished; (3) be deprived of money or property to which he or she has a cognizable claim; or (4) be required to enter into a transaction, costing money or property, that would otherwise have been unnecessary. Neither the text of Proposition 64 nor the ballot arguments in support of it purport to define or limit the concept of “lost money or property,” nor can or need we supply an exhaustive list of the ways in which unfair competition may cause economic harm. It suffices to say that, in sharp contrast to the state of the law before passage of Proposition 64, a private plaintiff filing suit now must establish that he or she has personally suffered such harm.

Id. at 323.

In the instant case, PeopleConnect argues that Plaintiffs have failed to allege a loss of money or property because personal information does not qualify as “property.” See, e.g., *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 715 n.10 (N.D. Cal. 2011) (Ware, J.) (noting that plaintiffs did not offer authority to support the argument that personal information “is a form of property” or that “unauthorized release of personal information constitutes a loss of property”). But as

Plaintiffs point out, their names and likenesses are intellectual property, and the underlying point of § 17204 is to make sure that a plaintiff has suffered an economic injury for purposes of standing. Here, Plaintiffs have alleged an economic injury; they were not paid—implicitly, by PeopleConnect—for the use of their names and likenesses. *Cf.* Opp'n at 17 (asserting that “[t]he theft of intellectual property leading to a loss of potential income is a loss of ‘money or property’”). In reply, PeopleConnect argues that Plaintiffs “offer only speculative and conclusory allegations that the use of the yearbook excerpts caused them to lose ‘potential’ income.” Reply at 11. But PeopleConnect does not explain how there is speculation if Plaintiffs are simply asserting that PeopleConnect should have paid them for use of their names and likenesses.¹⁰ As noted above, a reasonable inference may be made that Plaintiffs’ names and likeness had value in advertising the subscription services.

3. Intrusion Upon Seclusion

PeopleConnect challenges the claim for intrusion upon seclusion. “[T]he action for intrusion [on seclusion] has two elements: (1) intrusion into a private place, conversation or matter, (2) in a manner highly offensive to a reasonable person.” *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 231 (1998). On the first element, “the plaintiff must show the defendant

¹⁰ PeopleConnect has argued only that Plaintiffs lack standing for their § 17200 claim. They have not made any argument as to what relief Plaintiffs might be able to obtain for a § 17200 violation.

penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff. The tort is proven only if the plaintiff had an objectively reasonable expectation of seclusion or solitude in the place, conversation or data source.” *Id.* at 232. On the second element, “all the circumstances of an intrusion, including the motives or justification of the intruder, are pertinent to the offensiveness element. Motivation or justification becomes particularly important when the intrusion is by a member of the print or broadcast press in the pursuit of news material.” *Id.* at 236. In the instant case, PeopleConnect argues that Plaintiffs cannot plausibly plead either element.

Whether Plaintiffs have sufficiently pled the first element presents a close call. PeopleConnect understandably argues that Plaintiffs could not have a reasonable expectation of privacy because their names and likenesses were used in yearbooks which (1) were clearly intended for public distribution and (2) ultimately had no restrictions on their dissemination. But, as Plaintiffs point out, the California Supreme Court has never “stated that an expectation of privacy, in order to be reasonable for purposes of the intrusion tort, must be of *absolute or complete privacy*.” *Sanders v. Am. Broad. Cos.*, 20 Cal. 4th 907, 915 (1999) (emphasis in original). “[P]rivacy, for purposes of the intrusion tort, is not a binary, all-or-nothing characteristic. [Rather,] [t]here are degrees and nuances to societal recognition of our expectations of privacy,” and “the fact that the privacy one expects in a given setting is not complete or absolute does not

render the expectation unreasonable as a matter of law.” *Id.* at 916. Thus, *e.g.*, in *In re Facebook, Inc.*, 402 F. Supp. 3d 767 (N.D. Cal. 2019), Judge Chhabria rejected Facebook’s argument that, “once you make information available to your friends on social media, you completely relinquish any privacy interest in that information.” *Id.* at 782. In the instant case, publication of an image in a hardbound yearbook with limited distribution is one thing, but publication on the Internet for the world to see may be something else. Thus, this element would appear to raise a question of fact.

