

No.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEST CARPET VALUES, INC. and THOMAS D. RUTLEDGE, on behalf of themselves
and all others similarly situated,

Plaintiffs-Respondents,

—v.—

GOOGLE LLC,

Defendant-Petitioner.

On Petition for Permission to Appeal under 28 U.S.C. § 1292(b)

An Order of the United States District Court

for the Northern District of California

Case No. 5:20-cv-04700-EJD

Hon. Edward J. Davila

**GOOGLE LLC'S PETITION FOR PERMISSION TO APPEAL UNDER
28 U.S.C. § 1292(b)**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for Defendant-Petitioner states that Google LLC is a subsidiary of XXVI Holdings Inc., which is a subsidiary of Alphabet Inc., a publicly traded company, and that no publicly traded company holds 10% or more of Alphabet Inc.'s stock.

/s/ Victor Jih

Victor Jih

Attorney for Defendant-Petitioner

Google LLC

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INTRODUCTION

This Court is being asked again to take up important issues about the interplay of tort and copyright law to control the flow of information on the internet. When the Court wrestled with similar issues in *Kremen v. Cohen*, 325 F.3d 1035, 1040 (9th Cir. 2003), it recognized their “significant precedential and public policy importance” given the ubiquity of the internet. Based on *Kremen*, which recognized a claim for conversion of a domain name, the District Court held that a website owner can use state trespass law to control how visitors see its web pages, without running afoul of copyright preemption or the First Amendment. These new duties recognized by the District Court’s order are implicated every time a user accesses a website. Early appellate guidance thus is essential not only to this case and these parties, but to anyone who uses the internet.

The underlying case concerns one of the countless ways a person can search for and access websites on the internet—specifically, the Google Search App on Android (“Search App”). The Search App, with its integration into Android phones, provides Android users with a convenient option to quickly search the internet. The Search App gives the user an option to view a separate frame recommending “related pages” that Google believes might be of interest.

Plaintiffs complain that Google’s recommendations might suggest a site Plaintiffs do not endorse, might lead users to material critical of Plaintiffs, or may

contain advertisements for competing sites. Nothing about the Search App, however, affects how Plaintiffs' websites function or how they are displayed by other programs, and nothing interferes with Plaintiffs' computer systems or even the files stored on them. Plaintiffs simply think they are entitled to control the surrounding screen environment when users of Google's Search App display Plaintiffs' websites on their *own* phones. Plaintiffs want to prohibit users from seeing the suggested alternatives that the Search App superimposes in a "pop-up" frame on their screens when they visit Plaintiffs' sites.

The ability to control the display of any copy of a website by the owner of that website is the quintessential domain of federal copyright law, but Plaintiffs tellingly do not assert a copyright claim. Plaintiffs instead bring state law claims for trespass to chattels, unjust enrichment, and unfair competition.

None of these is remotely viable. The trespass to chattels claim fails as a matter of law because Google's Search App does not interfere with or harm Plaintiffs' *tangible* property in any manner. Use of the Search App, at most, affects "copies" of websites, which Plaintiffs can control only to the extent federal copyright law allows. The unjust enrichment claim is likewise squarely preempted by the Copyright Act. What remains of the unfair competition claim is entirely derivative of the non-viable trespass and unjust enrichment claims: it fails.

And even if Plaintiffs could plead valid state law claims, the First Amendment protects Google's right to suggest results to users and users' rights to decide what information they wish to see and how they wish to see it. Plaintiffs' claim that Google cannot suggest "related pages" to users who visit a website in an expandable "pop up" frame directly threatens these First Amendment interests. Those interests are no less important even if Plaintiffs' allegation that some of the suggested pages may contain advertisements is assumed to be true.

After more than 10 months' consideration and grappling with these claims in a 21-page order, the District Court allowed them to proceed past the pleading stage. A1-21 (the "Order"). The District Court, however, certified four critical questions for interlocutory review. A22-27. These questions concern (1) whether this Court's precedent should be extended to protect as chattel the copies of websites displayed on a user's screen; (2) whether trespass to chattels can be based on "functional harm *or* disruption" to a website; (3) whether website owners can invoke state law to control how their websites are displayed on a user's screen without preemption by federal copyright law; and (4) whether the risk of confusing or misleading consumers defeats Google's First Amendment right to suggest search results to users interested in viewing a particular website. A24.

This case satisfies all three of Section 1292(b)'s requirements. A22-27. All four certified questions are "controlling questions of law." 28 U.S.C. § 1292(b).

They are all “legal questions that do not depend on a material dispute of fact” and are “potentially dispositive” of some or all of Plaintiffs’ claims. A24.

Nor is there any doubt that the certified questions present “substantial ground for difference of opinion.” 28 U.S.C. § 1292(b). As the District Court recognized, the certified questions are “novel and difficult.” A24. In many instances, they are “questions of first impression” that “no court” has before considered. A24-25. And for the rest, “[o]ther courts” disagree with the District Court on the answers. A25. What’s more, the District Court’s resolution of these questions sparked immediate critical commentary from leading academics, who recognized that Plaintiffs’ theories risk disrupting how people access the internet.

Finally, an immediate appeal would “materially advance . . . the litigation.” 28 U.S.C. § 1292(b). A ruling in Google’s favor on any question could dispose of one or all of Plaintiffs’ claims, narrowing or terminating the case. A27. “[E]ven an affirmance” would materially advance the litigation by clarifying the scope of Plaintiffs’ claims, help focus “potentially wide-ranging and expensive discovery into how millions of websites may have been displayed on Android devices over a two-year period,” and inform thorny questions likely to arise during any class certification proceedings. A27. Indeed, because Plaintiffs bring claims on behalf of a sprawling putative class, early appellate guidance on the viability or scope of Plaintiffs’ legal theories would conserve substantial judicial and party resources.

Even apart from the statutory factors, this case presents an exceptional case for immediate appellate review. Given “ubiquity and importance of the Internet,” there are “serious public policy considerations” involved with “imposing new tort duties” of the sort Plaintiffs envision. *Kremen*, 325 F.3d at 1040. Indeed, expanding these causes of action would chill the availability and development of tools for making information more accessible on the internet.

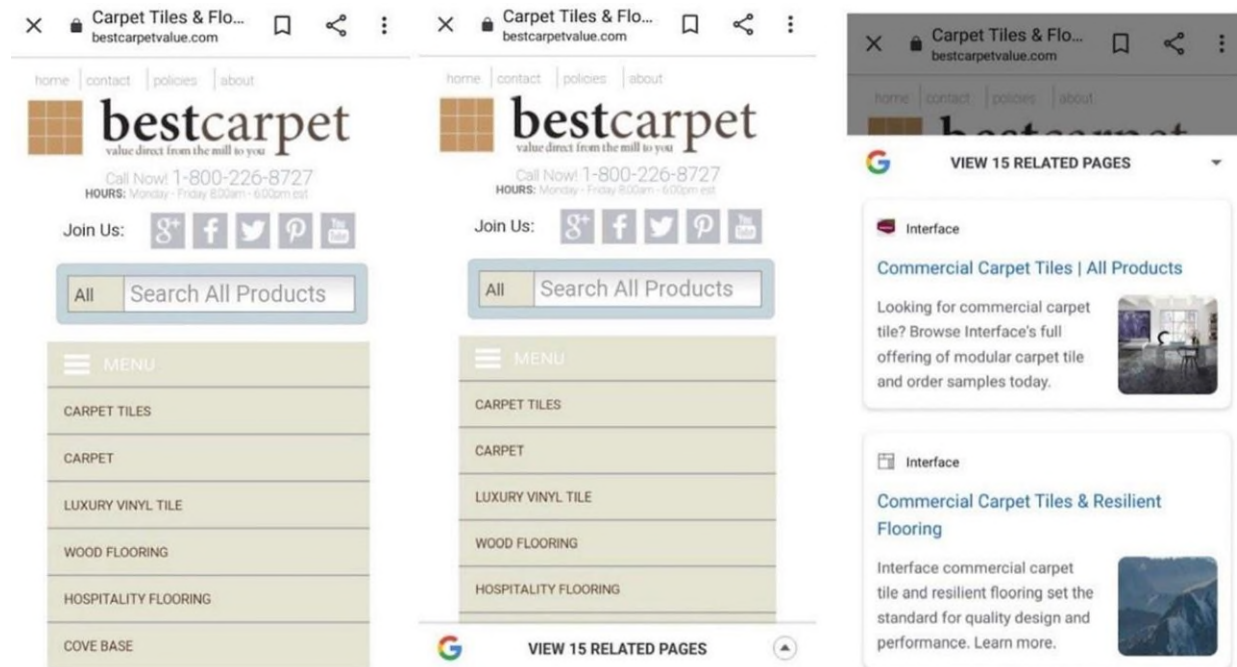
RELEVANT FACTS AND PROCEDURAL HISTORY

A. The Complaint And Google’s Motion To Dismiss.

Users can access the internet, and through it, Plaintiffs’ websites, using a number of different “browser” programs, such as Google Chrome, Mozilla Firefox, and Microsoft Edge. Dkt. 1 ¶¶ 3, 34. Mobile device users can also access websites through individual applications installed on their devices, such as Google’s Search App. *Id.* ¶¶ 59-60. If the user inputs a query into the Search App, it returns a list of results. *Id.* ¶¶ 60, 69. When a user clicks one of the suggested results, the Search App retrieves, loads, and displays a copy of the webpage. *Id.* ¶ 70.

Plaintiffs’ claims target a Search App function where, if the user chooses, the Search App will display links to other websites that Google believes the user might find relevant based on the current page the user is viewing in the Search App (“Related Pages”). When enabled, these links appear in a separate frame which temporarily appears on the user’s screen and covers a portion of the copy of

Plaintiffs’ website being displayed on the user’s screen. *See id.* ¶¶ 73-74. The frame is subject to the user’s control; it initially appears closed and expands only after the user affirmatively clicks the “pop-up button.” *See id.* ¶ 74. The stages of this Related Pages functionality are illustrated by images in the complaint:



Id. ¶¶ 73-74. Plaintiffs allege that this Related Pages functionality “obscures” and “blocks” their websites. *Id.* Plaintiffs also allege that the related links may be “ads for the host website’s competitors” or “links to news stories about the website’s owner.” *Id.* ¶¶ 77-78.

Plaintiffs Best Carpet Values, Inc. and Thomas D. Rutledge (collectively, “Plaintiffs”) filed a putative class action suit against Google, asserting claims for trespass to chattels, implied-in-law contract and unjust enrichment, and unfair and unlawful conduct in violation of California Business and Professions Code

§§ 17200, 17203. Dkt. No. 1. Plaintiffs purport to represent all website owners residing in the United States that own active websites between March 2018 and April 2020 on which Google’s “Related Pages” banner appeared when their websites were viewed by Android mobile phone users using the Search App. *Id.* ¶ 156. As the owners of active U.S.-based websites, Plaintiffs claim an entitlement “to control the content and information displayed on their websites’ web pages, including any advertisements, without interference.” *Id.* ¶ 51. Plaintiffs believe that by interfering with the display of their websites, Google committed trespass to chattels, and to the extent that Google superimposed advertisements over their websites without consent or payment, Google is liable under a theory of implied-in-law contract or unjust enrichment. *See id.* ¶¶ 176-190.

Google moved to dismiss the complaint. Dkt. No. 19. Google argued the trespass to chattels claim failed because Google’s Search App did not physically injure any of Plaintiffs’ tangible property. The unjust enrichment claim, Google contended, was preempted by the Copyright Act because it sounded in the “display” right protected by 17 U.S.C. § 106(5). And to the extent the UCL claim was not entirely derivative of the trespass and unjust enrichment claims, it failed to allege an incipient violation of the antitrust laws as required by *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 187 (1999). Google also argued that Plaintiffs’ claims were barred by the First Amendment because they sought to

control the display of the information that Google chooses to suggest and that users choose to see when they access Plaintiffs' websites.

B. The District Court's Motion To Dismiss Order.

After extensive briefing and oral argument, the District Court dismissed Plaintiffs' "unfair" conduct claim under California Business and Professions Code § 17200, but otherwise permitted Plaintiffs to proceed. A1-21.

