Kellman et al v. Spokeo, Inc.

2024 | Cited 0 times | N.D. California | May 29, 2024

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

AVIVA KELLMAN, et al.,

Plaintiffs, v. SPOKEO, INC.,

Defendant.

Case No. 21-cv-08976-WHO

ORDER REGARDING CLASS CERTIFICATION

website that collects consumer and public data from various public sources and private vendors, associates that data with particular names, and publishes it online. The plaintiffs here are Aviva Kellman, Jason Fry, Nicholas Newell, Susan Gledhill Stephens, and William Williams V. They assert that their statutory rights of publicity and common law rights regarding misappropriation of name and likeness were and are being violated y seek class certification against Spokeo for four classes of people in California and Ohio. 1

For the following reasons, the motion is granted.

BACKGROUND A. FACTUAL BACKGROUND Much of the relevant case background was discussed in detail in my prior order addressing

with the Prior Order and reproduces key facts, including those based on newly discovered evidence.

1 In their motion, plaintiffs also sought to certify two nationwide classes. They withdrew that request prior to the hearing. Dkt. No. 187. Spokeo is headquartered in Pasadena, California; it owns and operates the website spokeo.com. See 58; Answer [Dkt. No. 129] ¶ 58. Spokeo collects data and information about the American adult public from public -8] 133:25 134:1, 156:3 161:11.

Using proprietar merge all that data into persons, person objects, which are then designated with a unique [personal Id. 21:12 21. That aggregated data, associated with a particular PID, can then be searched for by users of the website. See id. 39:3 40:21. It is also id. 22:18 21, which can be viewed by the public without a subscription to the website. Any visitor to spokeo.com can search for a specific

teaser profile, using a name, phone number, address, or email. See, e.g., SAC ¶ 63. Each teaser profile contains at least a name and address. Daly Depo. 60:6 8.

The plaintiffs here each found a teaser profile associated with their personal information. See SAC ¶¶ 61, 77, 93, 109, 141. For example, the teaser profile for Kellman shows: Id. ¶ 61. The teaser profiles advertise additional personal information about the subject of the profile, including about their family, court records, sex offender registration status, marital status, and more. See id. ¶ 62. Visitors to spokeo.com can pay to access this additional information, including by paying for a single report or a subscription. See id. ¶¶ 66 67. The plaintiffs say that website. See id. ¶¶ 60, 76, 92, 108, 140. Their theory of the case is that Spokeo unfairly and unlawfully profited by publishing their personal information in the teaser profiles, thereby enticing consumers to pay Spokeo so they could access additional information about people. Plaintiffs all say that they suffered emotional and mental injury stemming from this nonconsensual loss of control of their personal information. See id. ¶¶ 72 74, 88 90, 104 06, 121 22, 153 54. At least s s profile prior to purchasing a subscription. Id. ¶¶ 116, 148. As a result of these alleged injuries, the plaintiffs filed a class action in this court. B. PROCEDURAL BACKGROUND

The plaintiffs filed their complaint in November 2021, [Dkt. No. 1], and their operative I previous see also Kellman v. Spokeo, Inc., 599 F. Supp. 3d 877 (N.D. Cal. 2022), motion to certify appeal denied, No. 3:21-CV-08976-WHO, 2022 WL 2965399 (N.D. Cal. July 8, 2022). I denied Spokeo motion to certify the order for interlocutory appeal. [Dkt. No. 64].

Now the plaintiffs have filed their motion for class certification, seeking to certify two -3]; see also

- -3].

Spokeo also moved to exclude the declaration and testimony of plain - No. 154- -3].

expert, Steven - No. 152 2

-4].

- -3]. The plaintiffs -4].

filed an op

I held a hearing at which counsel for both parties appeared.

LEGAL STANDARD I. CLASS CERTIFICATION

Federal Rule of Civil Procedure 23 governs class actions. See Olean Wholesale Grocery Coop., Inc. v.

Bumble Bee Foods LLC, 31 F.4th 651, 663 64 (9th Cir. 2022) (en banc).

2 The docket entry for this document asserts that it is redacted, but the document itself does not appear to have redactions, and the plaintiffs did not file another unredacted version or a motion to seal. For those reasons, I based my analysis on the document filed at Dkt. No. 152. requirements of Rule 23 are met. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350 51 (2011)

(quoting Gen. Tel. Co. of SW v. Falcon, 457 U.S. 147, 161 (1982)). facts necessary to carry the burden of establishing that the prerequisites of Rule 23 are satisfied by

Olean, 31 F.4th at 665.

Olean, 31 F.4th at 663. Id.

(quoting Fed. R. Civ. Proc. 23(a)). 3

Wal-Mart, 564 U.S. at 349 50 (quoting Falcon, 457 U.S. at 157).

