

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
San Francisco Division

MEREDITH CALLAHAN, et al., on behalf
of themselves and all others similarly
situated,

Plaintiffs,

v.

ANCESTRY.COM INC., et al.,

Defendants.

Case No. 20-cv-08437-LB

**ORDER GRANTING MOTION TO
DISMISS AND DENYING MOTION TO
STRIKE.**

Re: ECF No. 13

INTRODUCTION

The plaintiffs are California residents who object to Ancestry.com’s inclusion of their decades-old yearbook photographs and information in Ancestry’s Yearbook Database. They sued Ancestry — individually and on behalf of a putative California class — for using their information to solicit paying subscribers, claiming (1) a violation of their right of publicity under Cal. Civ. Code § 3344, (2) unlawful and unfair business practices, in violation of California’s Unfair Competition Law (UCL), Cal. Bus. & Prof. Code § 17200, (3) intrusion upon seclusion, in violation of California common law, and (4) unjust enrichment resulting from Ancestry’s selling their personal information.¹

¹ Compl. – ECF No. 1. Citations refer to material in the Electronic Case File (“ECF”); pinpoint citations are to the ECF-generated page numbers at the top of documents.

1 Ancestry moved to dismiss the claims in part on the grounds that (1) the plaintiffs lack Article III
 2 standing to challenge its use of public data, and (2) it is immune from liability under the
 3 Communications Decency Act, 47 U.S.C. § 230(c)(1). The court dismisses the claims. First, the
 4 plaintiffs have not plausibly alleged standing. More is needed — beyond Ancestry’s use of the data to
 5 solicit paying subscribers — such as an inference that the profiled persons personally endorsed
 6 Ancestry’s product (or an equivalent interest). Second, Ancestry did not create the third-party content
 7 and thus is immune from liability under the Communications Decency Act.

8 Ancestry also moved to strike (1) the plaintiffs’ prayer for statutory damages and claim for
 9 restitution under the UCL and (2) all claims under California’s Anti-SLAPP statute, Cal. Civil Proc. §
 10 425.16, on the ground that the content on its website is protected free speech and a public issue. The
 11 court denies the anti-SLAPP motion because Ancestry’s inclusion of the yearbook information is not
 12 a public issue. Ancestry’s motion to strike is otherwise moot.

13 14 STATEMENT

15 Ancestry has databases of personal and historical information — including information from
 16 “school yearbooks, birth records, marriage records, death records, U.S. census records, immigration
 17 records, military records, and photographs of grave sites” — that it sells to subscribers.²

18 The plaintiffs’ yearbook pictures and information were in the Ancestry Yearbook database.
 19 Each record in the Yearbook database — about 730 million collected from more than 450,000
 20 yearbooks — has “at least” the following information: the person’s name, photograph, school name,
 21 yearbook year, and city or town (at the time of the yearbook). A record can contain other
 22 information such as estimated age at the time of the photograph, estimated birth year, and school
 23 activities. Ancestry “does not disclose how it created” the Yearbook database, but a section of its
 24 website “encourage[es] visitors to donate their old yearbooks.” It does not try to obtain consent
 25
 26
 27

28 ² *Id.* at 2 (¶ 3), 22–23 (¶ 45); *see* Mot. – ECF No. 13 at 11–12.

1 from the donors or the persons depicted in the yearbooks to display their information. It does ask
2 the donor to sign a disclaimer about copyright restrictions.³

3 Ancestry’s main selling point to paying subscribers to the Yearbook database is that the records
4 “uniquely identify specific individuals.” It offers access to the database (including searching,
5 viewing, and downloading records) in several paid subscription plans, including the U.S. Discovery,
6 World Explorer, and All Access plans. It gives free access in a 14-day promotion and through a
7 limited-access website that has some of the Yearbook database records and that uses pop-up ads
8 (when a user hovers over a yearbook record) to solicit paying subscribers. It also solicits subscribers
9 through emails that contain yearbook records (such as photographs and names).⁴

