

No. _____

IN THE
Supreme Court of the United States

PEOPLECONNECT, INC.,
Applicant,

v.

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

APPLICATION FOR STAY PENDING DISPOSITION OF
PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 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.

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE
SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

INTRODUCTION

Pursuant to 28 U.S.C. § 1651 and Supreme Court Rule 23, Applicant PeopleConnect, Inc. (“PeopleConnect”) respectfully seeks an order staying proceedings in *Callahan v. PeopleConnect, Inc.*, No. 20-cv-09203-EMC (N.D. Cal.), pending disposition of PeopleConnect’s petition for certiorari.¹

This stay application arises from a putative class action filed by respondents Meredith Callahan and Lawrence Geoffrey Abraham against 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. The district court and Ninth Circuit both denied a stay.

¹ PeopleConnect’s application and petition present the same question as PeopleConnect’s now-withdrawn application and petition in *PeopleConnect, Inc. v. Knapke*, Nos. 21A160 and 21-725. However, the two cases are unrelated. *Knapke* was a class action brought by Ohioans in the Western District of Washington, while this case is a class action brought by Californians in the Northern District of California. In *Knapke*, after PeopleConnect filed its application and petition, the plaintiffs acquiesced to a stay pending appeal, which rendered the application and petition moot. But the plaintiffs in this case are represented by different counsel than the plaintiffs in *Knapke* and counsel in this case has indicated that he would continue to oppose PeopleConnect’s requested stay.

In PeopleConnect’s petition for certiorari, PeopleConnect is seeking review of the Ninth Circuit’s order denying PeopleConnect’s requested stay. In this application, PeopleConnect seeks a stay of district court proceedings pending disposition of that petition for certiorari. The Court should grant the stay application because the Court is likely to grant certiorari and reverse the Ninth Circuit, and a stay is necessary to avoid irreparable harm.

The Court is likely to grant certiorari because there is a longstanding circuit split on whether district courts are ousted of jurisdiction pending a non-frivolous appeal of the denial of a motion to compel arbitration. In the Second, Fifth, and Ninth Circuits, district courts are not ousted of jurisdiction. In those circuits, the movant must establish its entitlement to a stay under the traditional discretionary test. In the decision below, the Ninth Circuit applied that legal standard and concluded that PeopleConnect was not entitled to a stay.

By contrast, in the Third, Fourth, Seventh, Tenth, and Eleventh Circuits, a stay of district court proceedings is automatic. Once a non-frivolous appeal is filed, the district court is ousted of jurisdiction, and district court proceedings must halt.

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 case is an ideal vehicle to resolve the circuit split because the Ninth Circuit’s legal standard was outcome-determinative. Had this case arisen in the Third, Fourth, Seventh, Tenth, and Eleventh Circuits, PeopleConnect’s appeal would have automatically halted proceedings in the district court. But because this case arose in the Ninth Circuit, PeopleConnect was subjected to a less favorable legal standard that resulted in its stay motion being denied.

If the Court grants certiorari, it is likely to reverse the Ninth Circuit. The majority rule is correct. 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.

Finally, PeopleConnect would encounter irreparable harm if its stay application is denied. The purpose of arbitration is to avoid burdensome discovery and court procedures. PeopleConnect's requested stay seeks to avoid those procedures pending a decision on whether to compel arbitration. If district court proceedings continue while PeopleConnect's petition for certiorari is pending, PeopleConnect will encounter the very burdensome discovery procedures the stay is designed to avoid. That harm cannot be undone even if PeopleConnect prevails in this Court. The Court has previously granted stays in closely similar procedural postures, and it should adhere to its prior practice.

Because this case concerns the legal standard for stays pending appeal, it will become moot when the court of appeals issues its mandate. Hence, if the Court grants this stay application, PeopleConnect respectfully requests that the Court ensure the case is heard expeditiously.

In particular, PeopleConnect proposes that the Court construe this stay application as a petition for certiorari, grant the stay application, grant certiorari, and issue an expedited briefing schedule. The Court took that path in a previous case that addressed the legal standard for stays pending appeal. In *Nken v. Holder*, 556 U.S. 418 (2009), the applicant filed a stay application, seeking review of a circuit split on the appropriate legal standard for stays pending appeal in immigration cases. Like this case, *Nken* (and any other case raising the same issue) would become moot once the court of

appeals ruled. The Court granted the stay application, treated the stay application as a petition for certiorari, granted certiorari, and set an expedited briefing schedule. If the Court proceeds in that fashion, PeopleConnect would dismiss its separately-filed petition for certiorari. Alternatively, if the Court declines to treat this stay application as a petition for certiorari, the Court should grant PeopleConnect's motion to expedite consideration of PeopleConnect's separately-filed petition for certiorari.

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. Ex. B, ¶2.

No names or photos are displayed on Classmates.com 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. Ex. D, ¶¶12-14, 16. 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." Ex. D, ¶7. 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." Ex. C at 5. The Terms of Service grant

all users a right to opt out of the contractual arbitration agreement within 30 days of registration. Ex. E, § 13(D).

Respondents' counsel did not opt out. Instead, counsel included in respondents' Complaint screenshots available only to a user that accepted the Terms of Service. Ex. D, ¶16.

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' 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. Ex. F at 10.

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." Ex. F at 10. 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. Ex. G.

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. Ex. A. The court also denied PeopleConnect’s request for an administrative stay to permit en banc reconsideration of *Britton*. *Id.*

ARGUMENT

This case presents the question whether PeopleConnect is entitled to a stay as a matter of right of the district court’s proceedings pending appeal of the denial of PeopleConnect’s motion to compel arbitration. PeopleConnect’s position on the merits is that it is entitled to a stay as a matter of right, and hence need not establish the requirements of the traditional discretionary test for a stay.

Nevertheless, PeopleConnect recognizes that the Court may be reluctant to resolve the merits of this case in connection with the antecedent inquiry of whether PeopleConnect is entitled to a stay pending review. PeopleConnect will therefore assume, for purposes of this application, that the more stringent discretionary test for a stay applies. If PeopleConnect satisfies that standard, then it would, *a fortiori*, be entitled to a stay under the position it intends to advance in this Court that it is entitled to a stay as a matter of right.

Under the traditional discretionary standard, a stay is warranted when there is “(1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that

the Court will then reverse the decision below, and (3) a likelihood that irreparable harm [will] result from the denial of a stay.” *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers).

These criteria are met in this case. There is a reasonable probability that the Court will grant certiorari to resolve the entrenched and well-recognized conflict of authority over whether a district court is ousted of jurisdiction pending appeal of the denial of a motion to compel arbitration. There is a fair prospect that the Court will reverse the Ninth Circuit’s decision and adopt the majority approach. Finally, PeopleConnect would be irreparably harmed if a stay is denied: it would suffer the very discovery burdens that the sought-after stay is designed to prevent.

I. THIS COURT IS LIKELY TO GRANT CERTIORARI TO REVIEW THE NINTH CIRCUIT’S DENIAL OF A STAY PENDING APPEAL.

This case meets all of the Court’s criteria for certiorari. There is a square and longstanding circuit split on the question presented, the issue is important and arises regularly, and this case is a perfect vehicle.

A. 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.

- i. 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.*

- ii. Five circuits hold that district courts do not maintain jurisdiction while an appeal of the denial of a 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, LLC*, 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 “whether 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.* “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.* at 265. 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.*

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.

B. 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.² 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 competing interests and concerns about potential abuse of litigation and appeals.” *McCauley*, 413 F.3d at 1161. “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

² 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 (ECT/TNL), 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).

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.

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. 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.

II. THIS COURT IS LIKELY TO REVERSE THE NINTH CIRCUIT.

If this Court grants certiorari, it is likely to reverse the Ninth Circuit.

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 506. *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.

III. ABSENT A STAY, PEOPLECONNECT WILL INCUR IRREPARABLE HARM.

If the Court denies a stay, PeopleConnect will incur the very expenses and burdens of litigation that arbitration—and PeopleConnect’s sought-after stay—are designed to prevent. As this Court has previously concluded in a similar procedural posture, those expenses and burdens qualify as irreparable harm warranting a stay.

Because PeopleConnect’s motion for stay was denied, the parties are proceeding to active discovery. By contrast, if the case proceeded to arbitration, discovery would be much less burdensome. 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.” Ex. E, § 13(B)(i); *see also* AAA Consumer Arb. R. R-22-(a).

Moreover, PeopleConnect is seeking to compel individualized arbitration, whereas 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 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”).

In addition to being costly, discovery “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.” *Levin*, 634 F.3d at 265. That risk is particularly acute in the context of class discovery, in which respondents may seek sensitive information about PeopleConnect’s business in her effort to persuade the court to certify a class. In an individualized arbitration, that discovery would never occur.

Without a stay, these harms will be irreparable. Respondents recently served a draft joint Rule 26(f) report, stating that respondents intend to seek extensive discovery, including class discovery, on an aggressive schedule. While no schedule is in place yet, respondents’ draft confirms that they intend to impose significant burdens on PeopleConnect while PeopleConnect waits for its appeal to be resolved. Moreover, 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. Ex. H.

If PeopleConnect is forced to engage in discovery while this case is pending in this Court, any victory would be tantamount to closing the barn door after the horse has

bolted. If PeopleConnect wins in this Court, it will obtain a stay of discovery—and yet the discovery sought to be stayed, including almost all class certification discovery, will already have occurred. Those expenses and burdens cannot be undone. *Levin*, 634 F.3d at 265 (“[T]he 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.”). PeopleConnect will have permanently lost the benefit of what it bargained for: low-cost individualized arbitration procedures. *See, e.g., Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984) (“If [a] party must undergo the expense and delay of a trial before being able to appeal, the advantages of arbitration—speed and economy—are lost forever” and the resulting harm is “serious, perhaps, irreparable”).

Indeed, Congress has authorized interlocutory appeals of denials of motion to compel arbitration precisely because awaiting final judgment would cause irreparable harm. *See Ehleiter*, 482 F.3d at 214 (“[T]he availability of interlocutory review under Section 16 of decisions favoring litigation avoids the possibility that a litigant seeking to invoke his arbitration rights will have to endure a full trial on the underlying controversy before he can receive a *definitive* ruling on whether he was legally obligated to participate in such a trial in the first instance” (quotation marks and alterations omitted)). For the identical reason, denying PeopleConnect’s requested stay here would cause irreparable harm: PeopleConnect would have to endure months of class discovery while awaiting resolution of its claim that the claim should be individually arbitrated.

Twice in recent years, this Court has granted stays of district court proceedings in a similar procedure posture. In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 19A766, as well as in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, No. 17A859, the petitioner sought review of lower-court rulings denying its motion to compel arbitration, and also filed applications in this Court to stay proceedings in the district court pending resolution of its petitions for certiorari. In both cases, this Court granted the petitioner’s stay applications and stayed district court proceedings. The Court should follow that practice and grant PeopleConnect’s stay application here.³

IV. TO AVOID MOOTNESS, THE COURT SHOULD ENSURE THAT THIS CASE IS HEARD THIS TERM.

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

³ When deciding whether to grant a stay pending certiorari review, “in a close case it may be appropriate to ‘balance the equities’—to explore the relative harms to applicant and respondents, as well as the interests of the public at large.” *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). Here, the balance of equities favors PeopleConnect. As explained above, PeopleConnect would face irreparable harm. By contrast, respondents would not be substantially harmed by the temporary stay of class discovery that PeopleConnect seeks, especially given that PeopleConnect is seeking expedited review. Finally, staying class discovery would cause no discernable harm to the public interest.

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, it can construe this stay application as a petition for certiorari, grant certiorari, and set an expedited briefing schedule. This would be PeopleConnect's preference because it would be the most expeditious and efficient option.

The Court took that path the last time a similar situation arose. In *Nken v. Holder*, 556 U.S. 418 (2009), the applicant filed a stay application, seeking review of a circuit split on the appropriate legal standard for stays pending appeal in immigration cases. Like this case, *Nken* (and any other case raising the same issue) would inherently become moot once the court of appeals ruled. The Court granted the stay application, treated the stay application as a petition for certiorari, granted certiorari, and set an expedited briefing schedule that allowed the case to be argued less than two months after the stay application was granted. If the Court proceeds similarly here, PeopleConnect would respectfully request a briefing schedule on the same timeline as in *Nken*, although

PeopleConnect would be prepared to brief this case on whatever expedited schedule the Court deems appropriate.

In an abundance of caution, PeopleConnect is also filing, in conjunction with this stay application, a separate petition for certiorari as well as a motion to expedite consideration of that petition. If the Court treats this stay application as a petition for certiorari, PeopleConnect would dismiss that separate petition and motion. Alternatively, if the Court declines to treat this stay application as a petition for certiorari, PeopleConnect respectfully requests that the Court grant this stay application and set an expedited briefing schedule for the petition for certiorari. PeopleConnect would propose that the brief in opposition be due on December 23, 2021. PeopleConnect would file its reply brief by December 30, 2021 which would allow this Court to consider the petition at its January 7, 2022 Conference. PeopleConnect would then respectfully request a briefing schedule that would allow the case to be argued in March 2022.

CONCLUSION

The application for stay should be granted.

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EXHIBIT A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

DEC 9 2021

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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

Plaintiffs-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

Before: O'SCANNLAIN 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.

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

EXHIBIT B

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 and the Proposed Class*

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

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

Plaintiffs,

v.

PEOPLECONNECT, INC., a Delaware
 Corporation; PEOPLECONNECT INC., a
 California Corporation; CLASSMATES
 MEDIA CORPORATION, a Delaware
 Corporation; and DOES 1 through 50, inclusive,

Defendants.

Case No.

CLASS ACTION COMPLAINT FOR
 VIOLATION OF CAL. CIV. CODE § 3344,
 AND CAL. BUS. & PROF. CODE § 17200,
 INTRUSION UPON SECLUSION, UNJUST
 ENRICHMENT

CLASS ACTION

JURY TRIAL DEMANDED

1 information, and identities appear in its Classmates Yearbook Collection.

2 6. The names, photographs, cities of residence, schools attended, likenesses, and
3 identities contained in the Classmates Yearbook Collection uniquely identify specific
4 individuals.

5 7. Classmates knowingly uses the names, photographs, cities of residence, schools
6 attended, likenesses, and identities in its Classmates Yearbook Collection to advertise, sell, and
7 solicit the purchase of reprinted yearbooks, which retail for up to \$99.95, and its “CM+”
8 subscription membership, which retails for up to \$3 per month.

9 8. Classmates knowingly uses the names, photographs, cities of residence, schools
10 attended, likenesses, and identities in its Classmates Yearbook Collection to advertise the free
11 version of its website, which is available to both unregistered users and registered non-paying
12 users. Classmates derives profit from the free version of its website by (1) selling targeted ads;
13 (2) driving users of the free version to purchase its paid products and services; and (3) on
14 information and belief, selling the personal information it collects from registered and
15 unregistered users to third parties.

16 9. Classmates knowingly uses the names, photographs, cities of residence, schools
17 attended, likenesses, and identities in its Classmates Yearbook Collection on and in its products
18 and services, by (1) selling reprinted yearbooks that contain the records; (2) selling access to
19 the records to paying subscribers via its CM+ online membership plan; and (3) including these
20 records on the free version of its website that is available to unregistered users and registered
21 non-paying users.

22 10. By misappropriating and misusing millions of Californian’s names,
23 photographs, and likenesses without consent, Classmates has harmed Plaintiffs and the class by
24 denying them the economic value of their likenesses, violating their legally protected rights to
25 exclusive use of their likenesses, and violating their right to seclusion. Classmates has also
26 earned ill-gotten profits and been unjustly enriched.

27 11. These practices, as further detailed in this complaint, violate the California right
28 to publicity as codified in Cal. Civ. Code § 3344; the California Unfair Competition Law, Cal.

1 Bus. & Prof. Code § 17200 *et seq.*; California’s common law right protecting against Intrusion
2 upon Seclusion; and California Unjust Enrichment law.

3 JURISDICTION AND VENUE

4 12. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d) (the
5 Class Action Fairness Act (“CAFA”)), because: (A) members of the putative class are citizens
6 of a state different from at least one defendant. According to available public records,
7 defendant PeopleConnect Inc. is incorporated in Delaware and has its principal place of
8 business in Seattle, Washington. The class members are residents of California. (B) The
9 proposed class consists of at least 100 members. Classmates advertises that its Classmates
10 Yearbook Collection comprises records collected from “over 400,000 yearbooks.” While
11 Classmates does not publish statistics concerning the total number of records in each yearbook,
12 or a breakdown by state, a conservative estimate would place the number of individual records
13 corresponding to Californians in the millions. And (C) the amount in controversy exceeds
14 \$5,000,000 exclusive of interest and costs. Cal. Civ. Code § 3344 provides for damages equal
15 to the greater of \$750 per violation, the actual damages suffered by Plaintiffs, or the profits
16 earned by Defendants attributable to the unauthorized use. Given millions of likely records in
17 California, the amount in controversy is well over the jurisdictional amount.

18 13. This Court has personal jurisdiction over the claims of Plaintiffs and the non-
19 named class members. Classmates maintains substantial connections to the state of California
20 and this district. Classmates maintains an office in Woodland Hills, California. Classmates
21 advertises its products and services to prospective customers in this state and district, provides
22 its products and services to existing customers in this state and district, and uses the
23 misappropriated names, photographs, likenesses, images, and identities of residents of this state
24 and district as described in this complaint.

25 14. Venue is appropriate pursuant to 28 U.S.C. § 1391(b). A substantial portion of
26 the events and conduct giving rise to the violations alleged in this complaint occurred in this
27 district. A substantial portion of the class members reside in this state and district. Named
28 Plaintiff Lawrence Geoffrey Abraham resides in this district.

INTRADISTRICT VENUE

15. Venue in this Division of the Northern District is proper because a substantial part of the events or omissions which give rise to the claim occurred in San Francisco County and because Plaintiff Lawrence Geoffrey Abraham lives in San Francisco.

PARTIES**Defendant Classmates**

16. Defendant PEOPLECONNECT, INC. is a Delaware corporation with its headquarters in Seattle, Washington. It conducts business under the brand names “Classmates.com,” “Classmates,” and other brand names associated with the various website and services it owns and operates. It conducts business throughout this district, California, and the United States. PeopleConnect, Inc. owns and operates the website Classmates.com.

17. Defendant PEOPLECONNECT INC. is a California corporation with its headquarters in Seattle, Washington. Defendant CLASSMATES MEDIA CORPORATION is a Delaware corporation with its headquarters in Woodland Hills, California.

18. There are many related entities associated with the Classmates.com website. Plaintiffs are ignorant of which additional related entities were involved in the wrongdoing alleged herein. Plaintiffs therefore sues these Doe Defendants by fictitious names. Plaintiffs will amend this Complaint to allege the true names and capacities of these fictitiously named Doe Defendants when they are ascertained. Each of the fictitiously named Doe Defendants is responsible for the conduct alleged in this Complaint and Plaintiffs’ damages were actually and proximately caused by the conduct of the fictitiously named Doe Defendants.

Plaintiff Lawrence Geoffrey Abraham

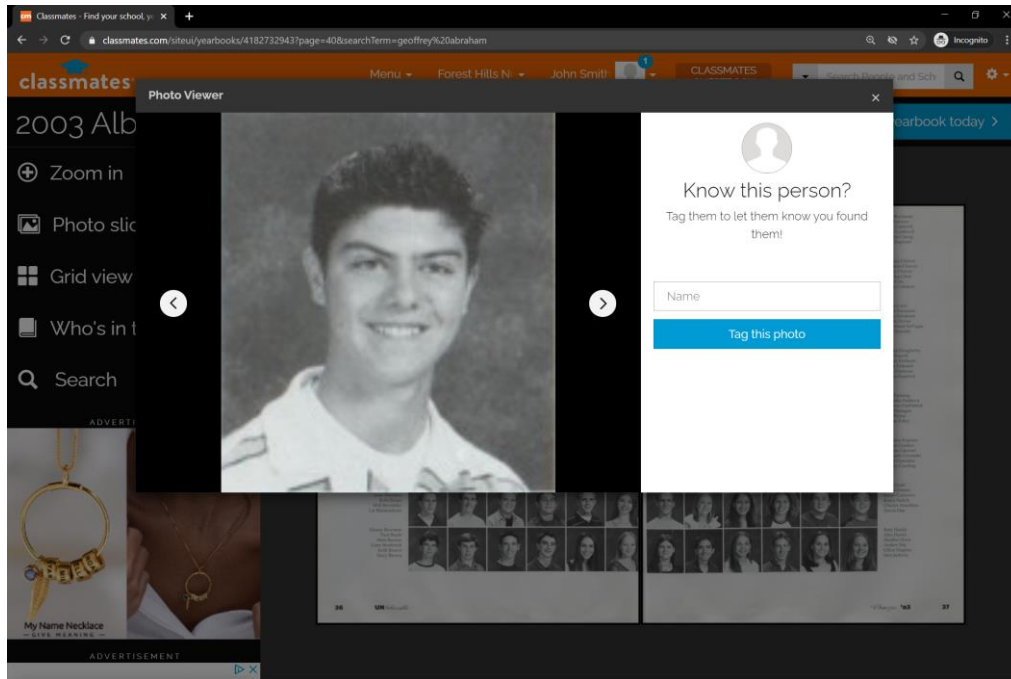
19. Plaintiff Lawrence Geoffrey Abraham is a resident of San Francisco, California. Mr. Abraham is not a subscriber of any Classmates products or services and is not subject to any Terms of Service or any other agreement with Classmates.

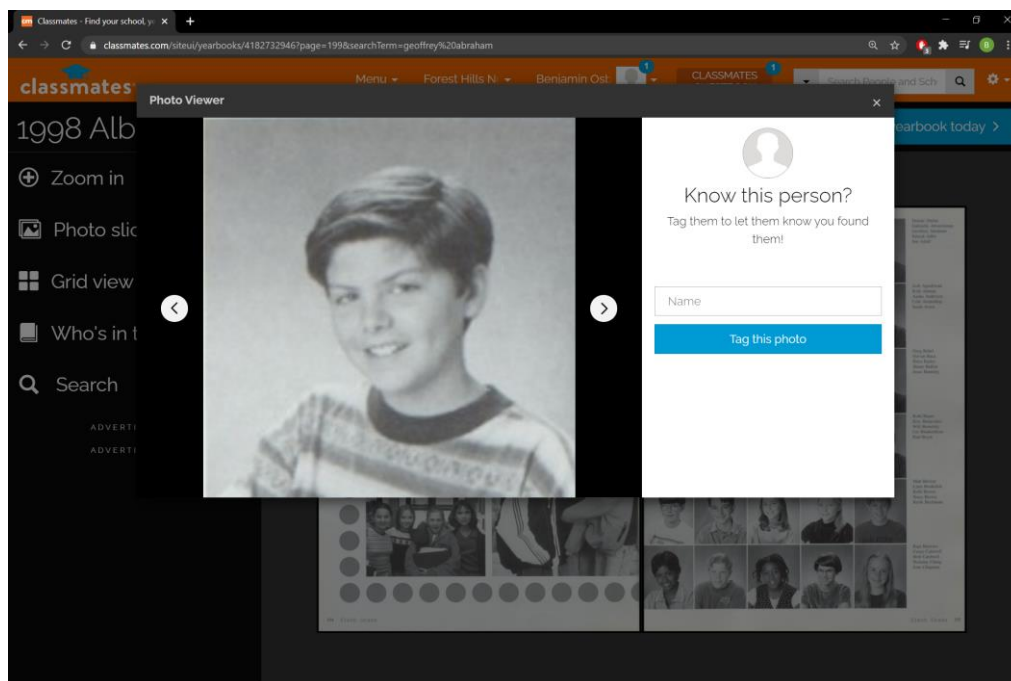
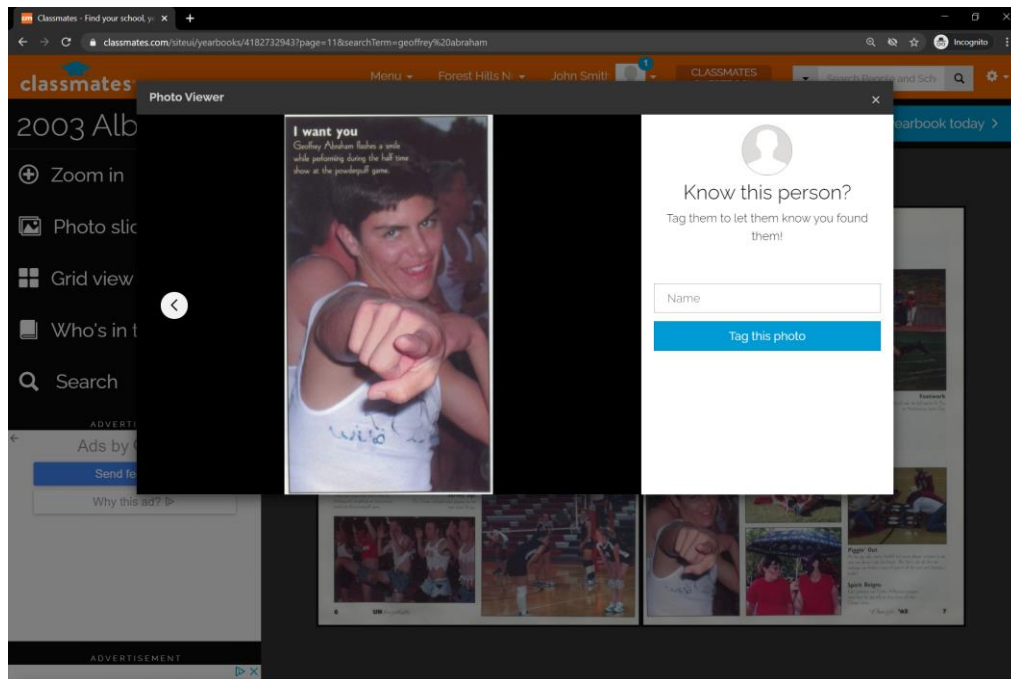
20. Mr. Abraham has never provided consent to Classmates, written or otherwise, for the use of his name, photograph, or likeness.

21. Classmates has never notified, requested consent, or provided compensation to

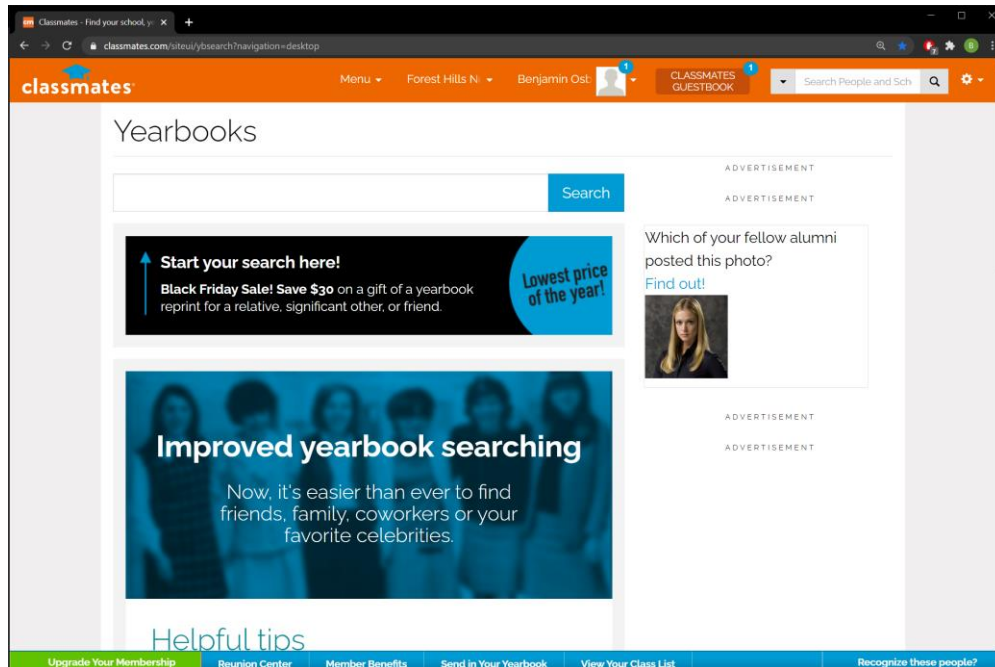
Mr. Abraham for its appropriation of his name, photograph, and likeness. Mr. Abraham first became aware that his personal information and photographs are being used by Classmates through the investigation of this lawsuit.