Second provided in Rule 23(b). Olean, 31 F.4th at 663. Under Rule 23(b)(3), a class may be certified if

or fact common to class members predominate over the questions affecting only individual members, and a class action is superior to other available methods for fairly and this, courts consider:

defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. Id.

3 Rule 23(a) provides:

One or more members of a class may sue or be sued as representative parties on behalf of all members only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. ted or refused to act on grounds that apply generally to the class, so that final injunctive relief or 23(b)(2). To establish standing for prospective injunctive relief, a plaintiff must demonstrate that

. . coupled with a Bates v. United Parcel Serv., Inc., 511 F.3d 974, 985 (9th Cir. 2007) (internal quotation marks and citations omitted). A Id. (internal quotation uct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present v.

Littleton, 414 U.S. 488, 495 96 (1974).

arry the burden of establishing that the prerequisites of Rule 23 are satisfied by a preponderance of the evidence. In carrying the burden of proving facts necessary for certifying a class under Rule 23(b)(3), plaintiffs may use any Olean, 31 F.4th at 665 (citing Tyson Foods v. Bouaphakeo, 577 U.S. 442, 454-55 (2016)). While the class- -ranging merits Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455, 465 considered to the extent but only to the extent that they are relevant to determining whether the

Rule 23 pr Id. (citation omitted).

In considering a motion for class certification, the substantive allegations of the complaint are accepted ons regarding the Hanni v. Am. Airlines, No. C-08- 00732-CW, 2010 WL 289297, at *8 (N.D. Cal. Jan. 15, 2010). supplemental evidentiary submissions of the part Id. he and degree of evidence

at the preliminary class certification stage is not the same as the successive stages of the i.e., at Sali v. Corona Med. Ctr., 909 F.3d 996, 1006 (9th Cir. 2018) (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992)). C. DAUBERT MOTIONS TO EXCLUDE AND STRIKE

Federal Rule of Evidence 702 provides: A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case. Courts apply the Daubert class c Sali, 909 F.3d at 1006. Under Daubert City of Pomona v. SQM N. Am. Corp., 750 F.3d 1036, 1043 (9th Cir. 2014) (quoting Primiano v. Cook,

Id. at 1044 (quoting Primiano, 598 F.3d at 565). It is lying it has a reliable basis in the knowledge and experience of the Id. (quoting Primiano, 598 F.3d at 565). Though courts should exclude being impeachable or even wrong. See id. (citing Alaska Rent-A-Car, Inc. v. Avis Budget Grp.,

Inc., 738 F.3d 960, 969 (9th Cir. 2013)).

the correctness of the opinions. Id. (citation omitted); see also

Cooper v. Brown, technical or other specialized knowledge, which does not include unsubstantiated speculation and

Id.

ot dispositive. Sali, 909 F.3d at 1006.

DISCUSSION I. MOTION FOR CLASS CERTIFICATION

The plaintiffs seek to certify the following four classes: California Viewed-Prior-to-Purchase Class (claims under California law; represented by proposed class representative Stephens): All California residents who are not registered users of Spokeo.com and whose teaser profile was viewed by a user immediately prior to purchasing a Spokeo.com subscription on or after November 19, 2019, where such teaser profile includes a name and home address. Ohio Viewed-Prior-to-Purchase Class (claims under Ohio law; represented by Plaintiff Williams): All Ohio residents who are not registered users of Spokeo.com and whose teaser profile was viewed by a user immediately prior to purchasing a Spokeo.com subscription on or after November 18, 2017, where such teaser profile includes a name and home address. California Published Teaser Profile Class (claims under California law; represented by Plaintiffs Kellman and Stephens): All United States residents who are not registered users of Spokeo.com and whose teaser profile is searchable on www.spokeo.com, where such teaser profile includes a name and home address. Ohio Published Teaser Profile Class (claims under Ohio law; represented by Plaintiff Newell): All Ohio residents who are not registered users of Spokeo.com and whose teaser profile is searchable on www.spokeo.com, where such teaser profile includes a name and home address. Mot. i ii; Mot. Suppl. 1.

Spokeo argues that none of the classes can or should be certified. I first address its arguments about standing and then turn to the class certification considerations under the Federal arguments about commonality, predominance, and superiority.

A. Standing Spokeo contends that the plaintiffs do not have Article III standing to bring their claims at all, let alone as class representatives. See Oppo. 7 11. I considered and rejected many of these arguments in the Prior Order, and the others are similarly unpersuasive. The plaintiffs have standing.

