

No. 22-35305

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KIM CARTER MARTINEZ,

Plaintiff-Appellee,

v.

ZOOMINFO TECHNOLOGIES INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the U.S. District Court for the Western District of Washington
No. 3:21-cv-05725-MJP
Hon. Marsha J. Pechman, District Judge

**ANSWERING BRIEF FOR PLAINTIFF-APPELLEE
KIM CARTER MARTINEZ**

Ben Osborn
Law Office of Benjamin R. Osborn
102 Bergen St.
Brooklyn, NY 11201
Phone: (347) 645-0464
Email: ben@benosbornlaw.com

Michael F. Ram (SBN 104805)
mram@forthepeople.com
MORGAN & MORGAN
COMPLEX LITIGATION GROUP
711 Van Ness Avenue, Suite 500
San Francisco, CA 94102
Telephone: (415) 358-6913
Telephone: (415) 358-6293

Sam Strauss
sam@turkestrauss.com
Raina Borrelli
raina@turkestrauss.com
TURKE & STRAUSS LLP
613 Williamson St., Suite 201
Madison, Wisconsin 53703-3515
Telephone: (608) 237-1775
Facsimile: (509) 4423

Attorneys for Plaintiff-Appellee

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INTRODUCTION

ZoomInfo is in the business of selling personal information to marketers without consent. ZoomInfo collects the information by paying third-party data aggregators, and by surreptitiously reading emails received by ZoomInfo subscribers. ER-152-53. Neither ZoomInfo nor the third-party data aggregators obtain individuals' consent or provide them any compensation. *Id.* Marketers who subscribe to ZoomInfo receive a searchable database containing individuals' names, photographs, locations, job descriptions, and contact information, which the marketers use to contact those individuals with unsolicited promotions. ER-151 & -57. Subscribers also receive ZoomInfo's "intent engine," which allows them to track targeted individuals' "consumption patterns and buying signals across the web" without their knowledge. ER-152.

Plaintiff Kim Martinez has no relationship with ZoomInfo. She did not share her information with ZoomInfo, does not endorse its service, and does not wish her Internet traffic to be tracked. ER-154 & -63. Nevertheless, ZoomInfo includes her personal information in its database and uses her name and persona to advertise its service. ZoomInfo publishes a teaser profile containing Plaintiff's name, location, job description, partially redacted contact information, and the redacted identities of her colleagues. ER-157-59. The teaser profile informs potential subscribers they must purchase a subscription to "Get Full Access to Kim's Info." *Id.* Anyone who

searches for Ms. Martinez's name in an Internet browser or on ZoomInfo's site receives her teaser profile in response. ER-159.

Consequently, ZoomInfo misappropriated intellectual property that belongs to Plaintiff: her persona. California's right of publicity statute prohibits the knowing use of a person's "name, voice, signature, photograph, or likeness, in any manner, on or in products . . . or for purposes of advertising or selling, or soliciting purchases of . . . goods or services, without such person's prior consent." Cal. Civ. Code § 3344. The California tort of misappropriation of name or likeness similarly forbids the "appropriation, for the defendant's advantage, of the plaintiff's name or likeness." *Eastwood v. Superior Court*, 149 Cal.App.3d 409, 416 (Cal. Ct. App. 1983) (citation omitted).

ZoomInfo's advertising teaser profiles contain no expressive elements, do not address any issue of interest to the general public, and are intended for marketers who will use ZoomInfo's service for commercial purposes. Nevertheless, ZoomInfo filed a motion to strike under California's anti-SLAPP statute, asserting that this lawsuit somehow arises from "speech . . . in connection with a public issue." *See* Cal. Code Civ. Proc. § 425.16(b)(1).

The district court rejected ZoomInfo's attempt to stretch the anti-SLAPP statute to cover its non-expressive commercial advertisements. Judge Pechman correctly denied the motion for three reasons. First, ZoomInfo's teaser profiles are

commercial speech not subject to anti-SLAPP protection. Second, ZoomInfo failed to show this suit arises from speech in connection with an issue of public interest. Third, Plaintiff has shown her claims have “minimal merit,” a finding supported by the fact that more than a dozen courts have denied motions to dismiss in similar cases.

JURISDICTIONAL STATEMENT

ZoomInfo’s jurisdictional statement is incorrect on multiple grounds. First, ZoomInfo falsely asserts this Court “has jurisdiction under 28 U.S.C. § 1291.” Opening Br., at *17. On the contrary, § 1291 applies only to “final decisions of district courts.” This is an interlocutory appeal. Because there has been no final decision, § 1291 does not apply, and therefore the only possible source for this Court’s jurisdiction is the collateral order doctrine. *See Planned Parenthood Fed’n of Am., Inc. v. Ctr. for Med. Progress*, 890 F.3d 828, 832 (9th Cir. 2018).

Second, ZoomInfo fails to provide any ground on which this Court has jurisdiction to review the district court’s ruling on Article III standing. If interlocutory review is available at all, it is confined to ZoomInfo’s anti-SLAPP motion. The Court should decline to exercise pendent jurisdiction over the issue of Article III standing, which is neither “inextricably intertwined” nor “necessary to ensure meaningful review” of the anti-SLAPP order. *See Melendres v. Arpaio*, 695

F.3d 990, 996-97 (9th Cir. 2012); *Batzel v. Smith*, 333 F.3d 1018, 1023 (9th Cir. 2003).

Third, under California's anti-SLAPP statute, interlocutory appeal is not available when the exceptions for commercial speech, or for suits brought in the public interest, apply. *Breazeale v. Victim Servs., Inc.*, 878 F.3d 759, 766-67 (9th Cir. 2017) (*citing* Cal. Civ. Proc. Code § 425.17(e)). Both exceptions apply here.

Fourth, as many judges in this Circuit have recognized, the denial of an anti-SLAPP motion does not meet the Federal standard for appealable collateral orders. *See, e.g., Planned Parenthood*, 890 F.3d at 835-38 (Gould, J., concurring). Although *Batzel*, 333 F.3d at 1024-25, currently allows interlocutory appeal of anti-SLAPP denials, this Circuit should take this opportunity to correct *Batzel* and join its sister Circuits in recognizing that the denial of an anti-SLAPP motion is not an appealable collateral order.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether this Court lacks jurisdiction because one or both of the statutory exceptions for commercial speech, and for suits in the public interest, apply;
2. Whether this Court should cease allowing interlocutory review of anti-SLAPP motions, thereby reconciling this Court's approach with the collateral order doctrine as clarified in *Will*;

3. Whether the district court committed reversible error in finding ZoomInfo failed to show Plaintiff's claims arise from speech in connection with an issue of public interest;
4. Whether the district court committed reversible error in finding Plaintiff showed her claims have minimal merit;
5. Whether this Court should decline to exercise pendent jurisdiction to review *de novo* the district court's decision on Article III standing, because standing was not part of the anti-SLAPP ruling that is the sole subject of this appeal;
6. If this Court reviews the issue of Article III standing, whether the district court committed reversible error in finding, as have many courts in similar cases, that Plaintiff alleged harms bearing a close resemblance to harms that traditionally gave rise to a tort claim, as required by *TransUnion*.

STANDARD OF REVIEW

“A district court’s denial of an anti-SLAPP motion . . . is reviewed *de novo*. *Jordan-Benel v. Universal City Studios, Inc.*, 859 F.3d 1184, 1188 (9th Cir. 2017). The reviewing court “accept[s] plaintiff’s submissions as true and consider[s] only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law.” *Park v. Board of Trustees of Cal. State Univ.*, 2 Cal. 5th 1057, 1067 (Cal. 2017).

Where, as here, a defendant appealing an anti-SLAPP motion attempts to raise the pendent issue of whether the district court has jurisdiction over Plaintiff's claims, the appeals court should decline to consider the jurisdictional issue unless it is "inextricably intertwined" with the anti-SLAPP denial. *Batzel*, 333 F.3d at 1023. Were the Court to review the 12(b)(6) order, this Court would "review de novo" the District Court's finding of Article III standing, and would "presume[e] that all facts alleged in the complaint are true." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015).

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

I. Factual Background

This case arises from ZoomInfo's failure to compensate and failure to obtain Plaintiff's consent before using her persona in a teaser profiles advertising ZoomInfo's marketing service. *See* ER-150-69. ZoomInfo's teaser profiles propose a commercial transaction, do not contain expressive or transformative content, and contain no discussion concerning any matter of public interest. ER-157-62.

II. Procedural History

Plaintiff filed a complaint on September 30, 2021. ER-150. On December 8, 2021, ZoomInfo filed a two-page motion arguing Plaintiff's claims should be struck pursuant to California's anti-SLAPP statute. ER-146-47. ZoomInfo also filed an eighteen-page motion to dismiss under Rule 12(b)(6). ER-129-47. On April 11,

2022, Judge Marsha Pechman denied ZoomInfo's anti-SLAPP motion to strike. ER-16-17. Judge Pechman also denied ZoomInfo's motion to dismiss, finding among other things that Plaintiff has Article III standing. ER-5-16. On April 14, 2022, ZoomInfo filed a notice of appeal seeking interlocutory review of the district court's denial of the anti-SLAPP motion. ER-170. ZoomInfo did not file a notice of appeal seeking review of the district court's ruling on Article III standing.

There are more than a dozen pending related cases against websites that, like ZoomInfo, use teaser profiles of information about individuals to advertise subscriptions. The judges presiding over these cases have unanimously agreed that the claims are not subject to dismissal under state anti-SLAPP statutes. With only one exception in which the court failed to cite *TransUnion*, these courts have also unanimously agreed that plaintiffs have Article III standing.

SUMMARY OF ARGUMENT

This Court does not have jurisdiction to review the denial of ZoomInfo's anti-SLAPP motion before final judgment. First, the statutory exceptions for commercial speech and for suits in the public interest apply. Second, as many judges of this Circuit have opined, allowing interlocutory appeal of anti-SLAPP denials is inconsistent with the collateral order rule as clarified by the Supreme Court in *Will v. Hallock*, 546 U.S. 345 (2006).

Should this court exercise jurisdiction over the anti-SLAPP issue, the district court's denial should be affirmed. First, ZoomInfo's teaser profile representing Plaintiff's persona is commercial speech promoting and describing a product, and is therefore exempt from California's anti-SLAPP statute. Second, ZoomInfo has failed to show this suit arises from speech concerning a "public issue." Third, Plaintiff has shown her claims have "minimal merit," not least because more than a dozen district courts have denied motions to dismiss similar claims.

The Court does not have jurisdiction at this stage to review Judge Pechman's order on ZoomInfo's motion to dismiss. Under the Court's precedent, the Court must avoid dipping into jurisdictional or other issues that were not decided as part of the anti-SLAPP motion, lest it run afoul of the collateral order doctrine.

Should the Court review the district court's denial of ZoomInfo's 12(b)(6) motion, it should affirm the district court's finding that Plaintiff has Article III standing. As many district courts have ruled in parallel cases, because Plaintiff alleged harms closely related to those that traditionally gave rise to a common law claim, under *TransUnion LLC v. Ramirez*, 141 S.Ct. 2190 (2021), Plaintiff has standing.

ARGUMENT

I. This Court does not have jurisdiction to review the district court's denial of ZoomInfo's anti-SLAPP motion.

For two independent reasons, this Court lacks jurisdiction to hear ZoomInfo's interlocutory appeal of its anti-SLAPP motion.

A. Interlocutory appeal is not available because the exceptions for commercial speech and suits in the public interest apply.

Recognizing that “there has been a disturbing abuse” of the anti-SLAPP law, undermining the very rights “of speech and petition” the law was meant to protect, California's legislature recognizes two exceptions that apply here.

