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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CAT BROOKS and RASHEED SHABAZZ, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

THOMSON REUTERS CORPORATION,

Defendant.

Case No. 3:21-cv-01418-EMC

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PURSUANT TO FRCP 12(b)(6), AND MOTION TO STRIKE PURSUANT TO CALIFORNIA CODE OF CIVIL PROCEDURE § 425.16

Date: June 24, 2021
Time: 1:30 p.m.
Place: Courtroom 5, 17th Floor
Judge: Hon. Edward M. Chen

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INTRODUCTION

Plaintiffs have no claim against Thomson Reuters. Their Opposition ("Opp.") only confirms this: not one of the more than 70 cases they cite embraces their theory of liability, which is that California—the birthplace of Silicon Valley—has made it unlawful for an information technology company to charge a fee to access factual information about people online.

Multiple independent reasons justify dismissal. *First,* the Complaint does not state a claim under any of its multitude of legal theories. Thomson Reuters' actions are categorically different from the conduct implicating the right of publicity, because that tort requires that a defendant use another's identity and appropriate their name and likeness for *publicity* purposes—i.e., to grab public attention or to promote the defendant's (commercial or non-commercial) endeavors. This flaw also dooms Plaintiffs' UCL "unlawful" claim, which is based on their rights of publicity. Plaintiffs' UCL "unfairness" claim fails because the California Consumer Privacy Act ("CCPA"), Cal. Civ. Code § 1798.100, *et seq*., permits the very conduct attacked here (an opt-out, rather than an opt-in, consent framework), and also because Plaintiffs fail the tests used to determine unfairness. Plaintiffs are not entitled to equitable relief because their legal remedy is adequate, and unjust enrichment is not a cognizable claim. *Second,* if any of Plaintiffs' mistaken legal theories were credited, the relief they seek would be a content-based restriction that would contravene free speech protections enshrined by the First Amendment. *Third*, Plaintiffs' claims are barred by the Communications Decency Act ("CDA"), 47 U.S.C. § 230, which protects interactive computer services like Thomson Reuters from being held liable for publishing content provided by others.

Under Plaintiffs' theory, no one could collect information about a Californian—even from popular search engines or other public sources—and then charge a fee to access it without first obtaining consent. This would fundamentally alter how this country operates, placing important contributors to the marketplace of ideas in the crosshairs of class action litigation—including newspapers, political campaigns and activists, biographers, libraries at universities, and researchers. Everyone in California would be a potential plaintiff. And any politician, celebrity, or convicted sex offender who preferred that the public not learn the truth about their past (or present) could simply withhold consent to the publication of their information. It is therefore unsurprising that the relief Plaintiffs seek is both unprecedented and contravened at virtually every level of authority, from the U.S. Constitution to federal and state statutes. The Complaint should be dismissed.

ARGUMENT

I. Plaintiffs have not established the essential elements of their claims.

A. Plaintiffs have not stated a common law publicity claim.

This tort requires establishing that Thomson Reuters (1) used Plaintiffs' "identities" and (2) appropriated their names and likenesses by taking advantage of the "commercially exploitable opportunities" resulting from "the reaction of the public to [their] name and likeness." *Lugosi v. Universal Pictures*, 25 Cal. 3d 813, 823 (1979); *see Eastwood v. Super. Ct. for Cty. of L.A.*, 149 Cal. App. 3d 409, 417 (1983); Mot. at 7-9. Plaintiffs have not shown use of their "identities," because they base their argument on the alleged sale of *personal information. See* Opp. at 3-5. But "identity," is not the same as "personal information," and "[w]hat is protected by the Right of Publicity is the very identity or persona of the plaintiff as a human being," *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004 (9th Cir. 2001) (citation omitted), *not* the plaintiff's mere personal information, *see* Mot. at 7-8 (collecting cases where defendants did not use the plaintiffs' *identities* merely by placing ads next to photographs of the plaintiffs).[1] Consistent with this, not one of the cases Plaintiffs cite equates identity with personal information.