I previously profiles were not viewed do not have standing. See Kellman, 599 F. Supp. 3d at 888 90; Oppo. 8 10. The injuries that the plaintiffs assert based on the publication of their information not the viewing of their information include the violation of their right to control their identities, the See SAC ¶¶ 72 74 (Kellman), 88 90 (Fry), 104 06 (Newell). All were recognized under historical and common law analogues, which is enough to assert a sufficiently concrete injury for Article III standing. Cf. Kellman, 599 F. Supp. 3d at 889 90. Sufficient for standing at this class certification stage, each Purchase class plaintiff has shown some evidence of this injury that Spokeo published teaser profiles with their names and addresses, and that they were damaged by loss of control of their identities and emotional and mental harm. See SAC ¶¶ 66 67 (Kellman), 77, 82 83 (Fry), 93 94, 98 99 (Newell). Whether they can show that this harm is from that publication and is legally sufficient to prove injury and yield a remedy is a common question that will be resolved at summary judgment. Cf. Oppo. 9 10 (asserting the harm is speculative).

TransUnion LLC v. Ramirez, 594 U.S. 413, 434 (2021), in which the Supreme Court held that where the appellant- defendant stored inaccurate information about consumers but did not publish or

disclose it to third parties, the consumers could not show injury for standing. The plaintiffs tried to bring claims for violations under the Fair Credit Reporting Act, which the Court analogized to defamation claims. See id. Id. at 434. This case differs for two interrelated reasons. The plaintiffs are bringing right to publicity and misappropriation claims, not defamation claims, and Spokeo did publish the information using

The question now is whether publication alone is enough to create the requisite harm and prove injury for right to publicity and misappropriation claims. That was not at issue in TransUnion.

found no standing for similar allegations. See Oppo. 8 9 (first citing Ridgeway v. Spokeo, Inc., No. 2:23-CV-01660-MEMF-AS, 2023 WL 6795277, at *5 (C.D. Cal. Oct. 11, 2023) (relying on TransUnion to find lack of injury and standing without addressing legal differences between TransUnion); then citing Fry v. Ancestry.com Operations Inc., No. 3:22-CV-140 JD, 2023 WL 2631387, at *5 (N.D. Ind. Mar. 24, 2023) (relying on TransUnion for similar proposition, with similar lack of distinction between and then citing Verde v. Confi-Chek, Inc., No. 21 C 50092, 2021 WL 4264674, at *4 (N.D. Ill.

Sept. 20, 2021) (similar, and noting that another court in that district recently came out differently on the standing analysis in a similar case).

Spokeo also argues that Williams does not have standing because his profile does not use or name or identity, see Oppo. at 9, but there is sufficient evidence in the record to suggest that the s identity, see -1] 28:18 29:21 (reco (explaining the format of his name in the teaser profile); [Dkt No. 138-19] 28:9 29:8 (plaintiff

-78:20 (recognizing the photo as his son and the name

their own plaintiff, but that goes to attorney competency and not to standing. For the same reason,

declaration that he recognizes himself in the teaser profile does not contradict his previous sworn testimony; his explanations about the roman numerals in his and his association with the addresses are consistent across testimonies. See Williams Decl. The validity of these explanations can be addressed at summary judgment or at trial; whether the teaser profile sufficiently identifies him is a question of law for summary judgment. See infra Part III.D.1.

Finally, the plaintiffs have standing to pursue injunctive relief. See Oppo. 10 11; Fed. R.

profit from publishing teaser profile with their names and likenesses and without consent, see, e.g., Mot. 22:13 Id. at 10 (quoting Khasin v. R. C. Bigelow, Inc., No. 12-CV-02204-WHO, 2016 WL

1213767, at *4 (N.D. Cal. Mar. 29, 2016)); see Bates, 511 F.3d at 985 (requiring plaintiffs to show, for standing under Rule 23(b)(2), concrete and particularized harm coupled with likelihood of future

harm in a similar way). Additionally, the current record suggests that opting out does not necessarily end the harm. For example, Spokeo co-founder and Chief Technology Officer, Mike Daly, explained that opting out is not perfect and does not necessarily catch all information, given how their data flow and systems operate. See Daly Depo. 202:8 209:25; see also Declaration of -6] ¶ 36 (describing opt out procedure). It also does not account for whether individuals consented to use before i citation to Mendia v. Garcia, 768 F.3d 1009, 1013 n.1 (9th Cir. 2014), where the plaintiff was granted release from prison but chose to stay to avoid potential immigration deportation upon release and endure the ongoing a

Accordingly, the plaintiffs have standing for all of their claims. B. Rule 23(a) Rule 23(a) requires that plaintiffs show numerosity, commonality, typicality, and adequacy. Fed. R. Civ. Proc. 23(a). Spokeo challenges adequacy but not numerosity or typicality, and it combines its challenge to commonality with its arguments under Rule 23(b)(3) about predominance and superiority. See generally Oppo. Accordingly, I address the 23(a) factors in this section, except for commonality which I address later.