Trespass to Chattels. Trespass to chattels lies where an intentional interference with the possession of personal property has proximately caused injury. *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1350-51 (2003). Plaintiffs' claim presented at least two questions, including whether copies of websites displayed on a user's screen are protectable chattel and whether a user-controlled overlay is a cognizable interference with the chattel. A7-13. The District Court answered both questions in the affirmative. Extending the reasoning of *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003), which recognized under California law a claim for conversion of a domain name, the District Court reasoned that Plaintiffs "have property rights to their websites for the same reasons a registrant has property rights to a domain name." A8-9. And citing *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342 (2003), the District Court held that "functional harm or disruption" in the form of obscuring copies of Plaintiffs' websites sufficed to state a claim even without any allegation of "physical harm to their websites." A12. In reaching these conclusions, the District Court

distinguished *Silvaco Data Sys. v. Intel Corp.*, 184 Cal. App. 4th 210 (2010), and the California Court of Appeal’s post-*Kremen* warning that “the expansion of conversion law to reach intangible property should not be permitted.” A10 & n.6. The District Court acknowledged seven contrary decisions, but declined to follow them. A11 & n.7. The District Court also overlooked *Hamidi*’s holding that trespass to chattels should not encompass a claim where the conduct “neither damages the recipient computer system nor impairs its functioning.” 30 Cal. 4th at 1347.

Implied-In-Law Contract/Unjust Enrichment. The District Court next analyzed whether the Copyright Act preempts Plaintiffs’ claims. A13-18. 17 U.S.C. § 301 preempts state-law claims where (1) the work involved falls within the general subject matter of the Copyright Act; and (2) the rights that the plaintiff asserts under state law are equivalent to an exclusive right protected by 17 U.S.C. § 106. *Kodadek v. MTV Networks, Inc.*, 152 F.3d 1209, 1213 (9th Cir. 1998). The District Court found that Plaintiffs’ websites fall within the subject matter of copyright, but that their claim did not involve rights equivalent to an exclusive right protected by the Copyright Act. A14-18.

The District Court reasoned that Plaintiffs want and expect Google to copy and display their websites and did not allege that Google “improperly benefited” from using their websites, as a copyright infringement plaintiff might. A15-16. Rather, the District Court found that the claims stem from “the coercive act of

superimposing advertisements” on Plaintiffs’ websites and from their right to prevent the display of their websites from being “covered up or obscured” even for a moment. A16.

Section 17200. The District Court permitted a claim for unlawful conduct using the trespass to chattels and implied contract/unjust enrichment claims as predicates. A18. The District Court dismissed Plaintiffs’ claim for unfair conduct because Plaintiffs could not show an incipient antitrust violation. A18-A19.

First Amendment. The District Court recognized Google’s First Amendment right to provide search engine results as part of its right to speak. A20. It questioned, however, Google’s right to speak again, after a user selects a website to visit, with additional suggestions specific to the selected website. A20. It also recognized that Plaintiffs were not challenging the content of Google’s search engine results, but Google’s right to display them in this way whether they advertised competitor websites or critical news stories. A5; A20. Because Plaintiffs allege that this second round of search results includes deceptive advertising, Google’s First Amendment right to display alternative search suggestions could be discounted. A20. The District Court also found that any right users may have to receive these website-specific suggestions was irrelevant because Google could not assert its users “right to hear.” A21.

C. The District Court’s Order Certifying An Interlocutory Appeal.

Google sought certification of the District Court’s order under 28 U.S.C. § 1292(b) and a stay of proceedings pending appeal. Dkt. 44. On May 2, 2022, the District Court granted those requests, certifying four controlling questions of law and staying proceedings pending a decision by the Ninth Circuit. A22-27.

QUESTIONS WARRANTING INTERLOCUTORY APPEAL

The District Court certified four controlling questions of law (A24):

- (1) Whether *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003), should be extended to protect as chattel the copies of websites displayed on a user’s screen?
- (2) Whether trespass to chattels can be based on “functional harm *or* disruption” to a website even though there is no “physical harm to their websites”?
- (3) Whether website owners can invoke state law to control how their websites are displayed on a user’s screen without preemption by federal copyright law?
- (4) Whether the risk consumers may be confused or misled by deceptive advertising defeats Google’s First Amendment right to suggest search results to users interested in viewing a particular website?

RELIEF SOUGHT

Google respectfully requests that this Court grant its petition for permission to appeal pursuant to 28 U.S.C. § 1292(b) and reverse the District Court’s determination that Plaintiffs stated claims for breach of an implied-in-law contract and unjust enrichment, trespass to chattels, and unlawful conduct in violation of California Business and Professions Code § 17200.

ARGUMENT

Certification of a non-final order for interlocutory appeal is appropriate where (1) the order involves a “controlling question of law,” (2) there is “substantial ground for difference of opinion,” and (3) an immediate appeal “may materially advance the ultimate termination of the litigation.” 28 U.S.C. § 1292(b); *see Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 687 (9th Cir. 2011) (taking interlocutory appeal from order on motion to dismiss). Here, the District Court found that all three requirements are clearly satisfied. The District Court’s determination warrants “careful consideration” (*United States v. Woodbury*, 263 F.2d 784, 786 (9th Cir. 1959)) and should be affirmed.

I. The Order Involves Four Controlling Questions Of Law.

The four questions certified by the District Court are controlling questions of law. *See* A23-24. They are questions of law that arise from Google’s motion to dismiss under Rule 12(b)(6). A24. They are controlling because resolving them could “materially affect the outcome of litigation in the district court” by disposing of some or all claims. *In re Cement Antitrust Litig. (MDL No. 296)*, 673 F.2d 1020, 1026 (9th Cir. 1982). The first two questions are “potentially dispositive” of Plaintiffs’ trespass-to-chattels claim and one of their unlawful conduct theories under Section 17200. A24. The third question not only concerns the implied

contract/unjust enrichment claim, but potentially disposes of all the claims. And the fourth question “is potentially dispositive of all of the claims.” A24.

II. There Is Substantial Ground For Difference Of Opinion.

The certified questions also satisfy the second statutory factor because “there is substantial ground for difference of opinion” regarding the District Court’s resolution of them. 28 U.S.C. § 1292(b). “[A] substantial ground for difference of opinion exists . . . where reasonable jurists might disagree on an issue’s resolution.” *Reese*, 643 F.3d at 688. That is indisputably the case here. A24-26.

First, the fundamental issues underlying the certified questions have been jurisprudentially controversial since their inception. When this Court first considered *Kremen*, it certified the issues to the California Supreme Court because there were “reasonable arguments . . . on both sides.” *Kremen v. Cohen*, 325 F.3d 1035, 1041 (9th Cir. 2003). The Court was forced to render a decision when the California Supreme Court declined the certification, only to have the California Court of Appeal later take issue with it in *Silvaco*. *Silvaco* observed that conversion traditionally required a taking of tangible property and cautioned that “the expansion of conversion law to reach intangible property should not be permitted to ‘displace other, more suitable law.’” 184 Cal. App. 4th at 239 n.21. It should be no surprise that any extension of *Kremen* or application of similar theories would be equally difficult, divisive, and fraught.

Second, while not required, there is on-point contrary authority on all four questions, as set forth below.

Extension of *Kremen*. Applying California state law, this Court held in *Kremen* that the tort of conversion applies to domain names. But since *Kremen*, other courts have disagreed over “whether the related tort of trespass to chattels extends to other forms of intangible property.” A25 (collecting cases). Indeed, other courts have parted ways with the District Court and refused to apply trespass-to-chattels theories to intangibles like websites. See *Discovery Educ., Inc. v. SchoolsPLP, LLC*, 2021 WL 2292223, at *3 (D. Del. June 4, 2021) (Bibas, C.J.) (declining to recognize websites as chattel, noting that only “[a] few state courts have [done] so”); *Exeter Twp. v. Gardecki*, 2018 WL 6616930, at *4 (E.D. Pa. Dec. 17, 2018) (“electronic files” are not chattel); *UCAR Tech. (USA) Inc. v. Li*, 2018 WL 2555429, at 4 (N.D. Cal. June 4, 2018) (Davila, J.) (“computer files” cannot be the subject of conversion or related torts); *MedioStream, Inc. v. Microsoft Corp.*, 869 F. Supp. 2d 1095, 1116 (N.D. Cal. 2012) (citing *Silvaco*, finding “documents and data and computer data discs” were not subject to conversion); *Tethys Bioscience, Inc. v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 2010 WL 2287474, at *7 (N.D. Cal. June 4, 2010) (citing *Silvaco*, refusing to extend *Kremen* to a patent application); *GNI Waterman LLC v. A/M Valve Co.*, 2007 WL 2669503, at *11 (E.D. Cal. Sept. 7, 2007) (dismissing trespass to chattels claim that was based on intangible

ownership rights of forms, designs, and patterns). Indeed, Plaintiffs' claims are even further out of step with the case law, because the alleged chattel is not even websites or computer files on servers under Plaintiffs' control, but rather "the copies of Plaintiffs' websites appearing on users' screens." A7 (emphasis added).

Functional But No Physical Harm. Similarly, in cases involving intangibles like websites, courts have disagreed over whether physical harm is required to state a claim. A25; *see also hiQ Labs, Inc. v. LinkedIn Corp.*, 31 F.4th 1180, 2022 WL 1132814 at *16 n.21 (9th Cir. 2022) (noting a split over whether web scraping constitutes trespass to chattels); *Discovery Educ., Inc.*, 2021 WL 2292223, at *3 (finding no trespass to chattels when there is no claim defendant's actions "damaged the actual website (by slowing it down, for example)"); *Fields v. Wise Media, LLC*, 2013 WL 5340490, at *4 (N.D. Cal. Sept. 24, 2013) (noting judicial split over "whether physical damage to the computer or device is necessary").

Copyright Preemption. Whether website owners can invoke state law to control how their websites are displayed on a user's screen without preemption by federal copyright law presents "a novel and difficult issue." A26. "[N]o court has considered whether copyright preemption applies to a claim" like Plaintiffs', "based on allegations that defendant superimposed advertisements on a website homepage and other landing pages without the consent of or compensation to the website owner." A26. And there is good reason to think other courts might disagree with

the District Court here based on other decisions involving the scope of the display right in federal copyright law. *See Jarvis v. K2 Inc.*, 486 F.3d 526, 531 (9th Cir. 2007) (the exclusive rights of the Copyright Act protects are implicated when images are “shrank, expanded, distorted, overlaid and otherwise edited”); *Gilliam v. ABC*, 538 F.2d 14, 21 (2d Cir. 1976) (“unauthorized editing of the underlying work” infringes); *Nat’l Bank of Commerce v. Shaklee Corp.*, 503 F. Supp. 533, 543 (W.D. Tex. 1980) (“addition of advertisements” to the work constitutes copyright infringement).

First Amendment. The First Amendment rights to speak and hear “similarly raise[] a novel and difficult issue.” A26. Many courts have recognized that the First Amendment protects search engine output results. A26. “[N]o court has considered whether that protection extends to advertisements and other messages superimposed on a website homepage and other landing pages.” A26. There is substantial ground to think that other jurists might disagree with the District Court’s order on this point, given that other courts have found similar speech to be protected by the First Amendment. *See Rogers v. Grimaldi*, 875 F.2d 994, 998 (2d Cir. 1989) (expression that combines fully protected “expression and commercial promotion” requires “more protection” than ordinary commercial speech); *Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 962 (9th Cir. 2012) (heightened scrutiny applied to yellow pages even though they contained advertisements); *Dr. Seuss Enters., L.P. v.*

ComicMix LLC, 983 F.3d 443, 461 (9th Cir. 2020) (the right to speak outweighs concerns about confusion or deception under trademark law, except when the use of the trademark is explicitly misleading); *Järlström v. Aldridge*, 366 F. Supp. 3d 1205, 1219 n.9 (D. Or. 2018) (states may not absolutely prohibit potentially misleading information “if the information also may be presented in a way that is not deceptive”).

In sum, this is not a situation where reasonable judges might differ. This is one where reasonable judges have already differed. The decisions cited above are just illustrative examples.