22. Classmates' Yearbook Collection contains sixteen unique records corresponding to Mr. Abraham, all from yearbooks between the years of 1998 and 2004 from Albuquerque Academy in Albuquerque, New Mexico, where Mr. Abraham attended school. The records uniquely identify Mr. Abraham. All sixteen records include his full name and clearly identify his place of residence and school he attended. Eleven of the records include photographs in which Mr. Abraham's face is plainly visible and identifiable. Various of the records identify Mr. Abraham's participation in school activities such as track, cross country, and chess club. A representative sample of the photographs from three of these records appear as screen captures below:

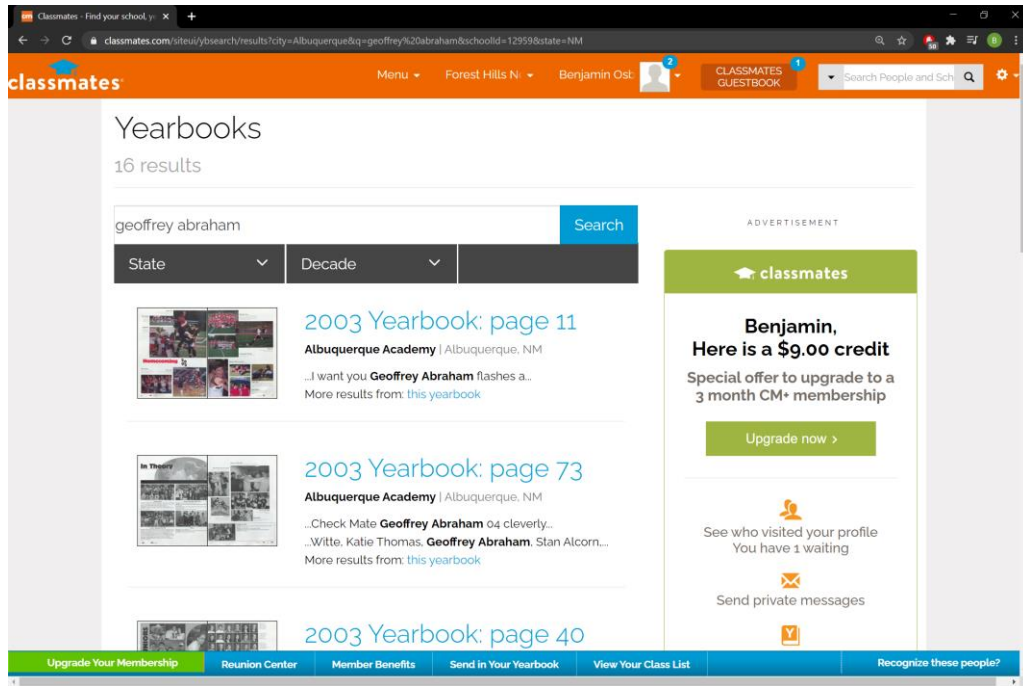




23. Classmates has and continues to knowingly use the records containing Mr. Abraham's name, photograph, and likeness to advertise, sell, and solicit the purchase of reprinted yearbooks. Users of the Classmates.com website are encouraged to enter the names of people they may know into a search bar. The search bar is indicated by an arrow labeled "Start your search here!" and promises promotional pricing on reprinted yearbooks that contain a relative, significant other, or friend.

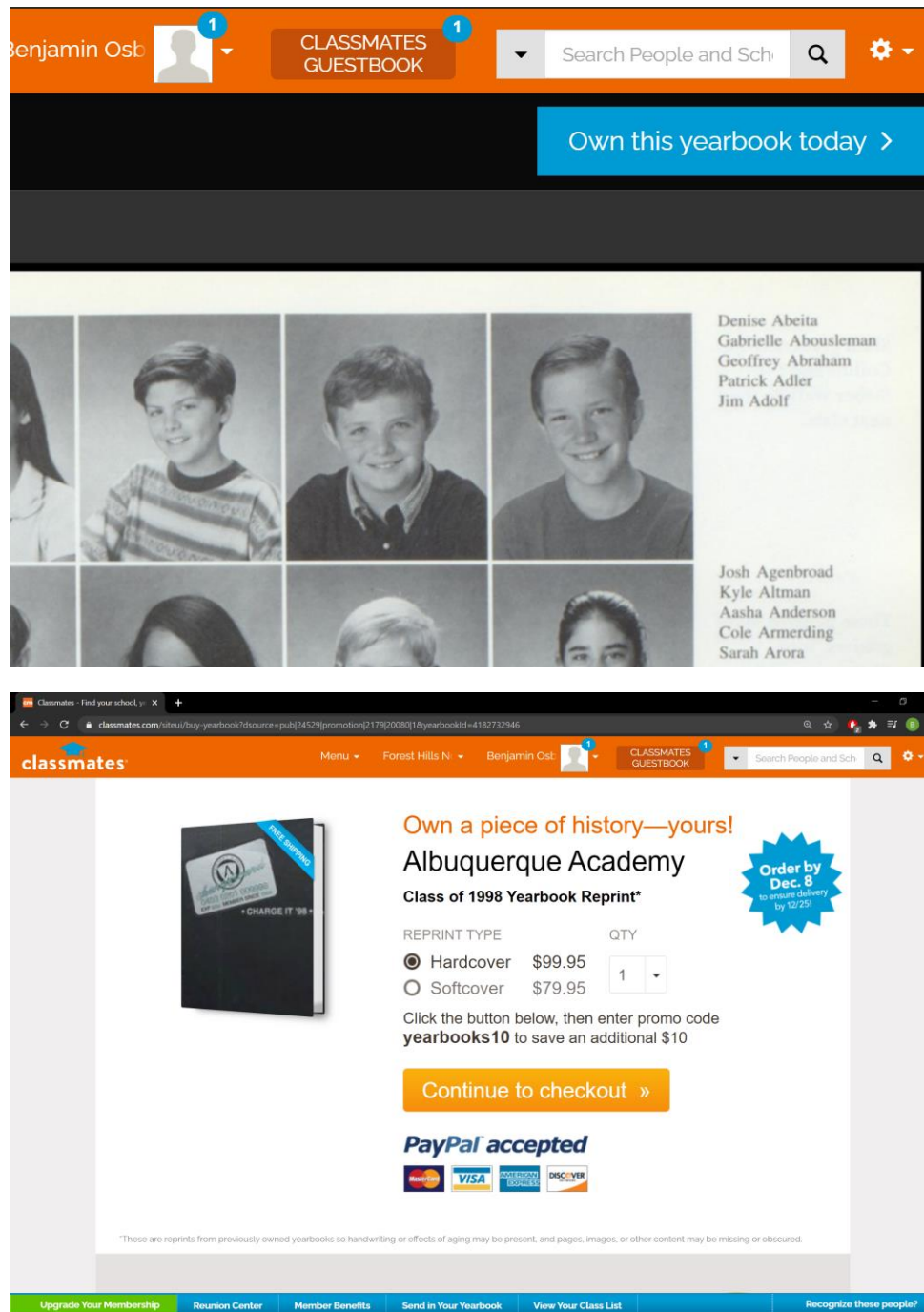


24. Users who enter Mr. Abraham's name receive in response a list of the sixteen records in Classmates' Yearbook Collection corresponding to Mr. Abraham. All Classmates users may search for Mr. Abraham's name and view this list, including unregistered users, registered non-paying users, and paying subscribers.

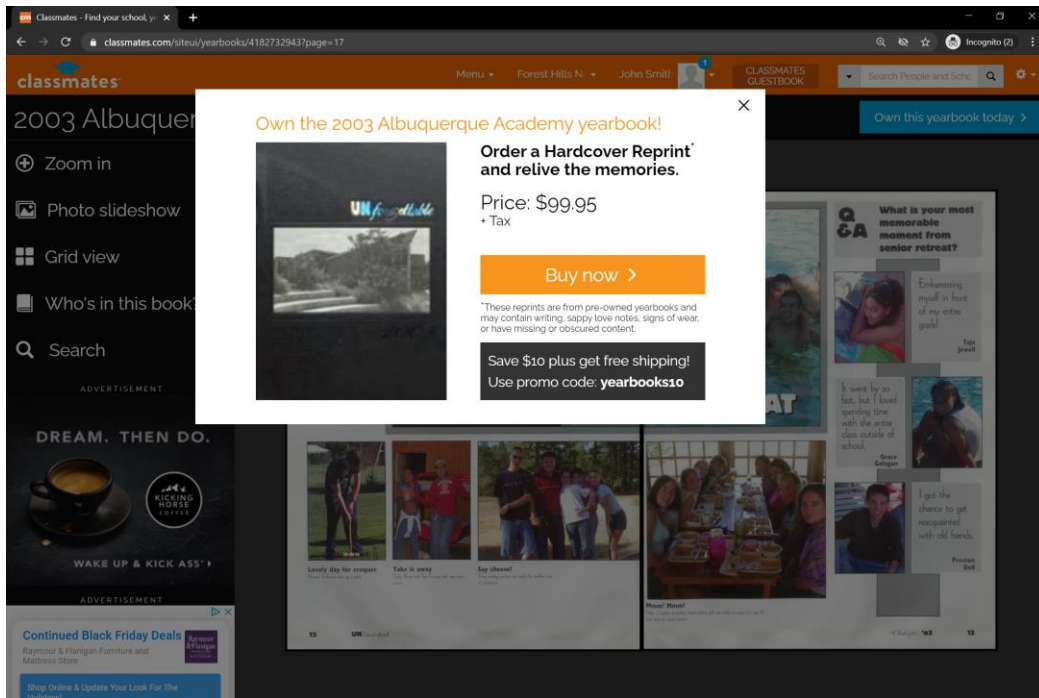


25. When users click to view any of the records corresponding to Mr. Abraham, Classmates displays at least two forms of advertisement encouraging them to buy a copy of a reprinted yearbook containing Mr. Abraham's name, image, and likeness. First, Classmates displays a page showing the photograph of Mr. Abraham and his name, accompanied by a link marked "Own this yearbook today," which leads to a page soliciting the purchase of the

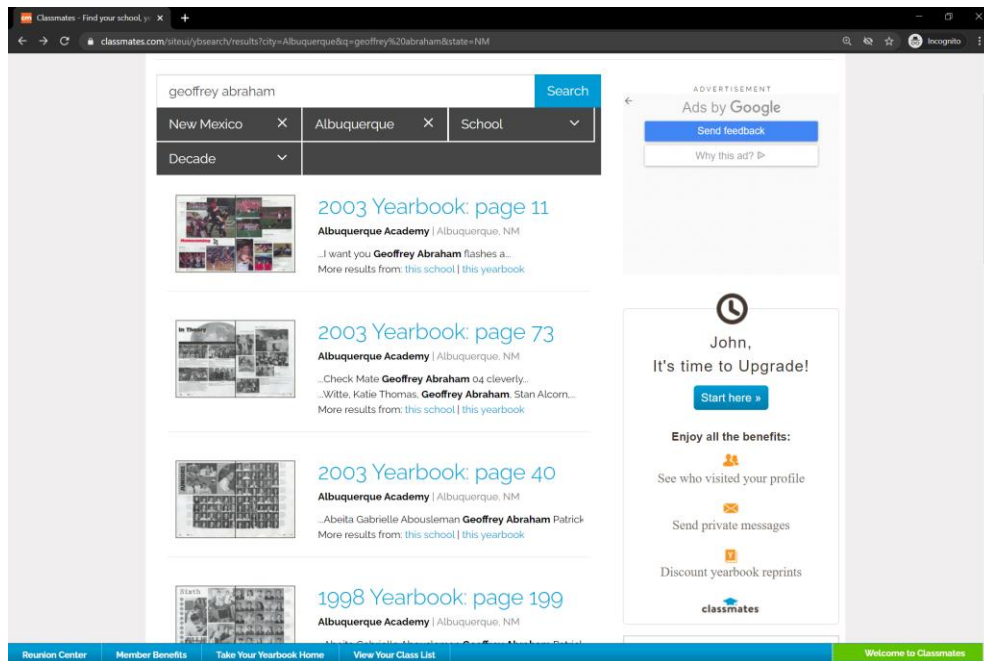
yearbook for \$99.95:



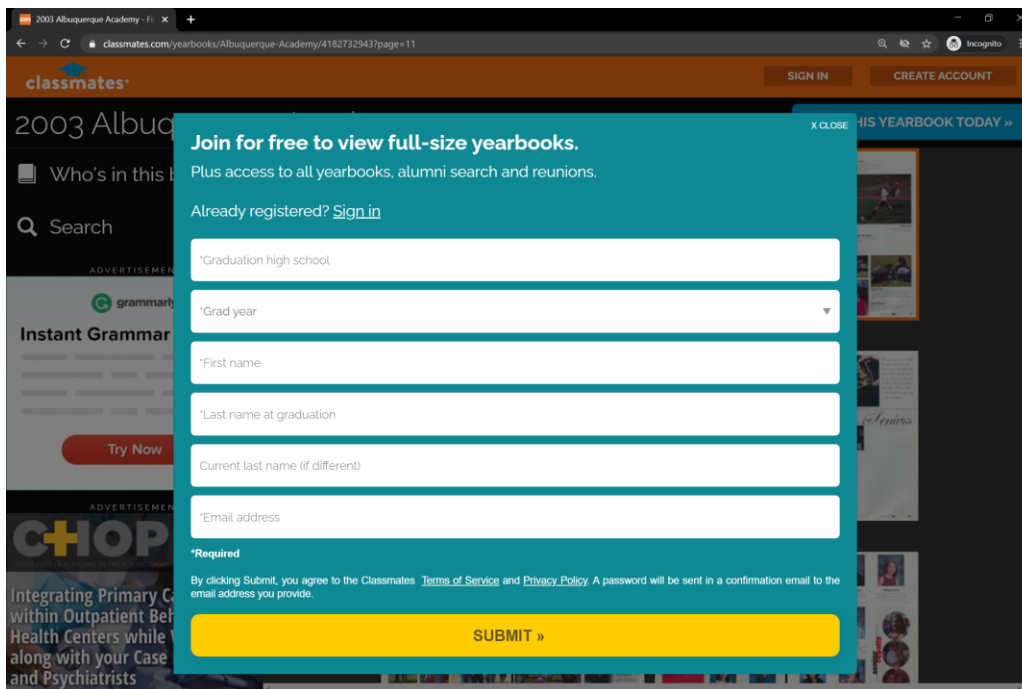
26. Second, for users who do not click the link but instead continue to browse through Mr. Abraham's photographs, upon their third attempt to load a photograph, Classmates displays a pop-up window prompting the user to "Buy now" a "Hardcover Reprint" of the yearbook containing Mr. Abraham's name, photograph, and likeness for \$99.95.



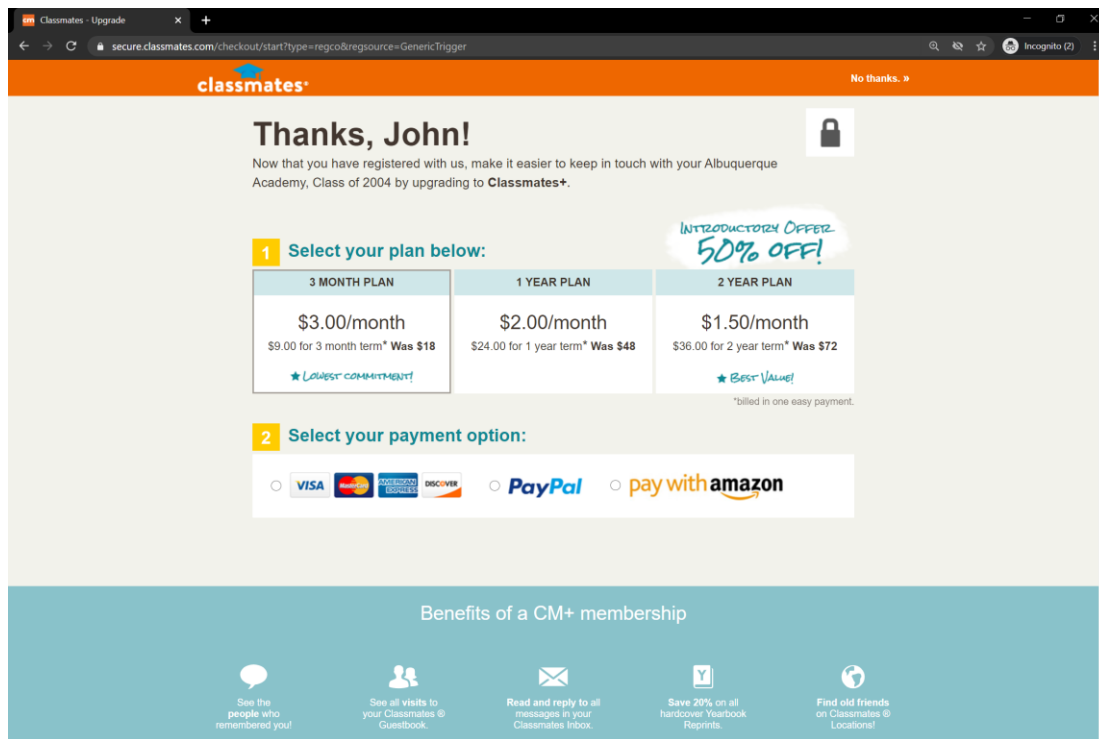
27. Classmates has and continues to knowingly use the sixteen records containing Mr. Abraham's name, photograph, and likeness to advertise, sell, and solicit the purchase of paid subscriptions to its "CM+" membership plan. Users may search for and view records containing Mr. Abraham's name, photograph, and likeness. For unregistered users and registered non-paying users, Classmates displays both the requested records and at least two forms of advertisement designed to solicit the purchase of a paid subscription to Classmates for a price ranging from \$1.50 to \$3 per month. First, adjacent to the list of records containing Mr. Abraham's name, photograph, and likeness, Classmates displays an advertisement prompting the user that "It's time to upgrade!" and promising several benefits to paying subscribers, including discounted prices on yearbook reprints. Users who click the link are brought to a page soliciting the purchase of a paid subscription membership.



28. Second, unregistered users are initially shown a low-resolution version of Mr. Abraham's photograph. Unregistered users who click on Mr. Abraham's photograph looking for a higher-resolution version are shown a pop-up asking them to register in order to view "full-size yearbooks."



29. Once users have entered the requested information, Classmates displays a second screen soliciting the purchase of a paid subscription plan, for prices ranging from \$1.50 to \$3. Although users do not have to pay for a subscription to view full-resolution records, Classmates does everything in its power to obscure this and make the user believe they must pay to continue. The screen is visually dominated by prompts asking users to select a paid plan and enter credit card or other payment information. A link titled “No thanks” written in miniscule font at the far top right corner of the page is the only indication users may proceed without paying money.



30. Classmates has and continues to knowingly use the sixteen records containing Mr. Abraham’s name, photograph, and likeness to advertise registered memberships on its website. Registered memberships are free of charge, but registered users must provide personal information including their high school, year of graduation, name, and email address. Classmates earns money from registered members by displaying targeted ads on its website. Upon information and belief, Classmates also earns money from registered members by selling their personal information to third parties.

31. Users may search for and view records containing Mr. Abraham's name, photograph, and likeness. Unregistered users are initially shown low-resolution versions of Mr. Abraham's photographs. Unregistered users who click on a photograph of Mr. Abraham looking for a "zoomed-in" higher-resolution version are shown a pop-up soliciting them to register and promising that registration will bring benefits including "access to all yearbooks" and the ability to view "full-sized yearbooks."

32. Classmates' purpose in appropriating and providing access to Mr. Abraham's name, photograph, and likeness on its website is to advertise, sell, and solicit the purchase of its products and services, including its yearbook reprints, paid subscription "CM+" membership plan, and non-paying registered membership plan.

33. Classmates has and continues to knowingly use the sixteen records containing Mr. Abraham's name, photograph, and likeness on and in its products and services by (1) selling reprinted yearbooks that contain Mr. Abraham's name, photograph, and likeness; (2) selling access to online records containing Mr. Abraham's name, photograph, and likeness to paying subscribers of its CM+ membership plan; and (3) including online records containing Mr. Abraham's name, photograph, and likeness on the free version of its website available to unregistered users and registered non-paying users.

34. Through its actions, Classmates has caused harm to Mr. Abraham by depriving him the fair economic value of his likeness; violating his exclusive right to control his likeness; and violating his right to freedom from intrusion upon seclusion. Classmates has earned ill-gotten profits and been unjustly enriched through its use of Mr. Abraham's name, photograph, and likeness.

Plaintiff Meredith Callahan

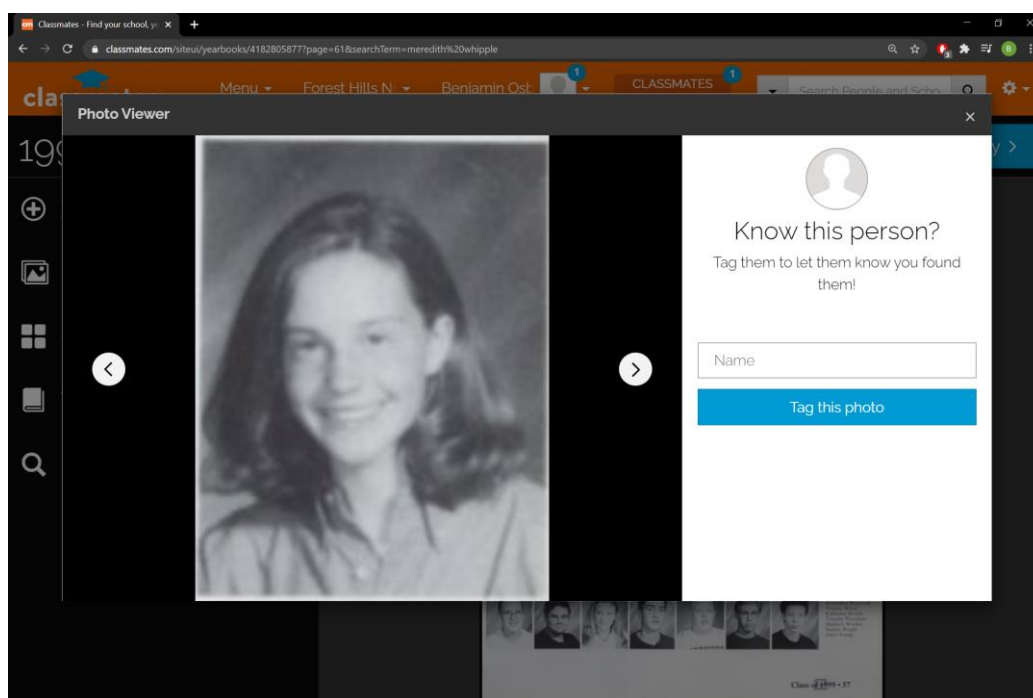
35. Plaintiff Meredith Callahan (née Whipple) is a resident of the city of Del Mar in San Diego County, California. Ms. Callahan is not a subscriber of any Classmates products or services and is not subject to any Terms of Service or any other agreement with Classmates.

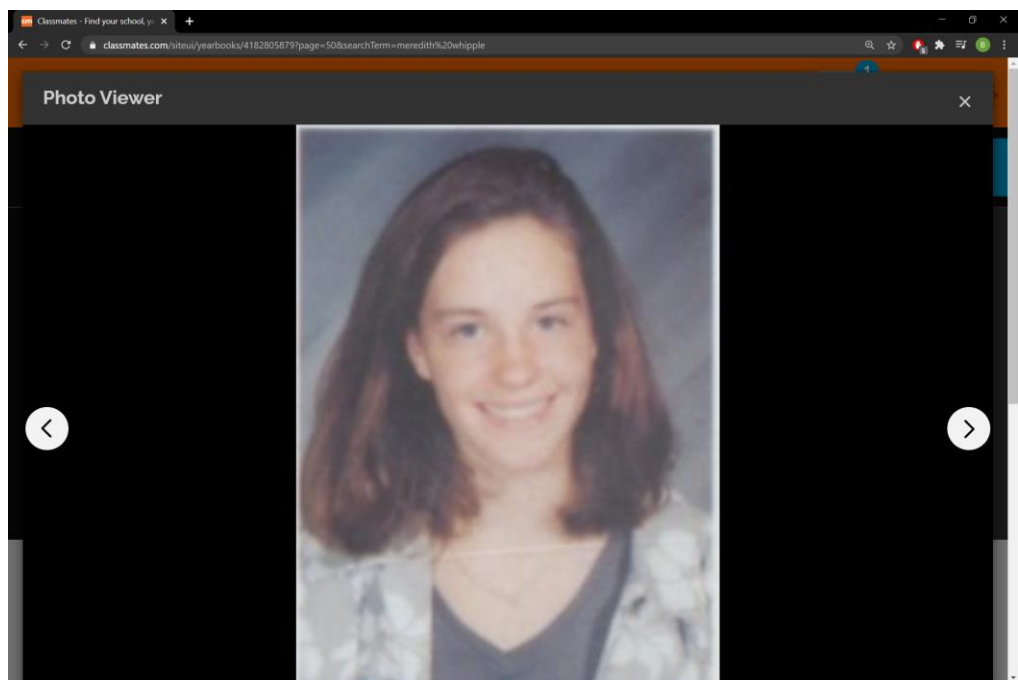
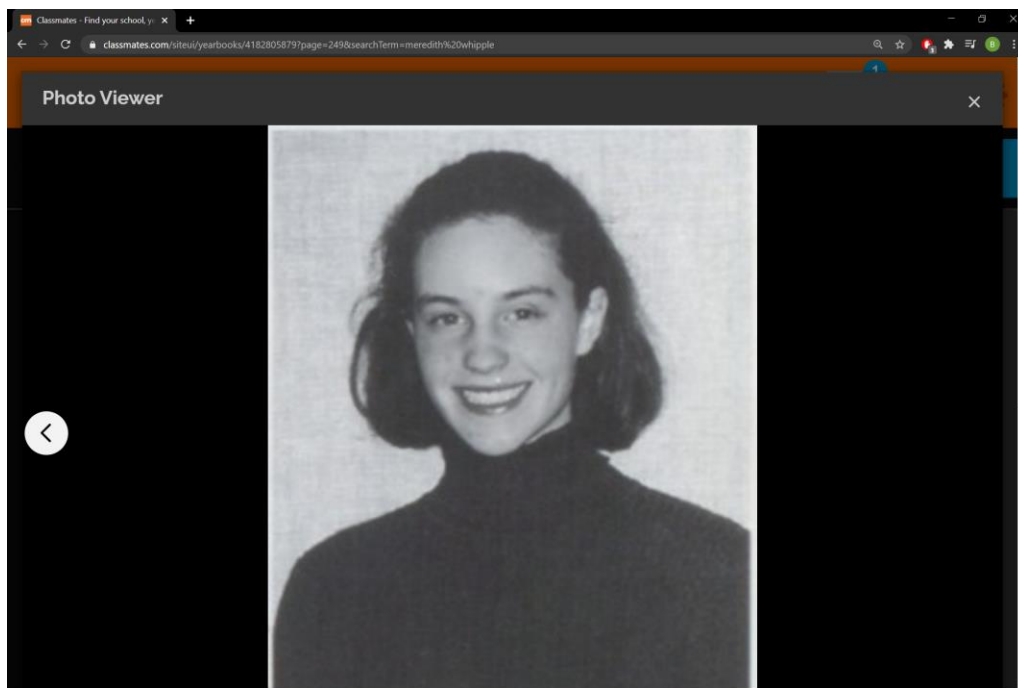
36. Ms. Callahan has never provided consent to Classmates, written or otherwise, for the use of her name, photograph, or likeness.