[C]ourts within the Ninth Circuit generally agree that numerosity is satisfied

Hilario v. Allstate Ins. Co., 642 F. Supp. 3d 1048, 1059 (N.D. Cal. 2022), , No. 23-15264, 2024 WL 615567 (9th Cir. Feb. 14, 2024) (citations omitted). The parties argue over how many people are in each class and disagree about the accuracy of the expert reports about this number. See, e.g., Naaman Mot.; Naaman Oppo. However, the plaintiffs show and Spokeo does not contest that each proposed class has many thousands of members. The numerosity requirement is met.

A. B. v. State of Educ., 30 F.4th 828, 839 (9th Cir.

2022) (quoting Fed. R. Civ. Proc. 23(a)(3)). The crux of the case is that Spokeo published teaser statutory rights of publicity and common law misappropriation theories. All class members have id. (citation omitted) violation of their statutory and common law rights, as discussed in the standing section and the Prior Order. The lawsuit as a whole is also

nationally, id. (citation omitted) publication of teaser profiles without consent for commercial this nonconsensual publication and resulting harm. Id. (citation omitted). The typicality requirement is met.

e plaintiff must show that (1) the named plaintiff and her counsel do

cludes a Hilario, 642 F. Supp. 3d at 1062 (citation omitted). The named plaintiffs here are adequate because they are typical and because their claims are identical to those of the other class members. See id. (drawing similar conclusion). Spokeo asserts that the named plaintiffs are conflicted because they are pursuing the statutory minimum in could re 19 (citing Sanchez v. Wal Mart Stores, Inc., No. Civ. 2:06-CV-

02573-JAM-KJM, 2009 WL 1514435, at *3 (E.D. Cal. May 28, 2009), which found the plaintiff ther than the personal injury claims on behalf of the class). But from the briefing and record at this stage, it seems that the vast majority of the members of all classes would only be entitled to the statutory minimum. Even for individuals who incurred actual damages, there is no evidence thus far that the relatively substantial statutory minimums $750 for California and $2500 for Ohio, Ohio Rev. Code Ann. § 2741.07 are less than the amount they would be entitled to in actual damages. The few potential class members who incurred damages in higher amounts can always opt out of the class. Spokeo does not assert otherwise.

in identifying or investigating potential cl

class actions, other complex litigation, and the types of claims asserted in the action; (iii) knowledge of the applicable law; and (iv) the resources that counsel will commit to representing

time and resources to the present case as evident from the docket, and they intend to continue to do so. See Mot. 15:23 16:2. In addition, they have substantial experience litigating consumer [Dkt. No. 93] ¶¶ 15, 19 3 8.

They have no conflicts of interest with any class members, and they are competent and qualified, 28, filing amended complaints or having experts challenged by opposing counsel are not reasons to find counsel inadequate. They meet the Rule 23 standard.

C. Rule 23(b)(3) Spokeo challenges four requirements under Rules 23(a) and 23(b)(3): commonality, predominance, superiority, and adequacy. Oppo. 14 25. It makes the same arguments about the first three requirements asserting that if that there are no common contentions or questions under the commonality requirement of Rule 23(a), then the plaintiffs cannot meet the commonality or superiority requirements of Rule 23(b)(3) so I address these arguments together. Spokeo does not challenge numerosity, though it does challenge the expert and report related to this calculations. See Oppo. 14 26.

1. Commonality and Predominance Courts in this district have addressed commonality and predominance in the same analysis. See, e.g., Nolen v. PeopleConnect, Inc., No. 20-CV-09203-EMC, 2023 WL 9423286, at *8 23 (N.D. Cal. Dec. 14, 2023).

Lytle v. Nutramax L Inc., No. 22-55744, 2024 WL 1710663, at *5 (9th Cir. Apr. 22, 2024) proceeding to generate common answers Id. (quoting

Alcantar v. Hobart Serv. -enabling, issues in the case are more prevalent or important than the non-common, aggregation- Id. (quoting Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016)).

requires plaintiffs seeking class certification to classwide resolution which means that determination

of its truth or falsity will resolve an issue that is central to the validity of each one A.B., 30 F.4th at 839 (quoting Wal-Mart prerequisite is met, a district court is limited to resolving whether the evidence establishes that a common question is capable of class-wide resolution, not whether the evidence in fact establishes that plaintiffs would win at trial. sidered [only] to the extent [ ] that they are relevant to determining whether the Rule 23 prerequisites for class certification are Olean, 31 F.4th at 666-67 (first quoting Wal-Mart, 564 U.S. at 351; then quoting Amgen, 568 U.S. at 466; and then citing Ellis v. Costco Wholesale Corp., 657 F.3d 970, 983 n.8 (9th Cir. 2011)).

predominates, claim. Id. at 665 (citing Wal-Mart, 564 U.S. at 349-50). Therefore, elements of the underlying cause of action. Id. (quoting Erica P. John Fund, Inc. v. Halliburton

Co., 563 U.S. 804, 809 (2011)).