Plaintiffs have not established "appropriation," because this requires that a person's name or likeness be used to a defendant's advantage *for purposes of publicity*. *See, e.g.*, *Browne v. McCain*, 611 F. Supp. 2d 1062, 1070 (C.D. Cal. 2009) (campaign ad played plaintiff's song to the

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[1] Plaintiffs try to distinguish these cases on the ground that third parties posted the content at issue. *See* Opp. at 4-5 (discussing *Perfect 10, Inc. v. Google, Inc.*, No. CV 04-9484, 2010 WL 9479060, at *13 (C.D. Cal. July 30, 2010), *aff'd*, 653 F.3d 976 (9th Cir. 2011), and *Cross v. Facebook, Inc.*, 14 Cal. App. 5th 190, 209 (2017)). Plaintiffs cite no authority holding that such a distinction matters with respect to right of publicity claims. Even if such authority existed, however, it would not matter, because Plaintiffs allege that CLEAR data is comprised of third-party content. *See, e.g.*, Compl. ¶ 2.

political advantage of the defendant); RESTATEMENT (SECOND) OF TORTS § 652C cmt. d (1977 June 2021 update) (tort requires that the defendant took "advantage of [the plaintiff's] reputation, prestige, or other value associated with [them], *for purposes of publicity*") (emphasis added). Here, as in *In re Facebook, Inc., Consumer Privacy User Profile Litigation*, Plaintiffs' "allegations about how [Thomson Reuters] shared the plaintiffs' information with third parties is categorically different from the type of conduct made unlawful by this tort." 402 F. Supp. 3d 767, 803 (N.D. Cal. 2019).

Plaintiffs argue that Thomson Reuters "appropriates" their names and likenesses because it profits from selling access to CLEAR. Opp. at 5. Similar reasoning would bar newspapers from charging for subscriptions. Plaintiffs cite no authority for such an expansive view of this tort, and their own cases only confirm that "appropriation" is tied to *publicity*—one "appropriates" by, for example, using another's name or likeness to *draw public attention* in order to sell a product. *See, e.g.*, *Eastwood*, 149 Cal. App. 3d at 418 (defendants' newspapers); *White v. Samsung Electronics America, Inc.*, 971 F.2d 1395, 1397 (9th Cir. 1992) (electronic products); *Fairfield v. American Photocopy Equip. Co.*, 138 Cal. App. 2d 82, 85-86 (1955) (copy machines); *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 409 (2001) (t-shirts and lithographs); *see also Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664 (2010) (striking claim under the anti-SLAPP statute where the plaintiffs complained that the defendant had implied they endorsed cigarettes). Plaintiffs allege no such facts here; rather, they allege that Thomson Reuters might use Plaintiffs' data only in *response* to a customer's inquiry. *See, e.g.*, Compl. ¶ 23.

Regardless, "incidental use of a plaintiff's name or likeness does not give rise to liability under a common law claim of commercial misappropriation or an action under Section 3344." *Yeager v. Cingular Wireless LLC*, 673 F. Supp. 2d 1089, 1100 (E.D. Cal. 2009) (citation and quotation marks omitted). Whether use is incidental does not turn on the amount of information available about the plaintiff, as Plaintiffs argue (*see* Opp. at 5 n. 2), but rather on the proportion of offending content relating to the plaintiff. *See Aligo v. Time-Life Books, Inc.*, No. C 94-20707, 1994 WL 715605, at *3 (N.D. Cal. Dec. 19, 1994) (dismissing claim where photo was "one of dozens of Rolling Stone covers used in the program and [was] insignificant to the commercial purpose of selling the music anthology"). Plaintiffs here are among "millions" of others whose data is allegedly in the CLEAR database. Compl. ¶ 2. Any use of Plaintiffs' names and likenesses is therefore incidental and not actionable.

B. Plaintiffs have not stated a UCL claim based on either "unlawful" or "unfair" conduct.

Unlawful conduct. Plaintiffs base their "unlawful" UCL claim on alleged violations of their common law and statutory rights of publicity. They fail to state a claim for violation of the common law right of publicity for the reasons discussed above. Their statutory claim therefore fails as well, because it requires "all the elements of the common law cause of action," among others.[2] *See Downing*, 265 F.3d at 1001 (citing *Eastwood*, 149 Cal. App. 3d at 417). Plaintiffs argue (Opp. at 6) that "section 3344 does not simply tack additional requirements onto the common-law right," but this is both incorrect and contravened by Plaintiffs' own cases. *See, e.g.*, *Stewart*, 181 Cal. App. 4th at 680 ("Under section 3344, a plaintiff must prove all the elements of the common law cause of action.") (citing *Downing*, 265 F.3d 994 at 1001); *see also Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1008 n. 2 (9th Cir. 2017); *Yeager*, 673 F. Supp. 2d at 1095.[3]

Plaintiffs' statutory claim also is barred by the newsworthiness exception of Section 3344(d), which, as Plaintiffs admit (Opp. at 7), "tracks the constitutional right to freedom of speech under the First Amendment." *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 804–05 (N.D. Cal. 2011). As discussed *infra* in Section II, the First Amendment forbids the type of content-based restriction urged by Plaintiffs here.