37. Classmates has never notified, requested consent, or provided compensation to Ms. Callahan for its appropriation of her name, photograph, and likeness. Ms. Callahan first became aware that her personal information and photographs are being used by Classmates through the investigation of this lawsuit.

38. Ms. Callahan is a published author and runs a coaching and consulting business. The image she presents online contributes to her book sales and forms a significant part of the brand and value of her business. She has a professional interest in maintaining her image and exerting control over how her name and image is used.

39. Classmates' Yearbook Collection contains thirty-six unique records corresponding to Ms. Callahan, all from yearbooks between the years of 1996 and 1999 from Northern High School in Port Huron, Michigan, where Ms. Callahan attended school. The records uniquely identify Ms. Callahan. All thirty-six records include her full name and clearly identify her place of residence and school she attended. Thirty of the records include photographs in which Ms. Callahan's face is plainly visible and identifiable. Various of the records identify Ms. Callahan's participation in school activities such as ski club, Students Against Drunk Driving, student council, cross country, and quiz bowl. A representative sample of the photographs from three of these records appear as screen captures below:

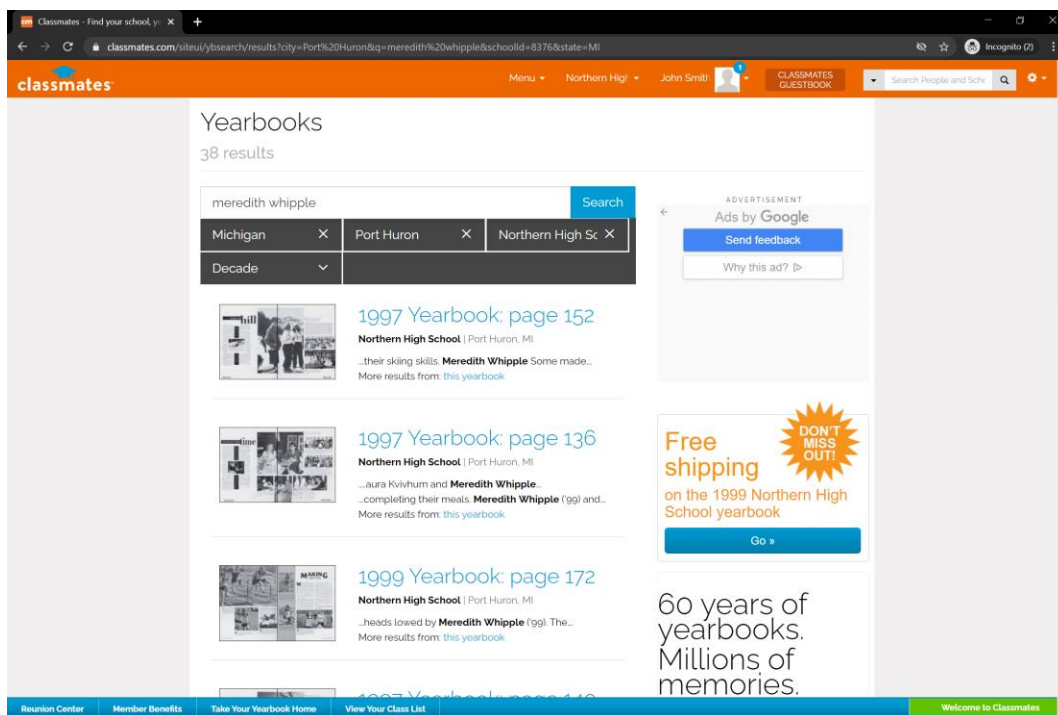




40. Classmates has and continues to knowingly use these records containing Ms. Callahan's name, photograph, and likeness to advertise, sell, and solicit the purchase of

reprinted yearbooks. Users of the Classmates.com website are encouraged to enter the names of people they may know into a search bar. The search bar is indicated by an arrow labeled “Start your search here!” and promises promotional pricing on reprinted yearbooks that contain a relative, significant other, or friend.

41. Users who enter Ms. Callahan’s name receive in response a list of the thirty-six records in Classmates’ Yearbook Collection corresponding to Ms. Callahan (the search returns thirty-eight results, but two of those results do not in fact correspond to Ms. Callahan). All Classmates users may search for Ms. Callahan’s name and view this list, including unregistered users, registered non-paying users, and paying subscribers. Immediately adjacent to the list of records corresponding to Ms. Callahan, Classmates displays an advertisement soliciting the purchase of a yearbook containing Ms. Callahan’s photograph. The advertisement promises “Free shipping on the 1999 Northern High School yearbook.”



42. When users click to view any of the records corresponding to Ms. Callahan, Classmates displays at least two additional forms of advertisement encouraging them to buy a copy of a reprinted yearbook containing Ms. Callahan’s name, image, and likeness. First,

Classmates displays a page showing the photograph of Ms. Callahan and her name, accompanied by a link marked “Own this yearbook today,” which leads to a page soliciting the purchase of the yearbook for \$99.95:

Menu Forest Hills N Benjamin Ost CLASSMATES GUESTBOOK Search People and School

Own this yearbook today >

Academic Top Twenty—Front Row: Nicholas Heier, Jeremy Goldsworthy, Mark Papneau. Second Row: Wendy Williams, Erin Dell, Melissa Allen, Whitney Goode, Kristin Wells. Back Row: Eric Cooper, Erin Baldwin, Ryan Lane, Keith Green, Heidi King, Danielle Cartone, Kelly Kayko, Michael Walker. (Not pictured: Joseph Ruiz, Demone Mirkin, Michelle Bodeis, Amanda Weller)

“In the end, all the hard work was worth it because it has opened doors to colleges and helped me to be eligible for scholarships. Setting high goals for myself has made high school difficult yet rewarding.”—Rachel Brown

“Next year, I will attend Harvard-Radcliffe College. I’m looking forward to the increased diversity and activity that embodies the campus. I wish luck to all my classmates in their endeavors.”—Lena Demashkiah

“Being accepted to Yale, I’m eager to attend, but undecided as to my course of study. I’m heartened to see that many have an interest in the success of myself and the school.”—Meredith Whipple

classmates Menu Forest Hills N Benjamin Ost CLASSMATES GUESTBOOK Search People and School

Own a piece of history—yours!

Northern High School

Class of 1999 Yearbook Reprint*

REPRINT TYPE QTY

☒ Hardcover \$99.95

☐ Softcover \$79.95

Click the button below, then enter promo code **yearbooks10** to save an additional \$10

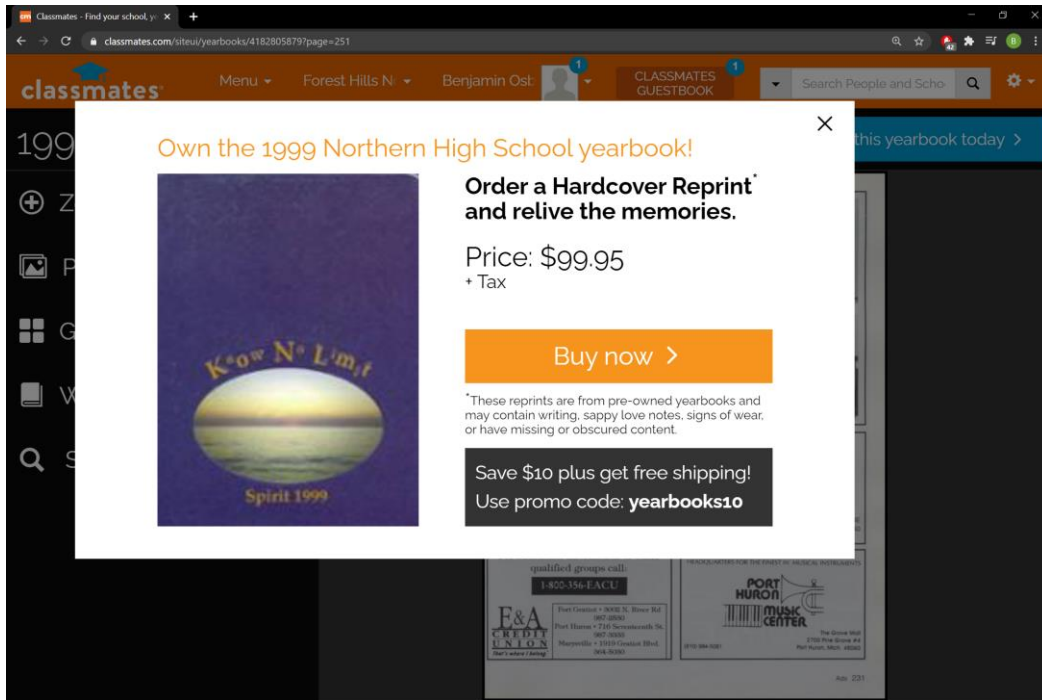
Continue to checkout >>

PayPal accepted

“These are reprints from previously owned yearbooks so handwriting or effects of aging may be present, and pages, images, or other content may be missing or obscured.”

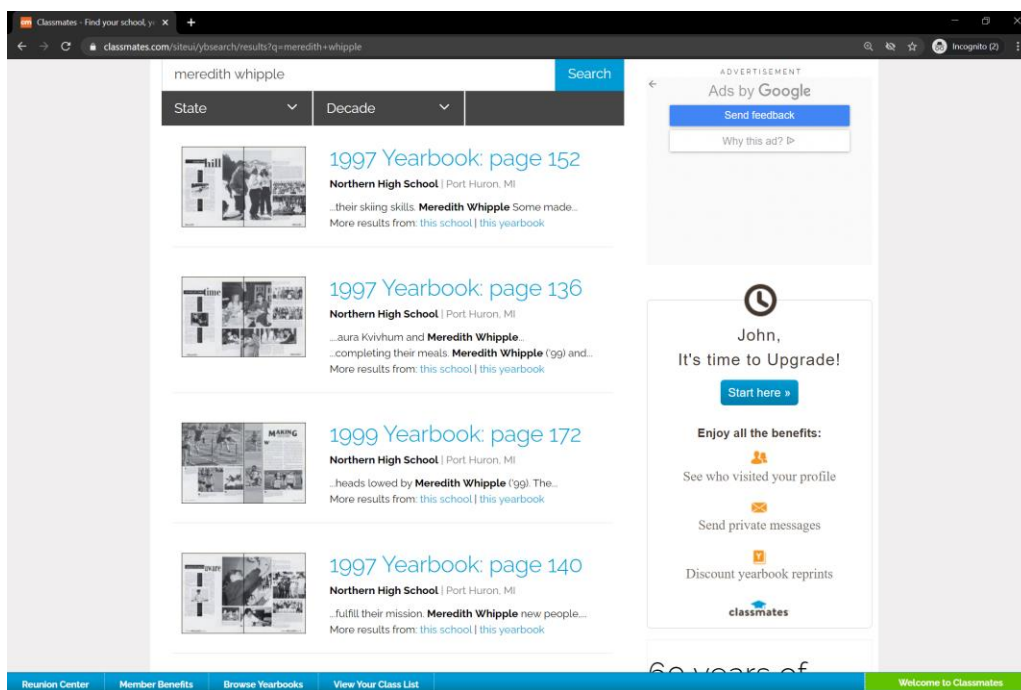
Upgrade Your Membership Reunion Center Member Benefits Send in Your Yearbook View Your Class List Recognize these people?

43. Second, for users who do not click the link but instead continue to browse through Mr. Callahan's photographs, upon their third attempt to load a photograph, Classmates displays a pop-up window prompting the user to "Buy now" a "Hardcover Reprint" of the yearbook containing Ms. Callahan's name, photograph, and likeness for \$99.95.

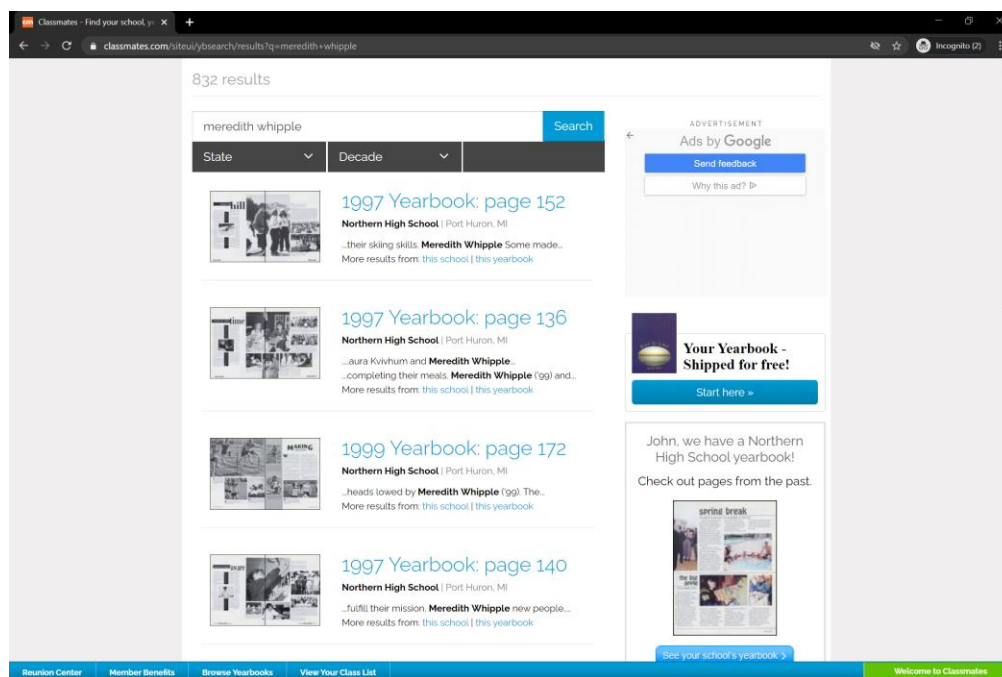


44. Classmates has and continues to knowingly use the thirty-six records containing Ms. Callahan's name, photograph, and likeness to advertise, sell, and solicit the purchase of paid subscriptions to its "CM+" membership plan. Users may search for and view records containing Ms. Callahan's name, photograph, and likeness. For unregistered users and registered non-paying users, Classmates displays both the requested records and at least two forms of advertisement designed to solicit the purchase of a paid subscription to Classmates for a price ranging from \$1.50 to \$3 per month. First, Classmates displays an advertisement prompting the user that "It's time to upgrade!" and promising several benefits to paying subscribers, including discounted prices on yearbook reprints. Users who click the link are

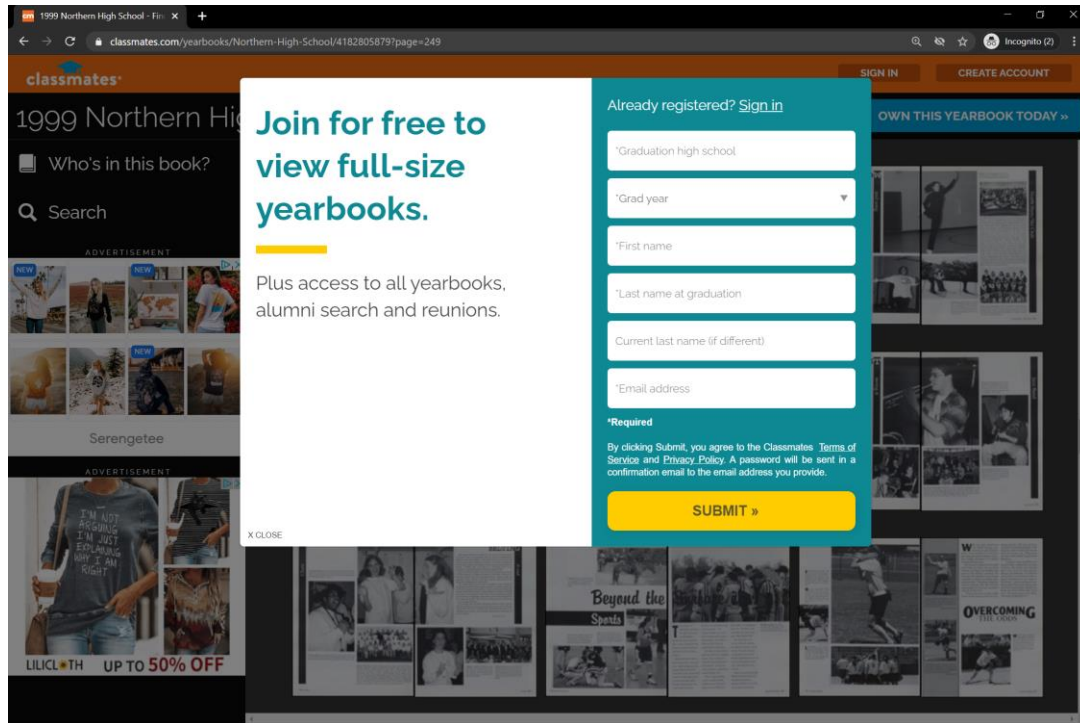
brought to a page soliciting the purchase of a paid subscription membership.



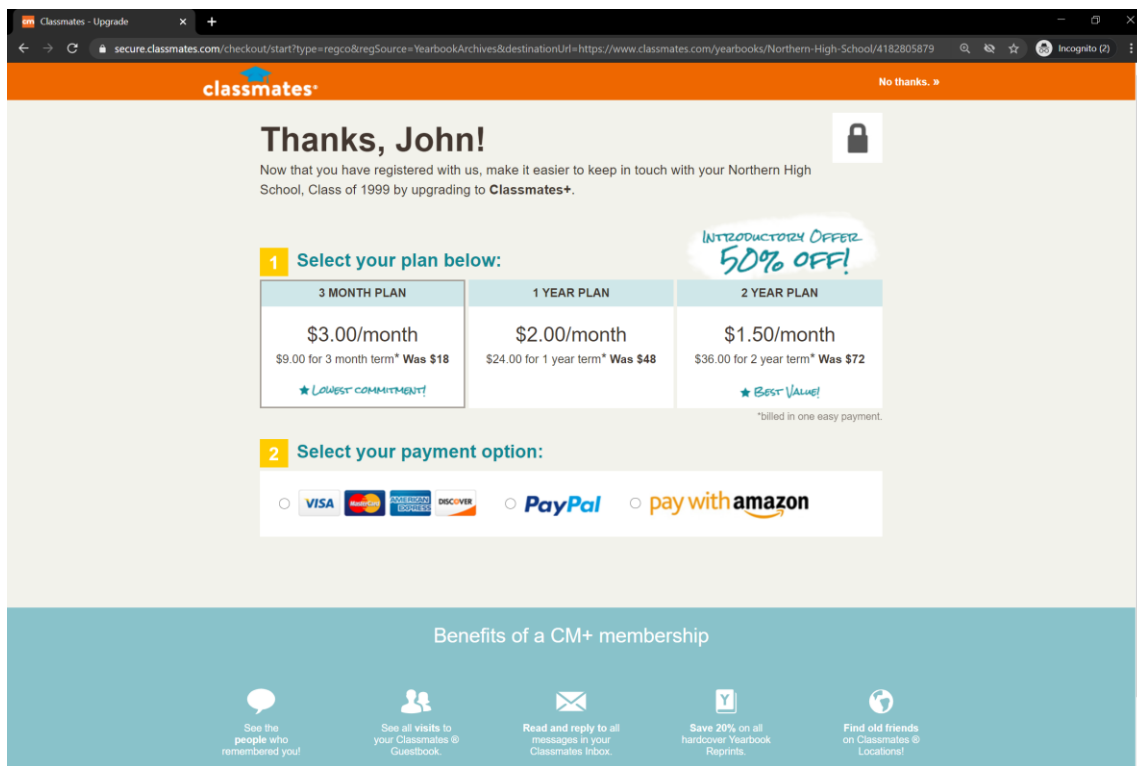
45. In an alternate version of this advertisement, Classmates solicits the purchase of the specific Northern High School Yearbook in which Ms. Callahan's photo appear, identifying the yearbook as a "Northern High School yearbook" and displaying the cover and a page from the interior of the yearbook:



46. Second, unregistered users are initially shown a low-resolution version of Ms. Callahan's photograph. Unregistered users who click on Ms. Callahan's photograph looking for a higher-resolution version are shown a pop-up asking them to register in order to view "full-size yearbooks."



47. Once users have entered the requested information, Classmates displays a second screen soliciting the purchase of a paid subscription plan, for prices ranging from \$1.50 to \$3. Although users do not have to pay for a subscription to view full-resolution records, Classmates does everything in its power to obscure this and make the user believe they must pay to continue. The screen is visually dominated by prompts asking users to select a paid plan and enter credit card or other payment information. A link titled “No thanks” written in miniscule font at the far top right corner of the page is the only indication users may proceed without paying money.



48. Classmates has and continues to knowingly use the thirty-six records containing Ms. Callahan’s name, photograph, and likeness to advertise registered memberships on its website. Registered memberships are free of charge, but registered users must provide personal information including their high school, year of graduation, name, and email address. Classmates earns money from registered members by displaying targeted ads on its website. Upon information and belief, Classmates also earns money from registered members by selling

1 their personal information to third parties.

2 49. Users may search for and view records containing Ms. Callahan's name,
3 photograph, and likeness. Unregistered users are initially shown low-resolution versions of Ms.
4 Callahan's photographs. Unregistered users who click on a photograph of Ms. Callahan looking
5 for a higher-resolution version are shown a pop-up soliciting them to register and promising
6 that registration will bring benefits including "access to all yearbooks" and the ability to view
7 "full-sized yearbooks."

8 50. Classmates' purpose in appropriating and providing access to Ms. Callahan's
9 name, photograph, and likeness on its website is to advertise, sell, and solicit the purchase of its
10 products and services, including its yearbook reprints, paid subscription "CM+" membership
11 plan, and non-paying registered membership plan.

12 51. Classmates has and continues to knowingly use the records containing Ms.
13 Callahan's name, photograph, and likeness on and in its products and services by (1) selling
14 reprinted yearbooks that contain Ms. Callahan's name, photograph, and likeness; (2) selling
15 access to online records containing Ms. Callahan's name, photograph, and likeness to paying
16 subscribers of its CM+ membership plan; and (3) including online records containing Ms.
17 Callahan's name, photograph, and likeness on the free version of its website available to
18 unregistered users and registered non-paying users.

19 52. Through its actions, Classmates has caused harm to Ms. Callahan by depriving
20 her the fair economic value of her likeness; violating her exclusive right to control her likeness;
21 and violating her right to freedom from intrusion upon seclusion. Classmates has earned ill-
22 gotten profits and been unjustly enriched through its use of Ms. Callahan's name, photograph,
23 and likeness.

24 **STATEMENT OF COMMON FACTS**

25 53. Classmates' business model relies on collecting personal information from
26 hundreds of thousands of school yearbooks. Classmates scans yearbooks into a digital format,
27 then extracts personal information including names, photographs, schools attended, years of
28 attendance, cities of residence, and biographical details. Classmates aggregates the extracted

1 information into digital records associated with specific individuals. Classmates then uses the
2 records to advertise and sell its products and services. Those products and services include
3 reprinted yearbooks, which Classmates sells for up to \$99.95, and subscription memberships to
4 the website Classmates.com, which Classmates sells for up to \$3 per month.

5 54. According to the Classmates.com website, Classmates' Yearbook Collection
6 contains records copied from over 400 thousand yearbooks. While Classmates does not publish
7 figures about the total number of records in the Collection or a breakdown by state, it is likely
8 the class includes millions of Californians whose names, photographs, and likenesses appear in
9 the Classmates Yearbook Collection.

10 55. Classmates did not ask consent from, given notice to, or provide compensation
11 to Plaintiffs or the class before using their names, photographs, and biographical information.

12 56. The names, photographs, cities of residence, likeness, and identities that
13 Classmates aggregates into individual records uniquely identify specific individuals.

14 57. Classmates knowingly uses the names, photographs, and likenesses of Plaintiffs
15 and the class to advertise, sell, and solicit the purchase of its products and services, including
16 (1) reprinted yearbooks; (2) its "CM+" subscription membership; and (3) the free version of its
17 website, from which Classmates profits by selling targeted advertisements and driving users to
18 its paid products and subscriptions.

19 58. Classmates employs a variety of advertising techniques through which it
20 exploits the names, photographs, and likenesses of Plaintiffs and the class, many of which are
21 detailed in the Plaintiff-specific portion of this complaint. Across all of the advertising
22 techniques it uses, Classmates seeks to translate its users' interest in seeing pictures of and
23 learning personal details about Plaintiffs and the class, into the purchase of a Classmates
24 product or service (or the use of a website from which Classmates drives profit).

25 59. Classmates knowingly uses the names, photographs, and likenesses of Plaintiffs
26 and the class on and in its products and services by including the records it has created about
27 Plaintiffs and the class in the reprinted yearbooks it sells, and on its website.

28 60. Although Classmates does not disclose how it created its Yearbook Collection,

1 there is a section of the Classmates website encouraging users to donate old yearbooks to
 2 Classmates. At least some, and possibly all, of its Yearbook Collection was built via such
 3 donations.

4 61. With the exception of the implied consent of the donor (who may or may not
 5 personally appear in the donated yearbook), Classmates makes no attempt to contact or gain the
 6 consent of the people whose names, photographs, likenesses, biographical information, and
 7 identifies appear in a donated yearbook. Classmates does not require or even suggest the donor
 8 should ask the consent of the people who appear in the yearbook to have their names,
 9 photographs, and images digitally extracted and aggregated into records sold and used for
 10 advertising by Classmates.

11 62. The vast majority of people whose personal information Classmates has digitally
 12 extracted and aggregated in its Classmates Yearbook Collection have no business relationship
 13 with Classmates, are not Classmates subscribers, and are not subject to a Terms of Service or
 14 any other agreement with Classmates.

15 63. Through its actions, Classmates has caused harm to Plaintiffs and the class by
 16 depriving them the fair economic value of their likenesses; violating their exclusive rights to
 17 control their likenesses; and violating their rights to freedom from intrusion upon seclusion.
 18 Classmates has earned ill-gotten profits and been unjustly enriched through its use of the
 19 names, photographs, and likenesses of Plaintiffs and the class.

20 64. Classmates knowing misappropriation of names, likenesses, photographs, and
 21 other personal information, and use of those names, likenesses, photographs, and other personal
 22 information in selling and advertising its products and services, violates California's Right of
 23 Publicity statute, Cal. Civ. Code § 3344; the California Unfair Competition Law, Cal. Bus. &
 24 Prof. Code § 17200 *et seq.*; California's common law right protecting against Intrusion upon
 25 Seclusion; and California Unjust Enrichment law.

26 **CLASS ALLEGATIONS**

27 65. Plaintiffs bring this complaint on behalf of themselves and a class of all
 28 California residents who (a) are not currently subscribers of any Classmates services, (b) have

never donated a yearbook to Classmates, and (c) whose names, photographs, and/or likenesses were extracted from yearbooks by Classmates and placed on the Classmates website as part of its Yearbook Collection, without Classmates obtaining their consent. Excluded from the class are (a) Plaintiffs' counsel; (b) Classmates, its officers and directors, counsel, successors and assigns; (c) any entity in which Classmates has a controlling interest; and (d) the judge to whom this case is assigned and the judge's immediate family.

66. The members of the proposed class are so numerous that joinder of individual claims is impracticable. Classmates represents that its Yearbook Collection contains records from over 400,000 yearbooks in the United States. Each yearbook contains the names and likeness of hundreds, sometimes thousands of individuals. Even accounting for the fact that only a portion of the yearbooks are from California, that some individuals in Classmates' database are deceased or no longer reside in California, and that the class excludes current Classmates subscribers (Classmates has about 4 million subscribers worldwide), the class likely numbers in the millions.