10 The named plaintiffs are Lawrence Abraham and Meredith Callahan, California residents who are
11 not Ancestry subscribers (and thus are not subject to Ancestry’s terms of service). Their yearbook
12 records — pictures and personal information such as name, estimated age, city, and school activities
13 — are in a subdirectory of the Yearbook database called the U.S. School Yearbooks, 1900–1999.
14 Ancestry users who hover over the plaintiffs’ records receive pop-up ads offering more access to the
15 plaintiffs’ information to paying subscribers. Ancestry also solicited paying subscribers by sending
16 emails that included the plaintiffs’ names and photographs. The plaintiffs did not consent to
17 Ancestry’s use of their information, and Ancestry never paid them for it.⁵

18 The plaintiffs assert the following claims individually and on behalf of a putative California
19 class: (1) a violation of their right of publicity under Cal. Civil Code § 3344; (2) unlawful and unfair
20 business practices, in violation of the UCL; (3) intrusion upon seclusion, in violation of California
21 common law; and (4) unjust enrichment.⁶ The class definition is as follows:

22 [A]ll California residents who (a) are not currently subscribers of any Ancestry services,
23 (b) have never donated a yearbook to Ancestry, and (c) whose names, photographs, and/or
24 likeness were uploaded by Ancestry into its Ancestry Yearbook Database and offered for
25 sale as part of Ancestry’s paid subscription plans, and/or used by Ancestry to advertise,

26 ³ Compl. – ECF No. 1 at 2 (¶ 3), 23–24 (¶¶ 46–50).

27 ⁴ *Id.* at 4–5 (¶ 12), 24–25 (¶¶ 51–54).

28 ⁵ *Id.* at 7–22 (¶¶ 22–44).

⁶ *Id.* at 29–32 (¶¶ 66–89).

1 sell, and solicit the purchase of Ancestry’s paid subscription plans, without Ancestry
obtaining their consent.⁷

2 Ancestry moved to dismiss the claims on the following grounds: (1) the plaintiffs lack
3 standing to challenge its use of public data; (2) Cal. Civil Code § 3344 exempts it from liability for
4 the right-of-publicity and UCL claims for its use of the yearbook information “in connection with
5 . . . public affairs;” (3) it is immune from liability under § 230(c)(1) of the Communications
6 Decency Act; (4) the Copyright Act, 17 U.S.C. § 301, preempts the right-of-publicity and the UCL
7 claims; (5) the plaintiffs did not plausibly state a claim for intrusion upon seclusion because the
8 yearbook information is public; and (6) there is no standalone claim for unjust enrichment. Ancestry
9 also moved to strike (1) the plaintiffs’ prayer for statutory damages under § 3344 because they did
10 not allege mental anguish, which is a predicate for statutory damages, (2) any claim for restitution
11 under the UCL because § 3344 provides an adequate remedy at law, and (3) all claims under
12 California’s Anti-SLAPP statute, Cal. Civil Proc. § 425.16, on the ground that the content on its
13 website is protected free speech.⁸ The court held a hearing on February 25, 2021.

14 The court has subject-matter jurisdiction under the Class Action Fairness Act, 28 U.S.C. §
15 1332(d). All parties consented to magistrate jurisdiction.⁹

17 STANDARD OF REVIEW

18 1. Rule 12(b)(1)

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

23 A defendant’s Rule 12(b)(1) jurisdictional attack can be either facial or factual. *White v. Lee*, 227
24 F.3d 1214, 1242 (9th Cir. 2000). “A ‘facial’ attack asserts that a complaint’s allegations are

26 _____
27 ⁷ *Id.* at 26 (¶ 58).

28 ⁸ Mot. – ECF No. 13 at 14–32.

⁹ Compl. – ECF No. 1 at 5–6 (¶ 15); Consents – ECF Nos. 10, 15.

1 themselves insufficient to invoke jurisdiction, while a ‘factual’ attack asserts that the complaint’s
2 allegations, though adequate on their face to invoke jurisdiction, are untrue.” *Courthouse News Serv.*
3 *v. Planet*, 750 F.3d 776, 780 n.3 (9th Cir. 2014). This is a facial attack. The court thus “accept[s] all
4 allegations of fact in the complaint as true and construe[s] them in the light most favorable to the
5 plaintiff[.]” *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003).

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

9 Dismissal of a complaint without leave to amend should be granted only if the jurisdictional
10 defect cannot be cured by amendment. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048,
11 1052 (9th Cir. 2003).