The Court need not resolve the issue, however, because, on the second element, Plaintiffs have failed to plead sufficient allegations. According to Plaintiffs, there is a question of fact as to whether the intrusion took place in a manner highly offensive to a reasonable person. Plaintiffs assert that a reasonable jury could find PeopleConnect’s conduct highly offensive because their information was disclosed “to a worldwide audience comprising millions of users” and at least some of the information was “highly sensitive, including photographs of Plaintiffs as minors and information about where they grew up and attended school.” Opp’n at 18. But Plaintiffs’ arguments are not compelling. First, it is entirely speculative that Plaintiffs’ information was actually disclosed to millions. Plaintiffs’ complaint indicates that Plaintiffs’ information would typically be located only when specific searches would be made for them. Second, Plaintiffs’ claim that “highly sensitive” information was disclosed is hyperbolic. Plaintiffs suggest that their

case is analogous to *Facebook* but the facts underlying that case are far different. There, the plaintiffs alleged that Facebook “disclosed to tens of thousands of app developers and business partners sensitive information . . . , including their photos, religious preferences, video-watching habits, relationships, and information that could reveal location. It even allegedly disclosed the contents of communications between two people on Facebook’s ostensibly private messenger system.” *Facebook*, 402 F. Supp. 3d at 797. The images and personal information here appear far more limited.

Accordingly, the Court dismisses the intrusion-on-seclusion claim. The dismissal is without prejudice but, at this juncture, without leave to amend. If Plaintiffs, through discovery, find additional facts suggesting a good faith basis to support the intrusion-upon-seclusion claim, then they may file a motion for leave to amend.

4. Unjust Enrichment

Finally, PeopleConnect argues that, under the Ninth Circuit’s decision in *Astiana v. Hain Celestial Group*, 783 F.3d 753 (9th Cir. 2015), the unjust enrichment claim should be dismissed. In *Astiana*, the Ninth Circuit stated as follows:

[I]n California, there is not a standalone cause of action for “unjust enrichment,” which is synonymous with “restitution.” *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350 (2010); *Jogani v. Superior Court*, 165 Cal. App. 4th 901 (2008). However, unjust enrichment and restitution are not irrelevant in California law. Rather, they describe the theory underlying a

claim that a defendant has been unjustly conferred a benefit “through mistake, fraud, coercion, or request.” 55 Cal. Jur. 3d Restitution § 2. The return of that benefit is the remedy “typically sought in a quasi-contract cause of action.” *Id.*; *see Munoz v. MacMillan*, 195 Cal. App. 4th 648 (2011) (“Common law principles of restitution require a party to return a benefit when the retention of such benefit would unjustly enrich the recipient; a typical cause of action involving such remedy is ‘quasi-contract.’”). When a plaintiff alleges unjust enrichment, a court may “construe the cause of action as a quasi-contract claim seeking restitution.” *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221 (2014).

Id. at 762. Based on *Astiana*, PeopleConnect contends that (1) Plaintiffs’ claim for unjust enrichment claim may be considered a quasi-contract claim seeking restitution, but (2) Plaintiffs must then allege that PeopleConnect was unjustly conferred a benefit through mistake, fraud, coercion, or request—which Plaintiffs have not done.

PeopleConnect’s interpretation of *Astiana*, however, may be too rigid. In a post-*Astiana* case, the Ninth Circuit noted as follows:

Some California courts allow a plaintiff to state a cause of action for unjust enrichment, while others have maintained that California has no such cause of action. *Compare Prakashpalan*, 223 Cal. App. 4th at 1132 (allowing plaintiffs to state a cause of action for unjust enrichment)

with *Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1370 (2010) (“There is no cause of action in California for unjust enrichment.”) (internal quotation marks and citation omitted). While California case law appears unsettled on the availability of such a cause of action, this Circuit has construed the common law to allow an unjust enrichment cause of action through quasi-contract. See *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (“When a plaintiff alleges unjust enrichment, a court may ‘construe the cause of action as a quasi-contract claim seeking restitution.’”) (quoting *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221, 231 (2014)). We therefore allow the cause of action, as we believe it states a claim for relief as an independent cause of action or as a quasi-contract claim for restitution.