Third, the Order sparked quick and critical academic commentary. Almost immediately, Stanford Law Professor Mark Lemley tweeted “[t]he nutty Internet ‘trespass to chattels’ theory is back . . . [a]nd this time it’s worse.” <https://twitter.com/marklemley/status/1442872861140520967> (“Just wait until the court finds out about the ‘resize windows’ button.”).

A more extensive analysis was then published by Santa Clara Law Professor Eric Goldman in his post “*If ‘Trespass to Chattels’ Isn’t Limited to “Chattels,” Anarchy Ensues—Best Carpet Values v. Google*,” Technology & Marketing Law Blog (Oct. 19, 2021), <https://blog.ericgoldman.org/archives/2021/10/if-trespass-to-chattels-isnt-limited-to-chattels-anarchy-ensues-best-carpet-values-v-google.htm>. Professor Goldman explained how embracing Plaintiffs’ claimed interest in “a

‘canonical’ version of a web page” is displayed “strips users of their own agency to decide what browsing tools best serve their needs and how best to configure those tools.” *Id.* He identified the uncertain core of the Plaintiffs’ claims since they do not own user screens and insist they are not relying on their copyright interest in their websites. *Id.* He questioned the extension of *Kremen* as “very, very confused” and inconsistent with *Hamidi*’s requirement that interference “cause measurable loss to computer system resources.” *Id.* He argues that the “extra element” to avoid preemption is “exactly what the derivative work rights covers” under the Copyright Act. *Id.* As for the First Amendment analysis, he said, “I can’t bring myself to blog it.” *Id.* He warned that the Order “creates a distorted pastiche of the precedent to reach an obviously wrong and wholly counterintuitive outcome” that will create “plenty of problematic edge cases.” *Id.*

Reasonable minds clearly disagree about the resolution of these issues.

III. An Immediate Appeal Would Materially Advance Resolution Of This Case.

Section 1292(b) does not require “that the interlocutory appeal have a final, dispositive effect on the litigation, only that it ‘may materially advance’ the litigation.” *Reese*, 643 F.3d at 688. Resolution of a question “materially advances” the termination of a litigation when, as here, it “shorten[s] the time” spent on the lawsuit, or reduces the “effort, or expense of conducting the lawsuit.” *In re Cement Antitrust Litig.*, 673 F.2d at 1027.

Guidance now will materially advance the litigation. “If the Ninth Circuit rules in favor of [Google] on even one question, then one or more of Plaintiffs’ claims will be dismissed.” A26. That “would impact the scope of Plaintiffs’ case and potentially their ability to pursue claims on behalf of a putative class.” A26.

“[E]ven an affirmance” would materially advance the litigation by clarifying the scope of Plaintiffs’ claims. A27. Identifying what the precise issues are and will need to be the focus of discovery is sensible case management before “potentially wide-ranging and expensive discovery into how millions of websites may have been displayed on Android devices over a two-year period.” A27. Given the amount-in-controversy and the size of the putative class, “the cost of discovery in this case will impose a heavy burden on the parties and the Court,” and early Ninth Circuit review “could result in a significant reduction of that burden or even eliminate it altogether.” *Silbersher v. Allergan Inc.*, 2021 WL 292244, at *3 (N.D. Cal. Jan. 28, 2021).

Immediate appellate review is particularly helpful here because Plaintiffs bring these claims on behalf of a putative class. To decide whether it is appropriate to certify a class of “tens of millions” of website owners, we need to know whether it matters if the suggested search result was an advertisement or a news story, whether it is necessary to determine what parts of the original website may have been blocked, whether a website owner needs to establish harm, whether there has to be a finding of deception or confusion, whether there needs to be demonstrable

detrimental reliance, whether any overlay or superimposition is *per se* illegal or does it depend on what Google suggests or the degree of functional harm. “[E]specially in class actions, uncertainty over a key claim’s status ‘may delay settlement (almost all class actions are settled . . .), and by doing so further protract the [case].’” *Casas v. Victoria’s Secret Stores, LLC*, 2015 WL 13446989, at *3 (C.D. Cal. Apr. 9, 2015).

Needless to say, the questions identified so far will not be the only difficult ones. Any insight that can be gleaned from how the Ninth Circuit views these issues will prove invaluable to the efficient and correct adjudication of this matter.

IV. This Is An Exceptional Case Warranting Immediate Review.

This case is the kind of exceptional case that warrants interlocutory review. These issues are of immense significance to anyone who uses or conducts business on the internet. When the Ninth Circuit considered whether to extend the tort of conversion to domain names in *Kremen*, the Court declared the issue to be of “significant precedential and public policy importance” given the “ubiquity and importance of the Internet” and the “serious public policy considerations” involved with “imposing new tort duties.” *Kremen*, 325 F.3d at 1040.

Indeed, the issues presented in this case affect not just the parties, but also the public at large. The novel extension of trespass to chattels to websites threatens to upend activities long understood to be lawful and vital to the public’s access to information. The mere threat of liability may chill the development and availability

of tools the public uses to access the internet. A leading scholar reviewing the Order identified several “problematic edge cases” implicated by Plaintiffs’ theories. *See* Goldman, *supra*. Under the Order’s logic, things like browser updates that change how websites are displayed or functionality that allows users to resize browser windows might be trespass to chattels because they might obscure or block parts of websites. *Id.* Functionality that makes websites more accessible, by increasing the size of text to make it more visible or changing the display color to ease eye strain, might lead to tort liability too.

Even looking merely at the parties’ interests, these issues are unusually significant. In this case alone, Plaintiffs seek a monetary recovery in excess of “\$2 billion.” Dkt. 1, ¶ 146. Plaintiffs also seek extraordinary relief in the form of “a permanent injunction requiring Google to forever disable the ad-generating feature of its Search App on every Android phone on which it has been installed, and preventing Google from installing any similar ad-generating code on any internet related devices or products in the future.” *Id.*, ¶¶ 182, 190. Interlocutory review here would serve Section 1292(b)’s core purpose of “avoid[ing] protracted and expensive litigation.” *In re Cement Antitrust Litig.*, 673 F.2d at 1026.

CONCLUSION

This case raises difficult and important issues. When the Ninth Circuit first wrestled with *Kremen v. Cohen*, it recognized its “significant precedential and public

policy importance” given the ubiquity of the internet. 325 F.3d at 1040. The same is true with *Kremen*’s extension. Plaintiffs’ theories are implicated every time a user visits a website because the Order recognizes the website owner’s right to control how it is displayed. The claims are not limited to instances of deceptive advertising, they apply broadly—every time a user opens multiple overlapping windows that may block the one displaying the website, every program that may display a website in a smaller window size than intended, and every ADA accommodation tool used to alter how a website functions to assist the visually or hearing impaired. It is important that these legal questions are answered definitively, correctly, and promptly.

Immediate appellate guidance has importance beyond this case and these parties. The requirements for interlocutory review and its wisdom in this instance are clearly present. Google respectfully requests that the Court grant Google’s petition for permission to appeal.

Dated: May 12, 2022

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: /s/ Victor Jih

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Attorneys for Defendant-Petitioner Google LLC

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Defendant-Petitioner respectfully states that there are no related cases.

Dated: May 12, 2022

Respectfully submitted,

WILSON SONSINI GOODRICH & ROSATI
Professional Corporation

By: */s/ Victor Jih*

Victor Jih

*Attorney for Defendant-Petitioner
Google LLC*

CERTIFICATE OF COMPLIANCE

I certify that this petition complies with the length limits permitted by Ninth Circuit Rules 5-2(b) and 32-3(2). The petition is 5,061 words, excluding the portions exempted by Fed. R. App. P. 32(f), which does not exceed the 5,600 words allowed for this petition. The petition's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated: May 12, 2022

By: /s/ Victor Jih
Victor Jih

ADDENDUM

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BEST CARPET VALUES, INC., et al.,
Plaintiffs,
v.
GOOGLE LLC,
Defendant.

Case No. [5:20-cv-04700-EJD](#)

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

Re: Dkt. No. 19

Plaintiffs Best Carpet Values, Inc. and Thomas D. Rutledge (collectively “Plaintiffs”) initiated this putative class action suit, asserting claims against Defendant Google LLC (“Google”) for implied-in-law contract and unjust enrichment; trespass to chattels; and unfair and unlawful conduct in violation of California Business and Profession Code § 17200. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Google moves to dismiss the complaint without leave to amend. Dkt. No. 19. Plaintiffs filed an opposition (Dkt. No. 22) and Google filed a reply (Dkt. No. 28). For the reasons discussed below, the Court will grant in part and deny in part Google’s motion.

I. BACKGROUND¹

Plaintiffs are owners of active U.S.-based websites. Compl. ¶ 1. Plaintiff Best Carpet Values, Inc. (“Best Carpet”) owns bestcarpetvalue.com and Plaintiff Thomas D. Rutledge (“Rutledge”) owns thomasrutledgelaw.com. *Id.* ¶ 9. A website is a digital document built with software and housed on a computer called a “web server.” *Id.* ¶ 34. A webserver is owned or

¹ The Background is a summary of the allegations in the Complaint.



1 controlled in part by the website’s owner. *Id.* Commercial websites typically have a unique
 2 “domain name” or “URL” (Uniform Resource Locator) address which enables an internet user to
 3 find the webserver on which the website resides. *Id.* ¶ 35. All websites have at least one page,
 4 called a homepage. *Id.* ¶ 36. Plaintiffs allege that “[b]y rights of ownership—and under the First
 5 Amendment—website owners are entitled to control the content and information displayed on
 6 their websites’ web pages, including any advertisements, without interference.” *Id.* ¶ 51. Once a
 7 website is “published” and becomes “active,” Internet users can reach a website by entering the
 8 website’s domain name into an internet “browser” program such as Google Chrome, Mozilla
 9 Firefox or Microsoft Edge. *Id.* ¶ 37.

10 Internet users do not necessarily need a URL to reach a website. Internet users can find the
 11 website by entering “search terms” into the “search bar” of an internet search engine such as
 12 Google.com, Yahoo.com or Bing.com. *Id.* ¶ 38. Performing searches on search engines yields
 13 “search results” typically in the form of a list of websites or documents that are potentially
 14 responsive to the user’s search terms. *Id.* When the internet user clicks on a link to a website, the
 15 user’s internet browser will connect the user to, and upload a page from, the website. *Id.* “The
 16 browser does this by finding and connecting to the web server hosting the website. The browser
 17 then obtains a copy of the requested website page from the host web server and delivers the copy
 18 to the user by translating the website’s codes and recreating the website page on the user’s
 19 computer monitor or mobile device screen.” *Id.* ¶ 39.

20 Google operates several internet related businesses that provide a variety of internet related
 21 products and services. *Id.* ¶ 54. Among other things, Google (1) makes and controls Android
 22 mobile phone software, including the Android operating system, which allows users to wirelessly
 23 access the internet; (2) owns and operates the world’s most used internet browser, Google
 24 Chrome, and the world’s most-used internet search engine, google.com; and (3) owns the world’s
 25 largest internet advertising network, offering products serving every aspect of that industry,
 26 including Google Ads (for clients advertising on Google’s search results pages), AdSense
 27 (matching buyers and sellers of display advertising on websites), and AdX (for buyers and sellers

1 of premium, high-end website display ads). *Id.* ¶¶ 55-58.

2 Android phone users can search the internet by either (1) opening a browser, such as
3 Chrome, by clicking the Chrome icon on one of their Android home screens; or (2) using Google’s
4 Search App, which is incorporated into nearly every Android phone. *Id.* ¶¶ 59-60. Android users
5 searching the internet are able to retrieve virtually the same search results, whether they use
6 Search App or Chrome. *Id.* ¶¶ 63-64.

7 Before March of 2018, the Search App icon “” appeared in the suite of Google apps
8 that Google installs on Android phones, and many Android users had to click on the Search App
9 icon to use the App. *Id.* ¶ 62. In late March of 2018, Google updated its Search App software by
10 placing the Search App’s search bar at the top of the first page of most Android home screens. *Id.*
11 ¶¶ 65, 66. This software update eliminated the need for Android users to click an icon before
12 conducting an internet search using Google’s Search App. *Id.* ¶ 60. The Search App search bar
13 bears Google’s “” logo. *Id.* ¶ 67. Between March of 2018 and April of 2020 (the “Class
14 Period”), virtually all of the approximately 50 million Android phone users in America have used
15 the Search App’s search bar to search the internet. *Id.* ¶ 68.