First, anti-SLAPP protection does not apply to commercial speech. Cal. Civ. P. Code § 425.17(c) excludes speech by defendants who are “in the business of selling . . . goods or services” that is “made for the purpose of . . . promoting . . . goods or services” and for which the intended audience is “an actual or potential buyer or customer.” Here, Plaintiff's right of publicity claim does not arise from “speech” at all, because it arises from ZoomInfo's failure to compensate and obtain consent, not the distribution of the teaser profile. *See* Part II(B) *below*. But even were this Court to determine that Plaintiff's claim arises from ZoomInfo's distribution of her teaser profile, the teaser profile is commercial speech excepted by § 425.17(c).

Simpson Strong-Tie Co., Inc. v. Gore, 49 Cal.4th 12, 30 (Cal. 2010) describes four factors, all of which weigh in favor of finding that ZoomInfo's teaser profile is

exempt. First, ZoomInfo is “engaged in the the business of selling” subscription marketing tools to private businesses. ER-160. Second, Plaintiff’s teaser profile “consist[s] of representations of fact about” ZoomInfo’s service, including that ZoomInfo has Plaintiff’s email address and that subscribers must purchase a subscription to “Get Full Access to Kim’s Info.” ER-157. Third, ZoomInfo displays Plaintiff’s teaser profile “for the purpose of . . . promoting” ZoomInfo’s service. ER-162-63. Fourth, ZoomInfo’s “intended audience” is “actual or potential buyer[s] or customer[s].” *Id.* Courts have repeatedly found that speech of this type is exempt under § 425.17(c). For example, in *JAMS, Inc. v. Superior Court of San Diego Cnty.*, the defendant ADR service published a retired judge’s professional history on its website, just as ZoomInfo publishes Plaintiff’s professional history. 1 Cal.App.5th 984, 993-98 (Cal. Ct. App. 2016). The court found that the website’s statements “about [her] background and experience” were “commercial speech” exempt from the anti-SLAPP statute because they were “placed on the JAMS Web site to be viewed by actual or potential ADR buyers or customers” and encourage them to buy the defendant’s services. *Id.*, at 998.

Second, the anti-SLAPP statute does not apply to “any action brought solely in the public interest or on behalf of the general public.” Cal. Civ. Proc. Code § 425.17(b). A class action is excepted if (1) the plaintiff does not seek relief different from the class, (2) the action would enforce an “important right affecting the public

interest,” and (3) “private enforcement is necessary and places a disproportionate financial burden on the plaintiff.” *Id.* Plaintiff’s suit against ZoomInfo is immune under § 425.17(b). The Plaintiff seeks the same relief as the class; the action seeks to protect the public from the unscrupulous theft of their personas; and the amounts at stake are too small for individual claims to be a viable path to protecting the public interest. *See, e.g., Smith v. Levine Leichtman Capital Partners, Inc.*, 723 F. Supp. 2d 1205, 1218-19 (N.D. Cal. 2010) (exception applied to class action by consumers against debt collection company).

Under California’s anti-SLAPP statute, interlocutory appeal is not available when either exception applies. Cal. Civ. Proc. Code § 425.17(e); *see also Breazeale*, 878 F.3d at 766-67. Plaintiff argued both the § 425.17(c) commercial speech and § 425.17(d) public interest exceptions below. ER-78-79. In denying ZoomInfo’s anti-SLAPP motion, Judge Pechman wrote that “the speech at issue is commercial in nature and not protected speech.” ER-16. Because Plaintiff’s claims are exempt from the anti-SLAPP statute, this Court should dismiss the present appeal for lack of jurisdiction.¹

¹ Even if this Court accepts jurisdiction, that the exceptions apply is an independent reason to affirm.

B. The Court should revisit *Batzel* in light of *Will* and rule that interlocutory appeals of anti-SLAPP denials are not available in federal court.

Nearly 20 years ago, this Court ruled that defendants may appeal denials of state anti-SLAPP motions before final judgment. *See Batzel*, 333 F.3d at 1024–26. As many Judges in this Circuit have since opined, this rule is inconsistent with the “modest scope” of the collateral order doctrine as clarified in an intervening Supreme Court decision, *Will*, 546 U.S. at 349 . Under *Will*, interlocutory review is available only for rare orders that meet three “stringent” conditions. *Id.* As relevant here, the order must “resolve an important issue completely separate from the merits of the action.” *Id.* Because the district court’s denial of ZoomInfo’s anti-SLAPP motion is not completely separate from the merits, interlocutory appeal is not available.

The Court should bring this Circuit’s approach in line with *Will* by ruling that defendants must await final judgment before appealing an anti-SLAPP motion. At the least, the Court should rule that interlocutory appeal is unavailable where, as here, the district court ruled that Plaintiff “has shown a reasonable probability of

prevailing on the merits.” ER-17. In such cases, review necessarily implicates the merits.²

In a dissenting opinion in *Makaeff v. Trump University, LLC*, 736 F.3d 1180 (9th Cir. 2013), four Judges of this Circuit – Judges Watford, Paez, Bea, and then Chief Judge Kozinski – opined that the Ninth Circuit “should stop entertaining interlocutory appeals from rulings on [anti-SLAPP] motions” because allowing such appeals is not “consistent with controlling Supreme Court precedent.” *Id.*, at 1188, 1190. An order denying an anti-SLAPP motion “doesn’t satisfy” the conditions in *Hill* because California’s anti-SLAPP inquiry asks whether “the plaintiff has established that there is a probability that the plaintiff will prevail.” *Id.*, at 1190 (quoting Cal. Civ. Proc. Code § 425.16(b)(1)). This inquiry requires “assessing the merits of the claim itself” and therefore is not “completely separate from the merits.” *Id.*, at 838.

In *Planned Parenthood*, Judge Gould, who previously joined the opinion in *Batzel*, wrote that he “now believes the interlocutory appeal of this issue is incorrect, potentially conflicts with federal procedural rules, and burdens the federal courts

² Recently, this Circuit “decline[d] to overrule” its prior cases establishing the availability of state anti-SLAPP procedures in Federal court. *CoreCivic, Inc. v. Candide Grp.*, No. 20-17285 (9th Cir. Aug. 30, 2022). The Court did not have occasion to visit the availability of interlocutory appeal. *See Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1183 (9th Cir. 2016) (Kozinski and Gould, concurring) (even if the Court retains anti-SLAPP motions in federal court, it should “[a]t the very least . . . reassess . . . the right to an immediate appeal”).

with unneeded interlocutory appeals.” 890 F.3d at 835. As Judge Gould noted, this Circuit’s approach places it in conflict with many of its sister Circuits. The Seventh, Tenth, and D.C. Circuits have “squarely rejected” “the use of anti-SLAPP procedure in federal courts” altogether. *Id.* (citing *Intercon Sols., Inc. v. Basel Action Network*, 969 F. Supp. 2d 1026 (N.D. Ill. 2013), *aff’d*, 791 F.3d 729 (7th Cir. 2015); *Los Lobos Renewable Power, LLC v. Americulture, Inc.*, 885 F.3d 659 (10th Cir. 2018); *Abbas v. Foreign Pol’y Grp., LLC*, 783 F.3d 1328 (D.C. Cir. 2015)). The Eleventh Circuit has since reached the same conclusion. *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345 (11th Cir. 2018). The Second Circuit allows anti-SLAPP motions but does not allow interlocutory appeals from denials because they are “inextricably intertwined with the merits.” *Planned Parenthood*, 890 F.3d at 838 (citing *Ernst v. Carrigan*, 814 F.3d 116, 119 (2d Cir. 2016)).³

Now-Chief Judge Murguia joined Judge Gould’s opinion in *Planned Parenthood*. And Judge Bress recently wrote a concurrence joining this consensus. *Flo & Eddie, Inc. v. Pandora Media, LLC*, No. 20-56134 (9th Cir. June 2, 2022) (unpublished).

³ The First and Fifth Circuits, like the Ninth, allow interlocutory appeals of anti-SLAPP denials. See *Henry v. Lake Charles American Press*, 566 F.3d 164 (5th Cir. 2009); *Godin v. Schencks*, 629 F.3d 79 (1st Cir. 2010). In adopting this rule, both Circuits relied on the reasoning of this Court in *Batzel*. See *Henry*, 566 F.3d at 175; *Godin*, 629 F.3d at 84-85.

This appeal presents a perfect opportunity for this Circuit to revisit *Batzel* and align this Circuit’s understanding of the collateral order doctrine with *Will* and its sister Circuits. The risks that prompted many judges to urge revisiting *Batzel* are manifest here. Because Judge Pechman ruled that ZoomInfo’s anti-SLAPP motion “must be denied because Martinez has shown a reasonable probability of prevailing on the merits,” ER-17, reviewing the Order would require this Court “to dive headlong into the merits.” *See Travelers Cas. Ins. Co. of Am. v. Hirsh*, 831 F.3d 1179, 1185 (9th Cir. 2016). Indeed, ZoomInfo explicitly asks the Court to evaluate the “Merits.” Opening Brief, at *52. ZoomInfo devotes most of its brief to arguing that this Court should re-evaluate the district court’s findings that Plaintiff showed actionable injury and that the statutory “public interest” exception does not apply. *See* Opening Brief at *52-61; 21-35. This “exhaustive (and exhausting) detour [into the merits] is exactly what the final judgment rule is designed to avoid.” *Travelers*, 831 F.3d at 1185.

Allowing interlocutory review also raises the risk that defendants will use the appeal of a “meritless motion to strike” as a procedural delay tactic. *Id.*, at 1184. Counsel representing ZoomInfo also represented Ancestry.com in the related case *Sessa v. Ancestry.com*, No. 20-cv-02292 (D. Nev. filed Dec. 17, 2020); appeal docketed, No. 21-16618 (9th Cir.). In *Sessa*, as here, the defendant filed an anti-SLAPP motion, which was denied. 591 F. Supp. 3d 1008, 1034-35 (D. Nev. 2021).

There, as here, the defendant filed an interlocutory appeal to the Ninth Circuit and obtained a stay while the appeal was pending. *See* No. 20-cv-02292, Dkt. No. 50 (Jan. 18, 2022). After the issue was fully briefed and the matter was scheduled for argument, the defendant voluntarily dismissed its appeal. *See* No. 21-16618, Dkt. No. 31.

II. If this Court accepts interlocutory appeal of the anti-SLAPP motion, it should affirm the district court’s ruling.

Seven courts have considered anti-SLAPP motions like ZoomInfo’s in similar cases. All seven denied the motions on the ground that profiles of information about individuals do not concern a “public issue” and therefore fail the first prong of the anti-SLAPP analysis.⁴ Plaintiff is not aware of, and ZoomInfo does not cite, a single case granting an anti-SLAPP motion on similar facts.

⁴ ER-16-17; *Callahan v. PeopleConnect*, No. 20-cv-09203, 2021 WL 5050079, at *21 (N.D. Cal. Nov. 1, 2021); *Boshears v. PeopleConnect*, No. 21-cv-01222-MJP, 2022 WL 888300, at *7 (W.D. Wash. Mar. 25, 2022); *Callahan v. Ancestry.com, Inc.*, 2021 WL783524, at *7 (N.D. Cal. Mar. 1, 2021); *Sessa v. Ancestry*, 561 F. Supp. 3d 1008, 1034 (D. Nev. 2021); *Spindler v. Seamless Contacts*, No. 22-cv-787, 2022 WL 16985678, at *6-7 (N.D. Cal. Oct. 24, 2022); *Camacho v. Control Group Media Co.*, No. 21-cv-1954, 2022 WL 3093306, at *33 (S.D. Cal. July 18, 2022).

A. The district court correctly held that ZoomInfo failed to carry its burden of showing speech in connection with a public issue.