ESG Capital Partners, Ltd. Partnership v. Stratos, 828 F.3d 1023, 1038-39 (9th Cir. 2016), (emphasis added).

The Court shall allow Plaintiffs to proceed with the theory of unjust conferral of a benefit through, in effect, misappropriation. Cf. *Hernandez v. Lopez*, 180 Cal. App. 4th 932, 938 (2009) (stating that “[t]he doctrine [of unjust enrichment] applies where the plaintiffs, while having no enforceable contract, nonetheless have conferred a benefit on the defendant which the defendant has knowingly accepted under circumstances that make it inequitable for the defendant to retain the benefit without paying for its value”).

D. First Amendment and California's Anti-SLAPP Statute

Finally, PeopleConnect argues that Plaintiffs' claims are barred by the First Amendment and should be stricken under California's anti-SLAPP statute—essentially making an argument similar to the public affairs argument discussed above (in conjunction with the § 3344 claim). As discussed above, it is unnecessary for the Court to address these issues because the § 3344, § 17200, and unjust enrichment claims are preempted to the extent the claims are based on PeopleConnect's reprinting of yearbooks and advertising of the yearbooks. PeopleConnect has failed to make a First Amendment and anti-SLAPP argument with respect to any claims based on the use of the images and likenesses in advertising its subscription membership.¹¹

IV. MOTION TO STAY DISCOVERY

In its motion to stay discovery, PeopleConnect asks the Court to stay discovery pending resolution of its motion to dismiss and strike. This stay motion is moot as (1) this order has now issued and (2) a significant part of Plaintiffs' case has survived the motion to dismiss and strike.

¹¹ To the extent Plaintiffs argue that the Court should give collateral estoppel effect to the *Knapke* court's First Amendment analysis, the Court's discussion on issue preclusion as to copyright preemption is applicable here as well.

V. CONCLUSION

For the foregoing reasons, the Court denies the motion to stay pending appeal, grants in part and denies in part the motion to dismiss and strike, and denies the motion to stay discovery. The § 3344, § 17200, and unjust enrichment claims are preempted in part by the Copyright Act. The intrusion-upon-seclusion claim is dismissed without prejudice but, at this juncture, without leave to amend. Plaintiffs' case may otherwise proceed. PeopleConnect shall file a response to the complaint within thirty (30) days of the date of this order.

This order disposes of Docket Nos. 26, 28, and 49, as well as Docket Nos. 60, 64, and 71.

IT IS SO ORDERED.

Dated: November 1, 2021

/s/
EDWARD M. CHEN
United States District Judge

Appendix C**UNITED STATES DISTRICT COURT****NORTHERN DISTRICT OF CALIFORNIA**

MEREDITH CALLAHAN, et al.	Case No. 20-cv-09203-EMC
Plaintiffs,	
v.	
PEOPLECONNECT, INC.	ORDER DENYING DEFENDANT'S MOTION TO COMPEL ARBITRATION
Defendant.	Docket No. 26

Plaintiffs Meredith Callahan and Lawrence Geoffrey Abraham have filed a class action against Defendant PeopleConnect, Inc.¹ According to Plaintiffs, PeopleConnect misappropriated Plaintiffs' names, photographs, and likenesses and used the same in advertising its products and services, "including reprinted yearbooks and subscription memberships to the website Classmates.com." Compl. ¶ 2. Currently pending before the Court is PeopleConnect's motion to compel arbitration.² Having considered the parties'

¹ Plaintiffs initially sued three affiliated entities but, subsequently, they voluntarily dismissed two of the companies, thus leaving PeopleConnect as the sole defendant.

² The motion to compel arbitration is actually a part of a broader motion to dismiss and strike. *See* Docket No. 26 (motion to dismiss and strike). The Court informed the parties that it intended to

briefs and accompanying submissions, the Court hereby DENIES the motion.

I. FACTUAL & PROCEDURAL BACKGROUND

In their complaint, Plaintiffs allege as follows.