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[2] The other elements are the defendant's knowing use and a direct connection between the alleged use and the commercial purpose. Plaintiffs have also failed to establish these. *See, e.g.*, Mot. at 11 n. 15 (Shabazz failed to allege scienter as to allegedly false information about him in CLEAR).

[3] Nor has the California Supreme Court, as Plaintiffs claim, "reject[ed] [a] Ninth Circuit case that had overly-narrowly construed statute." Opp. at 6. The case Plaintiffs cite involved a claim under California Civil Code Section 3344.1 (not 3344), where the court merely noted that *Newcombe v. Adolf Coors Co.*, 157 F.3d 686 (9th Cir. 1998), did not cite language that appears in Section 3344 because the language was not relevant. *See Comedy III Prods., Inc.*, 25 Cal. 4th at 396.

Finally, Plaintiffs' publicity claims are preempted by section 301 of the Copyright Act to the extent they are based on photographs. *See* Mot. at 9 (arguing preemption as to photographs); *Maloney*, 853 F.3d at 1011 (Copyright Act preempts publicity claim); *Fleet v. CBS, Inc.*, 50 Cal. App. 4th 1911, 1918-19 (1996) (same). Plaintiffs contend that "Thomson Reuters does not argue, because it cannot, that the photographs of Plaintiffs that Thomson Reuters sells were copyrightable works of art." Opp. at 21. This argument is meritless. "[A]lmost any[ ] photograph may claim the necessary originality to support a copyright," including photographs of Plaintiffs. *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068, 1076 (9th Cir. 2000).

Unfair conduct. Plaintiffs base their "unfair" UCL claim on the alleged sale of their data without consent. In other words, they argue they must consent, or "opt-*in*," to any sale before it may occur, and they base their claim on Thomson Reuters' use of an "opt-*out*" framework instead. Compl. ¶¶ 47, 57. But in enacting the CCPA, the California legislature expressly adopted the framework that Thomson Reuters uses—under the CCPA, one may sell another person's data unless the other person opts *out* of such a sale. *See, e.g.*, Mot. at 15-16; Cal. Civ. Code §§ 1798.115(c), 1798.120. The legislature therefore *permitted* precisely the conduct attacked here. And "where the allegedly unfair business practice has been authorized by the Legislature, no factual or equitable inquiry need be made, as the court can decide [and dismiss] the matter entirely on the law." *Schnall v. Hertz Corp.*, 78 Cal. App. 4th 1144, 1160 (2000); *see also* Mot. at 15-16; *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999).

Plaintiffs quibble with whether Thomson Reuters has complied with the CCPA's specific requirements, Opp. at 9-10, but they do not (and cannot) contest that the CCPA permits the conduct they target here—an opt-out framework for the sale of personal data. Additionally, the legislature made clear that it is not within courts' purview to parse compliance with the CCPA in private litigation: the private right of action in the CCPA is narrowly limited to incidents like security breaches, Cal. Civ. Code § 1798.150(a), and the CCPA unequivocally bars any attempt to use a CCPA violation as the predicate for another claim, *see id.* § 1798.150(c) ("Nothing in this title shall be interpreted to serve as the basis for a private right of action under any other law.")

Plaintiffs next argue that "a state statute only forecloses a UCL action where the statute makes the challenged conduct 'lawful, for all purposes, under all regulations.'" Opp. at 9 (citing *De La Torre v. CashCall, Inc.*, 5 Cal. 5th 966, 987 (2018)). Once again, this is simply not the law, nor is it what *De La Torre* holds.[4] *De La Torre* does not contravene the many decisions holding that when the legislature permits conduct, it cannot be "unfair" under the UCL.