12 13 **2. Rule 12(b)(6)**

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

21 To survive a motion to dismiss, a complaint must contain sufficient factual allegations, which
22 when accepted as true, “state a claim to relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556
23 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when
24 the plaintiff pleads factual content that allows the court to draw the reasonable inference that the
25 defendant is liable for the misconduct alleged.” *Id.* “The plausibility standard is not akin to a
26 ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted
27 unlawfully.” *Id.* (citing *Twombly*, 550 U.S. at 557). “Where a complaint pleads facts that are
28

1 merely consistent with a defendant’s liability, it stops short of the line between possibility and
 2 plausibility of ‘entitlement to relief.’” *Id.* (cleaned up) (quoting *Twombly*, 550 U.S. at 557).

3 If a court dismisses a complaint, it should give leave to amend unless the “pleading could not
 4 possibly be cured by the allegation of other facts.” *United States v. United Healthcare Ins. Co.*,
 5 848 F.3d 1161, 1182 (9th Cir. 2016) (cleaned up).

7 ANALYSIS

8 The court dismisses the claims for lack of Article III standing and, alternatively, because
 9 Ancestry is immune from liability under § 230(c)(1) of the Communications Decency Act. The
 10 court denies the anti-SLAPP motion because Ancestry’s inclusion of the yearbook information is
 11 not a public issue. Ancestry’s motion to strike is otherwise moot.

13 1. Article III Standing

14 “The ‘irreducible constitutional minimum’ of standing consists of three elements.” *Spokeo,*
 15 *Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555,
 16 560 (1992)). “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to
 17 the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable
 18 judicial decision.” *Id.* (citing *Lujan*, 504 U.S. at 560). “The plaintiff, as the party invoking federal
 19 jurisdiction, bears the burden of establishing these elements.” *Id.* (citing *FW/PBS, Inc. v. City of*
 20 *Dallas*, 493 U.S. 215, 231 (1990)). “Where, as here, a case is at the pleading stage, the plaintiff
 21 must ‘clearly allege facts demonstrating’ each element.” *Id.* (cleaned up) (quoting *Warth v. Seldin*,
 22 422 U.S. 490, 518 (1975)). “[S]tanding in federal court is a question of federal law, not state law.”
 23 *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013).

24 Ancestry’s main argument is that the plaintiffs have not established injury.¹⁰

25
 26
 27 ¹⁰ Ancestry also argues causation and redressability in a paragraph. Mot. – ECF No. 13 at 18. Given
 28 the court’s holding on injury in fact, and the overall slight briefing on the issues of redressability and
 causation, the court does not reach the issues.

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

9 The plaintiffs allege three forms of injury: (1) Ancestry exploits and profits from their
10 likenesses by obtaining paid subscribers; (2) they have lost potential earnings from the commercial
11 use of their likenesses; and (3) they have suffered injury by Ancestry’s denial of their § 3344 right
12 to control the distribution and use of their likenesses.¹¹ These allegations do not establish standing.

13 First, the information in the Yearbook database is not private: it is public yearbook information
14 distributed to classmates (and ultimately to Ancestry).¹² Ancestry’s using the public profiles to
15 solicit paying subscribers — standing alone — does not establish injury. *Cf. In re Google, Inc.*
16 *Privacy Policy Litig.*, No. C-12-01382-PSG, 2013 WL 6248499, at *5 (N.D. Cal. Dec. 3, 2013)
17 (“[A] plaintiff must do more than point to the dollars in a defendant’s pocket; he must sufficiently
18 allege that in the process he lost dollars of his own.”). Section 3344 cases suggest that more is
19 needed beyond using the profiles.

20 For example, standing can be established if the exploitation of users’ profiles suggests that the
21 users personally endorse a product or service. In *Fralely v. Facebook*, Facebook marketed products
22 (such as the Rosetta Stone language program) to a user’s Facebook friends by sending an
23 advertisement to the user’s friends with the user’s profile and her “Like” of the product. 830 F.
24 Supp. 2d 785, 791–92 (N.D. Cal. 2011). Facebook did this without the user’s consent and without
25 paying her. *Id.* at 797. This was concrete economic injury because it suggested the user’s personal

26
27 ¹¹ Opp’n – ECF No. 19 at 9–10.