PeopleConnect is a company that collects yearbooks, scans the yearbooks, and extracts information from the yearbooks (such as names, photographs, schools attended, and so forth) to be put into a database. *See Compl. ¶ 53; see also Compl. ¶ 54* (alleging that “Classmates’ Yearbook Collection contains records copied from over 400 thousand yearbooks”). Through a website that it owns and operates—Classmates.com—PeopleConnect “provides free access to some of the personal information in its database in order to [1] drive users to purchase its two paid products . . . and [2] gather registered users, from whom [they] profit by selling targeted ads.” Compl. ¶ 3. PeopleConnect’s two paid products are (1) “reprinted yearbooks that retail for up to \$99.95, and [(2)] a monthly subscription to Classmates.com that retails for up to \$3 per month.” Compl. ¶ 3. PeopleConnect “did not ask consent from, give[] notice to, or provide compensation to [individuals] before using their names, photographs, and biographical information.” Compl. ¶ 55.

sequence the issues so that it would address first the motion to compel arbitration and then, if necessary, the remainder of the motion to dismiss/strike, as well as a separate motion to stay. *See* Docket No. 28 (motion to stay).

“By misappropriating and misusing millions of Californian’s names, photographs, and likenesses without consent, [PeopleConnect] has harmed Plaintiffs and the class by denying them the economic value of their likenesses, violating their legally protected rights to exclusive use of their likenesses, and violating their right to seclusion. [PeopleConnect] has also earned ill-gotten profits and been unjustly enriched.” Compl. ¶ 10.

Plaintiffs have asserted the following claim for relief:

- (1) Violation of California Civil Code § 3344 (i.e., the right of publicity). *See* Cal. Civ. Code § 3344(a) (providing that “[a]ny person who knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases of, products, merchandise, goods or services, without such person’s prior consent . . . shall be liable”).
- (2) Violation of California Business & Professions Code § 17200 (both the unlawful and unfair prongs).
- (3) Intrusion upon seclusion.
- (4) Unjust enrichment.

II. DISCUSSION

In the case at bar, PeopleConnect argues that the dispute should be compelled to arbitration³ because, in investigating Plaintiffs' case, Plaintiffs' counsel—*i.e.*, their agent—

- (1) used the Classmates.com website and thus became bound by the Terms of Service ("TOS") which include an arbitration provision, see McGuane Decl. ¶ 5 (testifying that "[t]he TOS is accessible to each user of Classmates.com via a hyperlink in the website's persistent footer and on the non-registered user homepage"), and
- (2) registered for two accounts on Classmates.com and, to create these accounts, had to agree to the TOS. *See* McGuane Decl. ¶¶ 12-14 (testifying that counsel created two accounts on December 6, 2020—about two weeks before filing the instant lawsuit—using the user names "John Doe" and "John Smith")⁴; McGuane Decl. ¶ 6 (testifying that, when a person registers for an account, "he or she sees the following screen which includes the following: "By clicking Submit, you agree to the *Terms of Service* and *Privacy Policy*" and "[t]he phrase 'Terms of Service' is hyperlinked to a copy of the

³ PeopleConnect asserts that the Federal Arbitration Act ("FAA") governs the instant case; Plaintiffs do not make any argument to the contrary.

⁴ Ms. McGuane also testifies that counsel created an account on Classmates.com back on August 25, 2019. *See* McGuane Decl. ¶ 12.

current TOS"); McGuane Decl. ¶ 16 (testifying that certain screenshots in Plaintiffs' complaint "could only have been accessed after the [website] user agreed to the Classmates.com TOS").

The TOS are attached as Exhibit 1 to the McGuane Declaration. On the first page of the TOS, there is a section titled "Introduction" and then a section titled "Acceptance of Terms." The Acceptance of Terms includes the following:

By accessing and using the Websites and Services you are agreeing to the following Terms of Service. We encourage you to review these Terms of Service, along with the Privacy Policy, which is incorporated herein by reference, as they form a binding agreement between us and you. If you object to anything in the Terms of Service or the Privacy Policy, do not use the Websites and Services.