16 When Android users input internet search terms in the Search App’s search bar, the Search
17 App provides the user with search results, which appear on the Android user’s screen as a list of
18 websites and other documents available on the internet. *Id.* ¶ 69. The names of the websites on
19 this search results list contain hyperlinks to those websites. *Id.* ¶ 70. When users click on a
20 website name, Google’s search result page disappears from their screen and is replaced by the
21 website’s homepage. *Id.*

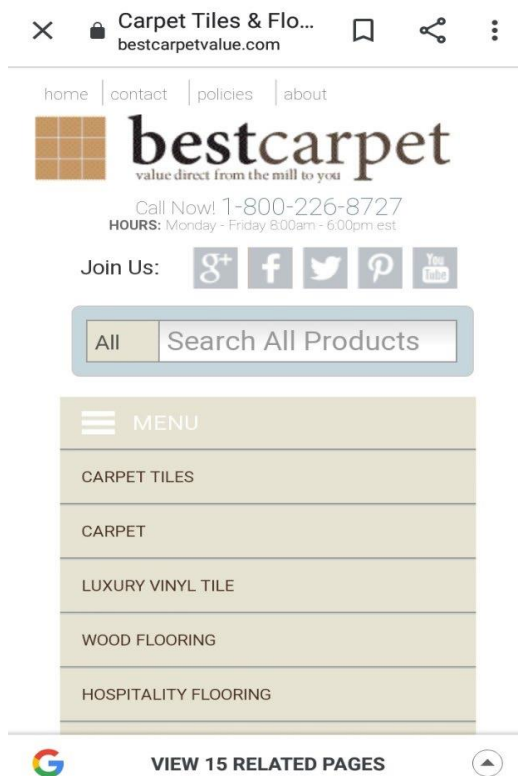
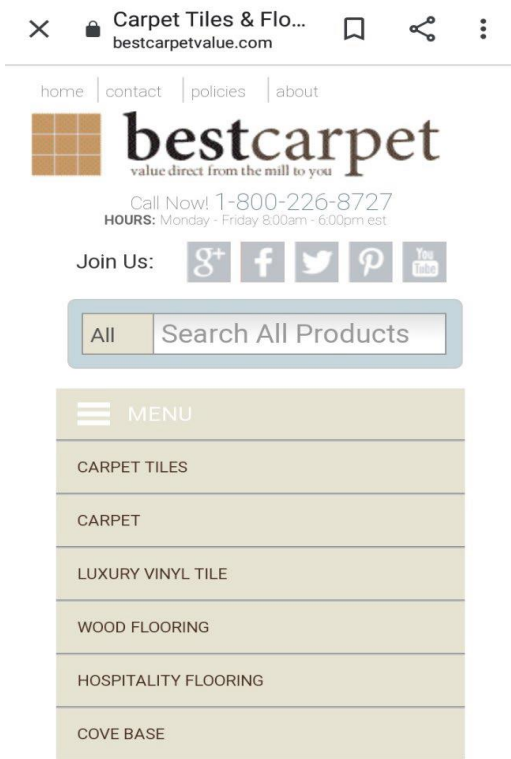
22 During the Class Period, “most websites retrieved via Search App, when activated by an
23 Android user’s touching and toggling of their phone’s screen, had Google’s unlawful ads
24 superimposed on their homepages or other ‘landing’ pages.” *Id.* ¶ 64. More specifically, Google
25 superimposed a leaderboard ad at the bottom of homepages that consisted of Google’s logo, the
26 phrase “VIEW 15 RELATED PAGES,” and a pop-up button. *Id.* ¶¶ 73-74. To illustrate, when a
27 Search App user clicked Best Carpet’s homepage link from the search results list, the website

28 Case No.: [5:20-cv-04700-EJD](#)

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

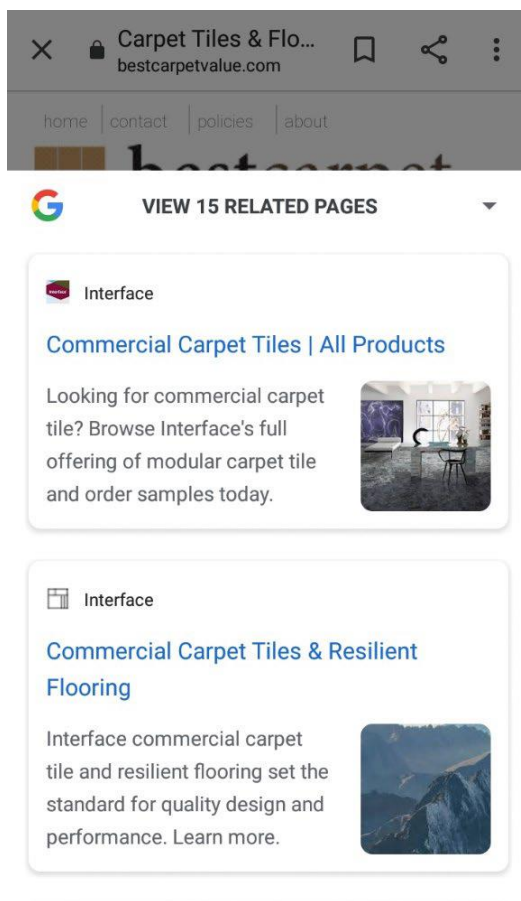
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appeared as depicted in the image below on the left. *Id.* ¶ 73.



Id. ¶ 73. Once a user engaged Best Carpet’s website by toggling its homepage, however, Google’s Search App activated and superimposed Google’s leaderboard ad on top of Best Carpet’s website as depicted above in the image to the right. *Id.* The result was that Google’s leaderboard, “VIEW 15 RELATED PAGES,” covered Best Carpet’s invitation to users to view its “Cove Base” products. *Id.* If a user were to click on the pop-up button (encircled triangle) in the leaderboard, the Search App superimposed two half-page “banner” ads that blocked 80% of what was previously viewable, and shadowed the remaining 20%. *Id.* ¶ 74. The two half-page banner ads were for Best Carpet’s direct competitors. *Id.* ¶ 74, 79. Technically, the superimposed “banner” ads appeared on the copy of Best Carpet’s website that was reproduced on the user’s screen. *Id.* ¶ 75. Best Carpet considers that copy its property. *Id.* Each banner ad contained a link that, if clicked, redirected the users from Best Carpet’s homepage to its competitor’s web page. *Id.* ¶¶ 76, 79-80. The image below illustrates the superimposed “banner” ads.

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Google’s ads intruded on website owners’ limited space and created distractions that undermined every web page’s central purpose. *Id.* ¶ 88. They also “compelled” business owners in nearly every conceivable industry to advertise for others, including competitors. *Id.* ¶¶ 89, 91. Google’s ad could also be misperceived by Android users as endorsements of unaffiliated businesses and people. *Id.* ¶ 91. The Related Pages banner ads often included ads for the host website’s competitors (*id.* ¶ 77) and links to news stories about the host website’s owner, including negative news articles (*id.* ¶¶ 78, 85).

The purpose of the March 2018 software update was to generate profit and Google succeeded in doing so. *Id.* ¶¶ 100-148. Google updated its Search App on or about April 22, 2020 to discontinue (at least temporarily) the conduct alleged in the Complaint. *Id.* ¶ 8, n.1. Plaintiffs estimate that for those two years, Google obtained over \$2 billion of non-consensual free advertising. *Id.* ¶ 146.

1 **II. STANDARDS**

2 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient
3 specificity “to give the defendant fair notice of what the . . . claim is and the grounds upon which
4 it rests.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotations omitted).
5 A complaint which falls short of the Rule 8(a) standard may, therefore, be dismissed if it fails to
6 state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6).

7 To survive a Rule 12(b)(6) motion to dismiss, the complaint “must contain sufficient
8 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v.*
9 *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp.*, 550 U.S. at 570). A claim has facial
10 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
11 inference that the defendant is liable for the misconduct alleged. *Id.* In evaluating the complaint,
12 the court must generally accept as true all “well-pleaded factual allegations.” *Id.* at 664. The
13 court must also construe the alleged facts in the light most favorable to the plaintiff. *See Retail*
14 *Prop. Trust v. United Bhd. Of Carpenters & Joiners of Am.*, 768 F.3d 938, 945 (9th Cir. 2014) (the
15 court must “draw all reasonable inferences in favor of the nonmoving party” for a Rule
16 12(b)(6) motion). The court, however, “does not have to accept as true conclusory allegations in a
17 complaint or legal claims asserted in the form of factual allegations.” *In re Tracht Gut, LLC*, 836
18 F.3d 1146, 1150-51 (9th Cir. 2016) (citing *Bell Atl. Corp.*, 550 U.S. at 555-56). Dismissal “is
19 proper only where there is no cognizable legal theory or an absence of sufficient facts alleged to
20 support a cognizable legal theory.” *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001).

21 **III. DISCUSSION**

22 Plaintiffs assert three claims on behalf of themselves, a Class, a Georgia Subclass, and a
23 California Subclass.² Each claim is addressed separately below.

24 _____

25 ² The “Class” is: “All persons or entities residing in the United States that owned websites that
26 were active between March 2018 and April 2020 (the ‘Class Period’) on which Google’s logo and
27 Related Pages banner ads appeared when their websites were viewed by Android mobile phone
28 owners using the Search App.” Compl. ¶ 156.

29 The “Georgia Subclass” is: “All persons or entities residing in Georgia that owned websites that
30 Case No.: [5:20-cv-04700-EJD](#)
ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

1 **A. Trespass to Chattels Claim**

2 Trespass to chattels lies where an intentional interference with the possession of personal
3 property has caused injury. *Intel Corp. v. Hamidi*, 30 Cal. 4th 1342, 1350-51 (2003); *see also*
4 *Brodsky v. Apple Inc.*, 2019 U.S. Dist. LEXIS 148808, at *8 (N.D. Cal. Aug. 30, 2019). “Dubbed
5 by Prosser the ‘little brother of conversion,’ the tort of trespass to chattels allows recovery for
6 interferences with possession of personal property ‘not sufficiently important to be classed as
7 conversion, and so to compel the defendant to pay the full value of the thing with which he has
8 interfered.’” *Hamidi*, 30 Cal. 4th at 1350 (quoting Prosser & Keeton, *Torts* (5th ed. 1984) § 14,
9 pp. 85–86). Under California law, “[i]n cases of interference with possession of personal property
10 not amounting to conversion, ‘the owner has a cause of action for trespass or case [sic], and may
11 recover only the actual damages suffered by reason of the impairment of the property or the loss of
12 its use.’” *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040, 1069 (N.D. Cal. 2012) (quoting
13 *Hamidi*, 30 Cal. 4th at 1351).

14 Here, there are two potential chattels: the computers hosting Plaintiffs’ websites and the
15 copies of Plaintiffs’ websites appearing on users’ screens. Google contends the trespass to chattels
16 claim fails as a matter of law as to both potential types of chattel because its Search App does not
17 cause physical injury (*i.e.*, intrusion, interference or harm) to any tangible property. Mot. at 6. In
18 making this argument, Google implicitly acknowledges that the computers hosting Plaintiffs’
19 websites are tangible property, but contends that the Search App does not interact with those
20 computers, much less damage them. As for the copies of Plaintiffs’ websites appearing on users’
21 screens, Google contends that they are not tangible property, and therefore cannot be the subject of
22 a trespass claim.

23 _____
24 were active between March 2018 and April 2020 on which Google’s logo and Related Pages
25 banner ads appeared when their websites were viewed by Android mobile phone owners using the
Search App.” *Id.* ¶ 157.

26 The “California Subclass” is: “All persons or entities residing in California that owned websites
27 that were active between March 2018 and April 2020 on which Google’s logo and Related Pages
28 banner ads appeared when their websites were viewed by Android mobile phone owners using the
Search App.” *Id.* ¶ 158.