To succeed on an anti-SLAPP motion, the movant must demonstrate that the plaintiff's claim "aris[es] from . . . free speech . . . in connection with a public issue." Cal. Code Civ. Proc. § 425.16(b)(1); *see also Hilton v. Hallmark Cards*, 599 F.3d 894, 903 (9th Cir. 2009) (burden rests with party asserting anti-SLAPP). The District Court correctly ruled ZoomInfo failed to carry this burden. *See* ER-16-17. California law establishes the following guiding principles:

- (1) "public interest" does not equate with mere curiosity;
- (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
- (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;
- (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
- (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Piping Rock Partners, Inc. v. David Lerner Assocs., Inc., 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013) (citation omitted). As the district court found, "none of these [principles] weighs in ZoomInfo's favor." ER-17. ZoomInfo's teaser profile about Plaintiff displays her name, workplace, job description, location, phone number, and

partially redacted email address, which users must pay to reveal. ER-157. Plaintiff is not a public figure and “[t]here is no evidence to suggest that her persona is a matter of public interest.” ER-17. ZoomInfo uses Plaintiff’s teaser profile to advertise subscriptions to marketers at private companies. It is difficult to imagine a use more directed to private interests. *See id.* (“ZoomInfo’s use of [Plaintiff’s] persona appears to be to generate revenue, rather than general public interest.”). No fewer than seven district courts have reached the same conclusion. *See n. 4 above.*

Attempting to identify a matter of public interest to which Plaintiff’s personal information supposedly relates, ZoomInfo argues that “contact information for professionals . . . facilities public knowledge and discussion about the professionals.” Opening Br., *22-23. But ZoomInfo fails to identify any evidence of a public “discussion” in which Plaintiff’s personal information has played a part. Indeed, ZoomInfo does not even identify a hypothetical topic of public discussion to which Plaintiff’s personal information *might* be relevant. *Id.*⁵ And “the assertion of a broad and amorphous public interest is not sufficient.” *Piping Rock*, 946 F. Supp. 2d at 968. Were the unproven assertion of a generic interest in “knowledge

⁵ *See also Talega Maintenance Corp. v. Standard Pacific Corp.*, 225 Cal.App.4th 722, 734 (Cal. Ct. App. 2014) (where the issue is of interest “to a limited, but definable portion of the public,” the speech must “at a minimum, occur in the context of an ongoing controversy, dispute or discussion” to qualify for anti-SLAPP protection) (citation omitted).

and discussion” about individuals’ personal information sufficient to prove a “public issue” under the anti-SLAPP statute, the “public issue” requirement would be meaningless.

The district court’s decision finds support in *FilmOn.com Inc. v. DoubleVerify Inc.*, 7 Cal.5th 133 (2019). In *FilmOn*, the defendant provided reports “about the websites on which the clients are interested in advertising,” including “a description of the websites’ content.” *Id.*, at 141. Just as ZoomInfo argues here, the defendant argued that its reports about websites “concerned issues of interest to the public” because “the public ha[s] a demonstrable interest in knowing what content is available on the Internet.” *Id.*, at 142 (quotation omitted); *compare* Opening Br., at *22-23 (arguing that “[b]eing able to search for, learn about, and find [Plaintiff’s] contact information” is of interest to the public). The California Supreme Court rejected this argument, writing that the defendant “cannot merely offer a ‘synecdoche theory’ of public interest” under which factual business information would somehow qualify for anti-SLAPP protection merely “by its slight reference to the broader public issue.” *FilmOn*, 7 Cal.5th at 152. The court found especially relevant that, as here, the defendant offered its reports “not to the wider public . . . but privately, to a coterie of paying clients [who] . . . use the information . . . for their business purposes alone.” *Id.*, at 153; *compare* ER-151 (ZoomInfo advertises its subscription service to professional marketers who pay “\$10,000 or more per year,”

and who use the service for private commercial purposes). The facts here are identical to *FilmOn*, except that ZoomInfo provides reports about *individuals*, not businesses, so the connection to any public issue is even further attenuated.

ZoomInfo emphasizes that its teaser profiles are “free speech” protected by the First Amendment. Opening Br., at *53-54. This is both unremarkable – indeed, almost all speech qualifies for some level of First Amendment protection, *see United States v. Alvarez*, 567 U.S. 709, 717 (2012) – and inapposite to the anti-SLAPP inquiry. The question is not whether Plaintiff’s claims arise from “speech,” but rather whether they arise from the narrower category of “speech in connection with a public issue.” *See City of Montebello v. Vasquez*, 1 Cal.5th 409, 422 (Cal. 2016) (citations omitted) (“[C]ourts determining whether conduct is protected under the anti-SLAPP statute look not to First Amendment law, but to the statutory definitions in section 425.16.”).

The cases on which ZoomInfo relies are easily distinguished. In the unreported *Davis v. Avvo, Inc.*, which addressed a now-defunct anti-SLAPP statute with a different standard than California’s,⁶ a website’s display of informational

⁶ The Washington anti-SLAPP statute at issue in *Davis v. Avvo, Inc.*, required only that the movant show “an action involving public participation.” No. 11-cv-1571, 2012 WL 1067640, at *3 (W.D. Wash. Mar. 28, 2012). This statute was ruled unconstitutional by the Washington Supreme Court in *Davis v. Cox*, 183 Wash. 2d 269 (Wash. 2015).

profiles about local professionals was “an action involving public participation” because of two factors that are not present here. *See* No. 11-cv-1571, 2012 WL 1067640, at *3 (W.D. Wash. Mar. 28, 2012). First, the profiles were provided for free “to the general public” to help them “in choosing a doctor, dentist or lawyer.” *Id.* Second, the public could “participate . . . by providing reviews” of the professionals, which rendered the website a “vehicle for discussion of public issues . . . distributed to a large and interested community.” *Id.* Here, ZoomInfo does not provide the full profiles “to the general public,” nor can ZoomInfo’s users “participate” by expressing their own views. Rather, ZoomInfo sells its subscription service at a high cost to professional marketers, who use the service for the commercial purpose of contacting individuals with unsolicited promotions.⁷

ZoomInfo also relies on *Ellis v. Dun & Bradstreet*, but ZoomInfo mis-cites the case. *See* No. 18-cv-1007-MRW, 2019 WL 8017821 (C.D. Cal. Nov. 20, 2019). ZoomInfo claims *Ellis* “held a website . . . protected under California’s anti-SLAPP law.” Dkt. No. 23, at *57. On the contrary, *Ellis* denied the defendant’s anti-SLAPP motion to strike. 2019 WL 8017821, at *6. The court wrote that the California Supreme Court’s decision in *FilmOn* “seems to close the door on”

⁷ ZoomInfo’s citation to *Vrdolyak v. Avvo, Inc.*, 206 F. Supp. 3d 1384, 1388 (N.D. Ill. 2016) is similarly unavailing. The case did not involve an anti-SLAPP motion, was decided under Illinois law, and did not address whether the suit arose from “speech in connection with a public issue.”

applying subsection (e)(4) – the only subsection that could plausibly apply to ZoomInfo’s teaser profiles – to “privately distributed commercial information” circulated “to a coterie of paying clients.” *Id.*, at *4. After denying the anti-SLAPP motion, the *Ellis* court acknowledged that “precedent allows interlocutory appellate review,” but then quoted Judge Gould’s and Judge Kozinski’s concurrences from *Planned Parenthood* and *Travelers* calling for en banc reconsideration of that precedent. *Id.*, at *6.

ZoomInfo’s reliance on *Exeltis USA Inc. v. First Databank, Inc.*, No. 17-CV-04810-HSG, 2017 WL 6539909 (N.D. Cal. Dec. 21, 2017) and *Kronemyer v. Internet Movie Database, Inc.*, 150 Cal.App.4th 941, 944 (Cal. Ct. App. 2007) demonstrates how far removed ZoomInfo’s profiles are from any “public issue.” In *Exeltis*, “coding changes for prenatal vitamins” “concern[ed] a topic of widespread, public interest” because there was “an ongoing [public] discussion about the prescription status of prenatal vitamins.” 2017 WL 6539909, at *13-14. Likewise, in *Kronemyer* the court found that “the motion picture My Big Fat Breek Wedding was a topic of widespread public interest.” 150 Cal.App.4th at 949. Here, ZoomInfo fails to identify any ongoing discussion of “widespread public interest” to which its advertisements teasing individuals’ contact information might relate. The district court’s finding that ZoomInfo failed the first prong of the anti-SLAPP analysis should be affirmed.

B. Plaintiff’s claim arises not from publication of teaser profiles *per se*, but rather from ZoomInfo’s failure to compensate and obtain consent.

In addition to showing “speech in connection with a public issue,” an anti-SLAPP movant must also show the plaintiff’s claim “arises from” that speech. Cal. Civ. Code § 425.16. “A claim may be struck only if the speech . . . *itself* is the wrong complained of.” *Wilson v. Cable News Network, Inc.*, 7 Cal.5th 871, 884 (Cal. 2019) (quotation omitted). ZoomInfo has failed to carry this burden.

If Plaintiff’s claim arises from speech at all, the relevant speech is her teaser profile, not the subscription service it advertises. Recognizing this distinction, many courts, including the court below, have rejected attempts to misconstrue claims about teaser profiles as if they arose from the service being advertised. *See, e.g., Lukis v. Whitepages, Inc.*, 542 F. Supp. 3d 831, 752 (N.D. Ill. 2020) (rejecting “public affairs” argument in part because “Defendant[] . . . forgets that Plaintiff’s claims are directed towards the free previews, not toward the subscription services advertised by the previews”); ER-14 (“while ZoomInfo may operate a database that might concern matters of general interest, its specific use of Martinez’s persona at issue in this case is purely commercial”); *Callahan v. PeopleConnect*, 20-cv-09203-EMC, 2021 WL 5050079, *17-18 (N.D. Cal. Nov. 1, 2021). Therefore, even if ZoomInfo could show its subscription service is “speech” about a “public issue” (under *FilmOn*, it cannot), the teaser profile about Plaintiff clearly is not.

Furthermore, Plaintiff's claim does not arise from speech at all, because it does not arise from ZoomInfo's publication of her teaser profile *per se*. Rather, Plaintiff's claim arises from ZoomInfo's failure to obtain her consent and provide her compensation. ZoomInfo could have legally published its teaser profile had it obtained Plaintiff's consent and provided her compensation. It is ZoomInfo's failure to compensate and obtain consent, not the teaser profile itself, that gives rise to the claim.

Jordan-Benel is instructive. 859 F.3d 1184. There, the plaintiff developed the screenplay idea for the movie "The Purge," which the defendant then filmed and released without compensating the plaintiff. This Court found that California's anti-SLAPP statute did not apply because the plaintiff's claim was "based on Defendant's failure to pay for the use" of his intellectual property, not "the creation, production, distribution, or content of the films." *Id.*, at 1187. Therefore, his claim did not "arise from an act in furtherance of the right of free speech." *Id.*

So too here. Plaintiff alleges economic injury and seeks monetary damages for the unauthorized use of her intellectual property. ZoomInfo acknowledges that Plaintiff "does not challenge the disclosure of her . . . profile." Opening Br., at *22. Here, as in *Jordan-Benel*, Plaintiff's claim arises not from speech, but from failure to obtain consent and failure to compensate.

C. The anti-SLAPP denial should be affirmed because Plaintiff made a prima facie showing of minimal merit.

The district court correctly held that ZoomInfo’s anti-SLAPP motion also fails the second prong. ER-17. Even if a defendant shows the claim arises from non-commercial speech on an issue of public interest, an anti-SLAPP motion “must be denied” if the plaintiff “makes a prima facie showing of facts which would support a judgment in his or her favor.” *Ross v. Kish*, 145 Cal.App.4th 188, 197 (Cal. Ct. App. 2006). The standard is quite low. “The statute requires only a minimum level of legal sufficiency and triability. Indeed, the second step of the anti-SLAPP inquiry is often called the minimal merit prong.” *Manzari v. Associated Newspapers Ltd.*, 830 F.3d 881, 887 (9th Cir. 2016) (quotation omitted; citation omitted).