Because the CCPA bars Plaintiffs' UCL "unfair" claim, there is no need to reach the tethering or balancing tests.[5] But Plaintiffs fail those tests, too. They fail the tethering test because the "legislatively declared policy" on which Plaintiffs rely is compliance with Section 3344, but they cannot show that statute was violated. *See supra* Section I.B; *see also* Mot. at 17. Plaintiffs fail the balancing test because the alleged harm to Plaintiffs—which amounts to not being paid $5 for their data (*see* Compl. ¶ 62) and having their data sold rather than disclosed for free (*see* Opp. at 18, arguing that Thomson Reuters "could comply with the law simply by . . . not charging for Californians' identities")—does not outweigh the utility of Thomson Reuters' conduct, which includes important activities such as enabling news, research, and political activism; preventing money laundering; facilitating commercial lending; protecting victims of human trafficking and sexual exploitation; and finding absent parents.[6] Plaintiffs also fail the balancing test because the practice they target is not "immoral, unethical, oppressive, unscrupulous, or substantially injurious," because, among other reasons, it is permitted by the CCPA. For the same reasons it does not "offend[] an established public policy." *In re Anthem, Inc. Data Breach Litig.*, 162 F. Supp. 3d 953, 990 (N.D. Cal. 2016).

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[4] *De La Torre* regarded Section 22303 of the Financial Code, which capped interest rates on loans under $2,500, and Section 22302 of the Financial Code, which prohibited unconscionable contracts. Defendants argued that Section 22303 barred the plaintiffs from arguing that high interest rates on loans of more than $2,500 were unconscionable under Section 22302. The court disagreed, holding that Section 22303 did not apply and that the loans could be found unconscionable under Section 22302. *Id.* at 976.

[5] Plaintiffs concede that the FTC test does not apply, *see* Opp. at 7, n. 4, but they fail that test as well, *see* Mot. at 17-18.

[6] *See* Mot. at 3-4 (collecting website materials that the Complaint incorporates by reference).

Finally, Plaintiffs argue that the Court should wait to apply either test, but neither of the two cases they cite in support involved a statute that reflects a public policy of permitting the targeted conduct, like the CCPA here. *See* Opp. at 7-8. UCL "unfair" claims are commonly subject to dismissal on the pleadings. *See e.g.*, *Cullen v. Netflix, Inc.*, 880 F. Supp. 2d 1017, 1029 (N.D. Cal. 2012) (dismissing unfair UCL claims on the pleadings); *Garcia v. Sony Comput. Ent. Am., LLC*, 859 F. Supp. 2d 1056, 1066 (N.D. Cal. 2012) (same).

C. Plaintiffs have not stated a claim for unjust enrichment.

As the Ninth Circuit has recognized, "in California, there is not a standalone cause of action for 'unjust enrichment[.]'" *Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015); *see also In re Google Location Hist. Litig.*, No. 18-cv-05062, 2021 WL 519380, at *8 (N.D. Cal. Jan. 25, 2021) (same); *Brodsky v. Apple Inc.*, 445 F. Supp. 3d 110, 132 (N.D. Cal. 2020) (same); *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845, 870 (2018) (dismissing unjust enrichment in right of publicity case because "[u]njust enrichment is not a cause of action"). The contrary cases Plaintiffs cite (Opp. at 11-12) stem from *Hartford Casualty Insurance Co. v. J.R. Marketing, L.L.C.*, 61 Cal. 4th 988 (2015), which held that an insurer could bring an unjust enrichment claim to recover attorneys' fees directly from the lawyer to whom it paid the fees, rather than from the insured. *See id*. at 1007-08. Although the *Hartford* court described its decision as "narrow," *id.*, the Ninth Circuit cited it in an unpublished memorandum disposition for the proposition that California law recognizes unjust enrichment claims. *See Bruton v. Gerber Prods. Co.*, 703 F. App'x 468, 470 (9th Cir. 2017). *Hartford* is not remotely analogous, *Bruton* is not precedential (*see* Ninth Circuit Rule 36-3), *Astiana* remains good law, and Plaintiff's unjust enrichment claim should be dismissed. *See Low v. LinkedIn Corp.*, 900 F. Supp. 2d 1010, 1031 (N.D. Cal. 2012) (collecting cases).