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ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

1 In response, Plaintiffs contend that tangible and intangible property alike can be the subject
2 of a trespass to chattels claim, and that they are alleging an injury to their intangible property,
3 namely their websites.³ Google allegedly injured their websites because the superimposed ads
4 impaired the website’s “condition, quality, or value.” Opp’n at 18.

5 Consistent with *Kremen v. Cohen*, 337 F.3d 1024, 1029-31, 1034-35 (9th Cir. 2003), and
6 subsequently issued cases, the Court agrees with Plaintiffs that a website can be the subject of a
7 trespass to chattels claim. In *Kremen*, the Ninth Circuit held that a registrant has property rights in
8 a domain name, and further that a domain name is intangible property⁴ that is protected by
9 California conversion law. *Id.* at 1035. In doing so, the *Kremen* court recognized that conversion
10 was originally a remedy for the wrongful taking of another’s goods, so it applied only to tangible
11 property. *Id.* at 1030. The *Kremen* court, however, observed that virtually every jurisdiction has
12 discarded this limitation to some degree and cited to the *Restatement* as one example of an
13 alternative test:

14 (1) Where there is conversion of a document in which intangible
15 rights are merged, the damages include the value of such rights.

16 (2) One who effectively prevents the exercise of intangible rights of
17 the kind customarily *merged in a document* is subject to a liability
18 similar to that for conversion, even though the document is not itself
19 converted.

20 *Restatement (Second) of Torts* § 242 (1965) (emphasis added). The *Kremen* court surveyed
21 California cases, determined that California does not follow the *Restatement*’s merger requirement
22 quoted above,⁵ and opined that conversion is a remedy for conversion of “every species of
23

24 ³ None of Plaintiffs’ websites, files, or data were physically altered in any way. Nor were
25 Plaintiffs’ servers disrupted.

26 ⁴ A property right exists in a domain name because (1) it is an interest capable of precise
27 definition; (2) it is capable of exclusive possession or control; and (3) registrants of the domain
28 name have a legitimate claim to exclusivity. *Id.* at 1030.

⁵ The *Kremen* court observed that “courts routinely apply the tort to intangibles without inquiring
whether they are merged in a document and, while it’s often possible to dream up *some* document
the intangible is connected to in some fashion, it’s seldom one that represents the owner’s property
interest.” *Kremen*, 337 F.3d at 1033.

1 personal property,” whether tangible or intangible. *Id.* at 1033 (quoting *Payne v. Elliot* 54 Cal.
 2 339, 341 (1880)). Nevertheless, the *Kremen* court found it unnecessary to resolve whether or not
 3 California applies the merger requirement because *Kremen*’s domain name had a “connection to a
 4 document or tangible object,” namely the Domain Name System (“DNS”)—the distributed
 5 electronic database that associates domain names with particular computers connected to the
 6 internet. *Id.* at 1033-34. The DNS was, in the Ninth Circuit’s view, akin to an electronic
 7 document. *Id.* at 1034. The Ninth Circuit explained:

8 We need not delve too far into the mechanics of the Internet to resolve
 9 this case. It is sufficient to observe that information correlating
 10 *Kremen*’s domain name with a particular computer on the Internet
 11 must exist somewhere in some form in the DNS; if it did not, the
 database would not serve its intended purpose. Change the
 information in the DNS, and you change the website people see when
 they type “www.sex.com.”

12 *Id.* at 1034. After *Kremen*, several courts have held that domain names are subject to conversion
 13 in California. See e.g., *CRS Recovery, Inc. v. Laxton*, 600 F.3d 1138, 1142 (9th Cir. 2010)
 14 (“Domain names are thus subject to conversion under California law, notwithstanding the
 15 common law tort law distinction between tangible and intangible property for conversion
 16 claims.”); *United States Marine Surveyors, Inc. v. Reiner*, 2016 WL 9131961, at *4 (C.D. Cal.
 17 Aug. 4, 2016) (“A website domain is property which may be converted.”); *Salonclick LLC v.*
 18 *SuperEgo Mgmt. LLC*, 2017 WL 239379, at *4 (S.D.N.Y. Jan. 18, 2017) (holding that plaintiff
 19 had stated a claim for conversion of domain name and social media accounts under New York
 20 law).

21 Plaintiffs have property rights to their websites for the same reasons a registrant has
 22 property rights to a domain name. The owner of an Internet website “has the right to establish the
 23 extent to (and the conditions under) which members of the public will be allowed access to
 24 information, services and/or applications which are available on the website.” *U.S. v. Drew*, 259
 25 F.R.D. 449, 461 (C.D. Cal. 2009) (citing *U.S. v. Phillips*, 477 F.3d 215, 219–21 (5th Cir. 2007);
 26 *EF Cultural Travel BV v. Zefer Corp.*, 318 F.3d 58, 62 (1st Cir. 2003); *Register.com, Inc. v. Verio,*
 27 *Inc.*, 126 F. Supp. 2d 238, 245–46 (S.D.N.Y. 2000); and *CompuServe Inc. v. Cyber Promotions,*

1 *Inc.*, 962 F. Supp. 1015, 1023–24 (S.D. Ohio 1997)). Plaintiffs contend that website ownership
 2 grants them a right to be paid for the advertising space occupied by Google on their websites. And
 3 like a domain name, a website is a form of intangible property that has a connection to an
 4 electronic document. “A website is a digital document built with software and housed on a
 5 computer called a ‘web server,’ which is owned or controlled in part by the website’s owner. A
 6 website occupies physical space on the web server, which can host many other documents as
 7 well.” Compl. ¶ 34. Plaintiffs’ website is also connected to the DNS through its domain name,
 8 bestcarpetvalue.com, just as Kremen’s domain name was connected to the DNS. Under the
 9 *Kremen* court’s reasoning, Plaintiffs’ website has a connection to a tangible object, which satisfies
 10 the *Restatement*’s merger requirement.⁶ Therefore, consistent with *Kremen*, trespass to chattels
 11 ought to apply to a website, and several courts have so found. *See YLD Ltd. v. Node Firm*, 2016
 12 WL 7851414, at *2 (N.D. Cal. Aug. 17, 2016) (applying New York and federal law and denying
 13 motion to dismiss claims for trespass to chattels and conversion that were based, in part, on an
 14 alleged disruption to the use of a website); *Combs v. Doe*, 2011 WL 738052, at *1 (N.D. Cal. Feb.
 15 23, 2011) (magistrate’s report and recommendation granting default judgment on conversion claim
 16 based on allegations that defendant stole website and domain names by hacking into plaintiff’s
 17 email); *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F. Supp. 2d 609, 618 (S.D.N.Y. 2003)
 18 (sustaining claim for conversion of copyrighted website); *Ground Zero Museum Workshop v.*
 19 *Wilson*, 813 F. Supp. 2d 678, 698 (D. Md. 2011) (finding allegations that defendant deprived
 20 plaintiff of possession of website and damaged the chattel by inserting a redirect command
 21 support a legally cognizable trespass to chattels claim); *State Analysis, Inc. v. Am. Fin. Servs.*
 22 *Assoc.*, 621 F. Supp. 2d 309, 320 (E.D. Va. 2009) (sustaining trespass to chattels claim where

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 25 ⁶ After *Kremen*, the California Court of Appeal, Sixth Appellate District, noted that conversion
 26 traditionally required a taking of *tangible* property and that “this restriction has been greatly
 27 eroded,” but not “destroyed.” *Silvaco Data Sys. v. Intel Corp.*, 184 Cal. App. 4th 210, 239 n.21
 (2010) (emphasis in original). The *Silvaco* court also cautioned that “the expansion of conversion law
 to reach intangible property should not be permitted to ‘displace other, more suitable law.’” *Id.* As
 discussed above, however, Plaintiffs’ websites have a connection to a tangible object.

1 defendant accessed a password protect portion of plaintiff’s website and thereby diminished the
2 value of plaintiff’s “possessory interest in its computer network”). Google points to only one case
3 in the Ninth Circuit where the court rejected a claim for trespass to chattels involving intangible
4 property. *See e.g., GNI Waterman LLC v. A/M Valve Co. LLC*, 2007 WL 2669503, at *11 (E.D.
5 Cal. Sept. 7, 2007) (dismissing trespass to chattels claim that was based on intangible ownership
6 rights of forms, designs and patterns). The *Waterman* case, however, is not helpful because it
7 lacks any analysis.⁷

8 Having concluded that a website is a form of intangible property subject to the tort of
9 trespass to chattels, the next issue is whether Plaintiffs have alleged an injury. *Hamidi*, 30 Cal. 4th
10 at 1348 (“the trespass to chattels tort . . . may not, in California, be proved without evidence of an
11 injury to the plaintiff’s personal property or legal interest therein”). “In modern American law
12 generally, ‘[t]respass remains as an occasional remedy for minor interferences, resulting in some
13 damage, but not sufficiently serious or sufficiently important to amount to the greater tort’ of
14 conversion.” *Id.* at 1351 (quoting Prosser & Keeton, Torts, supra, § 15, p. 90, italics added.).
15 “Therefore, one who intentionally intermeddles with another’s chattel is subject to liability only if
16 his intermeddling is harmful to the possessor’s materially valuable interest in the physical
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18 ⁷ In *Gary Friedrich Enters., LLC v. Marvel Enters.*, 713 F. Supp. 2d 215 (S.D.N.Y. 2010), the
19 court held that the claim for trespass to chattels under Illinois and New York law failed because
20 (1) defendant never assumed “physical control” over plaintiff’s story idea and characters and (2)
21 the claim was preempted by federal copyright law. Other cases cited by Google do not discuss the
22 distinction between tangible and intangible property and offer little guidance. *See e.g., Level 3*
23 *Commc’ns, Inc. v. Lidco Imperial Valley, Inc.*, 2012 WL 4848929, at *4 (S.D. Cal. Oct. 11, 2012)
24 (explaining that trespass to chattels requires “intentionally bringing about a physical contact with
25 the chattel”); *In re L.T.*, 103 Cal. App. 4th 262, 265 (2002) (explaining that for arson, “chattels”
26 are things that are “visible, tangible, movable”); *Italiani v. Metro-Goldwyn-Mayer Corp.*, 45 Cal.
27 App. 2d 464, 467 (1941) (explaining that trover, detinue and replevin require “interference with
28 possession of, or damage to, some specific tangible property, and are not concerned with
intangible or incorporeal rights which may exist in connection with, or entirely apart from any
particular piece of physical property”); *In re iPhone Application Litig.*, 844 F. Supp. 2d 1040,
1069 (N.D. Cal. 2012) (dismissing trespass claim because although placement of data on iPhones
may have caused “harm” by taking up bandwidth, storage space, or shortening the battery life of a
device, plaintiffs did not plausibly establish a significant reduction in service constituting an
“interference with the intended functioning of the system, as by *significantly reducing* its available
memory and processing power”) (citation omitted); *Angelica Textile Servs., Inc. v. Park*, 220 Cal.
App. 4th 495, 508 (2013) (conversion claim asserted against an employee who retained plaintiff’s
documents was not displaced by California’s Uniform Trade Secrets Act).

1 condition, quality, or value of the chattel, or if the possessor is deprived of the use of the chattel
 2 for a substantial time, or some other legally protected interest of the possessor is affected.” *Id.*;
 3 *see also Grace v. Apple, Inc.*, 2019 WL 3944988, at *7 (N.D. Cal. Aug. 21, 2019) (same). In
 4 *Hamidi*, Intel filed suit against a former employee, claiming that by communicating with employees
 5 over the company’s e-mail system, Hamidi committed trespass to chattels. *Id.* at 1346-47. The
 6 California Supreme Court concluded that Intel was not entitled to summary judgment on its
 7 trespass to chattels claim because Intel had not presented undisputed facts demonstrating that the
 8 emails caused any “physical *or* functional harm *or* disruption” to the company’s computer system.
 9 *Id.* at 1360 (emphasis added).