28 ¹² Mot. – ECF No. 13 at 16 (disclosure of public information alone is not a harm) (collecting cases).

1 endorsement of the product, which was — according to Facebook’s CEO and COO — “the Holy
2 Grail of advertising.” *Id.* at 799; accord *Perkins v. LinkedIn Corp.*, 53 F. Supp 3d 1190, 1208
3 (N.D. Cal. 2014) (in *Fraley*, the court found that the “plaintiffs had articulated a coherent theory of
4 economic injury because the plaintiffs had alleged that ‘individual personalized endorsement of
5 products, services, and brands to their friends and acquaintances has concrete, provable value in
6 the economy at large, which can be measured by the additional profit Facebook earns by selling
7 Sponsored Stories [the ads at issue] compared to its sale of regular advertisements.’”) (quoting
8 *Fraley*, 830 F. Supp. 2d at 799). In contrast to the *Fraley* plaintiffs’ asserted property interest in
9 that endorsement, Ancestry’s use of the plaintiffs’ profiles does not imply an endorsement of
10 Ancestry’s products or an equivalent interest. *Id.*

11 Second, the plaintiffs do not have a commercial interest in their public profiles that precludes
12 Ancestry’s use of the profiles for commercial gain. In *Cohen v. Facebook*, for example, Facebook
13 marketed its Friend Finder feature — a service that compares a user’s email contacts with Facebook
14 users — by telling potential users that their Facebook friends used the feature. 798 F. Supp. 2d 1090,
15 1092 (N.D. Cal. 2011). That use benefited Facebook because it could grow its user base (and profit
16 from the new users). *Id.*, 2011 WL 5117164 at *2–3. But the use was not concrete injury that
17 established standing for the plaintiffs’ § 3324 claim because the profiles were displayed only to the
18 users’ Facebook friends, who already had access to the profiles. *Id.* at *3. The plaintiffs — like the
19 plaintiffs here — did not show that they had a commercial interest in their images that precluded the
20 platform’s use of them. *Id.* (distinguishing cases involving persons who — while not celebrities —
21 were models and thus had a commercial interest in their likenesses).

22 Third, the plaintiffs claim injury by Ancestry’s denial of their § 3344 right to control the
23 distribution and use of their likenesses. But the statute imposes liability only where “persons [are]
24 injured as a result.” Cal. Civ. Code § 3344(a). That makes this case different from cases involving
25 statutes that establish liability for a statutory violation alone. *In re Facebook, Inc. Internet Tracking*
26 *Litig.*, 956 F.3d 589, 598–99 (9th Cir. 2020) (standing for claims under the California Invasion of
27 Privacy Act, the Wiretap Act, and the Stored Communications Act because “the legislative history
28

1 and statutory text demonstrate that Congress and the California legislature intended to protect these
2 historical privacy rights when they passed the” acts).

3 In sum, the plaintiffs have not plausibly pleaded Article III standing. The court dismisses the
4 complaint with leave to amend to give the plaintiffs an opportunity to cure the jurisdictional defect.

5
6 **2. The Communications Decency Act**

7 Ancestry is immune from liability under the Communications Decency Act. 47 U.S.C. §
8 230(c)(1).

9 Under the Act, (1) website operators generally are immune from liability for third-party
10 content posted on their websites, but (2) they are not immune if they create or develop the
11 information, in whole or in part. 47 U.S.C. §§ 230(c)(1) & (f)(3). “Immunity from liability exists
12 for (1) a provider or user of an interactive computer service, (2) whom a plaintiff seeks to treat,
13 under a state law cause of action, as a publisher or speaker of (3) information provided by another
14 information content provider.” *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th
15 Cir. 2019) (cleaned up).

16 Ancestry is an interactive-computer service. It did not create the underlying yearbook records
17 and instead obtained them from third parties. It thus is immune from liability for the third-party
18 content. 47 U.S.C. § 230(f)(3). The plaintiffs nonetheless that two contexts here create liability:
19 Ancestry did not obtain the yearbooks from another information-content provider, and it created
20 content by extracting the yearbook content and using the content in its own webpages and emails.