67. There are significant questions of fact and law common to the members of the class. These issues include:

- a. Whether Classmates' extraction and aggregation of personal information about Plaintiffs and the class members, including names, yearbook photographs, yearbook years, cities of residence, schools attended, and interest and hobbies, in its Classmates Yearbook Collection, and selling of that information via reprinted yearbooks and paid subscription plans, constitute the knowing use of another's name, photograph, or likeness, in any manner, on or in products, merchandise or goods within the meaning of Cal. Civ. Code § 3344;
- b. Whether Classmates' extraction and aggregation of personal information about Plaintiffs and the class members, including names, yearbook photographs, yearbook years, cities of residence, schools attended, and interests and hobbies, and use of that information in the advertising techniques described in this complaint, constitutes the knowing use of another's name, photograph, or

likeness for purposes of advertising or selling, or soliciting purchases of products, merchandise, goods or services, within the meaning of Cal. Civ. Code § 3344;

- c. Whether Plaintiffs and the class consented to the use of their names, photographs, and likenesses in Classmates products and advertisements;
- d. Whether Classmates' use of names, photographs, and likeness constitutes a use in connection with news or public affairs for which consent is not required;
- e. Whether Classmates' conduct as described in this complaint violated California's Unfair Competition Law;
- f. Whether Classmates was unjustly enriched as a result of the conduct described in this complaint; and
- g. Whether Plaintiffs and members of the class are entitled to injunctive, declaratory and monetary relief as a result of Classmates' conduct as described in this complaint.

68. Plaintiffs' claims are typical of those of the proposed class. Plaintiffs and all members of the proposed class have been harmed by Classmates misappropriation and misuse of their names, likenesses, photographs, and other personal information.

69. The proposed class representatives will fairly and adequately represent the proposed class. The class representatives' claims are co-extensive with those of the rest of the class, and they are represented by qualified counsel experienced in class action litigation of this nature.

70. A class action is superior to other available methods for the fair and efficient adjudication of these claims because individual joinder of the claims of all members of the proposed class is impracticable. Many members of the class do not have the financial resources necessary to pursue this claim, and even if they did, the size of their interest in the case may not be large enough to merit the cost of pursuing the case. Individual litigation of these claims would be unduly burdensome on the courts in which individualized cases would proceed. Individual litigation would greatly increase the time and expense needed to resolve a dispute

concerning Classmates' common actions towards an entire group. Class action procedures allow for the benefits of unitary adjudication, economy of scale, and comprehensive supervision of the controversy by a single court.

71. The proposed class action may be certified pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. Classmates has acted on ground generally applicable to the proposed class, such that final injunctive and declaratory relief is appropriate with respect to the class as a whole.

72. The proposed class action may be certified pursuant to Rule 23(b)(3). Questions of law and fact common to class members predominate over questions affecting individual members, and a class action is superior to other available methods for fairly and efficiency adjudicating the controversy.

FIRST CAUSE OF ACTION (Cal. Civ. Code § 3344)

73. Plaintiffs incorporate by reference the allegations contained in all preceding paragraphs of this complaint.

74. California's Right of Publicity Statute, California Civil Code § 3344, prohibits and provides damages for the knowing misappropriation of a name, voice, signature, photograph, or likeness in advertising or soliciting without prior consent.

75. By engaging in the forgoing acts and omissions, Classmates knowingly used class members' names, photographs, and likenesses in its products and services for the purpose of advertising and selling its services, without class members' consent.

76. Each use of a class member's name, photograph, or likeness is a separate and distinct violation of California Civil Code § 3344 giving rise to damages.

77. Plaintiffs seek declaratory, injunctive, and monetary damages for themselves and on behalf of each member of the proposed class as provided for in California Civil Code § 3344, including statutory damages equal to the greater of \$750 per violation, actual damages, or profits from Classmates' illegal actions, punitive damages, and the award of attorneys' fees and costs in the event Plaintiffs prevail in this action.

78. Defendants, and each of them, have been guilty of oppression, fraud, and/or malice and despicable conduct warranting an award of exemplary and/or punitive damages under the provisions of Cal. Civ. Code § 3294. The foregoing conduct has been approved, authorized and/or ratified by each Defendants' officers, directors and/or managing agents as required by the provisions section 3294.

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SECOND CAUSE OF ACTION
(Cal. Bus. & Prof. Code § 17200 *et seq.*)

79. Plaintiffs incorporate by reference the allegations contained in all preceding paragraphs of this complaint.

80. Classmates has and is engaged in unfair competition, as that term is defined in the California Unfair Competition Law, Cal. Bus. & Prof. Code. § 17200 *et seq.* ("UCL").

81. As described in this complaint, Classmates' misappropriation and use without consent of Plaintiffs' and class members' names, photographs, likenesses, and personal information is a violation of California's Right to Publicity Statute, Cal. Civ. Code § 3344.

82. By engaging in the conduct described in this complaint and violating California law, Classmates engaged in and continues to engage in "unlawful" business acts and practices prohibited by the UCL.

83. By engaging in the conduct described in this complaint, including profiting from the sale and use in advertising of personal information it misappropriated without consent, Classmates engaged in and continues to engage in "unfair" business acts and practices prohibited by the UCL.

84. As a result of Classmates' actions, Plaintiffs and the class have been injured. Plaintiffs and members of the class each lost the economic value of their likenesses, their exclusive right to control their likenesses, and their freedom from intrusion upon seclusion. Plaintiffs and members of the class also lost the right to refuse consent and protect their privacy, as guaranteed by California law.

**THIRD CAUSE OF ACTION
(Intrusion Upon Seclusion)**

85. Plaintiffs incorporate by reference the allegations contained in all preceding paragraphs of this complaint.

86. Plaintiffs and class members have a reasonable expectation of privacy in their personal information, including their photographs and biographical details.

87. Classmates intentionally intruded on the seclusion of Plaintiffs and the class by appropriating their names, likeness, photographs, and biographical information, and using the appropriated information to advertise and sell online services.

88. Classmates' misuse of personal information reveals private facts in which a reasonable person would expect privacy. It maintains, sells, and advertises using records that reveal intimate details about subjects' private lives, including ages, locations, biographical details, and photographs.

89. Plaintiffs and members of the class were harmed by Classmates' intrusion into their private affairs as detailed in the complaint.

90. Among other remedies, Plaintiffs and members of the class seek damages, including punitive damages in light of Classmates' conscious disregard of Plaintiffs' and class members privacy rights and exploitation of their personal information for profit.

91. Defendants, and each of them, have been guilty of oppression, fraud, and/or malice and despicable conduct warranting an award of exemplary and/or punitive damages under the provisions of Cal. Civ. Code § 3294. The foregoing conduct has been approved, authorized and/or ratified by each Defendants' officers, directors and/or managing agents as required by the provisions section 3294.

**FOURTH CAUSE OF ACTION
(Unjust Enrichment)**

92. Plaintiffs incorporate by reference the allegations contained in all preceding paragraphs of this complaint.

93. Plaintiffs and members of the class have conferred an unwarranted benefit on Classmates. Classmates' business model centers around using personal information that

1 rightfully belongs to Plaintiffs and members of the class to sell its products and services.
 2 Classmates uses the personal information it misappropriated without consent. Each sale of a
 3 reprinted yearbook that contains records that rightfully belong to class members, each “CM+”
 4 subscription sold to users who then gain access to records that rightfully belong to class
 5 members, and all advertising revenue collected from the delivery of ads on pages displaying
 6 records that rightfully belong to class members, represents an unwarranted benefit conferred
 7 upon Classmates by the class.

8 94. Under principles of equity and good conscience, Classmates should not be
 9 permitted to retain the benefits it gained by its actions.

10 95. Plaintiffs and members of the class have suffered loss as a direct result of
 11 Classmates’ conduct.

12 96. Among other remedies, Plaintiffs, on their own behalf and on behalf of absent
 13 class members, seek the imposition of a constructive trust and restitution of proceeds
 14 Classmates received as a result of the conduct described in this complaint, as well as an award
 15 of attorneys’ fees, costs, and interest pursuant to Cal. Civ. Proc. Code § 1021.5.

16 PRAYER FOR RELIEF

17 97. WHEREFORE Plaintiffs, on behalf of themselves and all others similarly
 18 situation, hereby demand judgment against Defendant Classmates as follows:

19 (a) For an order certifying the proposed class and appointing Plaintiffs and their
 20 counsel to represent the class;

21 (b) For a declaration that Classmates’ acts and omissions constitute a knowing
 22 misappropriation of names, likeness, photographs, and other personal
 23 information, and infringe on protected privacy rights, in violation of California
 24 law;

25 (c) For preliminary and permanent injunctive relief enjoining and preventing
 26 Classmates from continuing to operate its Classmates website and expand its
 27 databases without appropriate safeguards to ensure people’s personal
 28 information is not used illegally without their consent;

- (d) For an order enjoining Classmates from continuing the unlawful and unfair conduct described in this complaint;
- (e) For restitution for Plaintiffs and members the class for the value that Defendants derived from misappropriating their likenesses;
- (f) For an award of damages, including without limitation damages for actual harm, profits earned by Classmates, and statutory damages;
- (g) For an award of reasonable attorneys' fees and costs incurred by Plaintiffs and the class members; and
- (h) For an award of other relief in law and equity to which Plaintiffs and the class members may be entitled.

JURY TRIAL DEMAND

Plaintiffs hereby demand a jury trial for all individual and Class claims so triable.

Respectfully submitted,

Dated: December 17, 2020

By: /s/ Michael F. Ram
Michael F. Ram

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EXHIBIT C

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

PEOPLECONNECT, INC., a Delaware
Corporation; PEOPLECONNECT INC., a
California Corporation; CLASSMATES MEDIA
CORPORATION, a Delaware Corporation; and
DOES 1 through 50, inclusive,

Defendants.

Case No. 3:20-cv-09203-EMC

**NOTICE OF DEFENDANT'S MOTION AND
MOTION TO DISMISS PURSUANT TO FED.
R. CIV. P. 12 AND MOTION TO STRIKE
PURSUANT TO CALIFORNIA CODE OF
CIVIL PROCEDURE § 425.16 AND
MEMORANDUM IN SUPPORT**

Complaint Filed: December 18, 2020

Hearing Date: April 29, 2021
Hearing Time: 1:30 p.m.
Judge: Judge Edward M. Chen
Courtroom: 5

1 TO THE COURT, ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE that, on April 29, 2021 at 1:30 p.m., or as soon thereafter as the Court is
3 available, in Courtroom 5 of the federal courthouse located at 450 Golden Gate Avenue, San Francisco,
4 CA 94102, Defendant PeopleConnect, Inc. (“PeopleConnect”) will and hereby does move the Court to
5 dismiss Plaintiff’s Complaint pursuant to Federal Rule of Civil Procedure 12(b)(3) and Federal Rule of
6 Civil Procedure (12)(b)(6).

7 PeopleConnect’s Motion is based on this Notice of Motion, the following Memorandum of Points
8 and Authorities, the concurrently-filed Declaration and exhibit attached thereto, any additional briefing on
9 this subject, and any evidence and arguments that will be presented to the Court at the hearing on this
10 matter.

11
12 Dated: March 19, 2021

JENNER & BLOCK LLP

13
14
15 By: /s/ Kate T. Spelman

Kate T. Spelman

Debbie L. Berman

16 Wade A. Thomson

17 Attorneys for Defendant

18 PeopleConnect, Inc.

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INTRODUCTION

Yearbooks are American institutions. They are the primary medium through which school communities memorialize the events, stories, and images of the prior year. Local libraries as well as national archives maintain yearbooks as valued artifacts, which both inform and entertain their readers for generations. PeopleConnect, Inc. operates one of the most comprehensive online libraries of yearbooks in the nation. Much of that material is available to any website user for free. Some of it is available to subscribing members. But all of it comes from that most ubiquitous of keepsakes—yearbooks.

Plaintiffs submit that PeopleConnect violates California law by displaying and selling yearbooks on the internet. They seek to pursue a sweeping class action—as these same Plaintiffs already unsuccessfully attempted with regard to a similar database of yearbooks maintained by another website, *see Callahan v. Ancestry.com, Inc.*, No. 20-cv-08437, 2021 WL 783524 (N.D. Cal. Mar. 1, 2021)—under various right of publicity and privacy theories. Initially, those claims go nowhere in this Court as Plaintiffs have agreed to resolve their disputes with PeopleConnect in arbitration. But more fundamentally, given that Plaintiffs seek to remove from the internet documents available to all at public libraries, it is no surprise that a host of legal doctrines bar Plaintiffs’ efforts. Federal law—specifically, Section 230 of the Communications Decency Act and Section 301 of the Copyright Act—prevents Plaintiffs from pursuing their state law claims; Plaintiffs cannot plead all the elements they must; and the First Amendment protects the very speech Plaintiffs seek to prohibit. The Court therefore should dismiss Plaintiffs’ Complaint.

BACKGROUND FACTS AND PLAINTIFFS’ MATERIAL ALLEGATIONS

PeopleConnect, Inc. owns and operates Classmates.com, which includes an online library of over 450,000 school yearbooks that can be viewed by its 70 million members. Plaintiff Lawrence Geoffrey Abraham alleges that the Classmates.com library includes yearbooks from Albuquerque Academy in Albuquerque, New Mexico, which contain “sixteen unique records,” which use his “name, photograph, and likeness.” Complaint ¶¶ 22–23, Dkt. No. 2 (“Compl.”).¹ To support his claims, Abraham identifies

¹ Yearbooks from Abraham’s alma mater are available at his hometown library. *See* <https://albuq.cabq.gov/search~S1?Xyearbook+albuquerque+academy&searchscope=1&SORT=D/Xyearbook+albuquerque+academy&searchscope=1&SORT=D&SUBKEY=yearbook+albuquerque+academy/1%2C5%2C5%2CB/frameset&FF=Xyearbook+albuquerque+academy&searchscope=1&SORT=D&2%2C2%2C> (last accessed Mar. 18, 2021).

three yearbook records accessible to Classmates.com users: (1) his 11th grade portrait from 2003; (2) his 7th grade portrait from 1998; and (3) a photograph from Abraham’s 11th grade yearbook, *id.* ¶ 22. Plaintiff Meredith Callahan similarly alleges that the Classmates.com library contains yearbooks from Northern High School in Port Huron, Michigan, which contain “thirty-six unique records” using her “name, photograph, and likeness.” *Id.* ¶¶ 39–40.² Callahan also highlights three records accessible to Classmates.com users: (1) her 10th grade portrait from 1997; (2) her 12th grade valedictorian photo; and (3) her 12th grade portrait from 1999. *Id.* ¶¶ 39, 42. Neither Plaintiff alleges that their records have ever been viewed by any Classmates.com user.

Plaintiffs pursue a putative class action based on PeopleConnect’s online database of decades-old yearbooks and assert four causes of action: (1) violation of California Civil Code § 3344; (2) violation of California Business & Professions Code § 17200; (3) intrusion upon seclusion; and (4) unjust enrichment. *Id.* ¶¶ 73–96. In doing so, Plaintiffs offer two overarching theories. First, that it is unlawful for PeopleConnect to sell reprinted yearbooks and access to online scans of those same yearbooks because they include Plaintiffs’ names and likenesses. *See id.* ¶ 9. Second, that it is unlawful for PeopleConnect to use Plaintiffs’ names and likenesses in what Plaintiffs allege are advertisements for these reprinted and online yearbooks, as well as for memberships to Classmates.com. *Id.* ¶¶ 7–8.

ARGUMENT

I. Plaintiffs Should Be Required To Proceed In Arbitration.

To start, Plaintiffs are in the wrong forum. The Federal Arbitration Act (“FAA”) “mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 213 (1985). And where an arbitration agreement delegates questions of arbitrability to the arbitrator, the court’s role is limited to determining if a valid agreement exists. *Visa USA, Inc. v. Martiz Inc.*, No. 07-05585, 2008 WL 744832, at *3–4 (N.D. Cal. Mar. 18, 2008). Here, Plaintiffs’ counsel assented to the Classmates.com Terms of Service (“TOS”)

² Yearbooks from Callahan’s alma mater are available through her hometown library. St. Clair County Library System Digital Yearbook Collection, https://stclaircountylibrary.org/search_and_media/databases/yearbooks (last accessed Mar. 18, 2021); Port Huron Northern High School Yearbooks, Internet Archive, <https://archive.org/details/porthuronnorthernhsyearbooks> (last accessed Mar. 18, 2021).

while acting as Plaintiffs' agent, binding Plaintiffs to the arbitration provision therein. The Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(3).

A. A Valid Arbitration Agreement Exists Between Plaintiffs And PeopleConnect.

1. Registered Classmates.com Users Are Bound By The Terms Of Service.

Numerous courts have held that clickwrap agreements—which require a user to click a button to assent to a website's terms of service—constitute valid and enforceable contracts. *E.g.*, *Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1157 (N.D. Cal. 2015); *see Binder v. Aetna Life Ins. Co.*, 75 Cal. App. 4th 832, 850 (1999). The terms need not be displayed on the same page as the button; rather, a user may be bound by hyperlinked terms. *Tompkins v. 23andMe, Inc.*, No. 13-05682, 2014 WL 2903752, at *8 (N.D. Cal. June 25, 2014), *aff'd*, 840 F.3d 1016 (9th Cir. 2016) (enforcing arbitration agreement where plaintiff “clicked a box or button that appeared near a hyperlink to the TOS to indicate acceptance of the TOS”). *Cordas v. Uber Techs., Inc.*, 228 F. Supp. 3d 985 (N.D. Cal. 2017), is instructive. There, the plaintiff encountered the following when creating an account: “By creating an Uber account, you agree to the Terms & Conditions and Privacy Policy.” *Id.* at 990. “The phrase ‘Terms & Conditions and Privacy Policy’ was displayed in a clickable box that linked a user to the pages containing the then-current terms and conditions and privacy policies.” *Id.* at 988. The court held that “[b]y creating an account on the Uber app, [the user] affirmatively acknowledge[d] the agreement and is bound by its terms,” *id.* at 990 (internal quotation marks omitted), and granted Uber's motion to compel arbitration on that basis. *Id.* at 992.

The same is true here. To register for a free or paid account on Classmates.com, a user is prompted with the following message: “By clicking Submit, you agree to the Terms of Service and Privacy Policy.” Declaration of Tara McGuane, (“Decl.”) ¶ 6.³ The TOS are hyperlinked directly from that message, and the user must affirmatively click “submit” to create an account. *Id.* The TOS contains the following:

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.

³ Because a motion to compel arbitration is brought pursuant to Rule 12(b)(3), the Court need not accept the pleadings as true and may consider materials outside the pleadings. *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004).

Decl. ¶ 8. Under controlling law, this creates a valid and enforceable contract to arbitrate.

2. Plaintiffs' Counsel Registered As A Classmates User on Behalf of his Clients.

Plaintiffs' counsel, Benjamin Osborn, bound Plaintiffs to the arbitration agreement by acting on their behalf to create two Classmates.com accounts. A lawyer is his client's agent. *Clark v. Andover Sec.*, 44 F. App'x 228, 231 (9th Cir. 2002). Under California law, "[a]n agent represents his principal for all purposes within the scope of his actual or ostensible authority, and all the rights and liabilities which would accrue to the agent from transactions within such limit, if they had been entered into on his own account, accrue to the principal." Cal. Civ. Code § 2330. A principal thus cannot avoid an arbitration agreement by sending his agent to act on his behalf. *Keller Constr. Co. v. Kashani*, 220 Cal. App. 3d 222, 225–27 (1990); *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187–88 (9th Cir. 1986); *Velasquez-Reyes v. Samsung Elecs. Am., Inc.*, No. 16-1953, 2020 WL 6528422, at *4 (C.D. Cal. Oct. 20, 2020).

Osborn has three Classmates.com accounts, one of which uses the same email address that appears in his signature block in the Complaint. Decl. ¶¶ 12–14. He could not have created these accounts without assenting to the TOS. Decl. ¶¶ 6, 12–16. The Complaint confirms such assent, as it includes screenshots showing Osborn's access to sections of the website accessible only after assent. Compl. ¶¶ 22–27, 29, 39, 41–45, and 47; Decl. ¶¶ 6, 12–16. *See Tompkins*, 2014 WL 2903752, at *7 (plaintiff's access to portions of website requiring assent to terms of use constitutes sufficient evidence of assent). Those screenshots also confirm that Osborn used two of his Classmates.com accounts (one of which he created on December 6, 2020, twelve days before this action was filed) to search for records utilized to file this action on Plaintiffs' behalf—an activity “within the scope of his actual or ostensible authority.” Cal. Civ. Code § 2330.

Independent Living Resource Center San Francisco v. Uber Technologies, Inc., No. 18-06503, 2019 WL 3430656 (N.D. Cal. July 30, 2019), is on point. There, Uber moved to compel arbitration on the grounds that the plaintiffs' agent—a paralegal at the office representing plaintiffs—agreed to Uber's terms of service. *Id.*, at *4. The court held that because the plaintiffs had “dispatched their agents to affirmatively test the Uber application in order to bolster their claim of discrimination,” plaintiffs were “bound by the arbitration agreement to the same extent as their agent.” *Id.* This case is no different. Instead of accessing Classmates.com themselves, Plaintiffs “dispatched” Osborn to “affirmatively test [Classmates.com] in

order to bolster their claim[s].” *Id.* So through Osborn, Plaintiffs gained access to portions of Classmates.com they would not have been able to view without Osborn’s assent and then put images of those sections in their Complaint. Compl. ¶¶ 22–27, 29, 39, 41–45, and 47. Plaintiffs cannot avoid arbitration by having their attorney do what they otherwise would have had to do themselves. Rather, as in *Indep. Living Res.*, Plaintiffs are “bound by the arbitration agreement [in the TOS] to the same extent as their agent.” 2019 WL 3430656, at * 4.⁴

B. The Arbitrator Must Decide If This Dispute Is Within The Scope Of The Agreement.

When an arbitration agreement “clearly and unmistakably” contains a “delegation provision”—one that delegates issues of arbitrability to an arbitrator—“the FAA operates on this additional arbitration agreement just as it does on any other,” and requires a court to “compel[] arbitration” of that threshold issue. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–70, 70 n.1 (2010) (internal quotation marks omitted). The Ninth Circuit has held that “incorporation of the [American Arbitration Association] rules constitutes clear and unmistakable evidence that contracting parties agreed to arbitrate arbitrability.” *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015). And here, the TOS states “[t]he arbitration will be governed by the Consumer Arbitration Rules of the American Arbitration Association (‘AAA’), if applicable, as modified by this section.” Decl. ¶ 9. The AAA Consumer Arbitration Rules contain the same arbitrability provision the Ninth Circuit found controlling in *Brennan*, 796 F.3d at 1128. *See* AAA Consumer Arbitration Rule R-14(a).

Even if this Court were to resolve arbitrability, the provision in the TOS plainly applies, as it encompasses “any and all disputes that have arisen or may arise between [Plaintiffs] and the PeopleConnect entities.” Decl. ¶ 8. This is a “dispute[]” between Plaintiffs and PeopleConnect. It belongs in arbitration.

II. Plaintiffs’ Claims Are Barred By Federal Law.

Because the motion to compel arbitration is dispositive, the Court need not reach any other issue in this case and should dismiss on that basis alone. But assuming *arguendo* that Plaintiffs are not bound by

⁴ If this Court is not inclined to grant PeopleConnect’s motion to compel arbitration, Defendant requests leave to engage in limited discovery regarding Plaintiffs’ knowledge of and acquiescence to their counsel’s use of Classmates.com on their behalf. *See* Order, *Indep. Living Res. Ctr. S.F. v. Uber Techs., Inc.*, No. 18-06503 (N.D. Cal. May 6, 2019), ECF No. 35 (denying motion to compel arbitration without prejudice, but granting “limited discovery” to “clarify the issue” of whether the “testers were Plaintiffs’ agents”).

their arbitration agreement, the Court should dismiss the Complaint for the same reason the court in *Ancestry.com* dismissed that Complaint: federal law bars their claims. First, the Communications Decency Act of 1996 makes PeopleConnect immune from Plaintiffs' claims. 47 U.S.C. § 230(c)(1). Second, all but one of Plaintiffs' claims are preempted by the Copyright Act. 17 U.S.C. § 301. These defenses are plain from Plaintiffs' allegations alone, so the Court should dismiss the Complaint pursuant to Rule 12(b)(6). *See e.g., Coffee v. Google, LLC*, No. 20-03901, 2021 WL 493387, at *1 (N.D. Cal. Feb. 10, 2021) (granting motion to dismiss based on Section 230 immunity); *Hemlock Hat Co. v. Diesel Power Gear, LLC*, No. 19-024222020 WL 7013585, at *4–5 (S.D. Cal. Nov. 25, 2020) (granting motion to dismiss based on Copyright Act preemption).

A. The Communications Decency Act Bars Plaintiffs' Claims.

Section 230 of the Communications Decency Act provides that “[n]o 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). Courts in the Ninth Circuit have applied Section 230 to bar all the causes of action Plaintiffs plead here. *E.g. Caraccioli v. Facebook, Inc.*, 700 F. App’x 588, 590 (9th Cir. 2017) (“intrusion upon seclusion,” California Unfair Competition Law); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122, 1125 (9th Cir. 2003) (California right of publicity); *Jurin v. Google Inc.*, 695 F. Supp. 2d 1117, 1122–23 (E.D. Cal. 2010) (unjust enrichment).

Indeed, a court recently found Section 230 immunity in a virtually identical case alleging the same causes of action brought by *these same Plaintiffs*. *See Ancestry.com*, 2021 WL 783524, at *1, *6 & n.13.⁵ In *Ancestry.com*, these same Plaintiffs sued Ancestry on the same claims as in this case, “object[ing] to Ancestry.com’s inclusion of their decades-old yearbook photographs and information in Ancestry’s Yearbook Database.” *Id.* at *1. Ancestry moved to dismiss, arguing that Section 230 immunized it from

⁵ Additionally, when that case becomes final, Plaintiffs will be precluded from disputing the Section 230 issue under principles of collateral estoppel. Plaintiffs, “the part[ies] against whom issue preclusion is asserted,” were “part[ies] to the prior action.” *In re DirecTV Early Cancellation Litig.*, 738 F. Supp. 2d 1062, 1078 (C.D. Cal. 2010) (citation omitted). They had a “full and fair opportunity” to litigate Section 230, and “actually litigated” it. *Id.* And the Section 230 issue decided in that case is “identical” to the one now presented. *Id.*; *see Ancestry.com*, 2021 WL 783524, at *1–2, *5–6. Thus, the prior Section 230 ruling will preclude Plaintiffs from arguing the issue here once that court issues “a final judgment.” 738 F. Supp. 2d at 1078.

Plaintiffs’ claims. *Id.* at *2. Plaintiffs argued that Ancestry “create[d] content,” and lost immunity, by extracting information from yearbooks and placing it on Ancestry’s website. *Id.* at *6. The court rejected that assertion. “Instead of creating content,” the court held, “Ancestry—by taking information and photos from the donated yearbooks and republishing them on its website in an altered format—engaged in ‘a publisher’s traditional editorial functions [that] [] do not transform an individual into a content provider within the meaning of § 230.’” *Id.* (alterations in original and citation omitted). Because “Ancestry did not contribute ‘materially’ to the content,” Section 230 provided immunity. *Id.*

The *Ancestry.com* decision flows directly from Ninth Circuit precedent. When the underlying content complained of is provided by third parties, it makes no difference that a website “provide[s] neutral tools” that allow people to find that republished information through “their voluntary inputs.” *See Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1172 (9th Cir. 2008) (en banc). Indeed, it is for largely that same reason the Ninth Circuit in *Kimzey v. Yelp! Inc.* rejected the argument that “Yelp transformed [a] review by [a user] into its own ‘advertisement’ or ‘promotion’ on Google.” 836 F.3d 1263, 1269 (9th Cir. 2016). The court “fail[ed] to see how Yelp’s rating system, which is based on rating inputs from third parties and which reduces this information into a single, aggregate metric is anything other than user-generated data.” *See id.* at 1270; *accord Force v. Facebook, Inc.*, 934 F.3d 53, 65–71 (2d Cir. 2019); *Jones v. Dirty World Ent. Recordings LLC*, 755 F.3d 398, 413–15, 417 (6th Cir. 2014).