Here, Plaintiff’s claim easily clears this low bar. Fourteen district courts around the country have denied motions to dismiss parallel right of publicity claims, rejecting every one of ZoomInfo’s arguments.⁸ This strongly indicates Plaintiff’s

⁸ See, e.g., ER-3 (denying ZoomInfo’s motion to dismiss); *Bonilla v. Ancestry.com*, 574 F. Supp. 3d 582 (N.D. Ill. Dec. 7, 2021); *Callahan v. PeopleConnect*, 2021 WL 5050079 ; *Boshears*, 2022 WL 888300; *Sessa*, 561 F. Supp. 3d 1008 ; *Kellman v. Spokeo*, No. 21-cv-08976, --- F. Supp. 3d ----, 2022 WL 1157500 (N.D. Cal. April 19, 2022); *Knapke v. PeopleConnect*, 553 F. Supp. 3d 865 (W.D. Wash. 2021), *rev’d and remanded on other grounds*, No. 21-35690 (9th Cir. Jun. 29, 2022); *Lukis v. Whitepages, Inc.*, 542 F. Supp. 3d 831 (N.D. Ill. 2020); *Kolebuck-Utz v. Whitepages Inc.*, No. 21-cv-53, 2021 WL 1575219 (W.D. Wash. Apr. 22, 2021); *Gabiola v. Sarid*, No. 16-cv-02076, 2017 WL 4264000 (N.D. Ill. Sep. 26, 2017); *Siegel v. ZoomInfo Technologies, Inc.*, No. 21-cv-2032, 2021 WL 4306148 (N.D. Ill. Sep. 22, 2021); *Krause v. RocketReach, LLC*, 561 F. Supp.3d 778 (N.D. Ill. 2021); *Camacho*, 2022 WL 3093306; *Spindler*, 2022 WL 16985678. *But cf.* *Callahan v Ancestry*, Case No. 20-cv-08437, 2021 WL 783524 (N.D. Cal. Mar. 1, 2021).

claims have the required “minimal merit.” ZoomInfo fails to cite – and Plaintiff’s counsel cannot find – a single case in which an appeals court held that a claim that survived a 12(b)(6) motion to dismiss failed the second step of the anti-SLAPP inquiry. *Cf. Zamani v. Carnes*, 491 F.3d 990, 996 (9th Cir. 2007) (affirming that plaintiff “demonstrated a likelihood of success” on claims for which the district court denied a 12(b)(6) motion to dismiss).

ZoomInfo attempts to use this appeal to re-litigate issues it lost as part of its separate 12(b)(6) motion. *See* Opening Br., *52-61. This appeal is limited to ZoomInfo’s anti-SLAPP motion. *Hilton*, 599 F.3d at 900 . If this Court proceeds to the second step of the anti-SLAPP motion, its task is not, as ZoomInfo suggests, to review *de novo* the district court’s denial of ZoomInfo’s 12(b)(6) motion. Rather, its task is to determine whether Plaintiff’s claims have “minimal merit” in light of the Complaint and the district court’s order.

1. ZoomInfo failed to carry its burden of proving the public interest exception defense undermines the required minimal merit.

ZoomInfo argues that Plaintiff’s California statutory right of publicity, common law misappropriation, and UCL claims all lack “minimal merit” for the same reason: that ZoomInfo’s commercial use of Plaintiff’s persona is immune

because it is “in connection with . . . public affairs” and therefore falls within the “public interest” exception codified at Cal Civ. Code § 3344(d). *See* Opening Br., at *65-66. For the same reasons discussed above with respect to the “public interest” prong of California’s anti-SLAPP statute, this argument fails.

The “public interest” or “public affairs” exception “rests on the right of the public to know and the freedom of the press to tell it.” *Montana v. San Jose Mercury News, Inc.*, 34 Cal.App.4th 790, 793, 40 Cal.Rptr.2d 639 (1995). The exception covers “almost all reporting of recent events” about people who “create a legitimate and widespread attention to their activities.” *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 804 (N.D. Cal. 2011) (internal citations omitted). Although not strictly confined to news articles and reporting, the content must “significantly contribute to a matter of public interest.” *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1001 (9th Cir. 2001).

Applying the higher standard for a Rule 12(b)(6) motion, the district court correctly held that ZoomInfo’s conduct “does not fit within the public interest exception” because its teaser profile “invites visitors to subscribe to ZoomInfo’s services to learn more about [Plaintiff] without touching on issues of general public interest.” ER-13-14. Plaintiff’s name, contact information, location, and job description are not “in connection with any news, public affairs, or sports broadcast or account, or any political campaign,” Cal. Civ. Code § 3344(d), nor do they

concern “recent events.” *See Fraley*, 830 F. Supp. 2d at 804. Plaintiff is not someone who creates “a legitimate and widespread attention to their activities,” nor does ZoomInfo argue otherwise. *See id.*

ZoomInfo relies primarily on *Cher v. Forum International, Ltd.*, 692 F.2d 634 (9th Cir. 1982), but *Cher* could hardly be more different from this case. In *Cher*, several news magazines published an interview with a world-famous pop icon – an interview she willingly gave to a free-lance journalist. *Id.*, at 636-67. In ruling that the § 3344(d) exception protected one of the defendants, this Court emphasized that the exception covers “the thoughts and conduct of public and prominent persons.” *Id.*, at 638 (quotation omitted). Here, Plaintiff is not a public figure, nor does her teaser profile contain “thoughts” on any topic, much less a topic concerning any “public affairs.”⁹ Unlike *Cher*, Plaintiff did not willingly share her information with a journalist. And ZoomInfo is not a news magazine. It provides a subscription service for sales and marketing professionals. Plaintiff’s teaser profile is not targeted at the general public for their edification or entertainment. It is targeted at marketing

⁹ ZoomInfo’s reliance on *Gionfriddo v. Major League Baseball*, 94 Cal.App.4th 400 (Cal. Ct. App. 2001) is unavailing for the same reason. There, “factual data concerning [professional major league baseball] players” was immune from suit because “the athletic performance of these plaintiff commands a substantial public interest.” *Id.*, at 410-11. Here, Plaintiff is not a professional athlete, nor does her contact information “command substantial public interest.”

professionals who wish to contact Plaintiff and others like her with unsolicited promotions.

ZoomInfo argues that its service is an “expressive work,” and therefore that any advertisement for the service, including Plaintiff’s teaser profile, inherits the same First Amendment protection as the expressive work itself. Opening Br., at *67-68. ZoomInfo’s argument elides the distinction between speech that is generally protected under the First Amendment, which is true of almost all speech, and speech that qualifies for the § 3344(d) “public interest” exception, which as relevant here is true only of speech that concerns “public affairs.” *See Hilton*, 599 F.3d at 909 & n.11 (although the “public interest defense” is “based on the First Amendment,” the latter “is broader than the. . . public interest defense[.]”). But even if the authorities ZoomInfo cites spoke to § 3344 rather than the First Amendment, ZoomInfo’s argument would still fail.

First, ZoomInfo’s subscription service is not an “expressive work.” The television program in *Charles v. City of Los Angeles, Mun. Corp.*, 697 F.3d 1146 (9th Cir. 2012) was creative, expressive speech. By contrast, a ZoomInfo subscription costs \$10,000 (which ZoomInfo admits, *see* Opening Br., at *31); is used by marketing professionals for commercial purposes; and contains no creative or expressive content. ZoomInfo’s service comprises: (1) a directory containing individuals’ personal information; (2) “ZoomInfo’s intent engine,” which allows

subscribers to track individuals’ “consumption patterns and buying signals across the web” without their knowledge (ER-152); and (3) “Zoom Engage,” which generates automated emails and phone calls. (ER-151). None of these are “expression,” and the latter two are not even speech.

Those courts that have extended “full” First Amendment protection to speech promoting a product have done so only in a context where the product included religious or other expressive elements worthy of the highest level of protection. In *Charles*, this Court noted that the Supreme Court has drawn a “sharp contrast between the actions of ordinary, commercial booksellers” and those “who distribute literature as part of a religious mandate.” 697 F.3d at 1153. While advertisements for books that are distributed as part of a religious mandate may be entitled to full First Amendment protection, “ordinary advertisements for books” are not. *Id.* Similarly, the underlying works in *De Havilland v. FX Networks, LLC*, 21 Cal.App.5th 845, 863 (Cal. Ct. App. 2018) and *Cher*, 692 F.2d 634, were, respectively: a “docudrama about film stars Bette Davis and Joan Crawford,” and an interview with a famous singer. These authorities suggest that courts will extend “full” First Amendment protection to an advertisement only when the work being advertised contains religious or other expressive elements. ZoomInfo’s service does not.

Second, this Court has expressly rejected ZoomInfo’s position here, *i.e.*, that advertisements necessarily inherit whatever First Amendment protection exists for the products being advertised. *See Charles*, 697 F.3d at 1152 (“That the underlying E! News program is itself entitled to full First Amendment protection does not cloak all advertisements for the program with noncommercial status.”). *Ariix, LLC v. NutriSearch Corp.*, states the relevant standard: an otherwise commercial advertisement “can lose its commercial character” only when it is “inextricably intertwined with fully protected speech.” 985 F.3d 1107, 1119 (9th Cir. 2021) (quotations omitted). If “no law of man or of nature makes it impossible to present the noncommercial aspects of the speech without the commercial aspects,” then the advertisement does not inherit the First Amendment protection of the product. *Id.* Applying this standard, the *Ariix* court found that a promotional “ratings section” in a book about nutritional supplements did not enjoy full First Amendment protection because the ratings section was “easily separable” from the adjacent informational sections “describ[ing] the benefits and science of nutritional supplements.” *Id.* *See also Charles*, 697 F.3d at 1152.

Here, the commercial advertisements giving rise to Plaintiff’s claims – ZoomInfo’s teaser profile about Plaintiff and the buttons prompting users to purchase a subscription to “Get Full Access to [Plaintiff’s] Info” – are “easily separable” from the service. *See Ariix*, 985 F.3d at 1119. ZoomInfo could comply

with the law by replacing Plaintiff’s teaser profile with a generic sample, by removing the buttons promising more information if the viewer buys a subscription, or by obtaining Plaintiff’s consent and providing her compensation. Accordingly, under *Ariix* and *Charles*, the advertisements giving rise to Plaintiff’s claims are commercial speech and must be evaluated separately from the service.¹⁰

2. ZoomInfo failed to carry its burden of proving its Article III standing argument undermines the required minimal merit.

ZoomInfo also argues that Plaintiff’s claim does not have minimal merit because Plaintiff failed to show “actionable injury.” Opening Br., at *59. As shown in Part IV below, the district court correctly found Plaintiff alleged actionable injury. Given Plaintiff’s allegations satisfy the higher standard applicable to a Rule 12(b)(6) motion, they also satisfy the “minimal merit” standard.

¹⁰ For this reason, ZoomInfo’s reliance on *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952 (9th Cir. 2012) is misplaced. In *Dex*, the Seattle city government sought to forbid the publication of the directory itself (a phonebook). *Id.* at 959. The presence of advertisements for local businesses did not render the phonebooks “commercial speech” because there was “no clear link” between the phone listings in the directory and the businesses being advertised. *Id.* Here, Plaintiff does not seek to prevent publication of ZoomInfo’s directory. Furthermore, there is a “clear link” between each profile and the subscription ZoomInfo is selling. ZoomInfo’s teaser profiles expressly tie the purchase of a subscription to the revelation of more information about Plaintiff. ER-157. *See Kellman*, 2022 WL 1157500, at *14 (distinguishing *Dex* on similar grounds).

III. The Court should decline to exercise pendent jurisdiction over the denial of ZoomInfo’s separate motion to dismiss for lack of Article III standing.