The plaintiffs identify several central questions of law and fact that they say will be determined on a common basis based on class- s constitute appropriation and whether the plaintiffs consented, Mot. 5:18 id. 6 id. 8; whether a profile must be viewed for each claim to lie, id. 9 10; and how and whether statutes of limitations apply, id. 10 11. I address these below.

Starting with the causes of action and their elements, see Olean, 31 F.4th at 665, the underlying claims are for violations of the California and Ohio right of publicity statutes, Cal. Civ. Code § 3344; Ohio Rev. Code Ann. § 2741.02; common law torts of misappropriation of name or SAC ¶¶ 180 92, 205 22. The elements of the California right of publicity cause of

(2) the appropriation of plaintiff's Maloney v. T3Media, Inc., 853 F.3d 1004, 1008 n.2 (9th Cir. 2017) (quoting

Fleet v. CBS, Inc., 50 Cal. App. 4th 1911, 1918 (1996)); see also Ohio Rev. Code Ann. § 2741.02 (requiring similar elements). In addition to those elements, liability under California Civil Code sectio Maloney, 853 F.3d at 1008 n.2 (quoting Fleet, 50 Cal. App.

- - Id.

Though the plaintiffs frame this overbroad

on this record. That is because the evidence suggests that for each potential class member, Spokeo used the same common process to collect data from vendors, associate it with PIDs, and publish it on its website. See Daly Depo. 21:12 24:17, 133:25 134:1, 156:3 161:11; Declaration of David -7] 10 19; see also Kellman, 599 F. Su

features at least a name and home address another common fact. See Daly Depo. 60:1 15. The resulting common issue of law is whether using and publishing this information without consent is

sufficient to constitute use or appropriation of identity under California, Ohio, or common law. Cf. Oppo. 15:21 18:23. Spokeo argues that individualized inquiries will be necessary to ascertain whether any particular class member is identifiable based on this information, but because the evidence shows and the class definition requires and address was published, the common inquiry is whether name and address are enough to make someone identifiable and thereby violate the law. This common inquiry is the central legal question in this case.

ss definitions, the inquiry

es have inaccurate, fake, or nonresidential addresses. See, e.g., Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1132 (9th Cir. 2017) (noting that a consumer

see also Nolen, 2023 WL 9423286, at *16 17 (citing Briseno and explaining that plaintiffs can self-identify post-certification, noting that the defendant could move for decertification if necessary). as a maiden name), this too presents a common question of law whether the name and address

must be current, or whether it is sufficient under the relevant laws that the address is merely associated with the class member. Notably, Judge Chen recently conditionally certified a class asserting essentially identical causes of action against a very similar defendant, and in doing so he why the other information (there, photographs) made the person identifiable. See Nolen, 2023 WL

9423286, at *11. Here, the question is whether that name combined with an address is enough.

Spokeo cites for support Davis v. Electronic Arts Inc. Davis II -CV-03328-RS, 2018 WL 11436326, at *4 (N.D. Cal. Aug. 17, 2018), where Judge Seeborg denied class certification to NFL players alleging that their identities were used as avatars in video games. But Davis does not help Spokeo because there, each avatar had to be examined individually to determine whether it identified any particular individual, see id., whereas here the theory of the case i Davis identifiability turned on the individualized inquiry of whether a video game avatar looked like a class member. Here, identifiability turns on the legal question of whether name and residence are sufficient to make someone identifiable under the law.

amended slightly. See Wang v. Chinese Daily News, Inc., 737 F.3d 538, 546 (9th Cir. 2013) Rule 23 provides district courts with broad authority at various stages in the litigation to revisit Hilario v. Allstate Ins. Co., No. 23-15264, 2024 WL 615567, at *1 (9th Cir. Feb. 14, 2024) (unpublished) (citing Wang The definitions currently include relevant individuals who have a See Mot. i ii. These definitions are

it cannot be any home address. As discussed, though, it will be up to the parties at summary judgment to determine whether a prior address is sufficient for liability. 4

The consent element also meets the commonality requirement. First, whether Spokeo as required by the California and Ohio statutes, is subject to common proof, including whether there were procedures in place to obtain and confirm consent before publication. Spokeo says that the class members can use the opt-out feature on their websites, but asking to remove information after publication does not address whether plaintiffs consented prior to publication. Second, whether the plaintiffs subsequently