This Court should reach the same result. Section 230 makes a defendant immune from a claim that would impose liability on “(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.” *Kimzey*, 836 F.3d at 1268 (citation omitted). This test is met here.

First, PeopleConnect, as owners of a website used by millions, are “provider[s] ... of an interactive computer service.” *Id.* (“[T]oday, the most common interactive computer services are websites.”) (citation omitted).

Second, Plaintiffs’ claims are premised on PeopleConnect’s republication and distribution of content from student yearbooks, Compl. ¶¶ 3, 7–11, 60, 75, 81, 87, 93, and thus are “directed against [PeopleConnect] in its capacity as a publisher or speaker,” *Kimzey*, 836 F.3d at 1268. That is, because

1 Plaintiffs' claims depend on PeopleConnect's dissemination of Plaintiffs' information from their
 2 yearbooks, either by online republication or by sale, they trigger Section 230 immunity. *See, e.g., Liberi v.*
 3 *Taitz*, No. 11-0485, 2011 WL 13315691, at *11 (C.D. Cal. Oct. 17, 2011) (Section 230 would bar claims
 4 that Intelius, Reed Elsevier, and LexisNexis sold information for credit reports without proper security
 5 precautions). Indeed, the recent decision in *Ancestry.com* barred the same claims, by these same Plaintiffs,
 6 for that very reason. 2021 WL 783524, at *6.

7 *Third*, Plaintiffs' allegations confirm that PeopleConnect was a publisher "of information provided
 8 by another information content provider." *Kimzey*, 836 F.3d at 1268 (citation omitted). The Complaint
 9 alleges that PeopleConnect "extract[s]" and "aggregates" "personal information *from school yearbooks*,
 10 including names, photographs, schools attended, and other biographical information." Compl. ¶ 3
 11 (emphasis added). It further alleges that the Classmates.com "Yearbook Collection contains records *copied*
 12 *from* over 400 thousand yearbooks." *Id.* ¶ 4 (emphasis added). And Plaintiffs allege that "[a]t least some,
 13 and possibly all, of [Classmates.com's] Yearbook Collection was built via ... donations" from users. *Id.*
 14 ¶ 60. But Plaintiffs made the same allegation regarding how Ancestry obtains yearbooks, and the court
 15 nonetheless held that Ancestry was "immune" because it "did not create the underlying yearbook records
 16 and instead obtained them from third parties." *Ancestry.com*, 2021 WL 783524, at *1, *5. That follows
 17 from the many other courts that have held that businesses that search or ask for information from other
 18 sources and republish it in new forms receive Section 230 immunity. *E.g., Marshall's Locksmith Serv. Inc.*
 19 *v. Google, LLC*, 925 F.3d 1263, 1268–69 (D.C. Cir. 2019) (search engines pulling information from fake
 20 locksmiths' websites for search results); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 983,
 21 985–86 (10th Cir. 2000) (AOL publishing stock price information pulled for AOL by third-party
 22 providers); *accord Obado v. Magedson*, No. 13-2382, 2014 WL 3778261, at *1, * 4–7 (D.N.J. July 31,
 23 2014), *aff'd*, 612 F. App'x 90 (3d Cir. 2015); *Liberi*, 2011 WL 13315691, at *11.

24 The fact that PeopleConnect also sells copies of yearbooks makes no difference. PeopleConnect
 25 cannot be held liable "for disseminating the same content in essentially the same format ... , as this action
 26 does not change the origin of the third-party content." *See Kimzey*, 836 F.3d at 1270. What matters is that
 27 PeopleConnect did not "create[] or develop[] the specific content at issue"; it "published information
 28 created or developed by third parties." *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097–98

(9th Cir. 2019) (“recommendations and notifications” are “tools meant to facilitate the communication and content of others,” and “not content in and of themselves”); *see Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331–32 (4th Cir. 1997) (holding that “distributors, like traditional news vendors or book sellers,” are publishers and thus subject to Section 230); *Force*, 934 F.3d at 65 (same). “Simply put, proliferation and dissemination of content does not equal creation or development of content.” *Kimzey*, 836 F.3d at 1270.

“[R]eviewing courts have treated § 230(c) immunity as quite robust.” *Carafano*, 339 F.3d at 1123. It easily covers Plaintiffs’ claims, which seek to punish PeopleConnect for disseminating information about Plaintiffs created and provided to PeopleConnect by others. *See Ancestry.com*, 2021 WL 783524, at *6.

B. The Copyright Act Preempts All But One Of Plaintiffs’ Claims.

When a copyrightable work is disseminated to the public and an individual allegedly suffers harm as a result, federal copyright law is the exclusive means of redress. This is true regardless of whether the work at issue is actually copyrighted, *Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115, 1124 (N.D. Cal. 2001); *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1919–21 (1996), or whether either party owns the copyright, *Maloney v. T3Media, Inc.*, 94 F. Supp. 3d 1128, 1139 n.9 (C.D. Cal. 2015), *aff’d*, 853 F.3d 1004 (9th Cir. 2017); *see Jules Jordan Video, Inc. v. 144942 Canada, Inc.*, 617 F.3d 1146, 1154 (9th Cir. 2010). Under 17 U.S.C. § 301, a claim is preempted if (1) 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,” and (2) the “rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106.” *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1010 (9th Cir. 2017) (citation omitted). Plaintiffs’ § 3344, Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200, *et seq.*, and unjust enrichment claims all meet this test.

First, the “subject matter” of Plaintiffs’ state law claims falls within 17 U.S.C. §§ 102 and 103. All of Plaintiffs’ claims concern PeopleConnect’s use of their “names,” “photographs,” and “likenesses” either (1) in yearbooks or (2) in excerpts of yearbooks. Both “fall[] within the subject matter of copyright.” *See Maloney*, 853 F.3d at 1010. Yearbooks are copyrightable because they are “[w]orks of authorship” containing “pictorial, graphic,” and “literary works,” 17 U.S.C. § 102; or “compilations” thereof, *id.* § 103; *see id.* § 101 (defining “work[s] of authorship” to include “books” and defining “pictorial” and “graphic” works to include “photographs”). That is why the Copyright Office has granted copyright protection for school yearbooks. *E.g.*, Don Novello, *Shellville High School, The Blade*, TX0001451935, Public Catalog,

U.S. Copyright Office (Oct. 30, 1984), <https://bit.ly/2NE5Aui>. Excerpted portions of yearbooks are no different, regardless of whether they contain photographs or text. Photographs are copyrightable. 17 U.S.C. §§ 101, 102; *Maloney*, 94 F. Supp. 3d at 1135–36 (plaintiffs’ right of publicity claims challenging website’s use of photographs preempted). So too are excerpted phrases from yearbooks containing identifying text. 17 U.S.C. § 102; *see* Compl. ¶¶ 24–25, 27, 41–42, 44. That the excerpted phrases constitute a portion of a yearbook makes no difference. *See Jules Jordan Video*, 617 F.3d at 1154 (right of publicity claims preempted with respect to “‘still shots’ of the copyrighted video performance” used “on the covers of the counterfeit DVDs”); *Laws v. Sony Music Ent.t, Inc.*, 448 F.3d 1134, 1136 (9th Cir. 2006) (right of publicity claims preempted where defendant used “brief samples” of plaintiff’s voice recording).

Second, the rights asserted under Plaintiffs’ § 3344, UCL, and unjust enrichment claims, Compl. ¶¶ 73–84, 92–96, are the same “rights governed exclusively by copyright law.” *Maloney*, 853 F.3d at 1011. These “exclusive rights” include the right to publicly “display” the work, “reproduce” it, and “distribute copies ... to the public by sale.” 17 U.S.C. § 106. These are the rights Plaintiffs seek to hold PeopleConnect liable for exercising—displaying the yearbooks and snippets of the yearbooks to the public on Classmates.com, reproducing their yearbooks in hard copy and digitally, and distributing copies of the yearbooks to customers by selling them in print and digitally via subscription membership. *See, e.g.*, Compl. ¶¶ 2–3, 7–9, 22–33, 39–51.⁶

This conclusion aligns with precedent applying the Copyright Act to California law. In cases where a plaintiff’s personally-identifying characteristics were contained in copyrightable material and the defendant displayed, distributed, or sold that material, § 3344 and UCL claims have routinely been held to be preempted. *E.g.*, *Maloney*, 853 F.3d at 1007; *Fleet*, 50 Cal. App. 4th at 1913, 1915. If, as Plaintiffs would have it, state law imposes liability for distributing and selling copyrightable works containing a person’s name, photograph, or likeness without that person’s assent, California law “would destroy

⁶ Plaintiffs’ inaccurate use of the word “advertising” throughout their Complaint makes no difference to this analysis—in *Maloney*, for example, the plaintiffs alleged the defendant used their “names, images, and likenesses ... for the purpose of advertising” and both the district court and the Ninth Circuit nonetheless held that those claims were preempted. 94 F. Supp. 3d at 1138–39; *see also* 853 F.3d at 1011; *accord Fleet*, 50 Cal. App. 4th at 1913, 1915 (holding that claims alleging defendants “made unauthorized use of his photograph and likeness on the packaging and advertising materials for the motion picture” are preempted).

copyright holders’ ability to exercise their exclusive rights under the Copyright Act.” *Maloney*, 94 F. Supp. 3d at 1137–38. This outcome would “effectively giv[e] the subject of every photograph veto power over the artist’s rights under the Copyright Act and destroy[] the *exclusivity* of rights the Copyright Act aims to protect.” *Id.* Section 301 prevents this nonsensical result.

III. Plaintiffs Have Not Adequately Pleaded Any Causes of Action.

Plaintiffs’ claims also fail because none of them are legally viable as pleaded. “A pleading must ‘contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.’” *City of Oakland v. Oakland Raiders*, 445 F. Supp. 3d 587, 596 (N.D. Cal. 2020) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 562 (2007)). Those allegations must be “plausible.” *Twombly*, 550 U.S. at 555. “Plausibility requires pleading facts, as opposed to conclusory allegations or the formulaic recitation of the elements of a cause of action, and must rise above the mere conceivability or possibility of unlawful conduct that entitles the pleader to relief.” *Somers v. Apple, Inc.*, 729 F.3d 953, 959–60 (9th Cir. 2013) (internal citations and quotation marks omitted). “Threadbare recitals” supported by “conclusory statements” or facts “‘merely consistent with’ ... liability,” warrant dismissal pursuant to Rule 12(b)(6) is appropriate. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

A. Plaintiffs Have Failed To State A Claim Under The California Right Of Publicity Law.

To plead a claim under California Civil Code § 3344, Plaintiffs must allege: (1) defendant’s use of the plaintiff’s identity; (2) appropriation of plaintiff’s name or likeness to defendant’s advantage; (3) lack of consent; (4) resulting injury; (5) knowing use of the plaintiff’s name or likeness for purposes of advertising or solicitation; and (6) direct connection between the use and the commercial purpose. *Maloney*, 853 F.3d at 1008 n.2 (citing *Fleet*, 50 Cal. App. 4th at 1918). If these elements are met, § 3344 still does not prohibit “use of a name, ... photograph, or likeness in connection with any news, public affairs, or sports broadcast or account.” Cal. Civ. Code § 3344(d). Plaintiffs’ Complaint falls short in both respects—it does not allege all the § 3344 element and the conduct it identifies falls within § 3344(d).

1. Plaintiffs’ Allegations Are Insufficient To State A Claim Under § 3344.

i. Plaintiffs Have Not Pleaded An Actionable Injury.

Plaintiffs do not allege an injury that is actionable under § 3344. Instead, all they are able to offer is the conclusory assertion that PeopleConnect “den[ied] them the economic value of their likenesses,”

1 while nonetheless failing to plead any facts relating to the purported “economic value” of their names,
 2 photographs, or likenesses as required to recover economic damages under § 3344. Compl. ¶¶ 10, *see* 34,
 3 52.

4 That forecloses Plaintiffs’ § 3344 claim. It is the reason the court in *Cohen v. Facebook, Inc.*,
 5 dismissed a § 3344 claim brought by a non-celebrity who had not alleged to have suffered mental anguish
 6 as a result of the alleged misappropriation, as well as a plausible supporting factual basis for any such
 7 assertion. 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011); *see Miller v. Collectors Universe, Inc.*, 159 Cal.
 8 App. 4th 988, 1006 (2008) (noting that § 3344 permits “statutory minimum damages” awards “to
 9 compensate non-celebrity plaintiffs *who suffer ... mental anguish* yet no discernible commercial loss”)
 10 (emphasis added); *see also Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d 1222, 1242–46. (N.D. Cal. 2014).
 11 This Court should do the same. Under *Cohen*, because Plaintiffs have not pleaded mental anguish or
 12 demonstrated the economic value of their likeness, they have not pleaded a § 3344 injury.

13 **ii. Plaintiffs Have Not Plausibly Pleaded Unlawful Advertising.**

14 Plaintiffs also have not plausibly alleged that PeopleConnect used their names, images or likenesses
 15 for the purposes of advertising or soliciting purchases. *See Maloney*, 853 F.3d at 1008 n.2. That is because
 16 “[a]dvertising using a publication’s content does not violate the right to publicity of a person appearing in
 17 the advertising, unless the advertisement implies that the person is endorsing the publication.” *Local TV,*
 18 *LLC v. Superior Ct.t*, 3 Cal. App. 5th 1, 9 (2016) (citing *Cher v. Forum Int’l, Ltd.*, 692 F.2d 634, 639 (9th
 19 Cir. 1982) and *Montana v. San Jose Mercury News, Inc.*, 34 Cal. App. 4th 790, 797 (1995)). Here, the
 20 yearbook snippets are user-initiated and do not imply endorsement—they merely inform the user of the
 21 yearbook’s contents. Because there is no allegation that PeopleConnect’s use of Plaintiffs’ names,
 22 photographs, and likenesses from their yearbooks suggest endorsement of those yearbooks—nor could
 23 there be given the screenshots Plaintiffs provide in their Complaint—this theory is as baseless as the first.

24 The advertising theory also fails for another reason: although Plaintiffs allege PeopleConnect
 25 “knowingly uses the names ... [and] likenesses ... to advertise, sell, and solicit the purchase of” yearbooks
 26 and website memberships, Compl. ¶¶ 7–8, the allegations in the Complaint contradict that assertion.
 27 *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001), *amended by* 275 F.3d 1187 (2001)
 28 (a plaintiff can “plead himself out of a claim by including ... details contrary to his claims”). Plaintiffs

identify three types of webpages they allege present their likenesses as advertisements: (1) search result pages, (2) pop-up windows displaying advertisements, and (3) links to advertisements that appear on a separate webpage. Compl. ¶¶ 22–29, 39–47. None of these instances amounts to using names or likenesses “for purposes of advertising or solicitation or purchases.” *Maloney*, 853 F.3d at 1008 n.2. In each, the records at most appear “adjacent” to a separate advertisement, rather than as part of an advertisement. Compl. ¶ 27. That is not enough to state a claim under § 3344. *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 211 (2017) (holding that webpage using name and likeness also featuring unrelated, third-party advertisements did not establish Section 3344 claim).

2. The “Public Affairs” Exception Forecloses Plaintiffs’ Claim.

Section 3344 exempts from its coverage “use[s] of a name, ... photograph, or likeness in connection with any news, public affairs, or sports broadcast or account.” Cal. Civ. Code § 3344(d). That forecloses this claim, for PeopleConnect’s alleged uses of Plaintiffs’ names, photographs, and likenesses in their high school yearbooks were “in connection with” a “public affairs ... account.” *Id.*

What constitutes a “public affairs” account for purposes of § 3344(d) is “broadly interpreted.” *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 416 (2001); see *Baugh v. CBS, Inc.*, 828 F. Supp. 745, 754 (N.D. Cal. 1993). “Public affairs” includes any “name, photograph, or likeness” presented “for purposes of education, amusement or enlightenment, when the public may reasonably be expected to have a legitimate interest in what is published.” *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200, 225 (1998), *as modified on denial of reh’g* (July 29, 1998) (citation omitted). It is enough if a presentation conveys a “real life occurrence[]” that “is of more than passing interest to some.” *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 539–40, 546 (1993) (applying exception to documentary chronicling surfing in Malibu); *William O’Neil & Co. v. Validea.com Inc.*, 202 F. Supp. 2d 1113, 1117 (C.D. Cal. 2002) (“news’ exception” reaches “reproduction[s] of past events, travelogues and biographies”) (citation omitted).

Through its online library and reprinted yearbooks, PeopleConnect makes available information “related to real-life occurrences,” *Dora*, 15 Cal. App. 4th at 545, that, as Plaintiffs’ allegations illustrate, are of interest to many people. Compl. ¶ 66 (alleging that PeopleConnect has over “4 million subscribers worldwide” and its yearbook collection numbers “over 400,000 yearbooks in the United States”). Further, yearbooks frequently serve as important primary-source documents of a community’s activity in a given

1 year and inform the work of historians, archivists, journalists, genealogists and other scholars. Even the
 2 Library of Congress maintains a collection of yearbooks. *See* Library of Congress, [https://www.loc.gov/](https://www.loc.gov/resource/mss85590.041/?sp=1&r=-0.649,0.265,2.298,0.978,0)
 3 [resource/mss85590.041/?sp=1&r=-0.649,0.265,2.298,0.978,0](https://www.loc.gov/resource/mss85590.041/?sp=1&r=-0.649,0.265,2.298,0.978,0) (last accessed Mar. 18, 2021).

4 As for PeopleConnect’s alleged use of Plaintiffs’ names, photographs, and likenesses in
 5 advertisements, those uses too fall within the exception. First, by Plaintiffs’ account, Plaintiffs’ names,
 6 photographs, and likenesses do not appear in advertisements—as described above, Plaintiffs
 7 mischaracterize as advertisements the mention of their names in search results, the use of yearbook excerpts
 8 in pop-up windows, and the appearance of links to advertisements near yearbook excerpts. *See, e.g.,*
 9 Compl. ¶¶ 26–27. These excerpted records reproduce factual data—they represent the particular records
 10 that are responsive to the user’s search—and serve as a “reference source” for the records within
 11 PeopleConnect’s collection. *Davis v. Elec. Arts Inc.*, 775 F.3d 1172, 1179 (9th Cir. 2015). So just as in
 12 *Gionfriddo*, PeopleConnect’s yearbooks “qualify as ‘public affairs’ within the meaning of” § 3344(d). 94
 13 Cal. App. 4th at 416.

14 But even if PeopleConnect’s use of Plaintiffs’ names, photographs and likenesses were part of the
 15 advertisements, those uses were, at most, “merely an adjunct” of the use in the yearbooks themselves and
 16 thus entitled to the same protection under § 3344(d). *William O’Neil & Co.*, 202 F. Supp. 2d at 1119 (citing
 17 *Cher*, 692 F.2d at 639). In *O’Neil*, the defendant published a book on investment strategy that contained
 18 plaintiff’s name and likeness. The court held that the advertising promoting the book was only incidental
 19 to the protected speech, and so must be “protected to the same extent as the book itself.” *Id.* The rule,
 20 therefore, is that “advertisements are actionable when the plaintiff’s identity is used, without consent, to
 21 promote an *unrelated* product.” *Gionfriddo*, 94 Cal. App. 4th at 413–414 (collecting cases). Here,
 22 Plaintiffs’ likenesses are part of the products purportedly being advertised.

23 Finally, the Ninth Circuit has interpreted § 3344(d) not only to encompass speech activities
 24 protected by the First Amendment, but to sweep more broadly than the First Amendment. *New Kids on the*
 25 *Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 309–310 (9th Cir. 1992). As explained below,
 26 PeopleConnect’s alleged use of Plaintiffs’ names, photos, and likenesses qualifies as protected First
 27 Amendment speech. It thus necessarily falls within the bounds of § 3344(d) and any doubts as to whether
 28 the exemption applies should be resolved to avoid the constitutional limits of the First Amendment. *See*

1 *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575
 2 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional
 3 problems, the Court will construe the statute to avoid such problems unless such construction is plainly
 4 contrary to the intent of Congress.”), *accord hiQ Labs, Inc. v. LinkedIn Corp.*, 273 F. Supp. 3d 1099, 1114
 5 n.12 (N.D. Cal. 2017).

6 **B. Plaintiffs Do Not State A California Unfair Competition Law Claim.**

7 Plaintiffs also allege violations of the California UCL. To plead a claim under the UCL, a private
 8 plaintiff must allege having “lost money or property as a result of the unfair competition.” Cal. Bus. &
 9 Prof. Code § 17204. And even when that condition is satisfied, a plaintiff still must allege that the defendant
 10 engaged in “unfair competition”—meaning the defendant engaged in an “unlawful, unfair or fraudulent
 11 business act or practice.” Cal. Bus. & Prof. Code § 17200. Plaintiffs have done neither.

12 **1. Use Of Personal Information Is Not A Violation Of The UCL.**

13 A UCL claim requires a plaintiff to allege the loss of “money or property as a result of the unfair
 14 competition.” Cal. Bus. & Prof. Code § 17204; *see In re iPhone Application Litig.*, No. 11-02250, 2011
 15 WL 4403963, at *14 (N.D. Cal. Sept. 20, 2011). “Numerous courts have held that a plaintiff’s ‘personal
 16 information’ does not constitute money or property under the UCL.” *In re iPhone Application Litig.*, 2011
 17 WL 4403963, at *14; *see In re Facebook Priv. Litig.*, 791 F. Supp. 2d 705, 715 n.10 (N.D. Cal. 2011))
 18 (citing *Ruiz v. Gap Inc.*, 540 F. Supp. 2d 1121, 1127 (N.D. Cal. 2008)); *Thompson v. Home Depot, Inc.*,
 19 No. 07-1058, 2007 WL 2746603, at *3 (S.D. Cal. Sept. 18, 2007). Here, Plaintiffs’ UCL theory is based
 20 on the supposed dissemination of their “personal information,” Compl. ¶¶ 81, 83, and, therefore, Plaintiffs
 21 cannot state a claim under the UCL.

22 It makes no difference that Plaintiffs allege they “lost the economic value of their likenesses.”
 23 Compl. ¶ 84. As discussed above regarding § 3344, Plaintiffs do not allege, the existence of a market for
 24 them to monetize their depictions in their high school yearbooks. *See LaCourt v. Specific Media, Inc.*, No.
 25 10-1256, 2011 WL 1661532, at *5 (C.D. Cal. Apr. 28, 2011); *Archer v. United Rentals, Inc.*, 195 Cal. App.
 26 4th 807, 816 (2011). That is critical, for it is not enough for a plaintiff to show that personal information
 27 had value to the defendant—to allege adequate harm under the UCL, plaintiff must identify a stand-alone
 28 market for their information. *See Folgelstrom v. Lamps Plus, Inc.*, 195 Cal. App. 4th 986, 993–94 (2011)

(rejecting argument that plaintiff suffered economic harm under UCL based on collection and licensing of personal information). Having failed to do that, Plaintiffs fall well short of the “stringent standard for standing under the UCL.” *In re Anthem, Inc. Data Breach Litig.*, No. 15-02617, 2016 WL 3029783, at *30 (N.D. Cal. May 27, 2016).

2. Plaintiffs Do Not Allege An Unlawful Or Unfair Practice.

The UCL defines unfair competition as “any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising[.]” Cal. Bus. & Prof. Code § 17200. Plaintiffs do not allege fraud. Nor do they allege “unfair, deceptive, untrue, or misleading advertising.” Instead, they allege that PeopleConnect’s practices are “unlawful” and “unfair.” Compl. ¶¶ 82–83. Those conclusory allegations are inadequate.

Unlawful. The UCL “borrows violations from other laws and treats them as unlawful practices that the UCL makes independently actionable.” *In re Anthem, Inc. Data Breach Litig.*, 2016 WL 3029783, at *32 (citation omitted). Plaintiffs’ claim for unlawful conduct under the UCL is derivative of their right of publicity claim. *See* Compl. ¶¶ 81–82. Because Plaintiffs’ right of publicity claim fails for the reasons stated above, so too must their claim for unlawful conduct under the UCL.

Unfair. To determine whether a practice is “unfair,” courts variously consider: “(1) whether the challenged conduct is ‘tethered to any underlying constitutional, statutory or regulatory provision, or that it threatens an incipient violation of an antitrust law, or violates the policy or spirit of an antitrust law ... (2) whether the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers ... or (3) whether the practice’s impact on the victim outweighs the reasons, justifications and motives of the alleged wrongdoer.’” *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1214–15 (9th Cir. 2020) (citation omitted). Plaintiffs fail to plead facts sufficient to meet any of these tests; they simply assert by fiat the conduct was unfair. *See Jones v. PNC Bank, N.A.*, No. 10-01077, 2010 WL 3325615, at *3 (N.D. Cal. Aug. 20, 2010) (“Simply concluding that an act is ‘unfair’ does not meet the standard for stating a claim under the UCL.”)

First, the California Supreme Court has “limited” the tethering test to cases involving a “competitor alleging anticompetitive practices.” *Cel-Tech Commc’ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 187 n.12 (1999). Plaintiffs are not competitors with PeopleConnect. And Plaintiffs do not otherwise

allege that Classmates engages in “conduct that...significantly threatens or harms competition.” *In re Google Assistant Priv. Litig.*, 457 F. Supp. 3d 797, 843 (N.D. Cal. 2020) (citation omitted).

Second, Plaintiffs could not possibly contend that PeopleConnect’s conduct—making available online documents that are available in their hometown public libraries and are the types of materials routinely used by historians and researchers to document the community—“offends an established public policy or ... is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” *Id.* at 842–43 (citation omitted). This concept traditionally is equated with deceptive trade practices, such as fraudulent claims made on the label of a product that induced consumers to purchase it, not putting information online that already is in the public domain. *See Kwikset Corp. v. Superior Ct.t.*, 51 Cal. 4th 310, 326 (2011); *S. Bay Chevrolet v. Gen. Motors Acceptance Corp.*, 72 Cal. App. 4th 861, 886–87 (1999). Plaintiffs allege only that PeopleConnect’s business offends non-consumer Plaintiffs by selling a product containing their information. But as the Ninth Circuit has explained, “profit motive is not enough” under this test. *Doe*, 982 F.3d at 1214–15.

Third, the Complaint contains no allegation that Plaintiffs’ purported injuries “outweigh[] ‘the reasons, justifications and motives’” for PeopleConnect’s use of their personal information. *Id.* (citation omitted). Again, *Doe* suggests that to proceed under this theory, such an allegation must be made *and* there must be some explanation for why that balancing favors the Plaintiffs. *Id.* at 1215 (explaining that inquiry requires a balancing of evidence on both sides). Plaintiffs’ Complaint does neither.

In short, regardless of the test the California courts ultimately apply to determine whether conduct is “unfair,” Plaintiffs’ pleading under that element is insufficient. The Court should dismiss the claim.

C. Plaintiffs Fail To State A Claim For Intrusion On Seclusion.

Intrusion on seclusion claims have two elements: (1) an “intrusion into a private place, conversation or matter” and (2) “in a manner highly offensive to a reasonable person.” *Damner v. Facebook Inc.*, No. 20-05177, 2020 WL 7862706, at *6 (N.D. Cal. Dec. 31, 2020) (citing *Shulman*, 18 Cal. 4th at 231 (1998)). Plaintiffs do not satisfy either element.