D. Plaintiffs have not pleaded an inadequate remedy at law.

A court may not grant equitable relief unless "a plain, adequate and complete remedy at law [is] wanting." *Sonner v. Premier Nutrition Corp.*, 971 F.3d 834, 840 (9th Cir. 2020) (internal citation omitted). Plaintiffs argue (Opp. at 11) that their mere demand for injunctive relief establishes that their remedy at law is inadequate, but "cases in this Circuit have held that *Sonner* extends to claims for injunctive relief." *Huynh v. Quora, Inc.*, No. 18-cv-07597, 2020 WL 7495097, at *19 (N.D. Cal. Dec. 21, 2020) (collecting cases). Plaintiffs also argue that compensatory damages are inadequate "because the harm here is an invasion of privacy," which "can never be fully remedied through damages." Opp. at 11. But Plaintiffs' statutory remedy (even if they chose not to assert it[7]) addresses exactly this type of harm. *Miller v. Collectors Universe, Inc.*, 159 Cal. App. 4th 988, 1005 (2008) ("[T]he harm Miller suffered, and which section 3344(a)'s minimum statutory damages were intended to remedy, was the alleged injury to his mental feelings and peace of mind."). In any case, Plaintiffs' allegations belie the argument that they suffered a privacy harm that cannot be cured through damages: Plaintiffs argue that their harm is not that their information is *disclosed*, it is that it is *sold*. *See, e.g.*, Compl. ¶¶ 11-13, 39, 42, 51; Opp. at 18 (Thomson Reuters "could comply with the law simply by . . . not charging for Californians' identities"). "Selling" can be remedied through damages.

II. The First Amendment bars Plaintiffs' claims.

By challenging only Thomson Reuters' sale of factual information about Plaintiffs, not the Risk Inform score, *see* Opp. at 13 n. 9, Plaintiffs implicitly concede that barring Thomson Reuters from expressing opinions through its Risk Inform tool would violate the First Amendment. *See* Mot. at 12. Yet the First Amendment applies to factual information as well as opinions, *see* *Sorrell v. IMS Health Inc.*, 564 U.S. 552 (2011), and a bar on publishing Plaintiffs' personal information without consent is a content-based restriction on speech, *see, e.g.*, *Sarver v. Chartier*, 813 F.3d 891, 903 (9th Cir. 2016) ("California's right of publicity law clearly restricts speech based upon its content."). Content-based restrictions on speech are subject to strict scrutiny and "presumptively unconstitutional." *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

It is unsurprising that Plaintiffs do not identify any U.S. Supreme Court case where the Court so much as hinted that publishing accurate factual information could be punished consistent

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[7] *See McKesson HBOC, Inc. v. New York State Common Ret. Fund, Inc.*, 339 F.3d 1087, 1093 (9th Cir. 2003) (emphasis added) ("Whether [a plaintiff] chooses to pursue [statutory] remedies . . . does not alter the availability of the remedies at law.").

with the First Amendment, yet that is precisely what Plaintiffs expansively seek. In fact, the Supreme Court has repeatedly rejected attempts like Plaintiffs' to restrict factual information on the basis of alleged harms to privacy. *See* Mot. at 13 (collecting cases).

Plaintiffs' claims are similar to those at issue in *IMDb.com Inc. v. Becerra*, where the Ninth Circuit recently considered the constitutionality of a California law that sought to protect celebrities' privacy and prevent age discrimination by requiring subscription-based platforms, upon request, to remove and not further disseminate for publication a celebrity's age or date of birth. 962 F.3d 1111, 1118-19 (9th Cir. 2020). The Court determined the law was content-based because it "prohibit[ed] the dissemination of one type of speech: date of birth or age information," and it was unconstitutional because it did not survive strict scrutiny. *Id.* at 1120 (citation and quotation marks omitted). In this case, as in *IMDb*, Plaintiffs' proposed restrictions reflect a content-based restriction on speech because Plaintiffs seek to restrict the dissemination of one type of speech—personal information—and the restriction is unconstitutional because it does not survive strict scrutiny. *Id.*

Strict scrutiny in the misappropriation of likeness context means that, where a person's name, image, or likeness is used in speech for "informative or cultural" purposes, the use "is immune" under the First Amendment. *New Kids on the Block v. News Am. Publ'g, Inc.*, 745 F. Supp. 1540, 1546 (C.D. Cal. 1990), *aff'd*, 971 F.2d 302 (9th Cir. 1992).[8] Here, CLEAR's purpose is to inform, *see, e.g.*, Compl. ¶¶ 1, 2, 11, 24 (alleging aggregation and sale of *information*), so Plaintiffs' proposed restriction on speech is presumptively unconstitutional.

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[8] Restricting such speech categorically fails strict scrutiny because of the weight of the public's interest in informative or cultural speech and the inapplicability of the countervailing interest ordinarily implicated in right of publicity cases—namely, the protection of the "commercially exploitable opportunities" resulting from public reaction to a name or likeness, *see Lugosi*, 25 Cal. 3d at 823; *see also* Mot. at 10-14 (applying balancing test). Only if the speech "*serves no such function* but merely exploits the individual portrayed," is the balance different and strict scrutiny *potentially* satisfied. *Id.* (quoting Peter L. Felcher & Edward L. Rubin, *Privacy, Publicity and the Portrayal of Real People by the Media*, 88 YALE L.J. 1577, 1596 (1979)) (emphasis added).