USE OF THE WEBSITES AND/OR SERVICES REQUIRE YOU TO ARBITRATE ALL DISPUTES ON AN INDIVIDUAL BASIS, RATHER THAN JURY TRIALS OR CLASS ACTIONS, AND ALSO LIMITS THE REMEDIES AVAILABLE TO YOU IN THE EVENT OF A DISPUTE (SEE SECTION 13 BELOW).

McGuane Decl., Ex. 1 (emphasis in original).

As indicated above, § 13 (out of 14) addresses "Mandatory Arbitration, Dispute Resolution and Class Action Waiver." (The TOS has a section titled "Index

of Provisions” right after the Acceptance of Terms, which lists the 14 different sections that follow.) Section 13 provides in relevant part as follows:

PLEASE READ THIS SECTION CAREFULLY—IT MAY SIGNIFICANTLY AFFECT YOUR LEGAL RIGHTS, INCLUDING YOUR RIGHT TO FILE A LAWSUIT IN COURT. YOU AND THE PEOPLECONNECT ENTITIES EACH AGREE THAT ANY AND ALL DISPUTES THAT HAVE ARISEN OR MAY ARISE BETWEEN YOU AND THE PEOPLECONNECT ENTITIES SHALL BE RESOLVED EXCLUSIVELY THROUGH FINAL AND BINDING ARBITRATION, RATHER THAN IN COURT, EXCEPT THAT YOU MAY ASSERT CLAIMS IN SMALL CLAIMS COURT, IF YOUR CLAIMS QUALIFY.

You and PeopleConnect and/or its parent companies, subsidiaries, affiliates, and/or any and all of their respective directors, officers, employees and contractors (each a “PeopleConnect Entity” and, together, the “PeopleConnect Entities”) agree to arbitrate any and all disputes and claims between them (“Dispute(s)”), except as otherwise specifically provided below....

This agreement to arbitrate is intended to be broadly interpreted. It includes, but is not limited to: (1) Disputes related in any way to the Services, billing, privacy, advertising or our

communications with you; (2) Disputes arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory; (3) Disputes that arose before your agreement to these Terms of Services or any prior agreement; (4) Disputes that are currently the subject of purported class action litigation in which you are not a member of a certified class; and (5) Disputes that may arise after the termination of your use of the Services.

....

B. MANDATORY AND BINDING ARBITRATION PROCEDURES

YOU UNDERSTAND THAT BY THIS PROVISION, YOU AND THE PEOPLECONNECT ENTITIES ARE FOREGOING THE RIGHT TO SUE IN COURT AND HAVE A JURY TRIAL. THE FEDERAL ARBITRATION ACT GOVERNS THE INTERPRETATION AND ENFORCEMENT OF THIS AGREEMENT TO ARBITRATE.

- i. Rules. The arbitration will be governed by the Consumer Arbitration Rules of the American Arbitration Association (“AAA”), if applicable, as modified by this section. The AAA’s rules and a form for initiating the proceeding are available

at www.adr.org or by calling the AAA at 800.778.7879. The arbitration will be presided over by a single arbitrator selected in accordance with the AAA rules.

- ii. Unless otherwise required by the AAA rules, the arbitration shall be held in Seattle, Washington....

....

C. CLASS ACTION WAIVER.

ANY PROCEEDINGS WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS AND NOT IN A CLASS OR REPRESENTATIVE ACTION. NEITHER PARTY SHALL BE A MEMBER IN A CLASS, CONSOLIDATED, OR REPRESENTATIVE ACTION OR PROCEEDING, AND THE ARBITRATOR MAY AWARD RELIEF ONLY IN FAVOR OF THE INDIVIDUAL PARTY SEEKING RELIEF AND ONLY TO THE EXTENT NECESSARY TO PROVIDE RELIEF WARRANTED BY THAT PARTY'S INDIVIDUAL DISPUTE OR CLAIM. UNLESS THE PARTIES AGREE OTHERWISE, THE ARBITRATOR MAY NOT CONSOLIDATE MORE THAN ONE PERSON'S DISPUTES, AND MAY NOT OTHERWISE PRESIDE OVER ANY FORM OF A REPRESENTATIVE OR CLASS PROCEEDING. THE PEOPLECONNECT

ENTITIES DO NOT CONSENT TO CLASS ARBITRATION. THE PARTIES HEREBY WAIVE ANY RIGHT TO A JURY TRIAL.