10 Here, although Plaintiffs are not alleging physical harm to their websites, they do allege
 11 functional harm or disruption. Specifically, Plaintiffs allege that “[b]y obscuring and blocking the
 12 contents of [Plaintiffs’] website homepages when viewed on Android’s Search App, Google’s ads
 13 substantially interfered with and impaired the websites’ published output and exposed the website
 14 owners to unwanted risks of lost advertising revenues and lost sales to competitors, thereby
 15 materially reducing the websites’ value and utility to the website owners. Defendant’s
 16 unauthorized interferences proximately caused Plaintiffs . . . actual damage by impairing the
 17 condition, quality and value of their websites.” *Id.* ¶ 186. Plaintiffs seek damages equal to the
 18 diminished market value of their websites and a permanent injunction requiring Google to disable
 19 the ad-generating feature of its Search App on every Android phone on which it is installed and
 20 preventing Google from installing any similar feature in the future. *Id.* ¶¶ 187-90.

21 Google argues that there is no cognizable injury because its Search App does not affect
 22 how Plaintiffs’ websites function or how they are displayed by other programs. Mot. at 2. Google
 23 explains that its Search App does not alter Plaintiffs’ websites at all, but rather “displays
 24 additional content in a separate, user-controlled frame that overlays and coexists on phone screens
 25 with Plaintiffs’ sites.” Mot. at 7 (citing Compl. ¶¶ 73-74). But at the pleading stage, Plaintiffs’
 26 factual allegations must be taken as true. *Ashcroft*, 556 U.S. at 678. Plaintiffs allege that the ads
 27 obscured and blocked their websites, which if true, would interfere with and impair their websites’

1 published output. Google’s ad allegedly obscured the “Cove Base” product link on Best Carpet’s
 2 home page. Compl. ¶ 73. Although Google’s ad may not have disabled or deactivated the “Cove
 3 Base” product link, it nevertheless allegedly impaired the functionality of the website: an Android
 4 phone user cannot engage a link that cannot be seen. At the pleading stage, the alleged decrease in
 5 functionality of Plaintiffs’ website is sufficient to plausibly state a cognizable injury for a trespass
 6 to chattels claim. *See Compuserve Inc. v. Cyber Promotions*, 962 F. Supp. 1015, 1026 (S.D. Ohio
 7 1997) (plaintiff asserting injury aside from physical impact on computer equipment stated
 8 cognizable trespass to chattels claim based on decreased utility of plaintiff’s e-mail service and
 9 resulting customer complaints); *eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F. Supp. 2d 1058, 1070
 10 (N.D. Cal. 2000) (granting injunction based on likelihood of success on merits of trespass to
 11 chattels claim based, in part, on showing that web crawlers diminished the quality or value of
 12 eBay’s computer system, even though eBay did not claim physical damage).

13 **B. Implied Contract/Unjust Enrichment Claim**

14 Plaintiffs also assert a claim labeled “Implied Contract/Unjust Enrichment.” Compl. ¶¶
 15 176-182. Google contends that the Implied Contract/Unjust Enrichment claim should be
 16 dismissed because it is preempted by section 301 of the Copyright Act. Google reasons that
 17 Plaintiffs’ demand to be paid inevitably depends on their ability to control how copies of their
 18 websites are displayed on different users’ devices, and any right to control the way the websites
 19 appear must be grounded in the principles of copyright law.

20 Copyright preemption applies to claims that are “asserted to prevent nothing more than the
 21 reproduction, performance, distribution, or display of” the plaintiff’s copyrightable property.
 22 *Butler v. Target Corp.*, 323 F. Supp. 2d 1052, 1056 (C.D. Cal. 2004) (citation and internal
 23 quotation marks omitted). Section 301 of the Copyright Act preempts a state law claim when two
 24 conditions are satisfied: (1) the work involved falls within the general subject matter of the
 25 Copyright Act as specified by sections 102 and 103; and (2) the rights that the plaintiff asserts
 26 under state law are equivalent to those protected by the Act in section 106 in works of authorship
 27 that are fixed in a tangible medium of expression. *Kodadek v. MTV Networks, Inc.*, 152 F.3d

1 1209, 1213 (9th Cir. 1998). Here, the first condition is satisfied because websites and the manner
 2 in which they are displayed fall within the subject matter of copyright. See *Ticketmaster LLC v.*
 3 *Prestige Entm't W., Inc.*, 315 F. Supp. 3d 1147, 1160-61 (C.D. Cal. 2018) (“the typical
 4 commercial website readily qualifies for copyright protection.”); *Bangkok Broad. & TV Co. v.*
 5 *IPTV Corp.*, 742 F. Supp. 2d 1101, 1110 (C.D. Cal. 2010) (copyright protects website owners’
 6 “exclusive rights to copy, distribute or display the copyrighted work publicly”).

7 Plaintiffs rely on *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004 (9th Cir. 2001),
 8 which sets forth a slightly different formulation of the test for preemption. Plaintiffs argue that
 9 Google’s ads (and not the websites) are the subject matter of their claim, and because they do not
 10 assert any copyright in Google’s ads, their claim is not preempted. In *Downey*, the Ninth Circuit
 11 stated that the two conditions that must be satisfied for copyright preemption are: (1) “the content
 12 of the protected right must fall within the subject matter of copyright” and (2) “the right asserted
 13 under state law must be equivalent to the exclusive rights contained in section 106 of the
 14 Copyright Act.” *Id.* The plaintiffs in *Downing* brought suit against defendant because it published
 15 a photograph of them without their authorization. The Ninth Circuit held that the first condition
 16 was not satisfied because “the subject matter of [plaintiffs’] statutory and common law right of
 17 publicity claims [was] their names and likenesses,” which were not copyrightable, even though
 18 their names and likeness were embodied in a copyrightable photograph. *Id.* at 1005. Here, the
 19 “subject matter” of Plaintiffs’ claim necessarily concerns both Plaintiffs’ websites and the
 20 advertisements. Plaintiffs allege that it is the placement of the ads “on top” of their websites that
 21 give rise to their right to damages. Compl. ¶¶ 17, 73. As stated previously, websites fall within
 22 the subject matter of copyright. Therefore, the first part of the preemption test is satisfied.

23 Turning to the second condition, the Second Circuit has instructed that section 301
 24 preemption “only applies to those state law rights that ‘may be abridged by an act which, in and of
 25 itself, would infringe one of the exclusive rights’ provided by federal copyright law.” *Comput.*
 26 *Assocs. Int’l, Inc v. Altai, Inc.*, 982 F.2d 693, 716 (2d Cir. 1992) (citing *Harper & Row,*
 27 *Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 200 (2d Cir. 1983), *rev’d on other grounds*, 471

1 U.S. 539 (1985)). In other words, copyright preemption applies to claims that are “asserted to
 2 prevent nothing more than the reproduction, performance, distribution, or display of” a plaintiff’s
 3 copyrightable property. *Butler v. Target Corp.*, 323 F. Supp. 2d 1052, 1056 (C.D. Cal. 2004)
 4 (citation and internal quotation marks omitted). If the state law claim requires an extra element
 5 “instead of or in addition to the acts of reproduction, performance, distribution or display . . . ,
 6 then the right does not lie ‘within the general scope of copyright’ and there is no preemption.”
 7 *Nat’l Car Rental Sys. v. Comput. Assocs. Int’l*, 991 F.2d 426, 431 (8th Cir. 1993) (quoting 1
 8 Nimmer on Copyright § 1.01[B], at 1-13)). To avoid preemption, the state law claim must include
 9 “an ‘extra element’ that makes the right asserted *qualitatively different* from those protected under
 10 the Copyright Act” and “must effectively change the nature of the action so that it is qualitatively
 11 different from a copyright infringement claim.” *Media.net Advert.FZ-LLC v. NetSeer, Inc.*, 156 F.
 12 Supp. 3d 1052, 1069-70 (N.D. Cal. 2016) (state law claims predicated on alleged copying of
 13 “source code, design and look and feel” of search results page were preempted).

14 Here, Plaintiffs are not asserting infringement of any right to the reproduction,
 15 performance, distribution, or display of their websites.⁸ Plaintiffs want and expect Google to copy
 16 and display their websites in Chrome browser and Search App, and acknowledge that Google has
 17 license to do so. Opp’n at 6. Rather, Plaintiffs’ implied-in-law contract/unjust enrichment claim
 18 is a state claim with extra elements “instead of or in addition to” the acts giving rise to a copyright
 19 infringement claim. *Nat’l Car Rental Sys.*, 991 F.2d at 431. An implied-in-law contract claim “is
 20 a common law obligation implied by law based on the equities of a particular case.” *Fed. Deposit*
 21 *Ins. Corp. v. Dintino*, 167 Cal. App. 4th 333, 346-47 (2008); *see also Parino v. Bidrack, Inc.*, 838
 22 F. Supp. 2d 900, 908 (N.D. Cal. 2011) (“a claim for unjust enrichment/restitution is properly pled
 23 as a claim for a contract implied-in-law”). A party may be required to make restitution under an
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25 ⁸ As such, this case is distinguishable from the cases cited by Google in which the plaintiff
 26 asserted claims of copyright infringement. *See 1-800 Contacts, Inc. v. WhenU.com*, 309 F. Supp. 2d
 27 467, 479 (S.D.N.Y. 2003); *Wells Fargo & Co. v. WhenU.com, Inc.*, 293 F. Supp. 2d 734, 738 (E.D.
 Mich. 2003); and *U-Haul Int’l, Inc. v. WhenU.com, Inc.*, 279 F. Supp. 2d 723, 724 (E.D. Va. 2003)
 (rejecting copyright infringement claim, but dismissing unjust enrichment claim without prejudice).

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1 implied-in-law contract if that party is unjustly enriched at the expense of another. *Id.* at 346.
2 “Unjust enrichment claims are not categorically preempted by the Copyright Act.” *Martin v. Walt*
3 *Disney Internet Grp.*, 2010 WL 2634695, at *7 (S.D. Cal. 2010).

4 Plaintiffs allege that Google “unjustly enriched itself by saving substantial advertising
5 costs and earning undue profits at Plaintiffs’ expense . . . , and it did so through the coercive act of
6 superimposing advertisements on their websites’ homepages and other landing pages without
7 obtaining their consent or paying them compensation.” Compl. ¶ 178. Plaintiffs allege that this
8 unjust enrichment “gives rise to an implied-in-law obligation and contract with Plaintiffs . . .
9 requiring Defendant (i) to restore them to their original positions by making restitution to them
10 equal to the full value of the cost savings benefits that Defendant unjustly obtained, and (ii) to
11 disgorge and pay to them Defendant’s undue profits gained from its ads.” *Id.* Plaintiffs do not
12 rely on copyright protection for their websites in pleading their claim; Plaintiffs do not allege that
13 Google “improperly benefited from using a certain work.” *Firoozye v. Earthlink Network*, 153 F.
14 Supp. 2d 1115, 1123-24 (N.D. Cal. 2001).⁹ Instead, Google allegedly covered up or obscured a
15 portion of Plaintiffs’ websites from Android phone users for financial benefit, which makes their
16 claim “qualitatively different” from a copyright claim.

17 Indeed, the content of Plaintiffs’ websites and whether that content enjoys copyright
18 protection are irrelevant to Plaintiffs’ claim. Plaintiffs analogize their claim to that of a store
19 owner, asserting:

20 Google could not in the brick-and-mortar marketplace lawfully plant
21 its logo on Plaintiffs’ storefront windows without Plaintiffs’ consent,
22 even if Google owned their buildings. Nor could Google place ads in

23 ⁹ As such, this suit is distinguishable from cases relied on by Google. *See Identity Arts v. Best*
24 *Buy Enter. Servs., Inc.*, 2007 WL 1149155, at *20 (N.D. Cal. Apr. 18, 2007) (preemption applied
25 to unjust enrichment claim that was based on wrongful creation and use of derivative works of a
26 movie trailer); *Design Data Corp. v. Unigate Enter.*, 2013 WL360542, at *7 (N.D. Cal. Jan. 29,
27 2013) (preemption applied to implied contract claim that was based on unauthorized use of
copyrighted structural steel detailing software); *Santos v. Telmundo Commc’ns Grp. LLC*, 2012
WL 9503003, at *8 (C.D. Cal. Dec. 19, 2012) (unjust enrichment claim based on same facts and
same rights as copyright claim, i.e. alleged broadcasting of songs without permission, was
preempted).