21 First, Ancestry obtained the yearbook content from someone else, presumably other yearbook
22 users.¹³ The plaintiffs assert that this is not enough because Ancestry did not obtain the content from
23 the author of the content. To support this assertion, they cite two cases, “*KNB Enterprises* and
24 *Perfect 10*[, where] the defendants copied photographs from rival websites [and] then sold access to
25 the photos for a subscription fee.” Those defendants, the plaintiffs say, “could not have claimed the
26

27 _____
28 ¹³ Statement (Ancestry does not disclose how it creates the Yearbook database but it encourages users
to donate their old yearbooks).

1 protection of § 230” “[b]ecause they did not obtain the photographs from the people who created
 2 them. . . .” They conclude that similarly, Ancestry cannot claim § 230(c)(1) immunity.¹⁴ But *KNB*
 3 *Enterprises* and *Perfect 10* do not address § 230. *Perfect 10, Inc. v. Talisman Commc ’ns Inc.*, No.
 4 CV 99-10450 RAP MCX, 2000 WL 364813 (C.D. Cal. Mar. 27, 2000); *KNB Enters. v. Matthews*,
 5 78 Cal. App. 4th 362 (2000). Moreover, no case supports the conclusion that § 230(a)(1) immunity
 6 applies only if the website operator obtained the third-party content from the original author. To the
 7 contrary, the Act “immunizes an interactive computer service provider that ‘passively displays
 8 content that is created entirely by third parties.’” *Sikhs for Justice “SFJ”, Inc. v. Facebook, Inc.*,
 9 144 F. Supp. 3d 1088, 1094 (N.D. Cal. 2015) (quoting *Fair Hous. Council v. Roommates.com, LLC*,
 10 521 F.3d 1157, 1162)), *aff’d*, 697 F. App’x 526, 526–27 (9th Cir. 2017).

11 Second, Ancestry extracts yearbook data (names, photographs, and yearbook date), puts the
 12 content on its webpages and in its email solicitations, adds information (such as an estimated birth
 13 year and age), and adds interactive buttons (such as a button prompting a user to upgrade to a
 14 more expensive subscription). The plaintiffs say that by these actions, Ancestry creates content. To
 15 support that contention, they cite *Fraley*.¹⁵

16 But *Fraley* involved the transformation of the Facebook user’s content (liking a product) into an
 17 advertisement that — without the user’s consent — suggested the user’s endorsement of the product
 18 (and resulted in a profit to Facebook by selling the ads). 830 F. Supp. 2d at 791–92, 797. In contrast
 19 to the *Fraley* transformation of personal likes into endorsements, Ancestry did not transform data and
 20 instead offered data in a form — a platform with different functionalities — that did not alter the
 21 content. Adding an interactive button and providing access on a different platform do not create
 22 content. They just add functionality. *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1270 (9th Cir. 2016) (Yelp!
 23 had § 230 immunity despite adding a star rating to reviews from other websites); *Coffee v. Google*,
 24 *LLC*, No. 5:20-cv-08437, ECF No. 56 at 13 (Google had § 230 immunity despite adding industry
 25 standards and requiring app developers to disclose the odds of winning).

26

27 ¹⁴ Opp’n – ECF No. 19 at 17 (citations omitted).

28 ¹⁵ *Id.* at 18–19.

1 Instead of creating content, Ancestry — by taking information and photos from the donated
 2 yearbooks and republishing them on its website in an altered format — engaged in “a publisher’s
 3 traditional editorial functions [that] [] do not transform an individual into a content provider within
 4 the meaning of § 230.” *Fraleley*, 830 F. Supp. 2d at 802 (cleaned up); *cf. Roomates.com*, 521 F.3d at
 5 1173–74 (website is immune under §230 where it “publishes [] comments as written” that “come[]
 6 entirely from subscribers and [are] passively displayed” by the website operator). Ancestry did not
 7 contribute “materially” to the content. *Roomates.com*, 521 F.3d at 1167–68. In sum, Ancestry has
 8 immunity under § 230(c)(1).

10 **3. Motion to Strike**

11 Ancestry also moved to strike (1) the plaintiffs’ prayer for statutory damages, (2) any claim for
 12 restitution under the UCL, and (3) all claims under California’s Anti-SLAPP statute, Cal. Civil
 13 Proc. § 425.16, on the ground that the content on its website is protected free speech. The court
 14 denies the anti-SLAPP motion because Ancestry’s inclusion of the yearbook information is not a
 15 public issue. The court otherwise denies Ancestry’s motion to strike as moot.