D. ARBITRATION OPT-OUT. You have the right to opt-out and not be bound by this arbitration provision by sending written notice of your decision to opt-out to: PeopleConnect Arbitration Opt-Out, 1501 Fourth Avenue, Suite 400, Seattle, WA 98101. This notice must be sent within thirty (30) days of your first use of the Services or, if you are already a user of the Services upon initial release of this arbitration provision, within thirty (30) days of our email notice to you of that initial release.

The opt-out notice must state that you do not agree to this agreement to arbitrate and must include your name, address, phone number and email address(es) used to register with or use the Services. You must sign the opt-out notice for it to be effective. Any opt-out not received within the applicable thirty (30) day period set forth above will not be valid.

If you opt-out of the agreement to arbitrate, you and the PeopleConnect Entities agree that any Disputes will be resolved by a state or federal court located in King County, Washington, and you consent to the jurisdiction and venue of such court.

E. SMALL CLAIMS. You may choose to pursue your Dispute in small claims court (rather than arbitration) where jurisdiction and

venue over the applicable PeopleConnect Entity and you are proper, and where your claim does not include a request for any type of equitable relief, and so long as the matter advances on an individual (non-class) basis.

McGuane Decl., Ex. 1.

**A. Who Decides Motion to Compel Arbitration:
Court or Arbitrator**

As an initial matter, the Court must consider whether it or an arbitrator should decide the issues raised in PeopleConnect's motion to compel arbitration. The Court is required to decide at least part of the motion. Specifically, one of the issues raised in the motion is whether a principal who does not enter into an arbitration agreement himself or herself—*i.e.*, a nonsignatory to the agreement—can still be compelled to arbitrate if an agent of the principal (such as an attorney) was a signatory to the arbitration agreement. This is a contract formation issue and, as such, should be decided by the Court. *See Kum Tat Ltd. v. Linden Ox Pasture, LLC*, 845 F.3d 979 (9th Cir. 2017) (stating that, “[a]lthough challenges to the validity of a contract with an arbitration clause are to be decided by the arbitrator [based on a delegation clause], challenges to the very existence of the contract are, in general, properly directed to the court”); *see also Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126-27 (9th Cir. 2013) (in addressing whether a nonsignatory to certain purchase agreements could compel plaintiffs to arbitrate, stating that “whether parties have agreed to submi[t] a particular dispute to arbitration is typically an issue for judicial determination” and that, “where

the dispute at issue concerns contract formation, the dispute is generally for courts to decide") (internal quotation marks omitted). PeopleConnect agrees that contract formation is a decision for this Court to address. *See Reply at 3.*

B. Nonsignatory-Principal and Signatory-Agent

A nonsignatory-principal can be compelled to arbitrate based on the agreement to arbitrate made by a signatory-agent, but

[n]ot every agency relationship . . . will bind a nonsignatory to an arbitration agreement. “Every California case finding nonsignatories to be bound to arbitrate is based on facts that demonstrate, in one way or another, the signatory’s implicit authority to act on behalf of the nonsignatory.” Courts also have stated that the agency relationship between the nonsignatory and the signatory must make it “equitable to compel the nonsignatory” to arbitrate.

Cohen v. TNP 2008 Participating Notes Program, LLC, 31 Cal. App. 5th 840, 859-60, 243 Cal.Rptr.3d 340 (2019); *see also id.* at 861 (noting that the issue of “whether an arbitration agreement signed by an agent also binds the agent’s nonsignatory principal[] is less commonly litigated”).

In the instant case, there is no real dispute that Plaintiffs’ counsel is, in fact, their agent. However, the scope of counsel’s authority is contested—*i.e.*, did counsel have the authority to enter into the arbitration agreement on Plaintiffs’ behalf? It is PeopleConnect’s

burden to prove the scope of counsel's authority. *See Inglewood Teachers Ass'n v. Pub. Emp't Relations Bd.*, 227 Cal. App. 3d 767, 780, 278 Cal.Rptr. 228 (1991).