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Plaintiffs’ marketing brochures or superimpose ads on top of Plaintiffs’ print advertisements without Plaintiffs’ permission and without paying Plaintiffs’ price. Likewise, Google cannot in the online marketplace unilaterally superimpose ads on Plaintiffs’ website without Plaintiffs’ consent and without compensation just because Google makes the software through which Android users view that website on their mobile screens.

Compl. ¶ 17. According to Plaintiffs, a storefront business owner is injured when its window is obscured, regardless of whether that window is clear or covered with advertisements. By analogy, a website owner is injured when its website is obscured by unwanted ads, regardless of the content displayed in the website.

From Google’s perspective, the subject matter of Plaintiffs’ websites is surely significant. The leaderboard pop-up button Google superimposed on the Best Carpet website homepage led to ads for alternative products of potential interest to the Android phone user: “Commercial Carpet Tiles” and “Commercial Carpet Tiles & Resilient Flooring.” Compl. ¶ 74. Google no doubt placed carpet ads on Best Carpet’s website to lure business and make profit. But from Plaintiffs’ perspective, the content of their websites is not germane to their claims. What matters for purposes of Plaintiffs’ claim is that their websites are potential revenue-generating advertising space, and not that they display copyrightable content.

Under Plaintiffs’ theory, a Google ad obscuring a website with trivial or no content at all could support a claim for implied contract/unjust enrichment. Hypothetically, a website could consist of nothing more than a single line of noncopyrightable text such as “Pat and Jo’s Wedding.”¹⁰ If this hypothetical noncopyrightable website was overlaid with ads for wedding attire and tableware, an argument could be made that the advertiser was unjustly enriched at the expense of the wedding planners. “California law recognizes a right to disgorgement of profits resulting from unjust enrichment, even where an individual has not suffered a corresponding loss.” *In re Facebook, Inc. Internet Tracking Litig.*, 956 F.3d 589, 599 (9th Cir. 2020). Plaintiffs’ claim

¹⁰ Copyrights extend to “original works of authorship fixed in any tangible medium of expression,” such as literary, musical, graphic, architectural works and sound recordings. 17 U.S.C. § 102(a).

1 to recover advertising fees is not preempted. *See In re De Laurentiis Entm't Grp., Inc.*, 963 F.2d
 2 1269, 1271-72 (9th Cir. 1992) (copyright preemption not implicated as defense against implied-in-
 3 law contract claim to recover “the reasonable value of the advertising [plaintiff] had provided for
 4 [defendant’s] benefit and for which it had not been paid”).

5 **C. Section 17200 Claim**

6 Plaintiffs allege the Android Search App violates Section 17200 of California’s Unfair
 7 Competition Law (“UCL”), which prohibits business practices that are “unlawful, unfair, or
 8 fraudulent.” Cal. Bus & Prof Code § 17200. Plaintiffs bring their claim under only the first two
 9 prongs: unlawful and unfair. Compl. ¶ 194. As to the unlawful business practices prong,
 10 Plaintiffs allege that “Defendant plac[ed] nonconsensual advertisements on Plaintiffs’ . . . websites
 11 without compensation in violation of the common law doctrines of implied-in-law contract and
 12 unjust enrichment, and by trespassing on Plaintiffs’ . . . websites in violation of the common law
 13 prohibition against trespass to chattels.” Compl. ¶ 195. As to the unfair business practices prong,
 14 Plaintiffs allege that Google’s conduct is “immoral, unethical, oppressive, unscrupulous,
 15 unconscionable and substantially injurious to Plaintiffs.” *Id.* ¶ 196. Plaintiffs also allege that
 16 Google’s conduct is contrary to public policy as well as the common law, and the harm it caused
 17 (and threatens to continue to cause) outweighs its utility, if any. *Id.*

18 **1. Unlawful Prong**

19 The unlawful prong of the UCL prohibits “anything that can properly be called a business
 20 practice and that at the same time is forbidden by law.” *Cel-Tech Commc’ns, Inc. v. L.A. Cellular*
 21 *Tel. Co.*, 20 Cal.4th 163, 180 (1999) (quotation markets and citations omitted). Plaintiffs’ UCL
 22 claim, as pled under the unlawful prong, survives because the trespass to chattels and the breach of
 23 implied contract/unjust enrichment may serve as the predicate for the claim.

24 **2. Unfair Prong**

25 There are two standards for determining what “unfair competition” is under the UCL, and
 26 the parties disagree on the applicable standard. Defendants argue that Plaintiffs’ claim is
 27 essentially one “between competitors,” and therefore the applicable standard is whether the

1 conduct complained of threatens “an incipient violation of an antitrust law, or violates the policy
2 or spirit of one of those laws because its effects are comparable to or the same as a violation of the
3 law, or otherwise significantly threatens or harms competition.” *Cel-Tech*, 20 Cal.4th at 187.
4 Plaintiffs rely on the second standard, which is applicable to claims brought by a consumer and
5 “involves balancing the harm to the consumer against the utility of the defendant’s practice.”
6 *Lozano v. AT & T Wireless Servs., Inc.*, 504 F.3d 718, 735 (9th Cir. 2007). Plaintiffs characterize
7 themselves as “consumers of Google’s services giving the public access to their websites (which
8 they did not have to pay for because the service is free).” Opp’n at 19.

9 Google has the better argument. Plaintiffs are not consumers of the product that has
10 caused the alleged injury, the Google Search App.¹¹ In the context of this case, the consumers are
11 Android phone users who search the Internet for content. Therefore, the *Cel-Tech* standard
12 applies. Because Plaintiffs effectively concede they cannot meet the *Cel-Tech* standard, the UCL
13 claim, as pled under the unfair prong, is dismissed.

14 **D. First Amendment Defense**

15 Finally, Google argues that the First Amendment prohibits Plaintiffs’ attempts to control
16 what information is displayed to users when they access Plaintiffs’ websites. Mot. at 12. In
17 response, Plaintiffs contend that their First Amendment rights as website publishers are paramount
18 and that Google has no right to force its own messages onto Plaintiffs’ websites.

19 The First Amendment states that “Congress shall make no law respecting an establishment
20 of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the
21 press.” U.S. Const. amend. I. “[T]he First Amendment guarantees ‘freedom of speech,’ a term
22 necessarily comprising the decision of both what to say and what not to say.” *Riley v. Nat’l Fed’n*
23 *of the Blind of N.C., Inc.*, 487 U.S. 781, 796–97 (1988). The Free Speech Clause of the First
24 Amendment “can serve as a defense in state tort suits.” *Snyder v. Phelps*, 562 U.S. 443, 451

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26 ¹¹ California’s Consumer Legal Remedies Act defines a consumer as “an individual who seeks or
27 acquires, by purchase or lease, any goods or services for personal, family, or household purposes.”
28 Cal. Civ. Code § 1761; *see also* Cal. Civ. Code § 1791 (“consumer goods” are products “used,
bought, or leased for use primarily for personal, family, or household purposes”).

1 (2011) (citing *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–51 (1988)). In the context of the
 2 Internet, courts have recognized that search-engine results may constitute speech protected by the
 3 First Amendment. See *E-Ventures Worldwide, LLC v. Google, Inc.*, 188 F. Supp. 3d, 1265, 1274
 4 (2016) (search engine output results are protected by the First Amendment); *Zhang v. Baidu.Com,*
 5 *Inc.*, 10 F. Supp. 3d 433, 439 (S.D.N.Y. 2014) (“When search engines select and arrange others’
 6 materials, and add the all-important ordering that causes some materials to be displayed first and
 7 others last, they are engaging in fully protected First Amendment expression.”); *Search King, Inc.*
 8 *v. Google Tech., Inc.*, 2003 WL 21464568, at *4 (W.D. Okla. May 27, 2003) (Google’s PageRank
 9 system was “entitled to full constitutional protection”). Thus, a company such as Google cannot
 10 be compelled to place ads in “prominent places” on its search engine results. *Langdon v. Google,*
 11 *Inc.*, 474 F. Supp. 2d 622, 629 (D. Del. 2007) (“Defendants are correct in their position that the
 12 injunctive relief sought by Plaintiff contravenes Defendants’ First Amendment rights.”).

13 Here, Plaintiffs are not challenging Google’s search engine results. Rather, Plaintiffs
 14 complain that after users see Google’s search results and then choose to link to their proprietary
 15 websites, the users see unpaid-for Google ads on their webpages that entice and redirect those
 16 users to Best Carpet’s competitors’ or naysayers’ websites in order to generate profits for Google.
 17 Compl. ¶¶ 71-88. Therefore, the cases cited above are inapposite.

18 Furthermore, the First Amendment defense is not absolute. *Downing*, 265 F.3d at 1001.
 19 For example, the First Amendment does not immunize deceptive advertising. *Id.* at 1002 (holding
 20 that defendant’s commercial use of photographs to promote clothing “does not contribute
 21 significantly to a matter of the public interest and that Abercrombie cannot avail itself of the First
 22 Amendment”). Here, Plaintiffs allege that Google’s leaderboard and banner ads are commercial
 23 speech that misleadingly imply that they endorse Google’s ads or were compensated by Google
 24 for placing the ads. Compl. ¶¶ 75, 85. Therefore, if Plaintiffs prevail in this suit, Google can be
 25 enjoined from tethering similar ads to Plaintiffs’ websites in the future. See *Zauderer v. Office of*
 26 *Disciplinary Counsel of Supreme Court*, 471 U.S. 626, 637-38 (1985) (advertising is a form of
 27 commercial speech and can be enjoined if false, deceptive or misleading); *Compuserve Inc. v.*

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1 *Cyber Promotions*, 962 F. Supp. 1015, 1026 (S.D. Ohio 1997) (holding that the First Amendment
2 provides no defense for intentional bulk emailing to plaintiff’s subscribers).

3 Relatedly, Google argues that Android users’ have a “right to hear”—the right to receive
4 information—that is “no less protected by the First Amendment than [Google’s] right to speak.
5 *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002). However, this right is “a necessary
6 predicate to the *recipient’s* meaningful exercise of his own rights of speech, press, and political
7 freedom.” *Bd. of Educ., Island Tress Union Free School Dist. v. Pico*, 457 U.S. 853, 867 (1982).
8 Here, it is the Android users who are the recipients of the advertising, not Google. The “right to
9 hear” does not provide Google a defense against Plaintiffs’ claims.¹²

10 **IV. CONCLUSION**

11 For the reasons stated above, Google’s motion to dismiss is GRANTED as to the UCL
12 claim under the unfair prong and DENIED in all other respects. The UCL claim under the unfair
13 prong is dismissed without leave to amend.

14 **IT IS SO ORDERED.**

15 Dated: September 24, 2021

16 
17 _____
18 EDWARD J. DAVILA
19 United States District Judge

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25 _____
26 ¹² The other cases relied upon by Google are inapplicable here. *See Stanley v. Georgia*, 394 U.S.
27 557, 564 (1969) (holding that First and Fourteenth Amendments prohibit making private
28 possession of obscene material a crime); *Citizens United v. FEC*, 558 U.S. 310, 339 (2010)
(federal statute barring independent corporate expenditures for electioneering communications
violated First Amendment).

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Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

BEST CARPET VALUES, INC., ET AL.,
Plaintiffs,
v.
GOOGLE LLC,
Defendant.

Case No. [5:20-cv-04700-EJD](#)

**ORDER GRANTING DEFENDANT’S
MOTION FOR CERTIFICATION OF
INTERLOCUTORY APPEAL AND
STAYING ACTION PENDING APPEAL**

Re: Dkt. No. 44

Defendant Google LLC (“Defendant”) asks the Court to certify for interlocutory appeal the September 24, 2021 Order Granting in Part and Denying in Part Motion to Dismiss (Dkt. No. 41) and to stay the proceedings pending resolution of the appeal. Dkt. No. 44. Plaintiffs Best Carpet Values, Inc. and Thomas D. Rutledge (collectively “Plaintiffs”) filed an opposition (Dkt. No. 46), and Defendant filed a reply (Dkt. No. 47). The Court finds this matter suitable for disposition without oral argument. *See* Civil Local 7-1(b). For the reasons discussed below, the Court will grant Defendant’s motion.