This appeal is before the Court because *Batzel* recognized the denial of an anti-SLAPP motion as one of the “small class” of orders appealable before final judgment. 333 F.3d at 1025-26; *Will*, 546 U.S. at 350. As shown in Part I above, the Court should cease allowing such appeals. But even if it hears this appeal, the Court has jurisdiction only to review the district court’s denial of ZoomInfo’s anti-SLAPP motion. ZoomInfo devotes the first 15 pages of its argument to disputing the district court’s order denying ZoomInfo’s 12(b)(6) motion for lack of standing. That order is outside the scope of this appeal. Under this Court’s precedent, this Court should not address Article III standing, or any other issue not necessary to its review of the district court’s anti-SLAPP denial, until entry of final judgment.

ZoomInfo fails to allege any basis on which this Court has jurisdiction to review the district court’s finding that Plaintiff has standing. Were the Court to exercise jurisdiction, it would do so under the doctrine of “[p]endent appellate jurisdiction.” Under that doctrine, an appeals court may, in certain narrowly defined circumstances, review orders “that ordinarily may not be reviewed on interlocutory appeal . . . in conjunction with other issues properly before the court.” *Cunningham v. Gates*, 229 F.3d 1271, 1284 (9th Cir. 2000). “The Supreme Court set out a general rule against exercising pendent jurisdiction.” *Id.* (citing *Swint v. Chambers County*

Comm'n, 514 U.S. 35, 44 n. 2 (1995)). This Circuit “permits the exercise of [pendent] appellate jurisdiction” only when the pendent order is “inextricably intertwined with another order that is properly appealable.” *Batzel*, 333 F.3d at 1023. This Circuit “interpret[s] ‘inextricably intertwined’ very narrowly.” *Id.* The two orders must either “(a) be so intertwined that we must decide the pendent issue in order to review the claims properly raised on interlocutory appeal . . . or (b) resolution of the issue properly raised on interlocutory appeal necessarily resolves the pendent issue.” *Id.* (quoting *Cunningham*, 229 F.3d at 1284).

Neither standard is met here. This Court may resolve the question of whether Plaintiff’s claim arises from activity protected by the anti-SLAPP statute without resolving whether Plaintiff suffered Article III injury. Although ZoomInfo failed to assert any basis for jurisdiction in its opening brief, Plaintiff anticipates that ZoomInfo may argue in its reply¹¹ that the issue is relevant to the second prong of the anti-SLAPP analysis, *i.e.*, whether Plaintiff has shown “a probability that plaintiff will prevail on the claim.” *See* Cal. Code Civ. Proc. § 425.16. But as shown in Part II above, because Plaintiff’s claims do not arise from protected activity, ZoomInfo’s anti-SLAPP motion fails at the first prong. Even were the Court to reach

¹¹ “[A]rguments raised for the first time in a reply brief are waived.” *Graves v. Arpaio*, 623 F.3d 1043, 1048 (9th Cir. 2010).

the second prong, the “minimal merit” required to defeat an anti-SLAPP motion is a different standard than that required to defeat a 12(b)(6) motion. *Compare Ashcroft v. Iqbal*, 556 U.S. 662, 664 (2009) (to survive a motion to dismiss the allegations must “plausibly give rise to an entitlement to relief”); *with Manzari*, 830 F.3d at 887 (to survive the second prong of the anti-SLAPP analysis allegations need only have “minimal merit”). In such a circumstance, this Court will not exercise pendent appellate jurisdiction. *Burlington v. Vaughn*, 509 F.3d 1085, 1093 (9th Cir. 2007) (“Issues are not inextricably intertwined if different legal standards apply to each issue”) (citation omitted); *Arizona v. Arpaio*, 821 F.3d 1098, 1109 (9th Cir. 2016) (same). If this Court touches on the standing issue at all, it must be only to decide whether Plaintiff has shown the “minimal merit” required under the second prong, not to conduct a *de novo* review of the district court’s order on ZoomInfo’s motion to dismiss.

In two cases before this Court, defendants appealing the denial of an anti-SLAPP motion in a right of publicity case asked this Court to review related issues that had been decided on a motion to dismiss. On both occasions, this Court ruled it lacked pendent jurisdiction, even though the issues were relevant to the second prong of the anti-SLAPP analysis. In *Hilton*, the defendant asked this Court to review “the portions of [its] motion to dismiss pertaining to the misappropriation of publicity claim . . . that was the target of the anti-SLAPP motion.” 599 F.3d at 901. This Court

rejected the attempt, explaining that “neither the denial nor the grant of an anti-SLAPP motion necessary resolves a motion to dismiss regarding the same claim.” *Id.*, at 902. The Court “dismiss[ed] the appeal of the denial of [defendant’s] motion to dismiss . . . for lack of appellate jurisdiction.” *Id.*, at 912-13. Likewise, in *Batzel*, the defendant appealed the denial of its anti-SLAPP motion and sought to have this Court review the district court’s denial of its motion to dismiss for lack of personal jurisdiction. 332 F.3d at 1023. This Court ruled it did not have pendent jurisdiction because it could “decide the anti-SLAPP issue entirely independently of” whether the district court had jurisdiction, “and different legal standards apply to each issue.” *Id.* *Batzel* and *Hilton* compel the conclusion that this Court does not have jurisdiction to review the district court’s order denying ZoomInfo’s motion to dismiss for lack of standing.

Nor is there anything unique about the issue of Article III standing that would make it a proper subject of pendent jurisdiction while personal jurisdiction (*Batzel*) and the First Amendment (*Hilton*) are not. This Circuit and its sister Circuits routinely decline to exercise pendent jurisdiction where, as here, the Plaintiff’s standing is not “inextricably intertwined” with the proper subject of the appeal. *See, e.g., Eng v. Cooley*, 552 F.3d 1062, 1068 n.2 (9th Cir. 2009) (declining to address Article III standing on collateral appeal from qualified immunity decision); *Cassirer v. Kingdom of Spain*, 580 F.3d 1048, 1055 n.7 (9th Cir. 2009) (same for sovereign

immunity decisions); *Melendres*, 695 F.3d at 997 (“we will not exercise our pendent jurisdiction to review the Defendants’ additional argument that the Plaintiffs lacked standing”); *Sierra Nat. Ins. Holdings, Inc. v. Credit Lyonnais S.A.*, 64 F. App’x 6, 7 n.1 (9th Cir. 2003) (“standing is potentially quite fact-dependent in this case and can be adequately addressed after a final decision is entered”); *Rux v. Republic of Sudan*, 461 F.3d 461, 476 (4th Cir. 2006) (“we find no basis to exercise pendent appellate jurisdiction over the issue of standing”); *Prado-Steiman v. Bush*, 221 F.3d 1266, 1277-78 (11th Cir. 2000) (“issues of standing are normally not available for review on interlocutory appeal”).

That ZoomInfo is attempting to have this Court review *de novo* the district court’s decision on its motion to dismiss is precisely why many judges in this Circuit no longer wish to allow interlocutory review of anti-SLAPP motions, and why many Circuits reject the use of state anti-SLAPP motions in federal court altogether. There is an inherent tension between interlocutory appeals of anti-SLAPP motions and the final judgment rule. The second prong of the anti-SLAPP inquiry “touch[es] on the merits,” but at the same time must “still be sufficiently separate from the merits to satisfy the requirements of the collateral order doctrine.” *Makaeff*, 736 F.3d at 1186. This Court has three options to resolve the tension. The Court may cease allowing interlocutory appeals of anti-SLAPP denials. It may affirm the district court’s ruling on the first prong of the anti-SLAPP analysis without touching on the second. Or it

may “touch on the merits” by evaluating whether the district court correctly ruled that Plaintiff showed the “minimal merit” required at the second prong. No matter which option the Court chooses, it must decline ZoomInfo’s invitation to conduct a *de novo* review of the 12(b)(6) order.

In *Swint*, the Supreme Court warned that “a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay . . . collateral orders into multi-issue interlocutory appeal tickets.” 514 U.S. at 49. A multi-issue ticket is precisely what ZoomInfo is angling for. Indeed, ZoomInfo spends the bulk of its brief discussing an order that is not the subject of this appeal. This Court should adhere to *Swint*, *Batzel*, and *Hilton* by declining to review the district court’s Rule 12(b)(6) ruling on standing until final judgment has been entered.

IV. If the Court reviews the standing issue, it should affirm the district court’s order.

Of the ten district courts that have considered ZoomInfo’s standing argument, nine have rejected it, ruling that plaintiffs have standing to assert right of publicity and misappropriation of name or likeness claims against websites that distribute searchable profiles of personal information as a means of advertising subscriptions.¹²

¹² ER-5-12; *Callahan v. PeopleConnect*, 2021 WL 5050079, at *14-15 & *18 (analyzing statutory standing under § 3344 and California’s UCL); *Knapke* 553 F. Supp. 3d at 878; *Sessa*, 561 F. Supp. 3d at 1020-23; *Bonilla*, 574 F. Supp. 3d at 590-91; *Kellman*, 2022 WL 1157500, at *7; *Gabiola*, 2017 WL 4264000, at *6;

Plaintiff is aware of only one decision in which a magistrate judge facing similar facts found the plaintiffs lacked standing. *See Callahan v. Ancestry.com Inc.*, No. 20-cv-08437, 2021 WL 2433893, at *5 (N.D. Cal. June 15, 2021). The district court below joined the district courts in *Kellman*, *Sessa*, *Callahan v. PeopleConnect*, and *Bonilla* in explicitly rejecting *Callahan v. Ancestry* as inconsistent with controlling precedent, including the Supreme Court’s decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2209 (2021). *See* ER-11-12. In *Kellman*, Judge Orrick recently denied the defendant’s motion to certify interlocutory appeal on the issue of standing, noting that “I explicitly disagreed to some extent with [Callahan v. Ancestry’s] standing analysis . . . [and] I have not been alone in doing so.” --- F. Supp. 3d ---, 2022 WL 1157500, at *7 (N.D. Cal. April 19, 2022) (citations omitted); *see also Spindler v. Seamless Contacts, Inc.*, No. 22-cv-787-KAW, 2022 WL 16985678, at *3-4 (N.D. Cal. Oct. 24, 2022). This Court should affirm the reasoning and conclusion of judges Pechman, Orrick, Navarro, Chen, Kendall, Feinerman, Coleman, Westmore, and Anello by finding that Plaintiff has standing.

These courts followed the analysis articulated by the Supreme Court in *TransUnion*. *But cf. Callahan v. Ancestry*, 2021 WL 2433893, at *5 (failing to cite

Spindler, 2022 WL 16985678; *Lukis*, 549 F. Supp. 3d at 804-05; *Camacho*, 2022 WL 3093306 (analyzing statutory standing under § 3344).

TransUnion). Under *TransUnion*, courts evaluating whether a statutory violation gives rise to Article III standing must “ask[] whether plaintiffs have identified a . . . common-law analogue for their asserted injury.” 141 S. Ct. at 2204. If a common-law analogue exists, and the harm alleged “has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit” at common law, then Article III standing exists. *Id.* at 2209 (quoting *Spokeo v. Robins*, 578 U.S. 330, 341 (2016)). As this Court recently wrote, this analysis is “the very same one” this Circuit applied in *Van Patten* when finding that the receipt of “unsolicited telemarketing phone calls” is a “concrete injury in fact sufficient to confer Article III standing.” *Wakefield v. Visalus, Inc.*, No. 21-35201, Dkt. No. 67-1 (9th Cir. Oct. 20, 2022) (quoting *Van Patten v. Vertical Fitness Grp.*, 847 F.3d 1037, 1043 (9th Cir. 2017)). It is also the same analysis this Circuit applied in *Davis v. Facebook, Inc.*, when finding that “Facebook’s tracking and collection practices” gave rise to standing because they “cause harm or material risk of harm to [plaintiffs’] interest in controlling their personal information.” 956 F.3d 589, 599 (9th Cir. 2020).