First, the plaintiff must show (a) an actual, subjective expectation of seclusion or solitude in the place, conversation, or matter, and (b) that the expectation was objectively reasonable. *See Williams v. Facebook, Inc.*, 384 F. Supp. 3d 1043, 1053–54 (N.D. Cal. 2018). But all Plaintiffs allege is that their

“names, likenesses, photographs, and biographical information” were disseminated. Compl. ¶¶ 87–88. They do not allege they had a “subjective expectation of seclusion” in this information. Nor could they. Their allegations are that this information became public years ago when the yearbooks were released. *Id.* ¶¶ 22, 39. Even if Plaintiffs had alleged they expected such information to be kept secret, the expectation could not be “objectively reasonable” given that the purpose of a yearbook is to *disseminate* the information it contains. *See In re Facebook Internet Tracking Litig.*, 140 F. Supp. 3d 922, 933 n.5 (N.D. Cal. 2015).

Second, it cannot be that the intrusion Plaintiffs identify is “*highly offensive* to a reasonable person.” *In re Google, Inc., Priv. Policy Litig.*, 58 F. Supp. 3d 968, 988 (N.D. Cal. 2014) (emphasis added). This is a “high bar.” *Id.* (citing *Belluomini v. Citigroup, Inc.*, No. 13-01743, 2013 WL 5645168, at *3 (N.D. Cal. Oct. 16, 2013) (holding that issuance of customer’s “address and identity” to third party not highly offensive)). There is no way PeopleConnect’s alleged use of Plaintiffs’ names, likenesses, photographs, and biographical information to advertise and sell yearbooks amounts to a “highly offensive” intrusion. *Phillips v. Archstone Simi Valley LLC*, 2016 WL 400100, at *9 (C.D. Cal. 2016). This is especially true given that Plaintiffs sat for their yearbook photos and knew their photos, together with their names, would be published in the yearbooks—the opposite of any “intrusion” or “highly offensive” intrusion.

The intrusion on seclusion tort is designed to punish truly egregious conduct, like the unauthorized filming of a cardiac episode, *Miller v. Nat’l Broad. Co.*, 187 Cal. App. 3d 1463, 1484 (1986), or collection of data related to customers’ sexual activity, *S.D. v. Hytto Ltd.*, No. 18-00688, 2019 WL 8333519, at *10 (N.D. Cal. May 15, 2019). This case is nothing like those. Compl. ¶¶ 22, 42 (alleging dissemination of Abraham’s participation in track and cross country and Callahan’s acceptance to Yale University).

D. Plaintiffs’ Unjust Enrichment Claim Should Be Dismissed As A Matter of Law.

In California, there is no “stand-alone cause of action for unjust enrichment.” *Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1031 (N.D. Cal. 2012) (collecting cases). Plaintiffs’ claim for “unjust enrichment,” Compl. ¶¶ 92–96, therefore, must be dismissed. *See, e.g., McCoy v. Alphabet, Inc.*, No. 20-05427, 2021 WL 405816, at *12 (N.D. Cal. Feb. 2, 2021). To be sure, unjust enrichment can be shorthand for a “quasi-contract claim seeking restitution.” *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015). But that would not be appropriate here. To state such a claim, Plaintiffs must allege PeopleConnect was “unjustly conferred a benefit ‘through mistake, fraud, coercion, or request.’” *Avakian*

1 *v. Wells Fargo Bank, N.A.*, 827 F. App'x 765, 766 (9th Cir. 2020) (citing *Astiana*, 783 F.3d at 762); *see*
 2 *Donohue v. Apple, Inc.*, 871 F. Supp. 2d 913, 932–33 (N.D. Cal. 2012). Here, there is no such allegation.

3 **IV. PeopleConnect's Alleged Conduct Is Protected By The First Amendment.**

4 Even assuming *arguendo* that Plaintiffs' claims are not barred by federal law *and* that Plaintiffs
 5 have alleged some or all of their causes of action, the First Amendment bars this suit.⁷

6 **A. The Conduct Alleged Is Core First Amendment Speech.**

7 Plaintiffs' efforts to prevent PeopleConnect from disseminating their yearbook records is an attack
 8 on quintessential constitutionally protected speech. As courts have long recognized, where a person's
 9 name, image, or likeness is used in speech for "informative or cultural" purposes, the First Amendment
 10 renders the use "immune" from liability. *New Kids on the Block v. News Am. Publ'g, Inc.*, 745 F. Supp.
 11 1540, 1546 (C.D. Cal. 1990), *aff'd*, 971 F.2d 302 (9th Cir. 1992). This protection is not "contingent on the
 12 perceived value" of the speech. *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 964–65 (9th Cir. 2012).
 13 And it does not matter whether the speech is disseminated free of charge or is "undertaken for profit."
 14 *Gionfriddo*, 94 Cal. App. at 411–12; *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 682 (2010)
 15 (First Amendment protection extends to speech "*whether or not sold for a profit.*") (citation omitted).

16 "There can be no serious argument about the fact that, in its most basic form, the yearbook serves
 17 as a forum in which student editors present pictures, captions, and other written material, and that these
 18 materials constitute expression for purposes of the First Amendment." *Kincaid v. Gibson*, 236 F.3d 342,
 19 351 (6th Cir. 2001); *see Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). And online sources of
 20 information, such as the "biographical information" Plaintiffs seek to prevent PeopleConnect from
 21 releasing, also are protected. Compl. ¶ 55. *Kincaid*, 236 F. 3d at 351; *Sorrell*, 564 U.S. at 570; *see*
 22 *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1121–22 (9th Cir. 2020) (holding that "online database of
 23 information" including biographical information protected by First Amendment); *Dex Media W., Inc.*, 696
 24 F.3d at 964–65 (holding that "the yellow pages directories are entitled to full First Amendment
 25 protection"). As Plaintiffs' Complaint makes clear, the materials they seek to suppress are a source of

26 _____
 27 ⁷ *See Ozenne v. Chase Manhattan Bank (In re Ozenne)*, 841 F.3d 810, 814 (9th Cir. 2016) ("[A]s a
 28 fundamental rule of judicial restraint, we must consider nonconstitutional grounds for decision before
 reaching any constitutional questions.") (internal quotation marks and citation omitted).

information and interest for an audience of millions. *See, e.g.*, Compl. ¶¶ 22, 39, 66. PeopleConnect’s alleged dissemination of these materials therefore qualifies as speech protected by the First Amendment. *See Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) (recognizing that “the acts of ‘disclosing’ and ‘publishing’ information” qualify as “the kind of ‘speech’ that the First Amendment protects”).

To the extent the state laws Plaintiffs invoke restrict dissemination of their likenesses, they impose “content-based” restrictions on speech. *See, e.g., IMDb.com Inc.*, 962 F.3d at 1120 (“AB 1687 restricts speech because of its content. It prohibits the dissemination of one type of speech: ‘date of birth or age information.’”); *Sarver v. Chartier*, 813 F.3d 891, 903 (9th Cir. 2016) (“By its terms, California’s right of publicity law clearly restricts speech based upon its content.”). Content-based restrictions are subject to strict scrutiny—a standard that has never been met in any analogous case, and has no hope of being met in this one—unless the speech qualifies as “commercial speech.” *IMDb.com*, 962 F.3d at 1123; *see also Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (observing that “[c]ontent-based laws ... are presumptively unconstitutional”).⁸ Although the alleged speech at issue in this case is properly characterized as non-commercial, the First Amendment protects this speech even if it is deemed commercial.

B. Yearbooks Are Fully Protected, Non-Commercial Speech.

“Commercial speech” is speech that “‘does no more than propose a commercial transaction.’” *IMDb.com Inc.*, 962 F.3d at 1122 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976)). The records PeopleConnect disseminate do not satisfy this definition. Plaintiffs do not allege that their names, photographs, and likenesses in their school yearbooks do “no more than propose a commercial transaction.” *Id.* Nor could they. A yearbook is a “creative publication” that “exists for the purpose of expressive activity.” *Kincaid*, 236 F.3d at 351. By Plaintiffs’ account, the yearbooks convey information about their school-age selves. Compl. ¶¶ 22, 39.

As for excerpting yearbooks in connection with the sale of access to those same yearbooks, that too is not commercial speech. Even if Plaintiffs had adequately alleged that their names, images, and likenesses

⁸ For purposes of this analysis, it does not matter whether the yearbook information concerns issues of “public” or “private concern.” *IMDb.com*, 962 F.3d at 1123. As the Ninth Circuit recently clarified, “neither this court, nor the Supreme Court, has held that content-based restrictions on public speech touching on private issues escape strict scrutiny.” *Id.*

were used in advertising, though they have not, the speech Plaintiffs identify would be protected. If a publication qualifies as constitutionally protected speech, then disseminating portions of it in advertising that promotes the same publication is likewise protected. *See, e.g., William O'Neil & Co.*, 202 F. Supp. 2d at 1119; *Polydoros v. Twentieth Century Fox Film Corp.*, 67 Cal. App. 4th 318, 325 (1997); *Montana*, 34 Cal. App. 4th at 796. Indeed, Plaintiffs' allegations that PeopleConnect used their names, images and likenesses in advertisements are virtually indistinguishable from those rejected in *Gionfriddo*: "even if Baseball used depictions of players playing the game or recited statistics or historical facts about *the game* to advertise the game and promote attendance, the commercial speech cases relied on by plaintiffs would be inapposite. The owner of a product is entitled to show that product to entice customers to buy it." 94 Cal. App. at 414.

The only alleged circumstances in which PeopleConnect even arguably proposes a commercial transaction are in a section of a window next to search results, in pop-up windows, and in standalone webpages. In each of those contexts, Plaintiffs' information either is not visible or is visible in a separate part of the web page that merely reproduces the information in Plaintiffs' yearbooks. *Id.* These uses of Plaintiffs' names, images, and likenesses do not qualify as speech which "does no more than propose a commercial transaction," *IMDb.com*, 962 F.3d at 1122, regardless of their "proximity to" speech proposing a commercial transaction, *Stewart*, 181 Cal. App. 4th at 687 (speech in magazine is noncommercial where it is merely in "proximity to advertisements touching on the same subject matter").

C. If Displaying Information About Plaintiffs Is Commercial Speech, It Still Is Protected.

The Supreme Court has recognized that "[t]he commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." *Sorrell*, 564 U.S. at 579 (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). So even commercial speech is entitled to First Amendment protection. *Edenfield*, 507 U.S. at 767.

"Restrictions on commercial speech must survive intermediate scrutiny under *Central Hudson*." *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1176 (9th Cir. 2018) (referring to *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980)). "The *Central Hudson* test first asks whether the speech is either misleading or related to illegal activity. If the speech 'is neither misleading nor related to unlawful activity,' then '[t]he State must assert a substantial interest to be achieved by' the

regulation. The regulation must directly advance the asserted interest, and must not be ‘more extensive than is necessary to serve that interest.’” *Id.* (quoting *Central Hudson*, 447 U.S. at 563–66). “This requires that there be a reasonable fit between the restriction and the goal, and that the challenged regulation include ‘a means narrowly tailored to achieve the desired objective.’” *Ballen v. City of Redmond*, 466 F.3d 736, 742 (9th Cir. 2006) (quoting *Bd. of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)).

This test is nowhere near satisfied. First, Plaintiffs do not allege that PeopleConnect’s speech is “misleading [or] related to unlawful activity.” *Central Hudson*, 447 U.S. at 564; *see Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976) (holding that State may not “suppress the dissemination of concededly truthful information about entirely lawful activity”). Second, there is no “reasonable fit” between a law that imposes liability for PeopleConnect’s alleged use of Plaintiffs’ identities and any state interest. *Ballen*, 466 F.3d at 742. The only result of such a law would be to suppress information that interests millions of people, *see* Compl. ¶ 66, and provide a payout to those who have done nothing to earn it. The State has “no interest”—much less a substantial interest—“in giving [a private individual] an economic incentive to live his life as he otherwise would,” *Sarver*, 813 F.3d at 905, and suppressing informative speech in the process, *Sorrell*, 564 U.S. at 577–79.

V. The Complaint Is Barred By The California Anti-SLAPP Statute.

California Code of Civil Procedure 425.16 (“Section 425.16”), allows a defendant to bring a special motion to strike any cause of action “arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” Section 425.16(b)(1); *see Makaeff v. Trump Univ., LLC*, 736 F.3d 1180, 1181 (9th Cir. 2013) (en banc) (holding that Section 425.16 motion available in federal court). Section 425.16 is “construed broadly.” Cal. Code Civ. P. § 425.16(a). Its reach “is broader than the scope of constitutionally protected speech” and “applies to a cause of action arising from an act ‘in furtherance of’ the person’s right of free speech under the constitution.” *hiQ Labs*, 273 F. Supp. 3d at 1116. Courts apply a two-part test to determine whether claims are barred by Section 425.16. First, “the moving defendant must make a prima facie showing that the plaintiff’s suit arises from an act in furtherance of the defendant’s constitutional right to free speech.” *Makaeff v. Trump Univ., LLC*, 715 F.3d 254, 261 (9th Cir. 2013). If this showing is made, “[t]he burden then shifts to the plaintiff” to “establish a reasonable probability that it will prevail on

its claim.” *Id.* Application of both elements makes clear that Plaintiffs’ Complaint is a SLAPP and must be dismissed as such.

A. Plaintiffs’ Suit Arises From PeopleConnect’s Protected Conduct.

Section 425.16(e) protects “any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest” and “any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” Cal. Code Civ. P. § 425.16(e)(3), (e)(4). The challenged yearbooks and yearbook excerpts all appear on Classmates.com, which is a “public forum.” *Barrett v. Rosenthal*, 40 Cal. 4th 33, 41 n.4 (2006) (“Web sites accessible to the public ... are ‘public forums’ for purposes of the anti-SLAPP statute.”); *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 895 (2004) (statements posted on public website “hardly could be more public”).

The challenged yearbooks and yearbook excerpts also constitute speech “in connection with” an “issue of public interest.” Section 425.16(e)(3). Again, courts have repeatedly held that “gathering information for dissemination to the public” is a core First Amendment activity. *See New Kids on the Block*, 745 F. Supp. at 1546. Such activity is protected regardless of whether the information disseminated relates to current events or historical events, as “the public is also entitled to be informed and entertained about our history.” *Gionfriddo*, 94 Cal. App. 4th at 411; *see Gates v. Discovery Commc’ns, Inc.*, 34 Cal. 4th 679, 695 (2004) (granting anti-SLAPP motion regarding speech “of an historical nature”). And California courts have repeatedly held that speech of interest only to a specific community still constitutes speech in the “public interest.” *See, e.g., Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 479 (2000) (statements about homeowners association manager published in community newsletter were in “public interest”); *Ruiz v. Harbor View Cmty. Ass’n*, 134 Cal. App. 4th 1456, 1468–69 (2005) (letters from homeowners association regarding disputes over architectural guidelines were of “public interest” to residents of 523 lots governed by association); *Grenier v. Taylor*, 234 Cal. App. 4th 471, 482–83 (2015) (speech to community of 550 to 1,000 church members was in “public interest”).

The yearbooks and yearbook excerpts that underlie Plaintiffs’ claims constitute protected speech in connection with matters of public interest. First, the gathering and dissemination of the historical information in yearbooks falls squarely within the First Amendment. *New Kids on the Block*, 745 F. Supp.

at 1546; *Gionfriddo*, 94 Cal. App. 4th at 411–13; *Dora*, 15 Cal. App. 4th at 542–43. Second, yearbooks are in the “public interest.” One need look no further than Plaintiffs’ allegation that PeopleConnect has over four million subscribers worldwide to see that. Compl. ¶ 66. And in any event, yearbooks are of interest to a definable portion of the public—namely, school alumni communities. Yearbooks memorialize collective school experiences and allow members of school communities to relive these experiences, even decades later. Plaintiffs’ own allegations show how PeopleConnect has contributed to this matter of interest, as Plaintiffs allege that PeopleConnect has compiled records from over “400,000 yearbooks,” each with the names and likenesses of “hundreds, sometimes thousands” of students from those schools. Compl. ¶ 66. Such school communities—which today can include several thousand people from a single class—well exceed the size of communities that California courts have found to have a public interest. *See, e.g., Ruiz*, 134 Cal. App. 4th at 1468–69 (residents of 523 lots); *Grenier*, 234 Cal. App. 4th at 482–83 (550 to 1,000 church members); *Damon*, 85 Cal. App. 4th at 479 (3,000 homeowners’ association members).

Plaintiffs’ allegations that their names and likenesses appear in “advertisements” for yearbooks and yearbook subscriptions do not remove their claims from the reach of the anti-SLAPP statute. *First*, as discussed above, Plaintiffs’ names, likenesses, and information *do not* actually appear in advertisements. *Second*, courts have held that if a publication qualifies as constitutionally protected speech, then disseminating portions of it in advertising for the same publication is likewise protected. *See William O’Neil & Co.*, 202 F. Supp. 2d at 1119; *Polydoros*, 67 Cal. App. 4th at 325; *Montana*, 34 Cal. App. 4th at 796. Moreover, the scope of the anti-SLAPP statute extends *further* than the scope of constitutionally protected speech. *See hiQ Labs*, 273 F. Supp. 3d at 1116. PeopleConnect’s alleged use of excerpts from its yearbooks is, at a minimum, conduct “in furtherance” of its right to free speech on a public issue or matter of public interest. *See* Section 425.16(e)(4).

In *Ancestry.com*, the court dismissed Callahan’s claims, but denied Ancestry’s anti-SLAPP motion, finding that “decades-old yearbooks are not demonstrably an issue of public interest” because yearbooks do not (necessarily) involve “celebrities, public officials, or the public realm or more obvious public interest.” *Ancestry.com*, 2021 WL 783524, at *7. But California’s anti-SLAPP statute protects more than speech about celebrities and public officials. Yearbooks serve an important function as primary-source documents memorializing a community’s activity in a given year and informing the work of historians,

archivists, journalists, genealogists and other scholars. Even the Library of Congress maintains a collection of yearbooks. So yearbooks are at least as much in the “public interest” as, for example, a letter to a single homeowner regarding architectural guidelines (*Ruiz*, 134 Cal. App. 4th at 1468–69) or a letter discussing whether a homeowner’s association should switch to a professional management company (*Damon*, 85 Cal. App. 4th at 479). On this point, PeopleConnect believes the court in *Ancestry.com* was mistaken.

B. Plaintiffs Cannot Show A Likelihood Of Success On Their Claims.

Because Plaintiffs’ claims arise from protected speech or an act in furtherance of protected speech, Plaintiffs bear the burden to “establish a reasonable probability” they will prevail on their claims. *Makaeff*, 715 F.3d at 261. To satisfy this test, Plaintiffs must show that these claims are adequately pleaded. *Planned Parenthood Fed’n of Am Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 834 (9th Cir. 2018). For the reasons stated above, Plaintiffs have failed to make this showing. Accordingly, the Court should grant PeopleConnect’s motion to strike Plaintiffs’ claims and award PeopleConnect its attorney’s fees and costs. *See* Section 425.16(c)(1) (“[A] prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney’s fees and costs.”); *Planned Parenthood*, 890 F.3d at 834 (Section 425.16 fees provision applies in federal court).

CONCLUSION

For the foregoing reasons, the Complaint should be dismissed and Plaintiffs compelled to adjudicate their claims in arbitration. In the alternative, the Complaint should be dismissed for failure to state a claim upon which relief can be granted.

Dated: March 19, 2021

Respectfully submitted,

JENNER & BLOCK LLP

By: /s/ Kate T. Spelman

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Debbie L. Berman

Wade A. Thomson

Attorneys for Defendant PeopleConnect, Inc.

EXHIBIT D

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Attorneys for Defendant

PeopleConnect, Inc.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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

Plaintiffs,

v.

PEOPLECONNECT, INC., a Delaware
Corporation; PEOPLECONNECT INC., a
California Corporation; CLASSMATES MEDIA
CORPORATION, a Delaware Corporation; and
DOES 1 through 50, inclusive,

Defendants.

Case No. 3:20-cv-09203-EMC

DECLARATION OF TARA MCGUANE

1 I, Tara McGuane, hereby declare:

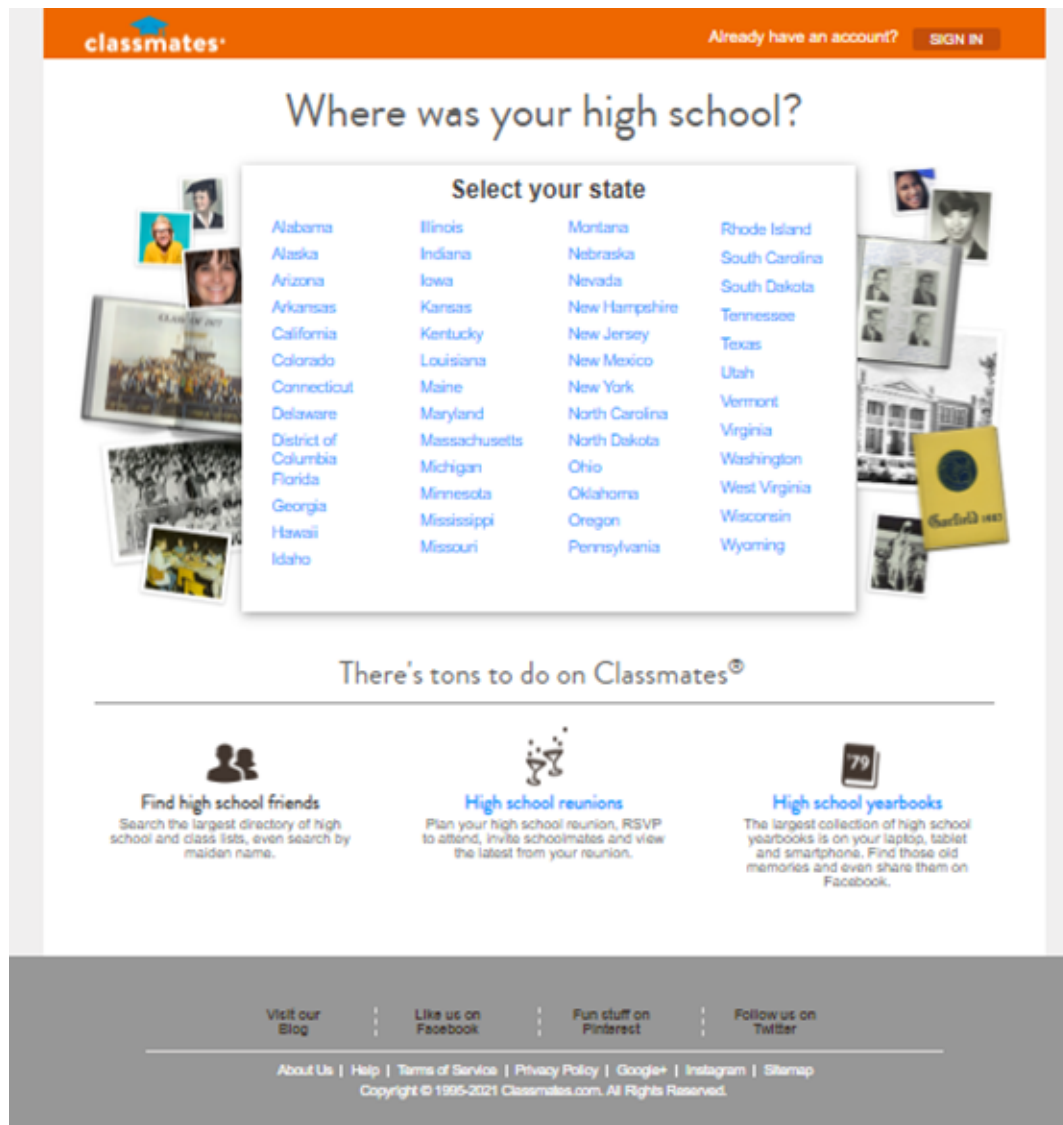
2 1. I am the Associate Director of Compliance and IP at PeopleConnect, Inc.
3 (“PeopleConnect”). I have been in that role since November 2020. In that role, I am responsible for drafting
4 and enforcing the Terms of Service (“TOS”) and am familiar with how the TOS are displayed on
5 Classmates.com. I previously held the position of Senior IP & Marketing Compliance Manager. I have
6 worked at PeopleConnect since 2002.

7 2. PeopleConnect owns and operates Classmates.com.

8 3. Classmates.com provides the general public access to an online database of alumni and
9 yearbook information.

10 4. Classmates.com is governed by the TOS published on Classmates.com. A true and correct
11 copy of the TOS is attached hereto as Exhibit 1.

5. The 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 as shown in the image below.



6. When a user of Classmates.com 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.” The phrase “Terms of Service” is hyperlinked to a copy of the current TOS.

7. The TOS state:

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).

(Ex. 1, Acceptance of Terms.)

8. The TOS includes the following arbitration provision:

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. Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts. Arbitrators can award the same damages and relief that a court can award.

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.

(Id. at Section 13.)

9. Any arbitrations are governed by the following rules:
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.

(Id. at Section 13(B)(i).)

10. The TOS also includes the following 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.

1 (Id. at 13(c).)

2 11. I have reviewed and am familiar with PeopleConnect's business records related to Mr.
3 Benjamin Ross Osborn's use of Classmates.com. PeopleConnect maintains those records in the ordinary
4 course of its business.

5 12. On August 25, 2019, Mr. Osborn created a free Classmates.com account under the username
6 Benjamin Osborn. His account was associated with the email address osbornb1@gmail.com.

7 13. On December 6, 2020, Mr. Osborn created a second free Clasmates.com account under the
8 username John Doe. His account was associated with the email address ben@benosbornlaw.com.

9 14. On December 6, 2020, Mr. Osborn created a third free Classmates.com account under the
10 username John Smith. His account was associated with the email benjamin.r.osborn@gmail.com.

11 15. Mr. Osborn could not have created a free account without first agreeing to the
12 Classmates.com TOS.

13 16. I have reviewed the complaint filed by Plaintiffs in this matter. The Classmates.com
14 webpages reflected in the screenshots in Paragraphs 22-27, 29, 39, 41-45, and 47 of the complaint could
15 only have been accessed after the user agreed to the Classmates.com TOS.

16 I declare under penalty of perjury under the laws of the United States that the foregoing is true and
17 correct and that I executed this declaration on March 18, 2021 in Seattle, Washington.


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Tara McGuane

EXHIBIT E

EXHIBIT 1



Terms of Service

Terms of Service

Update

Effective:

June 29, 2017 for new users

September 1, 2017 for existing users

Our Terms of Service have been updated, [click here](#) for a summary of changes. To view the previous version of the Terms of Service, [click here](#).

INTRODUCTION

Welcome to PeopleConnect and thank you for using our services. Our web sites include PeopleConnect.us, Classmates.com, Intelius.com and USSearch.com, as well as other websites owned and operated by us (collectively, the “Websites”), along with various applications and tools that we operate on third-party websites and devices, such as Facebook, smartphones or tablets (such services offered through the Websites, applications or tools collectively, the “Services”).

ACCEPTANCE OF TERMS

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).

We may change these Terms of Service, in whole or in part, at any time. Posting of the updated Terms of Service on the Websites will constitute notice to you of any such changes, although we may choose other types of notice for certain changes. Changes will become effective upon notice. Your continued use of the Websites or Services following notice shall constitute your acceptance of all changes, and each use of the Websites or Services constitutes your reaffirmation of your acceptance of these Terms of Service. If you do not agree to the changes to these Terms of Service, your sole and exclusive remedy will be to terminate your account and cease use of the Websites or Services.