Even if Plaintiffs could evade the categorical rule in right of publicity cases insulating informative or cultural speech, they would still need to show that their claims would survive strict scrutiny. To do this, they would need to establish that their proposed restriction is "the least restrictive means of achieving a compelling state interest." *McCullen v. Coakley*, 573 U.S. 464, 478 (2014). The relief they seek fails this test. The content encompassed by their proposed restriction is extraordinarily broad: all "personal data," including information as innocuous as "name" and "photographs," of everyone in California. *See* Compl. ¶ 70 (class definition). Their theory of relief would make a future defendant of anyone who charged a fee to access a Californian's data. And Plaintiffs do not even tie this relief to the harm they fear from, for example, bad actors that seek to harm them (who are not alleged to use CLEAR). The First Amendment does not tolerate such sweeping and indiscriminate relief. Additionally, to interpret California law to encompass the relief that Plaintiffs seek would also raise serious constitutional questions, which should be avoided. *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

In response, Plaintiffs argue that CLEAR does not concern a "public issue" and is not in the "public interest," citing defamation cases in support. *See* Opp. at 13. But the "public issue" test applies only to false speech in the defamation context, and as the Ninth Circuit recently reconfirmed, "neither this court, nor the Supreme Court, has held that content-based restrictions on public speech touching on private issues escape strict scrutiny." *IMDb.com*, 962 F.3d at 1123.[9] Just as the Ninth Circuit in *IMBd.com* refused to carve out an exception to strict scrutiny for dissemination of birthday and age information, 962 F.3d at 1123, this Court should decline to carve out an exception for the even more sweeping category of "personal information."

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[9] The only potentially analogous case cited by Plaintiffs, *Lukis v. Whitepages Inc.*, 2020 WL 6287369 at *6-7 (N.D. Ill. Oct. 27, 2020), contradicts the Ninth Circuit decision in *IMDB.com*.

Plaintiffs also appear to argue that Thomson Reuters' conduct is subject to lesser protection because Plaintiffs challenge only the "private sale" of data. Opp. at 13. But while "commercial speech" is afforded *lesser* First Amendment protection,[10] a "speaker's 'economic motivation' is 'insufficient by itself to render speech commercial,'" and what is instead required is a showing that the speech "*propose[s]* a commercial transaction." *IMDb.com Inc.*, 962 F.3d at 1122 (citations omitted) (emphasis added). Here, Plaintiffs have not alleged that CLEAR *proposes* a *commercial transaction*, nor can they. Strict scrutiny therefore applies.

Finally, to account for the narrow tailoring requirement of strict scrutiny, First Amendment protections are heightened (and actual malice is required) when it comes to speech about public figures such as Plaintiffs. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280-81 (1964); *Stewart*, 181 Cal. App. 4th at 681; *see also* Opp. at 16 (acknowledging that Plaintiffs' professions situate them differently than others). Dismissal is therefore further warranted because Plaintiffs have not alleged that Thomson Reuters acted with actual malice.

III. Section 230 of the CDA bars Plaintiffs' claims.

Plaintiffs' claims also fail because they are barred by Section 230 of the CDA. Plaintiffs effectively concede that Thomson Reuters is an interactive computer service, which satisfies the first prong of the CDA test. *See* Opp. at 16-20. Plaintiffs then rebut strawmen[11] and contest the second and third prongs, arguing that (a) their claims do not treat Thomson Reuters as a publisher or speaker, and (b) the content at issue was not provided by another. Plaintiffs' arguments fail.

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[10] *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980) (commercial speech restrictions limited to speech that is misleading or related to unlawful activity).

[11] To address the strawmen: Thomson Reuters argues that the CDA applies under the Ninth Circuit's three-part test for CDA immunity. *See* Mot. at 19-21. It does not argue that the CDA immunizes companies for violating the law if they do so over the Internet. *See* Opp. at 17. Nor does Thomson Reuters contend that the CDA applies to Plaintiffs' claims just because Thomson Reuters operates its service online. *Id.* Nor does Thomson Reuters argue that it is "automatically immune" under the CDA simply because it acquires content from third parties. *See* Opp. at 18.