Here, Plaintiff alleges claims under California’s right of publicity statute, Cal. Civ. Code § 3344, and the analogous California tort of misappropriation of name and likeness. California’s right of publicity statute is a modernization of and complement to the California tort. *Downing*, 265 F.3d at 1001; *Newcombe v. Adolf Coors Co.*, 157 F.3d 686, 692 (9th Cir. 1998). Because Plaintiff alleges harms that

traditionally gave rise to a common law claim, Plaintiff has Article III standing to pursue both her statutory and common law claims. *See* ER-5-6; *Kellman*, 2022 WL 1157500, at *5 (plaintiffs had standing to assert both claims because they alleged “harm[s] recognized at common law”); *Sessa*, 561 F. Supp. 3d at 1020 (same). Plaintiff alleges four such harms.

A. Plaintiff alleges economic injury from ZoomInfo’s exploitation of, and profiting from, her name and persona.

First, Plaintiff alleges injury in the form of ZoomInfo’s unjust profits and failure to compensate her from its unauthorized use of her persona, which “denied Plaintiff[] the economic value of [her] likeness[.]” *See Callahan v. PeopleConnect*, 2021 WL 5050079, at *15. Because “[e]conomic value may reasonably be inferred from use . . . to advertise,” the use of personal information to advertise a subscription satisfies § 3344’s requirement that the plaintiff be a “person or persons injured.” *Id.*, at *14-15. The district court below reached the same conclusion, finding that the “commercial value” of the persona was “evident in ZoomInfo’s reliance on this kind of information to generate profit.” ER-9. Plaintiff had standing because “she has been denied the economic value from defendant’s non-consensual misappropriation.” *Id. See also Camacho v. Control Group Media Co.*, No. 21-cv-1954, , 2022 WL 3093306, at *28 (S.D. Cal. July 18, 2022) (“the resulting injury is Defendants’ derivation of economic value from [the plaintiff] with their commercial use of her identity and other information without providing compensation”); *In re*

Clearview AI, Inc. Consumer Privacy Litig., No. 21-cv-0135, --- F. Supp. 3d ---, 2022 WL 444135, at *10 (N.D. Ill. Feb. 14, 2022) (allegations that class “was injured because the [] defendants did not compensate them for the use of their likenesses” were sufficient to state a “right to publicity claim under California law.”)

These decisions find support in the history of California’s misappropriation tort. Traditionally, plaintiffs stated a misappropriation claim by alleging the defendant profited or derived “advantage” from their name or likeness. ER-7-8; *see also Eastwood*, 149 Cal.App.3d at 416 (recognizing common law claim for “appropriation, for the defendant’s advantage, of the plaintiff’s name or likeness.”). As the district court correctly found, an individual did not need to be a celebrity to suffer the economic harm recognized at common law, nor need she have commercially developed her name or persona prior to the defendant’s use. ER-8; *see also Dora v. Frontline Video, Inc.*, 15 Cal.App.4th 536, 542 (Cal. Ct. App. 1993) (“both celebrities and noncelebrities have the right to be free from the unauthorized exploitation of their names and likenesses”); *Stilson v. Reader’s Digest Assn., Inc.*, 28 Cal.App.3d 270, 273-74 (Cal. Ct. App. 1972) (non-celebrities whose names had been used without their permission in a promotional sweepstakes mailing could pursue damages for “financial detriment”); *Fraleley*, 830 F. Supp. 2d. at 806-07 (recognizing economic harm to non-celebrity plaintiffs); *KNB Enters. v. Matthews*, 92 Cal. Rptr. 2d 713, 722 n.12 (Ct. App. 2000) (same). Applying California law, this

Court has noted that “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 economically valueless.” *Motschenbacher v. R. J. Reynolds Tobacco Co.*, 498 F.2d 821, 825–27 n.11 (9th Cir. 1974).

In drafting § 3344, California’s legislature recognized that at common law noncelebrity plaintiffs could bring suit to recover for economic harm, but often struggled to prove the amount of damages. *See* ER-7 (quoting *Miller v. Collectors Universe, Inc.*, 159 Cal. App. 4th 988, 1002 (2008); *Orthopedic Sys., Inc. v. Schlein*, 202 Cal. App. 4th 529, 546 (2011)). For this reason, the legislature provided for “minimum statutory damages” in addition to recovery of the defendant’s “profits from the unauthorized use,” the latter of which was already available to plaintiffs at common law. *Orthopedic Sys.*, at 546; Cal. Civ. Code § 3344; *Timed Out, LLC v. Youabian, Inc.*, 229 Cal.App.4th 1001, 1010-11 (Cal. Ct. App. 2014) (plaintiff bringing common law claim could pursue recovery of defendant’s “profits or gross revenues” derived from the “unauthorized use” of their images).¹³

¹³ ZoomInfo argues without citation that Plaintiff must “identify[] a market where plaintiff could make commercial use of her persona” or “alleg[e] that ZoomInfo . . . prevented her from pursuing such opportunities.” Opening Br., at *39. This claim finds no support in the caselaw or statutory text. Neither the misappropriation tort nor the right of publicity statute requires that the plaintiff plead the defendant prevented her from pursuing commercial opportunities. Rather, both causes of action focus on the defendant’s infringement and the “advantage” or “profits from the unauthorized use” thereby derived. *See Eastwood v. Superior Court*, 149 Cal.App.3d 409, 416 (Cal. Ct. App. 1983); Cal. Civ. Code § 3344; *Fraley v. Facebook, Inc.*, 830

ZoomInfo acknowledges that, in *Fraley*, now-Circuit Judge Koh held that non-celebrity plaintiffs suffered economic injury-in-fact when Facebook used their names and personas without their consent to advertise products the plaintiffs had “liked” to their friends. 830 F. Supp. 2d at 796. But ZoomInfo argues that the facts here are “miles away” from *Fraley*, because there the plaintiffs quoted statements by Facebook’s CEO indicating that the appearance of individuals’ names and likenesses made the advertisements more valuable to Facebook. *See* Opening Br., at *39. In fact, Plaintiff’s allegations parallel *Fraley*. The Complaint quotes a ZoomInfo annual report saying that it “relies heavily” on “the indexing of public facing directory pages” – *i.e.*, the teaser profiles containing Plaintiff’s and Class members’ information – “to generate a significant portion of the traffic to our website.” ER-152 (¶10). Here, as in *Fraley*, the defendant has acknowledged that the names and personas in its teaser profiles are economically valuable because they drive a “significant portion” of website visits by potential customers.

ZoomInfo has also publicly stated that it licenses some of the information in its teaser profiles from “third-party vendors.” ER-152. Through discovery, Plaintiff’s counsel expect to prove the dollar amounts ZoomInfo paid to license the

F. Supp. 2d 785, 806 (N.D. Cal. 2011) (“[T]he Court finds nothing . . . that 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.”) (emphasis in original).

information in Plaintiff's profile and profiles of other Class members, as they have in parallel cases. Nor do Plaintiff's allegations of economic value rely solely on ZoomInfo's use. Plaintiff alleges her name and persona are used in a similar fashion by ZoomInfo's competitors, many of which are defendants in parallel right of publicity cases cited throughout this brief. ER-152. These allegations are more than sufficient to plead Plaintiff suffered economic harm from ZoomInfo's failure to compensate her for its non-consensual use of her name and persona.

ZoomInfo argues that the information in Plaintiff's profile cannot be valuable "because it is publicly available elsewhere." Opening Br., at *41 n.6. This argument is contradicted by the Complaint, which quotes ZoomInfo's own statement that it pays "third-party vendors" for some of the data in Plaintiff's profile. ER-152. ZoomInfo collects the remainder of the data through software on its subscribers' computers that "automatically captures the names and contact information of every person the subscriber emails." ER-152-53. These are not "publicly available" sources. More fundamentally, ZoomInfo's argument misunderstands the right of publicity and associated misappropriation tort. Neither claim requires that information was secret or nonpublic prior to the defendant's misuse. *See Eastwood*, 149 Cal.App.3d at 417 (elements of misappropriation tort). As the Supreme Court recognized in *Zacchini v. Scripps-Howard Broadcasting Co.*, "in right of publicity cases the only question is who gets to do the publishing." 433 U.S. 562, 573 (1977);

see also Sessa, 561 F. Supp. 3d at 1022 n.3. The right of publicity gives individuals comfort they may safely and selectively place their personas in the public eye by, for example, sharing information on professional networking sites like LinkedIn, without fear someone will steal and exploit their names and identities for commercial gain. *See, e.g., Roe v. Amazon.com*, 170 F. Supp. 3d 1028, 1031-33 (S.D. Ohio 2016) (non-celebrity plaintiffs had a “property right” in refusing commercial use of their engagement photograph on a book cover because they “did not place the photograph on the internet for expropriation” by the defendant); *Timed Out*, 229 Cal.App.4th at 1006 (“the right of publicity holder possesses . . . a right to prevent others from misappropriating the economic value generated . . . through the merchandising of [their] ‘name, voice, signature, photograph, or likeness’”) (quotation omitted). Accordingly, almost all right of publicity cases involve material the plaintiff intentionally distributed, which the defendant then copied from a public source. *See, e.g., Fraley*, 830 F. Supp. 2d at 799 (Facebook misused information its users uploaded to the site); *Downing*, 265 F.3d 994 (defendant copied plaintiff’s image from a published book). Were only “secret” names and personas protected, the law would protect no one.

Changing tack, ZoomInfo argues that even if Plaintiff’s name and persona are economically valuable to ZoomInfo, they are only valuable “in the aggregate” – that is, when aggregated with the names and personas of others who appear in

ZoomInfo’s database. Opening Br., at *41 & n. 6. Again, this argument is belied by the Complaint, which demonstrates that ZoomInfo advertises subscriptions by: (1) displaying a link to Plaintiff’s profile in response to a search for her name on any search engine or on ZoomInfo’s website; and (2) concealing some information about Plaintiff, like her email, behind a paywall. ER-157-59. These are advertisements *about Plaintiff*, not about some “aggregate” group of which she is a member. To be sure, ZoomInfo also displays similar advertisements using the names and personas of other Class members. But ZoomInfo cannot escape liability simply because it is misappropriating the names and identities of a very large number of people. *See, e.g., Fraley*, 830 F. Supp. 2d at 799 (Facebook advertised using the names and likeness of many of its users). Nor is it relevant for Article III standing purposes that the advertisement featuring Plaintiff’s name and persona is one part of a larger advertising campaign. Even if the dollar value of her specific advertisement is small, that ZoomInfo and its competitors advertise using her name and persona demonstrates they have monetary value, and “a loss of even a small amount of money is ordinarily an ‘injury.’” *Van v. LLR, Inc.*, 962 F.3d 1160, 1162 (9th Cir. 2020) (quoting *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973, 98 (2008)).

ZoomInfo acknowledges that, in *Davis v. Facebook*, this Court found that individuals suffered “concrete economic harm” when Facebook sold their personal browsing histories. Opening Br., at *39 (citing 956 F.3d 589). But ZoomInfo

attempts to distinguish the case on the ground that the plaintiffs in *Davis* alleged there were entities willing to “pay . . . for access to their browsing histories.” *Id.*, at 600. Again, as with *Fraley*, Plaintiff’s allegations parallel *Davis*. Plaintiff alleges both that ZoomInfo paid third parties to obtain information in Plaintiff’s profile, ER-152 (¶11), and that ZoomInfo’s subscribers pay “\$10,000 or more per year” in exchange for “Full Access” to Plaintiff’s and Class members’ profiles, among other services. ER-151 (¶7). In short, Plaintiff’s allegations show that her name and persona have concrete, provable economic value – value that ZoomInfo unlawfully denied her when it incorporated her name and persona in advertisements without her consent.