INDEX OF PROVISIONS

1. [Becoming a Member of and Registering for the Services](#)
2. [Paid Services](#)
3. [Special Terms that Apply to Classmates Users](#)
4. [Special Terms that Apply to Intelius & US Search Users](#)
5. [Our Property Rights](#)
6. [Availability of Services](#)
7. [Linking To or From Our Services](#)
8. [Termination](#)
9. [Copyright Infringement Policy](#)
10. [Disclaimer of Warranties](#)
11. [Limitations of Liability](#)
12. [Indemnification](#)
13. [Mandatory Arbitration, Dispute Resolution and Class Action Waiver](#)
14. [Miscellaneous Terms](#)

1. BECOMING A MEMBER OF AND REGISTERING FOR THE SERVICES

A. Accessing the Services and Becoming a Member. THE SERVICES ARE INTENDED SOLELY FOR ACCESS AND USE BY INDIVIDUALS 18 YEARS OF AGE AND OLDER. BY ACCESSING AND USING THE SERVICES, YOU ARE CERTIFYING THAT YOU ARE AT LEAST 18 YEARS OLD. Our Services are primarily intended to be utilized by residents of the United States and we may limit or restrict access to the Websites and Services based on your geographic location or ISP. While there are parts of the Services where access requires the payment of a fee ("Paid Services"), there is no cost to register to become a member of the Services. The specific Services available to you will vary depending upon (1) whether you register as a member, (2) the community affiliation(s) to which you have self-identified (if you are a Classmates member), and (3) whether or not you choose to purchase Paid Services.

B. Your Information. We will collect, store, compile and utilize information about you, your computer, smartphone or other device, and your use of the Services, including information that you provide in response to questionnaires, surveys and registration forms. Please review our [Privacy Policy](#) for more information about our privacy policies and practices. For your part, you agree that all information that you provide to us or

post on the Services is complete, accurate and up to date. If any of your information changes, you agree to immediately update it. If you fail to update your information or if all or part of your information is (or appears to be) untrue, inaccurate, or incomplete, we may suspend or terminate your account and refuse any and all current or future use of the Services, without refund to you of any fees paid.

Without limiting any of the foregoing, you are responsible for ensuring that the email address you provide to us is valid and that the services, software or systems you use to access your email ("Email Systems") do not block or filter Communications (as defined below). We ask that you use your personal email address when registering. If you provide us with a non-personal email address or use an Email System that interferes with the delivery of Communications, we may not be able to provide you with certain Services. Your failure to provide us with an email address to which we can consistently deliver email may result in the termination of your account.

C. Your Password. During the registration process we may provide you with a unique registration number. We will also either ask you to create a password or assign you a random password, which you can change at any time by logging onto the "Account" portion of the Services. Alternatively, you may have the option of using your Facebook login credentials or similar login processes or co-registration forms from or on other third party websites to create an account and authenticate your access to the website. Because any activities that occur under your account are your responsibility, it is important for you to keep your password secure. Notify us immediately if you believe that someone has used your account without your authorization.

D. Communications. From time to time we will send you communications, in keeping with our [Privacy Policy](#) and as otherwise permitted in these Terms of Service ("Communications"). Please note that any number of issues may interfere with your receipt of such Communications, including some types of Email Systems that may use filtering or blocking techniques that are intended to block email. We are not responsible for the actual delivery or your actual receipt of these Communications.

2. PAID SERVICES

Access to some of the Services requires the purchase of Paid Services. If you elect to purchase Paid Services, you agree to our storage of your payment information and understand that your Paid Services are personal to you, such that you may not transfer or make available your account name and password to others. Any distribution or sharing by you of your account name and password may result in cancellation of your Paid Services without refund and/or additional charges based on unauthorized use. We reserve the right, from time to time, to change the Paid Services, with or without prior notice to you.

A. Payment. Prices for all Paid Services are in U.S. dollars and exclude any and all applicable taxes, unless expressly stated otherwise. To the extent permissible under law, you are responsible for any applicable taxes, whether or not they are listed on your receipt or statement. All applicable taxes are calculated based on the billing

information you provide us at the time of purchase. If you purchase Paid Services, you agree to pay, using a valid credit or debit card or other form of payment that we may accept from time to time ("Payment Method"), the applicable fees and taxes (if any) set forth in the offer that you accepted. We reserve the right, upon prior notice to you, to change the amount of any fees and to institute new fees, effective at the end of your current subscription period. All authorized charges will be billed to your designated Payment Method on the terms described in the specific offer. If payment cannot be charged to your Payment Method or your payment is returned to us for any reason, we reserve the right to either suspend or terminate your access to the unpaid-for Paid Services. It is your responsibility to ensure that sufficient funds are available to cover the charges for the Paid Services, and we have no liability for any overdraft or other fees that you may incur as a result of our processing of your payment.

B. Automatic Renewal Program. Upon your acceptance of an offer for the purchase of any subscription-based Paid Services, you will be enrolled in our automatic renewal program to help ensure that there is no interruption in your access to such Paid Services. Under this program, you authorize us to automatically renew your subscription at the end of the term of the subscription you purchased, and each subsequent term, for the same term length of the subscription you initially purchased (unless otherwise stated in the offer you accepted). Unless you change your renewal status as described below, at the time of each such renewal you authorize us to charge your designated Payment Method at the then-current, non-promotional price (unless otherwise stated in the offer you accepted) for the renewal of your subscription. If you no longer want to be enrolled in our automatic renewal program, you can change your renewal status at any time by completing the following steps:

- Classmates.com - logging onto the [Account](#) portion of the Classmates.com Website, clicking on "Account & Billing" and changing your renewal option from "automatic" to "manual."
- Intelius.com – logging onto the [My Account](#) portion of the Intelius.com Website and click on "cancel my membership."
- USSearch.com - logging onto the [Your Account](#) portion of the USSearch.com Website and click on "cancel service."

Please note that completing these steps will only stop future automatic renewals of your current subscription and will not impact any automatic renewals that occurred prior to the date that you completed these steps.

C. Current Information. You must provide us with current, complete and accurate information for your Payment Method. You must promptly update all information to keep your Payment Method current, complete and accurate (such as a change in billing address, card number or expiration date), and you must promptly notify us if your Payment Method is cancelled (including if you lose your card or it is stolen), or if you become aware of a potential breach of security (such as an unauthorized disclosure or use of your name or password). Changes to such information can be made by accessing the Account portion of the applicable Website or by contacting the applicable Customer Support. If you fail to provide us with any of the foregoing

information, you agree that you are responsible for fees accrued under your Payment Method. In addition, you authorize us to obtain updated or replacement expiration dates and card numbers for your credit or debit card as allowed or provided by your credit or debit card issuer.

D. No Refund Policy. All fees relating to Paid Services, including the initial fees and any subsequent automatic renewal fees (as described above), are non-refundable. If you initiate a chargeback or otherwise reverse a payment made with your Payment Method, we may in our discretion cancel your Paid Services immediately. If we successfully dispute the reversal, and the reversed funds are returned to us, you are not entitled to a refund or to have your Paid Services reinstated.

3. SPECIAL TERMS THAT APPLY TO CLASSMATES USERS

A. Classmates Member Conduct - Community Guidelines. The Classmates Services contain areas that enable members to communicate and share information, including without limitation sending email through the Services, providing information on your profile pages, and posting information on message boards, forums and other areas where you may interact with other members (collectively, the "Communication Tools"). When you use the Communication Tools, you may have the opportunity to disclose, post, upload, or otherwise publicly display, or to share directly with other members, information and other content, including without limitation biographical information, photographs, stories and comments (collectively, "Content"). While we may provide you with these Communications Tools, we also wish to remind you that you should choose carefully what information you post via the Services and share with other members.

You are required to use the Communication Tools responsibly, just as you would act responsibly when communicating or interacting with others in your offline communities. As a result, we expect and require that you take full responsibility for the Content that you post on or send through the Classmates Services. We have established some "Community Standards" that outline your responsibilities when using the Communication Tools.

The following Classmates Community Standards apply to and govern your use of the Communication Tools:

- Do not create a false identity, impersonate any person or entity, or otherwise misrepresent yourself, your age or your affiliation with any person or entity
- Do not register more than one personal membership or register on behalf of another person
- Do not post telephone numbers, street addresses or email addresses in Content that is publicly accessible on the Services, with the exception of the location of a reunion or other appropriate event
- Do not engage in behavior meant to threaten, harass, intimidate or bully others or which constitutes predatory or stalking conduct

- Do not use the Services as a venue to air personal disputes with other individuals
- Do not provide any Content that is illegal, obscene, pornographic or sexually explicit, depicts graphic or gratuitous violence or illegal drug paraphernalia, or is derogatory, demeaning, malicious, defamatory, abusive, hateful, racially or ethnically offensive, or otherwise determined to be objectionable
- Do not provide any Content that encourages a criminal offense or infringes, misappropriates, or otherwise violates the intellectual property rights or other rights of any third party
- Do not post web addresses that link to pornographic or inappropriate content, websites that promote your or someone else's commercial gain, websites that provide services similar to those offered by us, or any other content that violates these Community Standards
- Do not provide or post private communications from us or any other party without such party's permission
- Do not copy or re-post content provided by others or otherwise use information or content you obtained on the Services in any manner not authorized by us or the contributor
- Do not participate in any unauthorized or unsolicited promotions, advertising, junk mail, spam, or any other form of solicitation, or otherwise use the Services for any commercial purpose
- Do not violate any applicable local, state, national and international law or regulation
- Do not interfere with, interrupt, destroy or limit the functionality of the Services or any computer software or hardware or telecommunications equipment
- Do not try to gain unauthorized access to the Services, other members' accounts, or computers connected to the Services
- Do not collect users' content or information, or otherwise access the Services, using automated means, such as scripts, bots, robots, spiders or scrapers
- Do not do anything that could damage, disable, overburden or impair the proper working or appearance of the Services, such as a denial of service attack or interference with page rendering or other functionality

B. . Classmates Member Conduct - Monitoring and Enforcement. We do not actively monitor the Communication Tools or the Content that is provided through such Communication Tools, nor are we obligated to do so. Accordingly, we do not guarantee the accuracy, integrity or quality of the Content. Because individuals sometimes choose not to comply with our policies and practices, you may be exposed to Content that you find offensive or otherwise objectionable. We encourage you to use the tools available on the Classmates Services to report any Content that you think may violate the Community Standards. We may investigate the complaints that come to our attention, but are not obligated to do so. If we choose to investigate, we will take any action that we believe is appropriate in our sole discretion, such as issuing warnings, removing the Content, or suspending or terminating accounts. However, because situations and interpretations vary, we also reserve the right not to take any action. In such cases, we may not remove Content that you believe is

objectionable. Please remember that you can always choose to refrain from using any part of the Services that exposes you to something that you are uncomfortable with. Under no circumstances will we be liable in any way for any Content, including any errors or omissions in any Content or any loss or damage of any kind incurred as a result of the use of, access to or denial of access to any Content. In addition, we are not responsible for the conduct, whether online or offline, of any user of the Website or member of these Services.

C. Submitting or Posting Content on Classmates. We do not claim ownership of any of the Content you submit or post through the Classmates Services or allow us to obtain from third parties to include in the Services. Instead, you hereby grant us a royalty-free, worldwide, transferable, sub-licensable, non-exclusive license to use, reproduce, publish, store, distribute, display, communicate, perform, transmit, create derivative works based upon, and promote such Content (in whole or in part) in any medium now known or hereafter devised. Please remember that you are ultimately responsible for all of your Content, and you therefore warrant and represent that you are entitled to grant the foregoing license and that the Content does not violate any third party rights. No compensation will be paid for the use of your Content.

4. SPECIAL TERMS THAT APPLY TO INTELIOUS & US SEARCH USERS

A. Intelious and US Search Member Conduct.

The following member conduct guidelines apply to and govern your use of the Intelious or US Search Services:

- Do not create a false identity, impersonate any person or entity, or otherwise misrepresent yourself, your age or your affiliation with any person or entity
- Do not register more than one personal account/membership or register on behalf of another person
- Do not engage in behavior meant to threaten, harass, intimidate or bully others or which constitutes predatory or stalking conduct
- Do not use the Services to seek information about or harm minors in any way
- Do not provide or post private communications from us without permission
- Do not violate any applicable local, state, national and international law or regulation
- Do not interfere with, interrupt, destroy or limit the functionality of the Services or any computer software or hardware or telecommunications equipment
- Do not try to gain unauthorized access to the Services, other members' accounts, or computers connected to the Services
- Do not resell any of the products or services that you purchase from us
- Do not collect users' content or information, or otherwise access the Services, using automated means, such as scripts, bots, robots, spiders or scrapers
- Do not do anything that could damage, disable, overburden or impair the proper working or appearance of the Services, such as a denial of service attack or interference with page rendering or other functionality

B. FCRA Restrictions. We do not provide consumer reports and are not a consumer reporting agency as defined by the [Fair Credit Reporting Act \(15 U.S.C. § 1681b\)](#) (the “FCRA”). The Services cannot be used to determine an individual’s eligibility for credit, insurance, employment, housing or any other purpose prohibited under the FCRA Federal Trade Commission or court interpretations of the FCRA, or similar statutes or determinations.

C. Additional Restrictions. When using the Intelius or US Search Services, you should not assume that the data available through these Services include a complete or accurate representation of a person’s criminal or civil judgment background or other information. Certain records, such as criminal, marriage, divorce, etc. may not be available in all states and counties. The data contained in the databases used by the Services have been compiled from publicly available information (such as from court records, phone directories, social networks, business websites, and other public sources) and other proprietary sources for the specific purposes of locating individuals and/or providing general background information about individuals. Our technology can also analyze public data to reveal possible relationships, even when official records aren’t available. WE HAVE NOT VERIFIED THE DATA OR INFORMATION AVAILABLE THROUGH THE SERVICES AND DO NOT WARRANT ITS ACCURACY, LEGITIMACY, TIMELINESS, LEGALITY OR COMPLETENESS. ANY DATA OR INFORMATION PURCHASED FROM US VIA THE SERVICES IS PROVIDED “AS IS,” WITHOUT WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, FITNESS FOR A PARTICULAR PURPOSE, TITLE, OR IMPLIED WARRANTIES OF MERCHANTABILITY OR NON-INFRINGEMENT.

D. Search Products. All reports purchased via the Intelius and US Search Services are made available in the Account section of the applicable Website for a limited time, as follows:

- Intelius reports are made available for 45 days from date of purchase.
- US Search reports are made available for 1 year from date of purchase.
- Reports obtained via a subscription service are made available for as long as the subscription remains active.

To extend their availability, search reports may be printed or saved digitally using common web browser features.

5. OUR PROPERTY RIGHTS

The Services, and all of the content, information and other material that they contain, other than the Content posted by our users, are owned by us, or our third party licensors, and are protected by intellectual property and other rights and laws throughout the world. Subject to your compliance with these Terms of Service, we grant you a limited, revocable, non-exclusive, non-assignable, non-sublicenseable license for the period of your membership to access the Services and view any materials available on the Services for the sole purpose of using the Services. Aside from this limited license, nothing found on the Services maybe copied, reproduced,

republished, distributed, sold, licensed, transferred or modified without our express written permission. In addition, the trademarks, domain names, logos and service marks displayed on the Services are our property or the property of our licensors. This Agreement does not grant you any right or license with respect to any such trademarks, domain names, logos or service marks. If you are aware of Materials on the Services that infringes the copyright or other right of a third party, please contact us through the Copyright Infringement Policy process, which is described in Section 9 below.

6. AVAILABILITY OF SERVICES

We do not provide you with access to the Internet or the equipment necessary to access the Internet or the Services. You are responsible for the fees charged by others to obtain access to the Services and for obtaining the equipment necessary to access the Services. From time to time we may modify, suspend or discontinue any of the Services with or without notice to you. We shall not be liable to you for any such modification, suspension or discontinuance. We may establish certain policies and practices concerning use of the Services, such as the maximum number of email messages, search reports, message board postings or other Content that can be sent through the Services and the number of days that these items will be retained on our systems. We have no responsibility or liability for the deletion or failure to store any messages and other communications or other Content, or search reports maintained or transmitted by or through the Services. We reserve the right to change our practices and policies at any time, in our sole discretion, with or without notice to you.

7. LINKING TO OR FROM THE SERVICES

You cannot link to the Services without our prior written consent. While the Services may have links to the websites of third parties, we have no control over those websites. We are not responsible or liable for any content, advertising, products, services, information or other materials on or available from those websites. We are also not responsible or liable, directly or indirectly, for any damage or loss caused or alleged to be caused by or in connection with use of or reliance on any content, advertising, products, services, information or other materials on those websites.

8. TERMINATION

You may terminate your account, for any or no reason, at any time by contacting Customer Support through the applicable Website (see Section 2 above for more information about termination of Paid Services). We may terminate your account, for any or no reason, at any time, with or without notice. If we determine, in our sole discretion, that you are not in compliance with the Terms of Service or Privacy Policy, we reserve the right to restrict, suspend or terminate your account. Upon any termination of your account, we may immediately deactivate or delete your account and all related information and/or bar any further access to your account, Content or information. If you have purchased Paid Services from us, any termination by you, or by us with cause, is subject to the no-refund policy described in Section 2(D) above.

9. COPYRIGHT INFRINGEMENT POLICY

In compliance with the Digital Millennium Copyright Act ("DMCA"), we have established the procedure outlined below to address alleged copyright infringement on the Services. If you believe that your work has been copied and has been posted on the Services in a way that constitutes copyright infringement, you may provide us with notice of your complaint by providing our Designated Copyright Agent with the following information in writing:

1. The electronic or physical signature of the owner of the copyright or a person authorized to act on the owner's behalf;
2. Identification of the copyrighted work that you claim has been infringed;
3. Identification of the material that is claimed to be infringing, with information about its location reasonably specific to permit us to locate the material;
4. Your name, address, telephone number, and email address;
5. A statement by you that you have a good faith belief that the disputed use is not authorized by the copyright owner, its agent, or the law; and
6. A statement, made under penalty of perjury, that the above information in your notification is accurate and that you are the copyright owner or are authorized to act on the copyright owner's behalf.

To be effective, your notification must be in writing and include the above information. Our Designated Copyright Agent to receive your notification is:

Name of Agent: Intellectual Property Manager

Address: 1501 Fourth Avenue, Suite 400, Seattle, WA 98101

Telephone Number of Designated Agent: (206) 301-5800

Facsimile Number of Designated Agent: (206) 301-5795

Email Address Designated Agent: copyrightnotice@peopleconnect.us

We, in our sole discretion, reserve the right to refuse additional Content from members who have posted allegedly infringing material, to delete the material, and/or to terminate such members' accounts.

After receiving a notification, we will process and investigate the notification and will take appropriate actions under the DMCA and other applicable intellectual property laws. Upon receipt of a notification that complies or substantially complies with the DMCA (as set forth above), we will act expeditiously to remove or disable access to any material claimed to be infringing or claimed to be the subject of infringing activity, and will act expeditiously to remove or disable access to any reference or link to material or activity that is claimed to be infringing. We will promptly take reasonable steps to notify the member that is the subject of the notification that it has removed or disabled access to such material.

If you are subject to a notification, you may provide us with a counter notification by providing our Designated Copyright Agent the following information in writing:

1. Your physical or electronic signature;
2. Identification of the material that has been removed or to which access has been

- disabled and the location at which the material appeared before it was removed or access to it was disabled;
3. A statement under penalty of perjury that you have a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled; and
 4. Your name, address, and telephone number, and a statement that you consent to the jurisdiction of Federal District Court for the judicial district in which your address is located, or if your address is outside of the United States, for any judicial district in which we may be found and that you will accept service of process from the person who provided the initial notification of alleged infringement.

Upon receipt of a proper counter notification under the DMCA (as set forth above), we will promptly provide the person who provided the initial notification with a copy of the counter notification and inform that person that we will reinstate the removed material or cease disabling access to it in ten (10) business days. Additionally, we will replace the removed material and cease disabling access to it not less than ten (10), nor more than fourteen (14) business days following receipt of the counter notice, unless our Designated Copyright Agent first receives notice from the person who submitted the initial notification that such person has filed an action seeking a court order to restrain you from engaging in infringing activity relating to the material on the Services.

10. DISCLAIMER OF WARRANTIES

YOU UNDERSTAND AND AGREE THAT:

THE SERVICES ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS. WE DISCLAIM TO THE FULLEST EXTENT PERMISSIBLE BY LAW, AND YOU WAIVE, ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT. THE FUNCTIONS, MATERIALS AND CONTENT OF THE SERVICES ARE NOT WARRANTED TO BE UNINTERRUPTED, TIMELY, SECURE OR ERROR-FREE, AND WE MAKE NO WARRANTY THAT THE INFORMATION ON THE SERVICES WILL BE ACCURATE, CURRENT OR RELIABLE OR THAT THE QUALITY ANY PRODUCTS, INFORMATION OR OTHER MATERIAL PURCHASED OR OBTAINED BY YOU THROUGH THE SERVICES WILL MEET YOUR EXPECTATIONS. WE DISCLAIM ANY RESPONSIBILITY FOR THE DELETION, FAILURE TO STORE, MISDELIVERY, OR UNTIMELY DELIVERY OF ANY INFORMATION OR MATERIAL. YOU ASSUME THE ENTIRE RISK OF LOSS AND DAMAGE DUE TO YOUR USE OF THE SERVICES, INCLUDING BUT NOT LIMITED TO THE COST OF REPAIRS OR CORRECTIONS TO YOUR HARDWARE OR SOFTWARE. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES, AND AS A CONSEQUENCE SOME OF THE ABOVE DISCLAIMERS MAY NOT APPLY TO YOU.

11. LIMITATIONS OF LIABILITY

YOUR USE OF THE SERVICES IS ENTIRELY AT YOUR SOLE RISK. WE, OUR PARENTS, SUBSIDIARIES AND OTHER AFFILIATES, AND THEIR RESPECTIVE OWNERS, DIRECTORS, OFFICERS, EMPLOYEES, LICENSORS, AGENTS AND CONTRACTORS SHALL NOT BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES OR LOSSES (INCLUDING WITHOUT LIMITATION LOSS OF PROFITS, GOODWILL, USE, DATA OR OTHER INTANGIBLE LOSSES), WHICH YOU MAY INCUR IN CONNECTION WITH THE USE OF, OR INABILITY TO USE, THE SERVICES. IN ADDITION, OUR AGGREGATE LIABILITY WILL NOT EXCEED THE GREATER OF ONE HUNDRED DOLLARS (\$100) OR THE AMOUNT YOU HAVE PAID US IN THE TWELVE MONTHS PRIOR TO THE DATE ON WHICH YOUR CLAIM AROSE. THE FOREGOING LIMITATIONS OF LIABILITY ARE PART OF THE BASIS OF THE BARGAIN BETWEEN YOU AND US AND SHALL APPLY TO ALL CLAIMS OF LIABILITY (INCLUDING WITHOUT LIMITATION WARRANTY, TORT, NEGLIGENCE, CONTRACT OR STRICT LIABILITY), EVEN IF WE HAVE BEEN TOLD OF THE POSSIBILITY OF ANY SUCH DAMAGE AND EVEN IF THE AVAILABLE REMEDIES FAIL THEIR ESSENTIAL PURPOSE. SOME JURISDICTIONS DO NOT ALLOW THE LIMITATION OF LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES, AND AS A CONSEQUENCE SOME OF THE ABOVE LIMITATIONS MAY NOT APPLY TO YOU. IN ANY SUCH CASE, OUR LIABILITY WILL BE LIMITED TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW.

12. INDEMNIFICATION

You shall indemnify and hold harmless, and at our request, defend us, our parents, subsidiaries, and other affiliates, as well as their respective owners, directors, officers, shareholders, employees, licensors, agents and contractors (each, an "Indemnified Party") from and against any and all claims, proceedings, damages, injuries, liabilities, losses, costs and expenses (including reasonable attorneys' fees, an allocation for in-house counsel, and other legal costs) arising out of your acts or omissions, including claims resulting from your use of the Services, your submission, posting or transmission of information or Content, or any breach of your obligations set forth in the Terms of Service or Privacy Policy. You shall reimburse each Indemnified Party on demand for any costs, expenses and liabilities incurred by such Indemnified Party to which this indemnity relates.

13. MANDATORY ARBITRATION, DISPUTE RESOLUTION AND CLASS ACTION WAIVER

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

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. Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts. Arbitrators can award the same damages and relief that a court can award.

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.

A. CONTACT US FIRST. If you intend to pursue or participate in any Dispute in arbitration or small claims court (solely to the extent specifically provided below), you must first notify us of the dispute in writing at least thirty (30) days in advance of initiating arbitration or the small claims court action (if applicable) and attempt to informally negotiate a resolution to the Dispute in good faith. Notice to us should be sent via certified mail to: PeopleConnect, Inc., 1501 4th Avenue, Suite 400, Seattle, WA 98101, Attention: Legal Department. The notice of Dispute must: (a) include your name, address, phone number, and email address(es) used to register with or use the Services; (b) describe the nature and basis of the Dispute; (c) enclose and/or identify all relevant documents and/or information; and (d) set forth the specific relief sought. If the applicable PeopleConnect Entity and you do not reach an agreement to resolve the Dispute within thirty (30) days after the notice is received, you may commence with a formal arbitration proceeding or small claims court action (if applicable).

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. **Location.** Unless otherwise required by the AAA rules, the arbitration shall be held in Seattle, Washington. You and PeopleConnect may elect to have the arbitration conducted based solely on written submissions, subject to the arbitrator's discretion to require an in-person hearing. In cases where an in-person hearing is held, you or the applicable PeopleConnect Entity may attend by telephone, unless the arbitrator requires otherwise.
- iii. **Cost Sharing.** Payment of all filing, administration and arbitrator fees will be governed by the AAA's rules, unless otherwise stated in this agreement. The applicable PeopleConnect Entity will pay as much of the filing, administration and arbitrator fees as the arbitrator deems necessary to prevent the arbitration from being cost-prohibitive, unless the arbitrator determines that a Dispute was filed for purposes of harassment or is patently frivolous. Reasonable documented attorneys' fees of both parties will be borne by the party that ultimately loses.
- iv. **Arbitrator's Decision.** The arbitrator will decide the substance of the Dispute in accordance with the laws of the state of Washington, regardless of choice of law principles, and will honor all claims of privilege recognized by law. The arbitrator will have the power to award a party any relief or remedy that the party could have received in court in accordance with the law(s) that apply to the Dispute. The arbitrator's award shall be final and binding and judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

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 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.

F. INJUNCTIVE RELIEF. Notwithstanding anything to the contrary in the foregoing, either party may bring suit in court seeking a temporary or preliminary injunctive relief, which shall then be subject to review by the arbitrator should such party further seek permanent injunctive relief in arbitration.

G. TIME LIMIT TO PURSUE DISPUTE. You agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to use of the Services or the Terms of Service or [Privacy Policy](#) must be filed within one (1) year after such claim or cause of action arose or be forever barred.

H. CHANGES TO ARBITRATION CLAUSE. We may make changes to this arbitration provision during the term of our Services to you. You may reject any material changes by sending us written objection within thirty (30) days of the change to PeopleConnect, Inc., 1501 Fourth Avenue, Suite 400, Seattle, WA 98101, Attention: Legal Department. By rejecting any future material change, you are agreeing to arbitrate in accordance with the unmodified language of the previous version.