A. Plaintiffs' claims treat Thomson Reuters as a "publisher" or "speaker."

To determine whether the claims treat Thomson Reuters as a publisher or speaker, "courts must ask whether the duty allegedly violated derives from the defendant's status or conduct as a 'publisher or speaker.'" *Barnes v. Yahoo!, Inc.* 570 F.3d 1096, 1102 (9th Cir. 2009). Here, Plaintiffs claim that Thomson Reuters had a duty to seek their permission or pay them before deciding whether to publish content about them through its online service. *See, e.g.*, Compl. ¶¶ 85, 86, 98, 99, 106, 108, 113, 117. This is "quintessential" publisher conduct. *Barnes*, 570 F.3d at 1107. Plaintiffs' claims are no different from the paradigmatic CDA-barred claim that demands that a social media company remove defamatory statements from its service. *See, e.g.*, *Carafano v. Metrosplash.com, Inc*., 339 F.3d 1119, 1125 (9th Cir. 2003). In both cases, the publication is the alleged offense, so the claims treat the defendant as publisher or speaker.

Plaintiffs' sole response to this is that their claims do not require Thomson Reuters to "monitor" content. The CDA has no such requirement, and Plaintiffs' argument ignores the Ninth Circuit's definition of publishing as "reviewing, editing, and deciding whether to publish or to withdraw from publication third-party content." *Barnes*, 570 F.3d at 1102 (citing *Fair Hous. Council v. Roommates.com, LLC*, 521 F.3d 1157, 1170–71 (9th Cir. 2008) (en banc)). It also ignores the many cases finding CDA immunity from right of publicity claims that do not require "monitoring."[12] The single case Plaintiffs cite for this argument, *HomeAway Inc. v. City of Santa Monica*, is distinguishable because it is not a right of publicity case, and it merely held that the CDA did not preempt a short-term rental ordinance because the ordinance said nothing about the content on the defendants' sites. 918 F.3d 676, 682 (9th Cir. 2019). Finally, even if "monitoring" were required, Plaintiffs' claims would qualify, because to determine whether consent is required for a given piece of content, Thomson Reuters would need to evaluate whether *that content*

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[12] *See Carafano*, 339 F.3d at 1125 (Section 230 barred misappropriation of right of publicity claim); *Callahan v. Ancestry.com Inc.*, No. 20-CV-08437-LB, 2021 WL 783524, at *6 (N.D. Cal. Mar. 1, 2021) (same).

pertained to a person with California rights. This is monitoring. Plaintiffs' claims therefore treat Thomson Reuters as a publisher, so the second prong of the CDA test is satisfied.

B. Thomson Reuters is not the "information content provider."

Plaintiffs allege that the content here comes from entities other than Thomson Reuters. *See* Compl. ¶¶ 2, 14, 16-17. Plaintiffs nonetheless argue that Thomson Reuters is the information content provider for two, mistaken reasons. *First,* Plaintiffs say that only *user-generated content* is subject to CDA protection. Opp. at 18. Plaintiffs provide no authority for this radical proposition, and the CDA includes no such requirement. 47 U.S.C. §§ 230(c)(1), 230(f)(3); *see also Liberi v. Taitz*, No. SACV 11-0485, 2011 WL 13315691, at *11 (C.D. Cal. Oct. 17, 2011) (CDA applied where the content was obtained from "State and Federal government agencies; Mortgage companies; Banks; and Consumer Credit Reporting Agencies"); *Nasser v. WhitePages, Inc.*, No. 12cv097, 2013 WL 6147677, at *4 (W.D. Va. Nov. 22, 2013) (CDA applied where the content was obtained through "agreements with third-party data providers").

Second, Plaintiffs argue that Thomson Reuters is the information content provider because Thomson Reuters "develops" and is the "sole cause" of "unlawful" content in CLEAR. Opp. at 19. But the Complaint alleges otherwise. The content at issue is the "name[s], photographs, personal identifying information, [and] other personal data . . . included in the CLEAR database." Compl. ¶ 70. This is generated by third parties. *See id.* ¶¶ 2, 14, 16-17. That Plaintiffs argue that the *sale* of that content is unlawful does not make the content itself unlawful. *See Callahan*, 2021 WL 783524, at *1, *6 (CDA immunity barred claims against defendant who had "databases of personal and historical information . . . that it sells to subscribers"); *Liberi*, 2011 WL 13315691, at *11 (CDA barred claims against defendants who sold reports containing personal information about plaintiffs).