B. Plaintiff alleges injury from infringement of her intellectual property.

Second and relatedly, Plaintiff alleges injury from ZoomInfo’s infringement of her intellectual property. Traditionally, the California tort recognized an intellectual property right in an individual’s name and likeness. The misappropriation of this property was itself injury, just as the unauthorized use of copyrighted or trademarked material is injury. *See, e.g., Midler v. Ford Motor Co.*, 849 F.2d 460, 463 (9th Cir. 1988) (“[C]ommon law rights are also property rights. Appropriation of such common law rights is a tort in California.”) (citation omitted); *Moore v. Regents of Univ. of Calif.*, 51 Cal.3d 120, 138 (Cal. 1990) (“every person has a proprietary interest in his own likeness”); *Comedy III Productions, Inc. v. Gary*

Saderup, Inc., 25 Cal.4th 387, 399 (Cal. 2001) (“The right of publicity . . . protects a form of intellectual property”); *ETW Corp. v. Jireh Publishing, Inc.*, 332 F.3d 915, 928 (6th Cir. 2003) (“The right of publicity is an intellectual property right”); *Perfect 10, Inc. v. CCBill, LLC*, 340 F. Supp. 2d 1077, 1109 (C.D. Cal. 2004) (same); *Motschenbacher*, 498 F.2d at 825 (same).

Because violation of this intellectual property right was harm giving rise to a common law claim, individuals whose personal information is used to advertise website subscriptions have Article III standing. *See Kellman*, 2022 WL 1157500, at *5 (“[plaintiffs] allege [defendant] unjustly profited from their intellectual property—a harm recognized at common law”) (citation omitted); *Callahan v. PeopleConnect*, 2021 WL 5050079, at *19 (individuals’ “names and likenesses are intellectual property,” and a website’s use without compensation satisfies the requirement for alleging “lost money or property” under Cal. Bus. & Prof. Code § 17200); *Sessa*, 561 F. Supp. 3d at 1023 (“the right of publicity refers to a property right in a person’s identity”) (quotation omitted); *Camacho*, 2022 WL 3093306, at *20 (“Individuals have a property right in their own identity”) (*quoting Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 929 (N.D. Ohio 2004)). *See also Knapke*, 553 F. Supp. 3d at 880; *Spindler*, 2022 WL 16985678, at *4.

C. Plaintiff alleges concrete injury from the denial of her right to control the commercial use of her name and persona.

Third, Plaintiff alleges injury from ZoomInfo’s denial of her right to control the commercial use of her name and persona. Traditionally, the right of publicity protects “the inherent right of every human being to control the commercial use of his or her identity.” *Miller v. Glenn Miller Prods., Inc.*, 454 F.3d 975, 988 n.6 (9th Cir. 2006) (quoting J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition*, § 18:43 (4th ed. 2005)). This principle is embodied in both Cal. Civ. Code § 3344 and California’s common-law misappropriation tort. *Id.* In *Fraley*, the court found the plaintiffs had Article III standing to pursue a § 3344 claim in part because § 3344 arose from California common law protecting “the right to prevent others from appropriating elements of one’s identity for commercial gain.” 830 F. Supp. at 806. Therefore, “alleg[ing] a violation of their individual statutory rights” was sufficient to allege “an invasion of a legally protected interest for Article III purposes.” *Id.*, at 797. Similarly, *Kellman* found the plaintiffs had standing to bring § 3344 claims because they alleged the defendant “infringed their right to control commercial use of their names and identities — a harm recognized at common law.” 2022 WL 1157500, at *5. Courts evaluating Illinois statutory right of publicity, which is similar to California’s, have reached the same conclusion. *See, e.g., Lukis*, 549 F. Supp. 3d at 805 (because the statute “codified [the] common law tort,” which protected a substantive “right to control and to choose whether and how to use an

individual’s identity for commercial purposes,” under *Spokeo* a violation of statute itself “inflicts a concrete injury-in-fact under Article III.”). *See also Bonilla*, 574 F. Supp. 3d at 591 (accord).

These rulings find support in this Court’s decisions in *Davis v. Facebook*, 956 F.3d 589, and *Campbell v. Facebook, Inc.*, 951 F. 3d 1106 (9th Cir. 2020). Following the analysis proscribed by the Supreme Court in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016), and consistent with the subsequent opinion in *TransUnion*, this Circuit wrote that the violation of a statute that “codif[ies] a substantive right of privacy . . . gives rise to a concrete injury” supporting Article III standing. *Davis*, at 598 (citing *Campbell*, 951 F. 3d at 1117-19). In *Campbell*, this Circuit ruled this was true for the California Invasion of Privacy Act (“CIPA”) and the federal Wiretap Act, because both laws are “statutory modernizations of the privacy protections available at common law.” *Id.* (citing Cal. Pen. Code §§ 630 et seq.; 18 U.S.C. § 2510 et seq.). *Davis v. Facebook* extended this reasoning to the Stored Communications Act (“SCA”). 956 F.3d at 598 (citing 18 U.S.C. § 2701). Following similar reasoning, the Court has found Article III standing based solely on a violation of statutory privacy rights in cases brought under the Video Privacy Protection Act and the Telephone Consumer Protection Act. *See Eichenberger v. ESPN*, 876 F. 3d 979 (9th Cir. 2017) (VPPA); *Van Patten*, 847 F.3d at 1043 (TCPA).

Under this Court’s reasoning in *Campbell* and *Davis*, Cal. Civ. Code § 3344 codifies a “substantive right to privacy.” Like the CIPA, the SCA, and the Wiretap Act, Section 3344 is a “statutory modernization” of a “privacy protection” that has “traditionally been regarded as providing a basis for a lawsuit.” *See Campbell*, 951 F. 3d at 1117; *Newcombe v. Adolf Coors Company*, 157 F. 3d 686, 691-92 (9th Cir. 1998). The tort of “appropriation of the other’s name or likeness” is one of four privacy torts traditionally recognized at common law. *Patel v. Facebook, Inc.*, 932 F.3d 1264, 1272 (9th Cir. 2019) (quotation omitted). And like the CIPA, the SCA, and the Wiretap Act, the legislative history demonstrates “the California legislature intended to protect . . . historical privacy rights” when it passed Section 3344. *See* Stephen M. Lobbin, “The Right(s) of Publicity in California: Is Three Really Greater Than One?”, 2 UCLA Ent. L. Rev. 157, 162 (1994). Therefore, a violation of the statutorily protected right to exclude others from making commercial use of one’s name and persona – a right that has long existed at common law – is a concrete injury supporting Article III standing.

D. Plaintiff alleges mental injury.

Fourth, Plaintiff alleges ZoomInfo’s illegal conduct caused her mental injury and disturbed her peace of mind. At common law, mental injury “suffered from an appropriation of the attributes of one’s identity” was injury giving rise to a cause of action. *See Motschenbacher*, 498 F.2d at 824-25. As this Court has recognized, “the

injury suffered from an appropriation of the attributes of one's identity may be mental and subjective – in the nature of humiliation, embarrassment, and outrage.” *Id.*, at 824 (citation omitted). Knowledge of economic loss resulting from a defendant's misappropriation, and knowledge of potential harm to reputation resulting from the promotion of a product the Plaintiff does not approve of, are sources of mental injury that traditionally gave rise to a claim. *See Miller v. Collectors Univ.*, 159 Cal. App. 4th at 1006 n.12 . Here, Plaintiff alleges she is “deeply uncomfortable in the knowledge that ZoomInfo is using her name and persona” to advertise a product “she has no desire to promote,” and that ZoomInfo's misuse “has left her worried and uncertain about her inability to control” how her identity is used. ER-163-64. The district court correctly ruled that under *Motschenbacher* these allegations are adequate at the pleading stage to support Article III standing. ER-9; ER-12-13. Other district courts have reached the same conclusion based on similar allegations. *Kellman*, 2022 WL 1157500, at *5; *Spindler*, 2022 WL 16985678, at *3-4.

E. Plaintiff alleges actual current harm because ZoomInfo has and continues to widely disseminate the advertisements incorporating her name and persona to the public.

ZoomInfo argues Plaintiff did not allege “actual or imminent injury” because she did not allege anyone other than her counsel saw ZoomInfo's advertisements

incorporating her name and persona. Opening Br., at *48-51. This is both factually incorrect and legally irrelevant.

Let us start with the facts. ZoomInfo displays its advertisements incorporating Plaintiff's name and persona openly to the public on the Internet. ER-151, ¶4; ER-159. In response to a user searching for Plaintiff's name in any search engine, ZoomInfo displays her name and personal information along with a link to the profile about her on ZoomInfo.com. ER-159. ZoomInfo admits it "relies heavily" on "the indexing of public-facing directory pages" – that is, the display of search results like that shown in ¶32 (ER-159) of the Complaint – "to generate a significant portion of the traffic to our website." ER-152. These allegations support a reasonable inference that users have searched and will search for Plaintiff's name. *See Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001) ("all material allegations of the complaint are accepted as true, as well as all reasonable inferences to be drawn from them"). That a search for Plaintiff's name in the most popular Internet search engine returns a ZoomInfo advertisement containing a link to her profile makes it highly plausible members of the public have viewed and will view ZoomInfo's ad.

Now let us turn to the law. Even had Plaintiff not alleged ZoomInfo's advertisements were viewed by members of the public, her injury would still be both "actual" and "imminent," because ZoomInfo has and continues to publicly display advertisements incorporating her persona without her permission and without

providing her compensation. As many courts have held, including Judge Pechman in a parallel case, there is no requirement that “members of the public saw the offending image.” *Knapke*, 553 F. Supp. 3d at 876; *see also Fischer v. Instance Checkmate LLC*, 19 C 4892, 2022 WL 971479, at *11 (N.D. Ill. Mar. 31, 2022) (the right of publicity “does not impose a viewership requirement”); *Siegel v. ZoomInfo Techs*, No. 21-cv-2032, 2021 WL 4306148, at *3 (N.D. Ill. Sep. 22, 2021) (same). Plaintiff is not aware of a single right of publicity or misappropriation case requiring proof that a third party viewed the infringing advertisement. Plaintiff need not show ZoomInfo’s advertisements were viewed by a member of the public any more than a plaintiff whose photograph was illegally used in a billboard would need to prove specific motorists saw the billboard.

ZoomInfo argues that, under *TransUnion*, Plaintiff has not suffered cognizable injury unless she can show a third party “view[ed] her [publicly available] preview profile.” Opening Br., at *50. This argument misreads *TransUnion*, 141 S. Ct. 2190. As shown in above, district courts evaluating parallel cases have unanimously held that *TransUnion* supports a finding of Article III standing on these facts. In *TransUnion*, the defendant stored plaintiffs’ credit reports internally and would not share them with any third party unless they paid for a specific report. *Id.*, at 2210. Here, unlike in *TransUnion*, Plaintiff alleges publication and broad dissemination to the public. ZoomInfo publishes its advertisements

incorporating Plaintiff's name and persona publicly on the Internet, where they are available to anyone. ER-156-62. Indeed, ZoomInfo invests significant time and money to ensure its advertisements appear prominently in search engine results, because ZoomInfo relies on those advertisements to attract subscribers. ER-152. In short, Plaintiff has alleged precisely the "publication" and "dissemination" that were missing for some of the plaintiffs in *TransUnion*.

ZoomInfo's argument also ignores that the common-law analogue to Plaintiff's statutory right of publicity claim is the tort of misappropriation of name or likeness. This is a different tort those at issue in *TransUnion*, and it addresses a different type of harm. 141 S. Ct. at 2210-11 (discussing torts of defamation, libel per se, and slander per se). The torts of defamation, libel, and slander seek to prevent the dissemination of false information that is harmful to the plaintiff's reputation. *Id.* Therefore, it stands to reason that, at least in the case of defamation, no harm has occurred unless a third party has received the harmful information. *Id.* The tort of misappropriation of name or likeness, by contrast, seeks to protect the plaintiff's right to control how their name and likeness is used, and to receive compensation for any commercial use. The tort sounds in intellectual property and protects the plaintiff's "right to prevent others from misappropriating the economic value" of her name or identity. *Timed Out*, 229 Cal.App.4th at 1006. As the statutory language and caselaw make clear, the harm occurs when a defendant uses an individual's

name or persona for a commercial purpose without permission or compensation, regardless of whether a third party witnesses the misuse.