Although the extent of an agent's authority is often a question of fact, *see id.*, the California Supreme Court has addressed the specific issue of when a lawyer, as agent, can bind a client to an arbitration agreement—*i.e.*, waive the right to a judicial forum. *See Blanton v. Womancare, Inc.*, 38 Cal. 3d 396, 212 Cal.Rptr. 151, 696 P.2d 645 (1985). In Blanton, the California Supreme Court indicated that, if the lawyer had express actual authority to enter into an arbitration agreement, then the client would be bound. The Court also indicated that, if the lawyer entered into an arbitration agreement without authorization, but the client subsequently ratified the act, the client would be bound as well. *See id.* at 403, 212 Cal.Rptr. 151, 696 P.2d 645.

This left the Court with the question of whether a lawyer has implied actual authority or apparent authority to enter into an arbitration agreement. Regarding actions taken by a lawyer with respect to representation in connection with litigation, the lawyer has apparent authority “to do that which attorneys are normally authorized to do in the course of litigation manifested by the client's act of hiring an attorney.” *Id.* at 404, 212 Cal.Rptr. 151, 696 P.2d 645. Also, a lawyer has implied actual authority on certain procedural matters (efficiency driven) and tactical decisions (such as whether to call particular witness) that are a “necessary incident to the function he is engaged to perform.” *Id.* But an attorney is not authorized,

merely by virtue of his retention in litigation, to “impair the client’s substantial rights or the cause of action itself.” For example, “the law is well settled that an attorney must be specifically authorized to settle and compromise a claim, that merely on the basis of his employment he has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation.” Similarly, an attorney may not “stipulate to a matter which would eliminate an essential defense. He may not agree to the entry of a default judgment, may not . . . stipulate that only nominal damages may be awarded and he cannot agree to an increase in the amount of the judgment against his client. Likewise, an attorney is without authority to waive findings so that no appeal can be made. . . .” Such decisions differ from the routine and tactical decisions which have been called “procedural” both in the degree to which they affect the client’s interest, and in the degree to which they involve matters of judgment which extend beyond technical competence so that any client would be expected to share in the making of them.

Id. at 404-05; *cf. New York v. Hill*, 528 U.S. 110, 114, 120 S.Ct. 659, 145 L.Ed.2d 560 (2000) (indicating that “[w]hat suffices for waiver depends on the nature of the right at issue” and that, “[f]or certain fundamental rights, the defendant must personally make an informed waiver”) (emphasis added); *Winters v. Cook*, 489 F.2d 174, 179 (5th Cir. 1973) (noting that personal

fundamental rights that can be waived by a defendant only and not waived by an attorney include the right to plead guilty, the right to waive trial by jury, the right to waive appellate review, and the right to testify personally).

The *Blanton* Court went on to recognize that a client has substantial rights where the issue is whether the client waives a judicial forum in favor of binding arbitration. *See Blanton*, 38 Cal. 3d at 407, 212 Cal.Rptr. 151, 696 P.2d 645 (noting that binding arbitration “entail[ed] a waiver of all but minimal judicial review”; adding that the arbitration provision at issue also had other significant terms—*e.g.*, “unilateral selection of the arbitrator by the defendant’s attorney, from among attorneys whose practice consists primarily in defending medical malpractice actions” and “waive[r] [of] any right to recovery beyond \$ 15,000”). Thus, “[a]bsent express authority, it is established that an attorney does not have *implied* plenary authority to enter into contracts on behalf of his client.” *Id.* at 407, 212 Cal.Rptr. 151, 696 P.2d 645 (emphasis added).

[S]imilarly, an attorney, merely by virtue of his employment as such, has no *apparent* authority to bind his client to an agreement for arbitration. We find no reason in logic, or policy, for holding his apparent authority in that respect is enlarged by reason of the fact that he has been retained to engage in litigation. When a client engages an attorney to litigate in a judicial forum, the client has a right to be consulted, and his consent obtained, before the dispute is

shifted to another, and quite different, forum, particularly where the transfer entails the sort of substantial consequences present here.