14. MISCELLANEOUS TERMS

Our relationship is not one of agency or partnership and neither you nor we shall be deemed to be a partner, employee, fiduciary, agent or representative of the other by your use of the Services. You may not assign or transfer your rights to any third party. The terms and conditions in these Terms of Service are severable. In the event that any provision is determined to be unenforceable or invalid, such provision shall still be enforced to the fullest extent permitted by applicable law, and such determination shall not affect the validity and enforceability of any other provisions. If we fail to enforce any provision of these Terms of Service it shall not constitute a waiver of such provision. We may assign our rights and obligations under these Terms of Service. These Terms of Service will inure to the benefit of our successors, assigns and licensees. The failure of either party to insist upon or enforce the strict performance of the other party with respect to any provision of these Terms of Service, or to exercise any right thereunder, will not be construed as a waiver or relinquishment to any extent of such party's right to assert or rely upon any such provision or right in that or any other instance; rather, the same will be and will remain in full force and effect. The Terms of Service, the [Privacy Policy](#), and any additional terms incorporated by reference herein will be governed by the laws of the state of Washington and constitute the entire

understanding between us regarding your access to, license and use of the Services and supersede any prior agreements, statements or representations with respect to the same.

PRODUCTS

[Intelius](#)

[Classmates](#)

ABOUT

[Mission](#)

[Core Values](#)

[Leadership Team](#)

CAREERS

[Jobs at](#)

[PeopleConnect](#)

COMMUNICATE WITH US

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EXHIBIT F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MEREDITH CALLAHAN, et al.,

Plaintiffs,

v.

PEOPLECONNECT, INC.,

Defendant.

Case No. [20-cv-09203-EMC](#)

**ORDER DENYING DEFENDANT'S
MOTION TO COMPEL
ARBITRATION**

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' 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

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 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).

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.

“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.

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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 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

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.

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 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 submit 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 (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 (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 (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.

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. 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 (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 (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 (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 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 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (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



EDWARD M. CHEN
United States District Judge

EXHIBIT G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MEREDITH CALLAHAN, et al.,

Plaintiffs,

v.

PEOPLECONNECT, INC.,

Defendant.

Case No. [20-cv-09203-EMC](#)

**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**

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 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.

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 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).

1 **I. FACTUAL & PROCEDURAL BACKGROUND**

2 In their complaint, Plaintiffs allege as follows.

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

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

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

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

27 Plaintiffs have asserted the following claim for relief:

28 (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."

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

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."

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

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

1 *Callahan v. Ancestry.com Inc.*, No. 20-cv-08437-LB, to support its claim of CDA immunity. *See*
 2 *Callahan v. Ancestry.com Inc.*, No. 20-cv-08437-LB, 2021 U.S. Dist. LEXIS 37811 (N.D. Cal.
 3 Mar. 1, 2021) (hereinafter “*Ancestry P*”); *Callahan v. Ancestry*, No. 20-cv-08437-LB, 2021 U.S.
 4 Dist. LEXIS 112036 (N.D. Cal. June 15, 2021) (hereinafter “*Ancestry IP*”). In fact, PeopleConnect
 5 contends that the Court must give Judge Beeler’s decisions collateral estoppel effect because the
 6 plaintiffs in the *Ancestry* case are the same as Plaintiffs herein. *See generally Collins v. D.R.*
 7 *Horton, Inc.*, 505 F.3d 874, 884 (9th Cir. 2007) (stating that defensive collateral estoppel “‘occurs
 8 when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously
 9 litigated and lost against another defendant’”).

10 The Court rejects the collateral estoppel argument. Judge Beeler’s *Ancestry* case was a
 11 federal court case, but predicated on diversity jurisdiction. “[F]ederal common law governs the
 12 claim-preclusive effect of” a judgment rendered ‘by a federal court sitting in diversity.’” *NTCH-*
 13 *WA, Inc. v. ZTE Corp.*, 921 F.3d 1175, 1180 (9th Cir. 2019) (quoting *Semtek Int’l Inc. v. Lockheed*
 14 *Martin Corp.*, 531 U.S. 497, 508 (2001)). However, under the federal common law, where the
 15 prior judgment was predicated on diversity jurisdiction, state law on preclusion applies rather than
 16 federal law because “there is no need for a uniform federal rule.” *Semtek*, 531 U.S. at 508 (stating
 17 that, “indeed, nationwide uniformity in the substance of the matter is better served by having the
 18 same claim-preclusive rule (the state rule) apply whether the dismissal has been ordered by a state
 19 or a federal court”); *see also Taco Bell Corp. v. TBWA Chiat/Day Inc.*, 552 F.3d 1137, 1144 (9th
 20 Cir. 2009) (stating that “[f]ederal common law requires application of ‘the law that would be
 21 applied by state courts in the State in which the federal diversity court sits’”). Under California
 22 law, “a judgment is not final for purposes of collateral estoppel while open to direct attack, e.g., by
 23 appeal.” *Abelson v. Nat’l Union Fire Ins. Co.*, 28 Cal. App. 4th 776, 787 (1994). In the instant
 24 case, there is no dispute that the *Ancestry* plaintiffs have appealed Judge Beeler’s decisions to the
 25 Ninth Circuit; therefore, collateral estoppel cannot apply under California law because there is no
 26 final judgment.

27 In its papers, PeopleConnect protests the application of California law on collateral
 28 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*

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

1 *Ops. Inc.*, No. 2:20-cv-02292-GMN-BNW, 2021 U.S. Dist. LEXIS 177337, at *29-32 (D. Nev.
2 Sept. 16, 2021) (concluding that defendant acted as information content provider and adding that,
3 even if it were not, “the Court cannot grant dismissal based on the facts alleged in the Complaint
4 because it is unclear whether the yearbook providers [*i.e.*, publishers] – the ‘information content
5 providers’ who are ‘responsible . . . for the creation or development’ of the yearbooks – consented
6 to the information's publication on the internet”).

7 In other words, “[e]ven where the technical requirements are all met, the doctrine is to be
8 applied “only where such application comports with fairness and sound public policy.”” *Direct*
9 *Shopping Network, LLC v. James*, 206 Cal. App. 4th 1551, 1562 (2012). In *Parklane Hosiery Co.*
10 *v. Shore*, 439 U.S. 322 (1979), the Supreme Court stated, in addressing offensive collateral
11 estoppel, that a trial court has discretion to determine when the doctrine should be applied and
12 that a trial court should not allow the use of offensive collateral estoppel where application would
13 be unfair to the defendant – *e.g.*, “if the judgment relied upon as a basis for the estoppel is itself
14 inconsistent with one or more previous judgments in favor of the defendant.” *Id.* at 330. A
15 California state court has noted that, even though *Parklane* involved a federal court trial, “we
16 believe the principles articulated therein concerning the effect of inconsistent verdicts on the
17 application of collateral estoppel are equally pertinent to state court actions.” *Sandoval v.*
18 *Superior Court*, 140 Cal. App. 3d 932, 944 (1983) (addressing offensive collateral estoppel).
19 Similar concerns should inform defensive collateral estoppel as well. *See, e.g., Missud v. City &*
20 *Cty. of S.F.*, No. 15-cv-05596-JCS, 2017 U.S. Dist. LEXIS 40799, at *56 (N.D. Cal. Mar. 21,
21 2017) (stating that a factor that “may be considered to determine whether the assertion of
22 defensive collateral estoppel is equitable [is] the potential for inconsistent outcomes”); Restat. 2d
23 of Judgments, § 29(4) (providing that “[a] party precluded from relitigating an issue with an
24 opposing party . . . is also precluded from doing so with another person unless . . . circumstances
25 justify affording him an opportunity to relitigate the issue” – *e.g.*, “[t]he determination relied on as

26
27
28 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”).

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 contrary to *Batzel* which focuses on the reasonable perception of the service provider. PeopleConnect fails to

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 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.

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

8 In the instant case, it is obvious that the yearbook users/purchasers were not the creators or
9 developers of the yearbooks. Instead, the yearbook authors/publishers were the content providers.
10 PeopleConnect cannot claim the benefit of CDA immunity, absent a reasonable basis to believe
11 that the yearbook authors/publishers intended for there to be publication on the Internet. This
12 presents a question of fact that cannot be resolved at the 12(b)(6) phase of proceedings.⁷

13 B. Copyright Preemption

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

17 1. Collateral Estoppel

18 Plaintiffs argue first that PeopleConnect is precluded from raising the copyright
19 preemption defense based on a decision from a Washington district court in *Knapke*. In *Knapke* –
20 where PeopleConnect was sued for the same basic conduct as that at issue in the case at bar – the
21 court rejected the copyright preemption defense because “‘a publicity-right claim is not preempted
22 when it targets nonconsensual use of one’s name or likeness *on merchandise or in advertising*.’”

23
24 ⁷ There would also appear to be a question of fact as to whether PeopleConnect should be deemed
25 a developer of information itself – *i.e.*, not just a mere service provider – to the extent it was not
26 simply republishing yearbook photographs and/or information. *See Knapke*, 2021 U.S. Dist.
27 LEXIS 150249, at *10-11 (holding that PeopleConnect was not protected by CDA immunity
28 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”).

1 *Id.* at *12 (emphasis added).

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

7 PeopleConnect asserts that *Knapke* cannot be given collateral estoppel effect because no
8 final judgment has been reached in that case. In response, Plaintiffs contend that a final judgment
9 need not be a formal final judgment closing the case in its entirety; rather, the question is whether
10 the *Knapke* court essentially reached a final decision in rejecting copyright preemption. Plaintiffs
11 are correct that a formal final judgment or decision is not necessary. *See, e.g., Ensley v. Pitcher*,
12 152 Wash. App. 891, 901 (2009) (“While the record does not include an entry of final judgment
13 under CR 54(b) as to the summary judgment dismissing Red Onion, there are no other indicia in
14 the record that the summary judgment decision was not final as a practical matter.”); *Lee v.*
15 *Ferryman*, 88 Wash. App. 613, 622 (1997) (“The second requirement is also satisfied because a
16 grant of summary judgment in favor of Ferryman in the Oregon action constitutes a final judgment
17 on the merits and has the same preclusive effect as a full trial of the issue. As one court noted,
18 ‘[i]t would be strange indeed if a summary judgment could not have collateral estoppel effect.
19 This would reduce the utility of this modern device to zero.’”). However, Plaintiffs have not
20 pointed to any Washington state court authority holding that a decision made at the pleadings
21 stage is sufficiently final to give rise to a preclusive effect. (Plaintiffs primarily relied on a
22 Seventh Circuit case, *Gilldorn Savings Ass’n v. Commerce Savings Ass’n*, 804 F.2d 390, 393 (7th
23 Cir. 1986) (applying federal law on collateral estoppel).) More important, even though it is clear
24 that the *Knapke* court rejected the copyright preemption defense in its decision, it is not clear that
25 the court was thereby foreclosing PeopleConnect from raising the defense again (*i.e.*, after
26 discovery has been taken and a factual record has been developed). The Court, therefore, declines
27 to apply collateral estoppel and considers the merits of PeopleConnect’s copyright preemption
28 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.” *Maloney v.*

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.

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

2 3. Use of Name or Likeness in Advertising

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

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

14 The Ninth Circuit began its preemption analysis by noting that

15 "[w]e have adopted a two-part test," in accordance with [17 U.S.C.]
16 section 301, "to determine whether a state law claim is preempted by
17 the Act." First, we decide "whether the 'subject matter' of the state
18 law claim falls within the subject matter of copyright as described in
19 17 U.S.C. §§ 102 and 103." Second, assuming it does, we determine
20 "whether the rights asserted under state law are equivalent to the
21 rights contained in 17 U.S.C. § 106, which articulates the exclusive
22 rights of copyright holders."

23 *Id.* at 1010.

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

26 Here, the publicity-right claims arise from the licensing of
27 photographs, which plaintiffs concede are expressive "pictorial"
28 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

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

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

1 added); *cf. Cher v. Forum Int'l, Ltd.*, 692 F.2d 634, 639 (9th Cir. 1982) (stating that, if a
2 publication is protected by the First Amendment, “[c]onstitutional protection extends to the
3 truthful use of a public figure's name and likeness in advertising which is merely an adjunct of the
4 protected publication and promotes only the protected publication”).

5 As indicated above, there is a two-part test to determine whether a state law claim is
6 preempted by the Copyright Act: (1) does the subject matter of the state law claim fall within the
7 subject matter of copyright as described in 17 U.S.C. §§ 102 and 103, and (2) if so, are the rights
8 asserted under state law equivalent to the rights contained in § 106, which articulates the exclusive
9 rights of copyright holders? *See Laws v. Sony Music*, 448 F.3d 1134, 1137-38 (9th Cir. 2006).
10 The parties have focused on the first part of the test only. Plaintiffs have not challenged the
11 second part of the test. Even if they had, their position would lack merit based on *Laws*. *See at*
12 1143-44 (in discussing the second part of the test, stating that the “mere presence of an additional
13 element (‘commercial use’) in section 3344 is not enough to qualitatively distinguish [plaintiff’s]
14 right of publicity claim from a claim in copyright” because “[t]he extra element must transform
15 the nature of the action” and, “[a]lthough the elements of [the] state law claims may not be
16 identical to the elements in a copyright action, the underlying nature of [the] state law claims is
17 part and parcel of a copyright claim”); *accord Jackson*, 972 F.3d at 52-53 (noting that
18 “commercial interests have always played an enormous role in copyright law” and therefore,
19 “[e]ven if a commercial purpose is a necessary element of a Connecticut right of publicity claim,
20 this does not necessarily take the right of publicity outside of equivalency with the ‘rights within
21 the general scope of copyright’”). Here, the display of the photos from the yearbook – the
22 copyrighted work – requires no new transformative element to satisfy Plaintiffs’ § 3344, § 17200,
23 and unjust enrichment claims.

24 Accordingly, the Court concludes that Plaintiffs’ § 3344, § 17200, and unjust enrichment
25 claims are preempted by the Copyright Act, but only in part. The § 3344, § 17200, and unjust
26 enrichment claims are preempted to the extent they are based on the use of Plaintiffs’ names and
27 likenesses taken from the yearbooks themselves to advertise those reprinted yearbooks. To the
28 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.

1 *Id.* at 806-07 (emphasis added).

2 The Court acknowledges that there are some authorities to support PeopleConnect's
3 position. *See, e.g., Cohen v. Facebook, Inc.*, 798 F. Supp. 2d 1090, 1097 (N.D. Cal. 2011)
4 (Seeborg, J.) (stating that "[r]esulting injury is the sine qua non of a cause of action for
5 misappropriation of name" and, "[h]ere, plaintiffs' sole allegation relating to injury is the
6 conclusory assertion, repeated at least twice in the complaint, that they 'have suffered injury-in-
7 fact by having the name[s] and likeness[es] misappropriated without their knowledge or
8 consent"); *Ancestry I*, 2021 U.S. Dist. LEXIS 37811, at *13 (Beeler, J.) (in discussing standing,
9 holding that plaintiffs did not adequately plead an injury in fact – *e.g.*, plaintiffs "did not show that
10 they had a commercial interest in their images that precluded [the defendant's] use of them").
11 Nevertheless, it finds the authorities cited above more persuasive. Economic value may
12 reasonably be inferred from PeopleConnect's use of the images to advertise, and this is sufficient
13 to defeat a motion under Rule 12(b)(6).

14 ii. Statutory Damages

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

20 Although the argument seems strained on its face, there is authority to support it, including
21 decisions from Judge Seeborg and Judge Koh. *See Cohen*, 798 F. Supp. 2d at 1097 (Seeborg, J.)
22 (indicating that, to get statutory damages, a plaintiff must show some harm; "'statutory minimum
23 damages were meant to compensate non-celebrity plaintiffs who suffer . . . mental anguish yet no
24 discernible commercial loss'") (emphasis omitted); *Perkins v. LinkedIn Corp.*, 53 F. Supp. 3d
25 1222, 1242 (N.D. Cal. 2014) (Koh, J.) (recognizing that "[t]he text of section 3344 . . . contains no
26 express requirement that a plaintiff plead mental harm in order to claim the minimum statutory
27 damages figure" but a state appellate court "has inferred such a requirement from section 3344's
28 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

1 that she cannot prove actual damages or at least actual damages in excess of \$750. *Cf. Perkins*, 53
2 F. Supp. 3d at 1246 (stating that “the real injury compensated in *Miller* was not the reputational
3 harm itself; it was the effect of that reputational harm on Miller’s feelings and mental well-
4 being”).

5 b. Advertising

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

12 The first argument lacks merit. Nothing in the text of the statute suggests that endorsement
13 is required – only that the name or likeness be used. Case law also weighs against
14 PeopleConnect’s position. *See, e.g., Eastwood v. Superior Court*, 149 Cal. App. 3d 409, 418-19
15 (1983) (stating that “California law has not imposed any requirement that the unauthorized use or
16 publication of a person’s name or picture be suggestive of an indorsement or association with the
17 injured person”; adding that “the appearance of an ‘indorsement’ is not the *sine qua non* of a claim
18 for commercial appropriation”); *see also Fifty-Six Hope Rd. Music, Ltd. v. A.V.E.L.A., Inc.*, 778
19 F.3d 1059, 1072 (9th Cir. 2015) (noting that “[s]tate publicity right claims protect a plaintiff when
20 the defendant uses the plaintiff’s identity for commercial advantage, without permission”).

21 In its reply, PeopleConnect seems to backtrack somewhat. According to PeopleConnect, it
22 is *not* arguing that “endorsement is required for each type of § 3344 claim”; instead, it is simply
23 contending that endorsement is necessary “where a § 3344 claim contests use of a likeness in
24 advertising or solicitation.” Reply at 9. But all § 3344 claims seem to involve an advertising
25 element (*i.e.*, promotional aspect). *See* Cal. Civ. Code § 3344 (referring to a “person who
26 knowingly uses another’s name, voice, signature, photograph, or likeness, in any manner, on or in
27 products, merchandise, or goods, or for purposes of advertising or selling, or soliciting purchases
28 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 penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to

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.

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

8 Whether Plaintiffs have sufficiently pled the first element presents a close call.
 9 PeopleConnect understandably argues that Plaintiffs could not have a reasonable expectation of
 10 privacy because their names and likenesses were used in yearbooks which (1) were clearly
 11 intended for public distribution and (2) ultimately had no restrictions on their dissemination. But,
 12 as Plaintiffs point out, the California Supreme Court has never “stated that an expectation of
 13 privacy, in order to be reasonable for purposes of the intrusion tort, must be of *absolute* or
 14 *complete* privacy.” *Sanders v. Am. Broad. Cos.*, 20 Cal. 4th 907, 915 (1999) (emphasis in
 15 original). “[P]rivacy, for purposes of the intrusion tort, is not a binary, all-or-nothing
 16 characteristic. [Rather,] [t]here are degrees and nuances to societal recognition of our expectations
 17 of privacy,” and “the fact that the privacy one expects in a given setting is not complete or
 18 absolute does not render the expectation unreasonable as a matter of law.” *Id.* at 916. Thus, *e.g.*,
 19 in *In re Facebook, Inc.*, 402 F. Supp. 3d 767 (N.D. Cal. 2019), Judge Chhabria rejected
 20 Facebook’s argument that, “once you make information available to your friends on social media,
 21 you completely relinquish any privacy interest in that information.” *Id.* at 782. In the instant case,
 22 publication of an image in a hardbound yearbook with limited distribution is one thing, but
 23 publication on the Internet for the world to see may be something else. Thus, this element would
 24 appear to raise a question of fact.

25 The Court need not resolve the issue, however, because, on the second element, Plaintiffs
 26 have failed to plead sufficient allegations. According to Plaintiffs, there is a question of fact as to
 27 whether the intrusion took place in a manner highly offensive to a reasonable person. Plaintiffs
 28 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.

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


 EDWARD M. CHEN
 United States District Judge

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.

EXHIBIT H

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12
13 THE UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION
16

17 MEREDITH CALLAHAN and LAWRENCE
18 GEOFFREY ABRAHAM, individually and on
behalf of all others similarly situated,

19 Plaintiffs,

20 vs.

21 PEOPLECONNECT, INC., a Delaware
22 Corporation,

23 Defendant.
24

Case No.: 3:20-cv-09203-EMC

**PLAINTIFFS' FIRST SET OF REQUESTS
FOR PRODUCTION OF DOCUMENTS**

1 Pursuant to Rule 34 of the Federal Rules of Civil Procedure, Plaintiffs hereby request that
2 Defendant (also referred to as “PeopleConnect,” “Classmates,” and/or “you”) produce the
3 documents described herein.
4

5 INSTRUCTIONS

6 1. Pursuant to Fed. R. Civ. P. 34(b)(2)(B), if you object to a request, please provide
7 the specific reasons for your objection.
8

9 2. Pursuant to Fed. R. Civ. P. 26(b)(5), if you withhold otherwise responsive
10 information based on a claim the information is privileged, please provide a privilege log that
11 includes: the nature of the material not disclosed; the date and time the material was created or
12 sent; the identity of each author and recipient; the present location of the material; the number of
13 pages, attachments, and exhibits; and all information on which you base your claim of privilege.

14 3. Pursuant to Fed. R. Civ. P. 26(e), you are under a continuing duty to supplement
15 your responses to these discovery requests without further request from the Plaintiffs.

16 4. Please categorize and label all Documents produced according to the specific
17 numbered Request to which each Document is responsive.

18 5. Please provide all responsive Documents, including physical Documents, in
19 electronic format. The format should include computer-searchable text, meta-data, and Bates-
20 numbering. Plaintiffs request the parties meet and confer to agree on a stipulated order regarding
21 the discovery of electronically stored information. Plaintiffs also request the parties meet and
22 confer to agree on a stipulated protective order.

23 6. You are requested to produce the responsive Documents within 45 days of the
24 date this Request is served. If you believe production of responsive Documents will require more
25 than 45 days, Plaintiffs request the parties meet and confer regarding which categories you
26 believe will require more time and the reasons they will require more time.
27
28

DEFINITIONS

7. “Agreement” means any contract, arrangement, or understanding between two or more persons or entities, whether formal or informal, written or unwritten.

8. “Ancestry” means Ancestry.com Operations, Inc.; Ancestry.com, Inc.; Ancestry.com LLC; the website www.ancestry.com; all past and present officers, directors, representatives, agents, and employees of the three entities listed here; and all past and present parents, subsidiaries, divisions, or controlling shareholders of the three entities listed here.

9. “Answer” means the Answer and Affirmative and Other Defenses filed by Defendant PeopleConnect on December 1, 2021 (Dkt. No. 80).

10. The “Class” means all current and former California residents who do not currently subscribe to classmates.com and whose Yearbook Names and Yearbook Photographs Classmates included and/or includes in its Database.

11. “Classmates,” “PeopleConnect,” or “you” means the Defendant to whom these Requests for Production of Documents are directed, including all past and present officers, directors, representatives, agents, and employees of the Defendant, and all past and present parents, subsidiaries, divisions, or controlling shareholders of the Defendant.

12. “Documents” means the original and any nonidentical copy of any written, printed, reproduced, graphic, photographic, electronic, audio, visual, or computer records, however produced or reproduced, that is in Classmates’ possession, custody, or control. “Documents” includes but is not limited to: e-mail; electronically stored information (“ESI”); papers; notes; books; letters; facsimiles; photographs; videos; audio recordings; drawings; presentations; text messages; transcripts; minutes; court filings; calendars; contracts; agreements; microfilm; telephone logs; spreadsheets; social media communications; financial reports; accounting records; computer code, including but not limited to code implementing the website www.classmates.com; and databases, including any database containing Plaintiffs’ and/or Class members’ photographs and personal information. “Documents” includes information stored in or accessible through computer or other digital means, together with instructions and any materials necessary to use or interpret such information.

1 13. “Marketing Email” means any email communication sent by PeopleConnect to a
2 subscriber, prospective subscriber, or any other user of a website owned or operated by
3 PeopleConnect, including www.classmates.com.

4 14. “On-Site Messages” means all communications, pop-ups, text, images,
5 photographs, banners, or other content that may be accessed or viewed by a user on any website
6 owned or operated by PeopleConnect, including www.classmates.com.

7 15. “Plaintiffs” means the named Plaintiffs in this lawsuit, Meredith Callahan and
8 Geoffrey Lawrence Abraham.

9 16. “Relating to” means consisting of, referring to, describing, discussing,
10 constituting, evidencing, containing, mentioning, concerning, pertaining to, citing, summarizing,
11 analyzing, or bearing any logical or factual connection with the subject.

12 17. “Yearbook Database” means all information in Classmates’ custody or possession
13 that is derived, copied, or otherwise obtained from school yearbooks. “Yearbook Database”
14 includes but is not limited to photographs, names, and other personal information to which
15 Classmates provides searchable access on www.classmates.com.

16 18. “Yearbook Names” means all names in the Yearbook Database.

17 19. “Yearbook Photographs” means all photographs in the Yearbook Database.
18

19 **REQUESTS FOR PRODUCTION**

20 **REQUEST NO. 1:**

21 All current and past Agreements relating to the licensing or purchase of information in
22 the Yearbook Database, including Yearbook Photographs and Yearbook Names. This includes,
23 but is not limited to, Agreements relating to Classmates’ licensing of information including
24 Yearbook Photographs to Ancestry. Agreements produced should include amounts paid and
25 received.
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27
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1 **REQUEST NO. 2:**

2 Documents sufficient to show Classmates' revenue derived from the sale of website
3 subscriptions in each fiscal quarter since Classmates began including access to the Yearbook
4 Database as part of its subscription products.

6 **REQUEST NO. 3:**

7 All Documents relating to why Classmates displays On-Site Messages and Marketing
8 Emails that incorporate Yearbook Photographs and/or Yearbook Names, including Documents
9 relating to the value in attracting new users and Documents relating to the value in converting
10 trial users into paying users.

12 **REQUEST NO. 4:**

13 All Documents relating to Classmates' removal of the named Plaintiffs' names and
14 likenesses from the www.classmates.com website after the Complaint was filed, including
15 testimony explaining why Classmates removed Plaintiffs' names and likenesses.

17 **REQUEST NO. 5:**

18 Documents sufficient to show Classmates' insurance coverage for legal claims, including
19 all Agreements between Classmates and any insurer that include coverage for legal liability.

21 **REQUEST NO. 6:**

22 Documents sufficient to show the number of Yearbook Photographs in the Classmates
23 Database from schools located in California.

25 **REQUEST NO. 7:**

26 Documents sufficient to show the number of classmates.com subscribers whose accounts
27 are associated with a California address.

1
2 **REQUEST NO. 8:**

3 All Documents showing Classmates obtained consent, gave notice to, and/or provided
4 compensation to Plaintiffs or any member of the Class, as contended in the Answer. *See, e.g.,*
5 Answer, ¶¶ 5, 20, 36, 61; Answer, Ninth Defense (Consent).
6

7 **REQUEST NO. 9:**

8 Any Documents concerning whether Classmates' use of Yearbook Photographs,
9 Yearbook Names, and other personal information implicates the privacy of the subjects or their
10 intellectual property rights.
11

12 **REQUEST NO. 10:**

13 All Documents related to how Classmates obtained the photographs, names, and other
14 information in the Yearbook Database, including Documents sufficient to show whether
15 yearbook publishers indicated to Classmates they intended yearbooks to be published online as
16 part of the Yearbook Database.
17

18 **REQUEST NO. 11:**

19 All Documents related to the expected or actual use of Yearbook Photographs by
20 Classmates subscribers, including but not limited to all Documents upon which Classmates
21 intends to rely to support its contention that Yearbook Photographs are used in connection with
22 "public affairs." *See* Answer, Eight Defense (Statutory Exemptions).
23
24

25 **REQUEST NO. 12:**

26 All Documents upon which Classmates intends to rely in asserting the affirmative
27 defenses listed in the Answer.
28

1 **REQUEST NO. 13:**

2 If Classmates intends to assert additional affirmative defenses not listed in the Answer,
3 all Documents upon which Classmates intends to rely in asserting those defenses.
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9 Dated: December 9, 2021

By: /s/ Michael F. Ram

Michael F. Ram
MORGAN & MORGAN
*Attorney for Plaintiffs
and the Proposed Class*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of these Requests for Production was provided via e-mail on December 9, 2021, to the following counsel of record for the Defendant:

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