4 There appears to be a typographical error in the See Mot. ii:14 16. This is amended consented to use of their identities an element of the common law claims is also likely subject to common proof based on whether there were effective procedures available. For example, the plaintiffs note the website; common question is capable of class-wide resolution theory of the case. Olean, 31 F.4th at 666-67. Additionally, whether the availability of the opt- out process is sufficient to show implied consent is also a common question of law. Finally, whether a plaintiff ever consented to arbitration by signing up for Spokeo or agreeing to its terms may ultimately be an individualized inquiry, but it does not defeat the commonality of the consent element as a whole; indeed, it is possible that this question of fact could be addressed through common evidence if, for example, Spokeo has a list of known users or individuals who have agreed to arbitration.

law and fact. W tity for commercial purposes is a legally sufficient injury is a common question of law, central to the claim of each plaintiff in the Published classes. See, e.g., See Sessa v. Ancestry.com likeness for commercial purposes . . . establishes common law injury for

And whether the combination ent injury is a common question of law, central to the claim of each member of the Viewed Prior to Purchase classes. individualized proof. And even if the questio was injured here, whether they experienced the requisite mental or emotional harm for a privacy claim, see Kellman, 599 F. Supp. 3d at 889 is an underlying issue in every class action. Proof of injury can be provided by a sworn affidavit, a receipt, or something else. 5

Cf. Briseno, 844 F.3d at

5 ed inquiries can determine if each individual had a teaser profile. An individual cannot be injured without a teaser profile; if someone proves injury, she inherently proved she has a teaser profile. Wisely, the class definition only includes people with teaser profiles. 1131 32 (noting that class members may self-identify post certification). Just because a claimant must show she was injured to recover does not mean a class cannot be certified. 6

Spokeo points to no law that provides otherwise. Common questions of law therefore predominate the injury analysis.

Next, Spokeo challenges calculation of damages, but in the same breath concedes that the plaintiffs are only seeking to certify classes based on statutory, not actual, damages. See Oppo. 26 27. Statutory

damages are calculated as prescribed by the statutes. What the statute provides is a common question of law, so common questions predominate for the damages analysis, too.

Spokeo also argues that some class members will be subject to affirmative defenses. See id. 23 25. I already addressed its implied consent argument. With respect to its assertion that some claimants may be public figures subject to the First Amendment newsworthiness exception, it is true that this legal question would not apply class wide and would be subject to an class and can be said to predominate, the action may be considered proper under Rule 23(b)(3)

even though other important matters will have to be tried separately, such as . . . some affirmative defenses peculiar to some individual class members. Olean, 31 F.4th at 668 (citation omitted). As discussed above, there are many central issues that are common to the class. It is clear that they predominate over this single affirmative defense, particularly without evidence of how much of the class might be subject to the defense. Accordingly, this does not preclude certification. See id. at 668 69.

monality are not persuasive. Whether each teaser profile is a real person might go to the total number of class members, but it is not clear how it would affect commonality for class members, who each have a teaser profile by definition of the class. Dead class members, Oppo. 21 22, will not file claims; Spokeo does not point to evidence suggesting any likelihood of fraudulent claims being filed on behalf of the deceased. Individuals who used Spokeo or consented to arbitration, id. 19 21, are not included in the class definition,

6 23, fails. see Nolen, 2023 WL 9423286, at *23 (same). They can also be screened out through common

See Oppo. 26. As the media, and by class website. See infra, Part II.B. For the reasons explained below, this is sufficient to notify the California and Ohio classes. For those reasons, the plaintiffs meet the commonality requirement of Rule 23(a) and the predominance requirement of Rule 23(b)(3).

D. Superiority

Rules provide four considerations for courts assessing superiority:

defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. Fed. R. Civ. Proc. 23(b)(3)(A)-(D). Each consideration favors finding that the superiority requirement is met. First, the class

questions of law and fact are common and must be addressed whether the case is brought by an individual or a class. See id. 23(b)(3)(A). No individual plaintiff would have a greater or lesser interest

in determining, for example, whether her name and home address are sufficient to make her identifiable under right to publicity law. Though some individual plaintiffs may arguably have interests in pursuing more than the statutory minimum in damages, as discussed this is likely a very small number of possible class members, and they will be able to opt of the class action if they wish.

Additionally, there appears to be at least one prior case where plaintiffs are pursuing similar claims against Spokeo, but that case brought suit only under Alabama right to publicity law and was recently dismissed. Ridgeway v. Spokeo, Inc., No. 2:23-CV-01660-MEM-FAS, 2023 WL 6795277 (C.D. Cal. Oct. 11, 2023). The plaintiffs also point to one parallel action filed in state court, see Boyd v. Spokeo, Inc., 21-cv-13644 (Sup. Ct. Cal. Apr. 9, 2021), and assert that they is one. See Mot. 20:17 21. Accordingly, the extent and nature of litigation concerning potential class members is minimal. See Fed. R. Civ. Proc. 23(b)(3)(B).