16 California Code of Civil Procedure § 425.16 is called the anti-SLAPP statute because it allows
 17 a defendant to gain early dismissal of claims that are designed primarily to chill the exercise of
 18 First Amendment rights. *Siam v. Kizilbash*, 130 Cal. App. 4th 1563, 1568 (2005). Section
 19 425.16(b)(1) provides:

20 A cause of action against a person arising from any act of that person in furtherance of the
 21 person’s right of petition or free speech under the United States Constitution or the
 22 California Constitution in connection with a public issue shall be subject to a special
 motion to strike, unless the court determines that there is a probability that the plaintiff will
 prevail on the claim.

23 And Section 425.16(e) provides that acts “in furtherance of” these rights include:

- 24 (1) any written or oral statement or writing made before a legislative, executive, or judicial
 25 proceeding, or any other official proceeding authorized by law;
 26 (2) any written or oral statement or writing made in connection with an issue under
 27 consideration or review by a legislative, executive, or judicial body, or any other official
 28 proceeding authorized by law;
 (3) 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; or

1 (4) any other conduct in furtherance of the exercise of the constitutional right of petition or
 2 the constitutional right of free speech in connection with a public issue or an issue of public
 interest.

3 California’s anti-SLAPP statute applies to state claims in federal court. *Thomas v. Fry’s Elecs.,*
 4 *Inc.*, 400 F.3d 1206, 1206–07 (9th Cir. 2005).

5 In ruling on an anti-SLAPP motion, a court engages in a two-step process. *Equilon Enters. v.*
 6 *Consumer Cause, Inc.*, 29 Cal. 4th 53, 67 (2002). First, the court decides whether the defendant
 7 has made a threshold showing that the challenged cause of action arises from acts in furtherance of
 8 the defendant’s right of petition or free speech under the United States or California constitutions
 9 in connection with a public issue. *Id.* Second, “[i]f the court finds such a showing has been made,
 10 it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.”
 11 *Id.* The claim is subject to dismissal only when (1) the defendant shows that the claim is based on
 12 protected conduct and (2) the plaintiff fails to show a probability of success on that claim.
 13 *Navellier v. Sletten*, 29 Cal. 4th 82, 88–89 (2002).

14 Ancestry contends that its speech is protected because websites accessible to the public are
 15 public forums, and its speech is in connection to an issue of public interest.¹⁶ To support its
 16 contention, Ancestry cites cases that involve celebrities, public officials, or the public realm or more
 17 obvious public interest. *Dora v. Frontline Video, Inc.*, 15 Cal. App. 4th 536, 540 (1993) (a
 18 “legendary figure in surfing” in a documentary about surfing); *Gates v. Discovery Comm’ncs, Inc.*,
 19 34 Cal. 4th 679, 683, 696 (2004) (documentary about a “person who many years previously served
 20 a prison term for a felony conviction but who has since lived an obscure, lawful life” is protected by
 21 the First Amendment); *Hicks v. Richard*, 39 Cal. App. 5th 1167, 1176–77 (2019) (a principal’s
 22 misconduct was of public interest); *New Kids On The Block v. News Am. Publ’g, Inc.*, 745 F. Supp.
 23 1540, 1545–47 (C.D. Cal. 1990) (magazine’s “gathering information for dissemination to the
 24 public” through use of popular music groups’ images in a poll was a protected First Amendment
 25 activity); *Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 410–13, 415–16 (2001)
 26 (publishing of professional baseball players’ images and performance statistics was of “significant
 27

28 ¹⁶ Mot. – ECF No. 13 at 30–32.

1 public interest”). Viewed through the prism of these cases, decades-old yearbooks are not
2 demonstrably an issue of public interest. The court denies the motion to strike.

3
4 **CONCLUSION**

5 The court grants the motion to dismiss and denies the motion to strike. The plaintiffs must file
6 any amended complaint within 21 days and attach a blackline of the changes.

7 This disposes of ECF No. 13.

8 **IT IS SO ORDERED.**

9 Dated: March 1, 2021



10 LAUREL BEELER
11 United States Magistrate Judge

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
United States District Court
Northern District of California