Id. at 407-08 (emphasis added).

In short, absent client consent or ratification, a lawyer cannot bind a client to an arbitration agreement by virtue of the attorney-client relationship alone. *Blanton* is binding on this Court because the issue of whether a lawyer (signatory-agent) can bind a client (nonsignatory-principal) to an arbitration agreement is a matter of state law. *See Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (stating that, “[i]n determining whether a valid arbitration agreement exists, federal courts ‘apply ordinary state-law principles that govern the formation of contracts’”). That holding is consistent with federal law, which requires a knowing waiver of the right to a judicial forum. *See Kummetz v. Tech Mold*, 152 F.3d 1153, 1155 (9th Cir. 1998) (in ADA employment case, asking whether employee knowingly waived right to judicial forum and agreed to arbitrate). Here, there is no indication that Plaintiffs expressly authorized their counsel to enter into the arbitration agreement. In fact, at the hearing, counsel stated that he did not have express authorization; PeopleConnect did not dispute such. Nor is there any suggestion that Plaintiffs, after the fact, ratified the agreement to arbitrate. This leaves implied actual authority and apparent authority. Under *Blanton*, the mere fact of the attorney-client relationship does not give rise to either authority with respect to any agreement to arbitrate. PeopleConnect’s attempts to distinguish *Blanton* (e.g.,

that the client there had expressly told the lawyer not to agree to arbitrate, that the agreement to arbitrate took place during the litigation rather than before) are not persuasive. Counsel's action in accessing the Classmates.com website and registering for two accounts just before filing suit were clearly done in the course of counsel's representation of Plaintiffs for and in anticipation of litigation. The distinction PeopleConnect seeks to draw as to the precise timing of the registration has no logical basis.

Although PeopleConnect has cited authority to support its general position on agency, *Independent Living Resource Center San Francisco v. Uber Technologies, Inc.*, No. 18-cv-06503-RS, 2019 WL 3430656, 2019 U.S. Dist. LEXIS 127072 (N.D. Cal. July 30, 2019) [hereinafter “Uber”], Uber is not binding. Significantly, *Uber* did not address *Blanton* or the concerns raised therein.

As a final point, it is worth noting that the actions of Plaintiffs' counsel here do not serve as the basis of Plaintiffs' claims—*i.e.*, counsel's use of the Classmates.com website is not the factual predicate for Plaintiffs' claims. Rather, counsel's use of the website was undertaken as part of the investigation—an investigation consistent with counsel's Rule 11 obligations, *see Fed. R. Civ. P. 11*, and Plaintiffs' duty to plead with specificity a plausible claim under *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)—into whether Plaintiffs did, in fact, have claims against PeopleConnect. The Court is troubled by

PeopleConnect's suggestion that a plaintiff's access to a judicial forum may be cut off simply because counsel for the plaintiff fulfilled a duty under Rules 11 and 12 to investigate prior to filing suit. Under PeopleConnect's position, Plaintiffs here would either file suit without doing the necessary pre-suit investigation, raising serious concerns, or would waive the right to a judicial forum, a right protected under the First Amendment. *See White v. Lee*, 227 F.3d 1214, 1227 (9th Cir. 2000) (stating that “[t]he First Amendment . . . guarantees the right ‘to petition the Government for a redress of grievances’”). Whether one calls this being on the horns of a dilemma, Hobson’s choice, stuck between a rock and a hard place, or caught between Scylla and Charybdis, the resulting policy dilemma created by PeopleConnect’s position underscores the aptness of Blanton’s holding.

III. CONCLUSION

For the foregoing reasons, the Court denies the motion to compel arbitration. The Court further sets the remaining issues raised in the motion to dismiss and strike and motion to stay (Docket Nos. 26 and 28) for hearing on **June 24, 2021, at 1:30 p.m.**

IT IS SO ORDERED.

Dated: May 18, 2021

/s/
EDWARD M. CHEN
United States District Judge