I. BACKGROUND

As website owners, Plaintiffs allege they are entitled “to control the content and information displayed on their websites’ web pages, including any advertisements, without interference.” Compl. ¶ 51, Dkt. No.1. Between March 2018 and April 2020, Defendant allegedly superimposed ads on their websites without their consent. *Id.* ¶ 53. In this putative class action suit, Plaintiffs assert claims for implied-in-law contract and unjust enrichment; trespass to chattels; and unfair and unlawful conduct in violation of California Business and Professions Code

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1 § 17200. *Id.* ¶¶ 176-98.

2 Defendant moved to dismiss the Complaint pursuant to Federal Rule of Civil Procedure
3 12(b)(6). Dkt. No. 19. On September 24, 2021, the Court issued its ruling (“Order”). Dkt. No.
4 41. First, relying on *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003), the Court concluded that
5 Plaintiffs’ websites are a form of intangible property that may be the subject of a trespass to
6 chattels claim. Dkt. No. 41 at 9. The Court also concluded that Plaintiffs stated a cognizable
7 claim based on alleged “functional harm or disruption” to their websites, even though there was no
8 “physical harm to their websites.” *Id.* at 12. Second, the Court rejected Defendant’s argument
9 that the Copyright Act preempted the implied contract/unjust enrichment claim. Third, the Court
10 concluded that Plaintiffs stated a cognizable section 17200 claim using the trespass to chattels and
11 implied contract/unjust enrichment claims as predicates. Lastly, the Court rejected Defendant’s
12 First Amendment defense. Defendant now seeks certification to appeal the Court’s Order pursuant
13 to 28 U.S.C. § 1292(b).

14 **II. DISCUSSION**

15 In general, “only final judgments” of the district courts are appealable. *James v. Price*
16 *Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002). Title 28 United States Code § 1292(b)
17 codifies a narrow exception to that “normal rule.” *Id.* at 1067 n.6. Pursuant to 28 U.S.C. §
18 1292(b), a district judge may certify for immediate appeal an otherwise nonappealable order in a
19 civil action if it “involves a controlling question of law as to which there is substantial ground for
20 difference of opinion and . . . an immediate appeal from the order may materially advance the
21 ultimate termination of the litigation.” 28 U.S.C. § 1292(b). Certification is appropriate “when
22 novel legal issues are presented, on which fair-minded jurists might reach contradictory
23 conclusions.” *Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011). The
24 conditions for interlocutory appeal of the Order are met in this case.

25 **A. Controlling Questions of Law**

26 Controlling questions of law are those whose resolution “materially affect the outcome of

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1 litigation in the district court.” *In re Cement Antitrust Litig.* (MDL No. 296), 673 F.2d 1020, 1026
 2 (9th Cir. 1982). Here, although Plaintiffs argue to the contrary, Defendant has identified four
 3 controlling questions of law:

4 (1) Whether *Kremen v. Cohen*, 337 F.3d 1024 (9th Cir. 2003), should
 5 be extended to protect as chattel the copies of websites displayed on
 a user’s screen;

6 (2) Whether trespass to chattels can be based on “functional harm *or*
 7 disruption” to a website even though there is no “physical harm to
 their websites”;

8 (3) Whether website owners can invoke state law to control how their
 9 websites are displayed on a user’s screen without preemption by
 federal copyright law; and

10 (4) Whether the risk consumers may be confused or misled by
 11 deceptive advertising defeats Google’s First Amendment right to
 suggest search results to users interested in viewing a particular
 12 website.

13 Mot. at 2. These are legal questions that do not depend on a material dispute of fact. The first two
 14 issues are potentially dispositive of the trespass to chattels claim and one of the unlawful conduct
 15 theories underpinning the section 17200 claim. Defendant raised the third question, preemption,
 16 as a basis to dismiss the implied-in-law contract/unjust enrichment claim. The fourth question
 17 concerning Google’s right to speak is potentially dispositive of all of the claims. The Court thus
 18 finds that the first requirement for § 1292(b) is satisfied.

19 **B. Substantial Ground for Difference of Opinion**

20 Second, there must be “substantial grounds” for a difference of opinion. *CTSI Oregon,*
 21 *Inc. v. Int’l Longshore and Warehouse Union*, 22 F.4th 1125, 1130 (9th Cir. 2022). “Courts
 22 traditionally will find that a substantial ground for difference of opinion exists where ‘. . . novel
 23 and difficult questions of first impression are presented.’” *Reese*, 643 F.3d at 688 (quoting
 24 *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010)).

25 Here, there are novel and difficult questions of first impression relating to the trespass to
 26 chattels claim. Although *Kremen* conclusively established that conversion applies to domain

1 names, there remains substantial ground for disagreement as to whether the related tort of trespass
 2 to chattels extends to other forms of intangible property. *See, e.g., Silvaco Data Sys. v. Intel*
 3 *Corp.*, 184 Cal. App. 4th 210, 239 n. 21 (2010) (noting that conversion traditionally required a
 4 taking of tangible property and observing that “the expansion of conversion law to reach
 5 intangible property should not be permitted to ‘displace other, more suitable law’”). Some courts
 6 have applied trespass to chattels to other forms of intangible property, including websites. *See,*
 7 *e.g., YLD Ltd. v. Node Firm*, 2016 WL 7851414, at *2 (N.D. Cal. Aug. 17, 2016) (applying New
 8 York and federal law and denying motion to dismiss claims for trespass to chattels and conversion
 9 that were based, in part, on an alleged disruption to the use of a website); *Combs v. Doe*, 2011 WL
 10 738052, at *1 (N.D. Cal. Feb. 23, 2011) (magistrate’s report and recommendation granting default
 11 judgment on conversion claim based on allegations that defendant stole website and domain
 12 names by hacking into plaintiff’s email); *Astroworks, Inc. v. Astroexhibit, Inc.*, 257 F. Supp. 2d
 13 609, 618 (S.D.N.Y. 2003) (sustaining claim for conversion of copyrighted website); *Ground Zero*
 14 *Museum Workshop v. Wilson*, 813 F. Supp. 2d 678, 698 (D. Md. 2011) (finding allegations that
 15 defendant deprived plaintiff of possession of website and damaged the chattel by inserting a
 16 redirect command support a legally cognizable trespass to chattels claim); *State Analysis, Inc. v.*
 17 *Am. Fin. Servs. Assoc.*, 621 F. Supp. 2d 309, 320 (E.D. Va. 2009) (sustaining trespass to chattels
 18 claim where defendant accessed a password protected portion of plaintiff’s website and thereby
 19 diminished the value of plaintiff’s “possessory interest in its computer network”). Other courts
 20 have not. *See e.g., GNI Waterman LLC v. A/M Valve Co. LLC*, 2007 WL 2669503, at *11 (E.D.
 21 Cal. Sept. 7, 2007) (dismissing trespass to chattels claim that was based on intangible ownership
 22 rights of forms, designs and patterns); *Discovery Educ., Inc. v. SchoolsPLP*, 2021 WL 2292223, at
 23 * 3 (D. Del. June 4, 2021) (dismissing trespass to chattels claim because no Delaware court had
 24 extended the tort to a website and plaintiff had not alleged damage to the website); *Exeter Twp. v.*
 25 *Gardecki*, 2018 WL 6616930, at *4 (E.D. Pa. Dec. 17, 2018) (“electronic files” are not chattel);
 26 *Tethys Bioscience, Inc. v. Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.*, 2010 WL 2287474,

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1 at *7 (N.D. Cal. June 4, 2010) (citing *Silvaco*, refusing to extend *Kremen* to a patent application).

2 Further, Defendant’s preemption argument raises a novel and difficult issue. Although the
3 law is clear that websites fall within the subject matter of copyright¹, no court has considered
4 whether copyright preemption applies to a claim for implied contract/unjust enrichment that is
5 based on allegations that defendant superimposed advertisements on a website homepage and other
6 landing pages without the consent of or compensation to the website owner.

7 Defendant’s First Amendment argument similarly raises a novel and difficult issue. Although
8 courts have recognized that the First Amendment protects search engine output results², no court has
9 considered whether that protection extends to advertisements and other messages superimposed on a
10 website homepage and other landing pages. The Court thus concludes that the second requirement for
11 § 1292(b) is satisfied.

12 **C. Material Advance of the Ultimate Termination of the Litigation**

13 Third, the “materially advance” prong is satisfied when the resolution of the question “may
14 appreciably shorten the time, effort, or expense of conducting” the district court proceedings. *In*
15 *re Cement*, 673 F.2d at 1027. Guidance from the Ninth Circuit on any of the questions raised by
16 Defendant will materially advance the litigation. If the Ninth Circuit rules in favor of Defendant
17 on even one question, then one or more of Plaintiffs’ claims will be dismissed. This would impact
18 the scope of Plaintiffs’ case and potentially their ability to pursue claims on behalf of a putative
19 class.

20 Plaintiffs contend that an interlocutory appeal will only delay the litigation because they
21 anticipate either a complete affirmance of the Order or a reversal without prejudice to Plaintiffs’

22 _____
23 ¹ See *Ticketmaster LLC v. Prestige Entm’t W., Inc.*, 315 F. Supp. 3d 1147, 1160-61 (C.D. Cal.
24 2018) (concluding that websites are copyrightable as original works of authorship); *Integrative*
25 *Nutrition, Inc. v. Acad. of Healing Nutrition*, 476 F. Supp. 2d 291, 296 (S.D.N.Y. 2007)
26 (“[c]opyright protection for a website may extend to both the screen displays and the computer
27 code for the website”).

28 ² See *E-Ventures Worldwide, LLC v. Google, Inc.*, 188 F. Supp. 3d 1265, 1274 (M.D. Fla. 2016)
(collecting cases); *Zhang v. Baidu.com, Inc.*, 10 F. Supp. 3d 433, 441 (S.D.N.Y. 2014) (finding
First Amendment protected search engine’s decision to promote and display third-party content).

United States District Court
Northern District of California

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right to file an amended complaint. But even an affirmance may provide useful guidance before the parties engage in potentially wide-ranging and expensive discovery into how millions of websites may have been displayed on Android devices over a two-year period.

III. CONCLUSION

Defendant’s motion for certification of interlocutory appeal of the Court’s Order is GRANTED. That Order involves controlling questions of law, and “[s]o long as one controlling question is identified, an order can be certified for appeal to resolve ‘all questions material to the order.’” *Steering Comm. v. United States*, 6 F.3d 572, 576 (9th Cir. 1993). Accordingly, pursuant to 28 U.S.C. § 1292(b), the Court CERTIFIES the Order for interlocutory appeal. This matter is stayed pending a decision by the Ninth Circuit. Upon resolution of the stay, either party may ask the Court to reopen the case and lift the stay.

IT IS SO ORDERED.

Dated: May 2, 2022


EDWARD J. DAVILA
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing petition with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 12, 2022.

I certify that I served the foregoing petition both by third party commercial carrier for delivery within 3 calendar days and via email on all parties required to be served, including:

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Dated: May 12, 2022

By: /s/ Victor Jih
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No.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BEST CARPET VALUES, INC. and THOMAS D. RUTLEDGE, on behalf of themselves
and all others similarly situated,

Plaintiffs-Respondents,

—v.—

GOOGLE LLC,

Defendant-Petitioner.

On Petition for Permission to Appeal under 28 U.S.C. § 1292(b)

An Order of the United States District Court

for the Northern District of California

Case No. 5:20-cv-04700-EJD

Hon. Edward J. Davila

REPRESENTATION STATEMENT

Pursuant to Federal Rule of Appellate Procedure 12(b) and Ninth Circuit Rule 3-2(b), Defendant-Petitioner Google LLC hereby identifies all parties to this proceeding and their respective counsel. The parties to this proceeding are Defendant-Petitioner Google LLC and Plaintiffs-Respondents Best Carpet Values, Inc. and Thomas D. Rutledge, on behalf of themselves and all others similarly situated. The parties' respective counsel are:

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