Litigation in this forum is highly desirable given that Spokeo is located here, its witnesses and documents are here, and the underlying alleged violations mostly took place here. See id. 23(b)(3)(C). And finally, this case does not clearly present manageability issues above and beyond those typically associated with class actions. See id. 23(b)(3)(D). Accordingly, the superiority requirement is met.

Spokeo asserts in its motion that it contests superiority, but it does not discuss the Rule 23(b)(3) considerations. Instead, it seems to argue that the superiority element is not met because the plaintiffs cannot use common proof to show who is a Spokeo user and therefore excluded from the class. See Oppo. 21:4 see, e.g. cite). This is the same argument I rejected above when analyzing the commonality and predominance requirements, and I reject it again here for the same reasons.

Spokeo also cites superiority as a reason that its Due Process rights would be violated, arguing again that the damages calculations and amounts for the nationwide classes are immense. See id. 3:18 20, 27:20 28:4. Plaintiffs no longer seek to certify nationwide classes, so this argument is moot.

Accordingly, the superiority requirement is met. E. Rule 23(b)(2) Spokeo argues that the plaintiffs lack standing to seek an injunction and that their Rule 23(b)(2) classes lack commonality, ascertainability, 7

and superiority, see Oppo. 28:6 15, all of

7 See Hilario, 642 F. Supp. 3d at 1064 n.5 (declining to consider ascertainability as a separate element of Rule 23 and instead assessing it with the other factors). which I addressed and rejected above. Its only new argument is that an injunction would be improper on behalf of a nationwide class because different states offer different forms of relief, so class members would be (or would not be, as provided by some states) entitled to different injunctions. See id. 28:15 25. As plaintiffs withdrew the request for the nationwide classes, this argument is moot.

driver of this case, and if the damages class should be certified, then necessarily at Rule 23(b)(2)

should be certified as wNolen, 2023 WL 9423286, at *8 (citing Fed. R. Civ. Proc. 23(b)(2)). That is because Rule 23(b)(2) provides that a class may be certified under that rule if the Rule o act on grounds that apply generally to the class, so that final injunctive relief or corresponding Those requirements are met here; the Rule 23(a) factors favor certification, and the plaintiffs

presented sufficient evidence that Spokeo acted in a way that applies generally to the California and Ohio classes through its common policy and process for gathering consumer data and publishing it via teaser profiles on its website. I will therefore also grant certification of the

See Wang, 737 F.3d at 546.

Accordingly, the motion to certify under Rule 23(b)(2) is granted. F. MOTIONS TO DISQUALIFY AND STRIKE

A.

calculations are unreliable and that his method to calculate damages is fundamentally flawed. 8

See Naaman Mot. 11 -15].

8

miss the mark because Spokeo frames them as taking issue with the calculations of class size, but it does not challenge numerosity. For example, Spokeo argues that Naaman failed to exclude Spokeo users, dead people, people who assigned their rights, duplicated profiles, profiles with inaccurate home addresses, and profiles that refer to people who are not real from his class size calculations. See Naaman Mot. 7 9, 15 18. But even if Naaman should have excluded each of these which I do not find at this point the classes clearly would still meet the numerosity requirements given the data upon which he relied and the evidence of

American adult. See, e.g., Daly Depo. 47:12 48:25. Spokeo also repeats arguments that it made in its opposition to class certification, asserting that Naaman did not verify that each teaser profile corresponded with a real individual and residence. See Naaman Mot. 11 14. Again, these are framed as challenges to how Naaman calculated class size, see id.; Spokeo does not challenge numerosity, so the argument is superfluous.

It

about whether each profile represents a real person and whether each residence is accurate. But it is not clear why Naaman should be the source of proof of commonality, as his declaration and analyses were submitted to show numerosity, see Naaman Decl. ¶¶ 1 2, (which is why the declaration is not

irrelevant, see Oppo. 19:11 20:22), and potentially for superiority, though it is not clear that superiority is really an issue, supra Part III.D.2. And importantly, I rejected . Supra Part III.D.1. I am unconvinced by its parallel arguments here.

calculations, which is an element of class certification that Spokeo actually challenges. See Naaman Mot. 20:23 22:1; Oppo. 13:14 17. But the argument is unpersuasive. Spokeo asserts that Naaman does not provide a method for calculating damages and instead simply multiplies the number of class members by the minimum statutory penalty sought by the plaintiffs for the Viewed Prior to Purchase classes. That is a logical way to calculate damages in a case where the plaintiffs seek the statutory minimum for damages, and this would help the trier of fact. See Fed. R. Evid. 702. As discussed, supra Part III.D.1, entitlement to damages presents a common

DENIED.