Third, Plaintiffs argue that the Ninth Circuit "held that an internet company can only be immune for information that was 'tendered' to the company 'for posting online.'" Opp. at 19 (citing *Roommates.com*, 521 F.3d at 1172 n. 32). But *Roommates.com* did not so hold. It stated (in a footnote) that "Section 230 requires [courts] to *scrutinize particularly closely* any claim that can be boiled down to the failure of an interactive computer service to edit or block user-generated content that it believes was tendered for posting online." 521 F.3d at 1172 n. 32 (emphasis added). Moreover, Plaintiffs do not allege that Thomson Reuters posted content on CLEAR that Thomson Reuters did not believe was tendered to it for posting online. *See* Compl. ¶ 18 (alleging data elements collected online); *Callahan*, 2021 WL 783524, at *6 ("[N]o case supports the conclusion that … immunity applies only if the website operator obtained the third-party content from the original author."). The third CDA prong is therefore satisfied, so the CDA bars Plaintiffs' claims.

IV. California's anti-SLAPP statute applies.

A. Plaintiffs have not shown that the public interest exception applies.

Plaintiffs' lawsuit does not fall within anti-SLAPP's exception for actions "brought *solely* in the public interest or on behalf of the general public." Cal. Civ. P. Code § 425.17(b) (emphasis added). *First*, "a litigant seeking 'any' personal relief may not rely on the [Section] 425.17(b) exception." *Club Members for an Honest Election v. Sierra Club*, 45 Cal. 4th 309, 317 (2008); *see also Cruz v. City of Culver City*, 2 Cal. App. 5th 239, 250 (2016), *as modified* (Aug. 8, 2016) (public interest exception denied where plaintiffs would receive a direct benefit); *Blackburn v. ABC Legal Servs., Inc.*, No. C 11-01298, 2011 WL 8609453, at *3 (N.D. Cal. June 16, 2011) (same). Here, Plaintiffs seek payment for themselves, and they concede their unique position by alleging they are in the public eye and are targeted by those who dislike their speech. Opp. at 1-2, 16. *Second*, Plaintiffs have not shown that their suit would enforce an important right affecting the public interest and would confer a significant benefit on the general public. To do so, Plaintiffs would at least need to provide some "legal basis" for their assertion that Thomson Reuters has a "mandatory duty" to refrain from disseminating factual information that it obtained through lawful means. *Save Westwood Vill. v. Luskin*, 233 Cal. App. 4th 135, 144 (2014). They have not done so. *See supra* Sections I & II. *Third*, private enforcement is unnecessary. The CCPA comprehensively covers the sale of personal information, and that statute is enforced by the California Attorney General. *See* Cal. Civ. Code §§ 1795.150-1798.155.

B. CLEAR is protected activity under the anti-SLAPP statute.

Because the relief that Plaintiffs seek would restrict Thomson Reuters' protected speech in a public forum on a matter of public interest, Plaintiffs are unlikely to prevail on the merits and the Complaint should be stricken. *First*, Thomson Reuters' speech is protected by the First Amendment, *see supra* Section II, and the reach of California's anti-SLAPP statute is even "broader than the scope of constitutionally protected speech." *hiQ Labs, Inc. v. LinkedIn Corp*., 273 F. Supp. 3d 1099, 1116 (N.D. Cal. 2017). *Second*, Thomson Reuters' speech is in a public forum under the anti-SLAPP statute, because a website that receives over 100,000 search queries a day, *see* Compl. ¶ 21, is a public forum within the meaning of the statute even if it is not accessible by everyone and even if it charges for access. *See, e.g.*, *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 897 (2004) (website is a public forum even if the operator limits access); *see also Guglielmi v. Spelling–Goldberg Prods.*, 25 Cal. 3d 860, 868–69 (1979) ("The First Amendment is not limited to those who publish without charge"). *Third*, Thomson Reuters' speech is a matter of public interest for the reasons already discussed. *See supra* at p. 1; Mot. at 10-12, 24.[13] Like the database of pharmaceutical information used by government subscribers in *Exeltis USA Inc. v. First Databank, Inc.*, the CLEAR database, which is also used by law enforcement and government agencies, concerns a matter of public interest despite being available only to paying subscribers. No. 17-cv-04810, 2017 WL 6539909 (N.D. Cal. Dec. 21, 2017); Compl. ¶¶ 59, 63 (database used by government).

CONCLUSION

For the foregoing reasons and those stated in the Motion, the Complaint should be dismissed and Thomson Reuters' motion to strike pursuant to California Code of Civil Procedure Section 425.16 should be granted.

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[13] Plaintiffs' argument that Thomson Reuters waived this argument is puzzling and unfounded. *See* Opp. at 25.

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