TransUnion recognized that there are torts for which a plaintiff suffers actionable harm regardless of whether any third party saw the offending publication. 141 S. Ct. at 2211 (discussing “libel and slander *per se*” as traditional torts for which “publication is generally presumed to cause a harm.”). As with libel and slander *per se*, there is no “third party viewing” element for the tort of misappropriation of name or likeness. This Court should decline ZoomInfo’s invitation to invent a novel element found in neither the common law nor the statute.

Even were third-party viewing required to establish injury, Plaintiff has alleged that actual viewing by a member of the public is imminent, because ZoomInfo’s advertisements incorporating her likeness are publicly displayed on the Internet. ER-157-59. Further, Plaintiff’s profile is part of the subscription product ZoomInfo’s existing subscribers and trial users use every day. *Id.* Those who own intellectual property, as Plaintiff owns her name and persona, have the right to exclude others from distributing an infringing product. *See, e.g., Apple Inc. v. Samsung Elecs. Co.*, 801 F.3d 1352, 1365 (Fed. Cir. 2015) (intellectual property holder has the “statutory right to exclude” others from “making, using, selling, developing, advertising, or importing” infringing material). ZoomInfo is currently “using,” “selling,” and “advertising” with Plaintiff’s name and persona. She is

therefore currently experiencing precisely the injury the right of publicity and misappropriation tort are designed to redress.

CONCLUSION

For the reasons above, Plaintiff respectfully requests the Court remand for lack of jurisdiction. Should this Court entertain this appeal, Plaintiff respectfully requests the Court affirm the district court's order.

Dated: November 18, 2022

By: /s/ Benjamin R. Osborn

Ben Osborn
Law Office of Benjamin R. Osborn
102 Bergen St.
Brooklyn, NY 11201
Phone: (347) 645-0464
Email: ben@benosbornlaw.com

Michael F. Ram (SBN 104805)
mram@forthepeople.com
MORGAN & MORGAN
COMPLEX LITIGATION GROUP
711 Van Ness Avenue, Suite 500
San Francisco, CA 94102
Telephone: (415) 358-6913
Telephone: (415) 358-6293

Raina Borrelli
raina@turkestrauss.com
Sam Strauss
sam@turkestrauss.com
TURKE & STRAUSS LLP
613 Williamson St., Suite 201
Madison, Wisconsin 53703-3515
Telephone: (608) 237-1775

Facsimile: (509) 4423

Attorneys for Plaintiff-Appellee

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, this Answering Brief for Plaintiff-Appellee is proportionately spaced, has a 14-point typeface of and contains 13,751 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

By: /s/ Benjamin R. Osborn

STATEMENT OF RELATED CASES

Plaintiff-Appellee is unaware of any cases pending in this Court that are related to this appeal, as defined and required by Circuit Rule 28-2.6.

By: /s/ Benjamin R. Osborn_____

ADDENDUM

Pursuant to Circuit Rule 28-2.7

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Cal. Civ. Code § 3344

Section 3344 - Using another's name, voice, signature, photograph or likeness

(a) 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, or, in the case of a minor, the prior consent of his parent or legal guardian, 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.

(b) As used in this section, "photograph" means any photograph or photographic reproduction, still or moving, or any videotape or live television transmission, of any person, such that the person is readily identifiable.

(1) A person shall be deemed to be readily identifiable from a photograph when one who views the photograph with the naked eye can reasonably determine that the person depicted in the photograph is the same person who is complaining of its unauthorized use.

(2) If the photograph includes more than one person so identifiable, then the person or persons complaining of the use shall be represented as individuals rather than solely as members of a definable group represented in the photograph. A definable group includes, but is not limited to, the following examples: a crowd at any sporting event, a crowd in any street or public building, the audience at any theatrical or stage production, a glee club, or a baseball team.

(3) A person or persons shall be considered to be represented as members of a definable group if they are represented in the photograph solely as a result of being present at the time the photograph was taken and have not been singled out as individuals in any manner.

(c) Where a photograph or likeness of an employee of the person using the photograph or likeness appearing in the advertisement or other publication prepared by or in behalf of the user is only incidental, and not essential, to the purpose of the publication in which it appears, there shall arise a rebuttable presumption affecting the burden of producing evidence that the failure to obtain the consent of the employee was not a knowing use of the employee's photograph or likeness.

(d) 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).

(e) The use of a name, voice, signature, photograph, or likeness in a commercial medium shall not constitute a use for which consent is required under subdivision (a) solely because the material containing such use is commercially sponsored or contains paid advertising. Rather it shall be a question of fact whether or not the use of the person's name, voice, signature, photograph, or likeness was so directly connected with the commercial sponsorship or with the paid advertising as to constitute a use for which consent is required under subdivision (a).

(f) Nothing in this section shall apply to the owners or employees of any medium used for advertising, including, but not limited to, newspapers, magazines, radio and television networks and stations, cable television systems, billboards, and transit ads, by whom any advertisement or solicitation in violation of this section is published or disseminated, unless it is established that such owners or employees had knowledge of the unauthorized use of the person's name, voice, signature, photograph, or likeness as prohibited by this section.

(g) The remedies provided for in this section are cumulative and shall be in addition to any others provided for by law.

Ca. Civ. Code § 3344

Amended by Stats. 1984, Ch. 1704, Sec. 2.

Cal. Code Civ. Proc. § 425.17

Section 425.17 - Inapplicability of anti-SLAPP law

(a) The Legislature finds and declares that there has been a disturbing abuse of Section 425.16, the California Anti-SLAPP Law, which has undermined the exercise of the constitutional rights of freedom of speech and petition for the redress of grievances, contrary to the purpose and intent of Section 425.16. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process or Section 425.16.

(b) Section 425.16 does not apply to any action brought solely in the public interest or on behalf of the general public if all of the following conditions exist:

(1) The plaintiff does not seek any relief greater than or different from the relief sought for the general public or a class of which the plaintiff is a member. A claim for attorney's fees, costs, or penalties does not constitute greater or different relief for purposes of this subdivision.

(2) The action, if successful, would enforce an important right affecting the public interest, and would confer a significant benefit, whether pecuniary or nonpecuniary, on the general public or a large class of persons.

(3) Private enforcement is necessary and places a disproportionate financial burden on the plaintiff in relation to the plaintiff's stake in the matter.

(c) Section 425.16 does not apply to any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services, including, but not limited to, insurance, securities, or financial instruments, arising from any statement or conduct by that person if both of the following conditions exist:

(1) The statement or conduct consists of representations of fact about that person's or a business competitor's business operations, goods, or services, that is made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services, or the statement or conduct was made in the course of delivering the person's goods or services.

(2) The intended audience is an actual or potential buyer or customer, or a person likely to repeat the statement to, or otherwise influence, an actual or potential buyer or customer, or the statement or conduct arose out of or within the context of a regulatory approval process, proceeding, or investigation, except where the statement or conduct was made by a telephone corporation in the course of a proceeding before the California Public Utilities Commission and is the subject of a lawsuit brought by a competitor, notwithstanding that the conduct or statement concerns an important public issue.

(d) Subdivisions (b) and (c) do not apply to any of the following:

(1) Any person enumerated in subdivision (b) of Section 2 of Article I of the California Constitution or Section 1070 of the Evidence Code, or any person engaged in the

dissemination of ideas or expression in any book or academic journal, while engaged in the gathering, receiving, or processing of information for communication to the public.

(2) Any action against any person or entity based upon the creation, dissemination, exhibition, advertisement, or other similar promotion of any dramatic, literary, musical, political, or artistic work, including, but not limited to, a motion picture or television program, or an article published in a newspaper or magazine of general circulation.

(3) Any nonprofit organization that receives more than 50 percent of its annual revenues from federal, state, or local government grants, awards, programs, or reimbursements for services rendered.

(e) If any trial court denies a special motion to strike on the grounds that the action or cause of action is exempt pursuant to this section, the appeal provisions in subdivision (i) of Section 425.16 and paragraph (13) of subdivision (a) of Section 904.1 do not apply to that action or cause of action.

Ca. Civ. Proc. Code § 425.17

Amended by Stats 2011 ch 296 (AB 1023),s 36.5, eff. 1/1/2012.

Added by Stats 2003 ch 338 (SB 515),s 1, eff. 1/1/2004.

Cal. Code Civ. Proc. § 425.16

Section 425.16 - [Operative Until 1/1/2023] California anti-SLAPP law

(a) The Legislature finds and declares that there has been a disturbing increase in lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances. The Legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process. To this end, this section shall be construed broadly.

(b)

(1) A cause of action against a person 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 shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.

(2) In making its determination, the court shall consider the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.

(3) If the court determines that the plaintiff has established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence at any later stage of the case, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

(c)

(1) Except as provided in paragraph (2), in any action subject to subdivision (b), a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs. If the court finds that a special motion to strike is frivolous or is solely intended to cause unnecessary delay, the court shall award costs and reasonable attorney's fees to a plaintiff prevailing on the motion, pursuant to Section 128.5.

(2) A defendant who prevails on a special motion to strike in an action subject to paragraph (1) shall not be entitled to attorney's fees and costs if that cause of action is brought pursuant to Section 6259, 11130, 11130.3, 54960, or 54960.1 of the Government Code. Nothing in this paragraph shall be construed to prevent a prevailing defendant from recovering attorney's fees and costs pursuant to subdivision (d) of Section 6259, or Section 11130.5 or 54960.5, of the Government Code.

(d) This section shall not apply to any enforcement action brought in the name of the people of the State of California by the Attorney General, district attorney, or city attorney, acting as a public prosecutor.

(e) As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement or writing made before a legislative, executive, or

judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official 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 (4) 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.

(f) The special motion may be filed within 60 days of the service of the complaint or, in the court's discretion, at any later time upon terms it deems proper. The motion shall be scheduled by the clerk of the court for a hearing not more than 30 days after the service of the motion unless the docket conditions of the court require a later hearing.

(g) All discovery proceedings in the action shall be stayed upon the filing of a notice of motion made pursuant to this section. The stay of discovery shall remain in effect until notice of entry of the order ruling on the motion. The court, on noticed motion and for good cause shown, may order that specified discovery be conducted notwithstanding this subdivision.

(h) For purposes of this section, "complaint" includes "cross-complaint" and "petition," "plaintiff" includes "cross-complainant" and "petitioner," and "defendant" includes "cross-defendant" and "respondent."

(i) An order granting or denying a special motion to strike shall be appealable under Section 904.1.

(j)

(1) Any party who files a special motion to strike pursuant to this section, and any party who files an opposition to a special motion to strike, shall, promptly upon so filing, transmit to the Judicial Council, by e-mail or facsimile, a copy of the endorsed, filed caption page of the motion or opposition, a copy of any related notice of appeal or petition for a writ, and a conformed copy of any order issued pursuant to this section, including any order granting or denying a special motion to strike, discovery, or fees.

(2) The Judicial Council shall maintain a public record of information transmitted pursuant to this subdivision for at least three years, and may store the information on microfilm or other appropriate electronic media.

Ca. Civ. Proc. Code § 425.16

Amended by Stats 2014 ch 71 (SB 1304),s 17, eff. 1/1/2015.

Amended by Stats 2010 ch 328 (SB 1330),s 34, eff. 1/1/2011.

Amended by Stats 2009 ch 65 (SB 786),s 1, eff. 1/1/2010.

Amended by Stats 2005 ch 535 (AB 1158),s 1, eff. 10/5/2005.

Effective October 10, 1999 (Bill Number: AB 1675) (Chapter 960).

This section is set out more than once due to postponed, multiple, or conflicting amendments.