In reply, the plaintiffs submitted a supplemental declaration from Naaman; Spokeo moved to strike it as improperly submitting new evidence. See Strike Mot. Because I do not rely on the newly submitted declaration in my class certification analysis and findings, I do not need to address the merits of this motion. The motion is DENIED as moot on this point. 9

G. Spokeo also moves to exclude the declaration and testimony from Weisbrot about class notification, asserting that it is irrelevant and that its methodology is unreliable. See Weisbrot

les, by publication in the media, and by 13 14, 18 19, 26, 30 31. Though his proposed method provides notice to the nationwide classes, he explained how he would and could use the same method on a narrower target audience if smaller classes were certified, such as statewide classes. See 153-1 10

] 62:3 25. contends

9 I also denied the other argument in this motion. Supra Part I.A. 10 Plaintiffs did a terrible job of citing and filing this document. Their opposition merely cites the See [Dkt. No. 155]. docket, thinking it might have the missing Exhibit A. There is no unredacted version to be found. but Exhibit A to the declaration is just a firm CV for Angeion Group. [Dkt. No. 96] Ex. A. Eventually and after serious digging throughout the docket, Opposition in other words, there is no clear labeling indicating the connection to the Weisbrot declaration. Then I found that Exhibit 1 not Exhibit A, and not in a document attached to the opposition contained the correct document. Plaintiffs need to work on their filing procedures. notice plan will provide notice to all potential class members in the Purchase classes, and that this is overbroad because it is not directed only to members of the Viewed Prior to Purchase classes, for which notice is mandatory under Rule 23(b)(3). But the Federal Rules permit notice to 23(b)(2) classes like the Purchase classes, see Fed. R. Civ. Proc. 23(c)(2)(A), and Spokeo offers no reason why notice should does not offer a way to target solely Viewed Prior to Purchase members is merely another way to argue that the plaintiffs are unable to identify their own class members from

common evidence gument about

plaintiffs self-identifying is bizarre; claimants do not have to know pre-filing which class they are

for claimants to know without confirmation from Spokeo if they are members of the Viewed Prior to Purchase classes in addition to solely the Purchase classes. And the plaintiffs may use the claims administration process to determine which claimants belong in which classes, using common evidence in to determine class membership. See Chinitz v. Intero Real Est. Servs., No. 18-CV-05623-BLF, 2020 to Briseno v. ConAgra Foods, Inc., 844 F.3d 1121, 1132 (9th Cir. 2017))).

not rely on the email addresses that Spokeo has in its possession and includes for teaser profiles because they might not be real or correspond to a real person. See Weisbrot Mot. 12, Weisbrot Repl. 1, 4 urate emails, to the extent possible, is reliable and relevant. See Weisbrot Decl. ¶¶ 13 17; City of Pomona, 750 F.3d unreliable, and given the evidence about its use of data gathering and associating via personal

identifier labels to connect names with addresses and other information, it seems highly likely that many of the email addresses are correct for many of the teaser profiles. Third, if a notice email is improperly received by someone who had an email published but not a name and residence, and so does not fall into the class definition, they simply will not (and cannot) file a claim; it is not dispositive for class notice to be overinclusive. See Chinitz, 2020 WL 7042871, at *3 4. And fourth, even if an email bounces back, fails to reach its recipient, or is incorrectly assumed to belong to a particular potential class member, Weisbrot presents two other ways of providing notice. The fact that these methods notify members of the Purchase classes as well as the Viewed Prior to Purchase classes is not a reason to find the method is unreliable.

For those reasons, the motion is DENIED. B. aro See Alfaro Mot. They argue that Alfaro misrepresents evidence about Spokeo data vendors, is unqualified to opine notice and cannot opine on See also Alfaro Decl.

discount the declarations from Naaman or Weisbrot. But as I explained, there are independent I motions to exclude them. For Naaman, Spokeo does not challenge numerosity; to the extent that Alfaro challenges Naaman

or arguments about commonality; to the extent that Alfaro challenges it for these reasons, I do not consider those challenges. And to the extent that Alfaro challenges the resulting damages calculations that are calculated by assuming each potential class member would receive the statutory minimum ration for these arguments, because of course this is the proper method for calculating damages here. As

plaintiffs challenge Alf motion is DENIED as moot for these reasons.

Plaintiffs entirely correct that not all email addresses are accurate, I have already explained why that critique T

ethodology and qualifications at this stage. If they are still relevant at summary judgment, the plaintiffs may reraise their concerns then.

CONCLUSION for the California and Ohio classes, with the above amendments to the class definitions. The motion for the nationwide classes is withdrawn timony, to , ony is DENIED as moot.

IT IS SO ORDERED. Dated: May 29, 2024

William H. Orrick United States District Judge