UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPEAL NOS. 10-56400 and 10-56311

ANNA MARIA ALBERGHETTI, and BONNIE POINTER, on Behalf of Themselves and All Others Similarly Situated

Plaintiffs-Appellants-Cross Appellees

v.

CORBIS CORPORATION,

Defendant-Appellee/Cross-Appellant.

On Appeal from the United States District Court for the Central District of California, Eastern District Case No. 09-cv-05735-SVW

OPENING BRIEF OF APPELLANTS

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STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. §1332(c)(1) and (d) as amended by the Class Action Fairness Act of 2005. Notice of Appeal was timely filed on August 20, 2010. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

1. Whether the district court abused its discretion in denying Plaintiffs' Motion for Leave to file their Amended Complaint.
2. Whether the district court abused its discretion in denying Plaintiffs' Motion to Alter or Amend the Final Judgment and in granting Defendant's Motion for Attorney's fees and costs.
3. Whether the district court erred in granting Defendant's Motion for Summary Judgment.
4. Whether the district court abused its discretion in denying Plaintiffs' Amended Motion for Class Certification.

STANDARDS OF REVIEW

This Court reviews the district court's order denying Plaintiffs' Motion for Leave to file Their Amended Complaint and alter or amend judgment and granting Defendant's Motion for Attorney's fees and costs for abuse of discretion. *Griggs v. Pace Am. Group Inc.*, 170 F.3d 877 (9th Cir. 1992).

The Court reviews the district court's order granting Defendant's Motion for Summary Judgment with respect to the statute of limitations *de novo*. *Oja v. United States Army* 440 F. 3d 1122 (9th Cir. 2006).

The Court reviews whether the district court erred in denying Plaintiffs' Amended Motion for Class Certification for abuse of discretion. *Parra v. Bashas', Inc.*, 536 F.3d 975 (9th Cir. 2008).

STATEMENT OF CASE

Anna Maria Alberghetti ("Alberghetti") is a world-renowned, award-winning actress and singer. A former child prodigy, she began her singing career at the age of six, and performed at Carnegie Hall in New York at the age of thirteen. As a star on Broadway, she won the Tony Award in 1962 as Best Actress (Musical) for her performance in *Carnival.* Alberghetti has starred in several feature films, including *Ten Thousand Bedrooms*, opposite Dean Martin; *Cinderfella*, opposite Jerry Lewis; and *Here Comes the Groom*, opposite Bing Crosby. By reason of Alberghetti's painstaking efforts over several decades to build public recognition of her voice, music, and acting abilities, Alberghetti developed a proprietary interest in her name, public personality, singing style, acting style, voice, and likeness. ER 601, ¶1.

An accomplished R&B and disco singer, Bonnie Pointer ("Pointer") is a former member of the world-famous singing group, The Pointer Sisters. The

Pointer Sisters had several hit songs, and won a Grammy Award in 1974 for their crossover hit, "Fairytale." As a solo artist, Pointer has recorded several popular hit songs, including a disco cover of The Elgins, "Heaven Must Have Sent You," which became a U.S. top-20 hit in 1979 (reaching #11 on the Billboard Hot 100 Chart). By reason of Pointer's painstaking efforts to build public recognition of her voice and music, Pointer developed a proprietary interest in her name, public personality, singing style, voice, and likeness. ER 602, ¶ 1.

Alberghetti and Pointer ("Plaintiffs") filed a class action suit against Corbis Corporation ("Corbis") for violation of their Rights of Publicity. Corbis obtains pictures of celebrities from various sources and places them on its various internet sites for purposes of sale to corporations and individuals around the world. Those corporations and individuals who wish to purchase a picture of a particular celebrity may go to a Corbis website at www.corbis.com, www.corbismotion.com, www.corbisoutline.com, or www.snapvillage.com and click on that celebrity's name. A user may purchase and download pictures of any celebrity on Corbis' website. The price Corbis charges depends on how the user intends to use the photo.

Plaintiffs' claim is that their pictures are posted by Corbis on its various websites without their permission, knowledge or consent. No celebrities Plaintiffs were seeking to represent were compensated in any fashion by Corbis. Plaintiffs

claim Corbis' conduct violates Section 3344 of the California Civil Code dealing with Rights of Publicity and California common law as to unjust enrichment. ER 600,¶ 2.

Relevant proceedings in the district court.

Plaintiffs filed their Class Action Complaint ("Complaint") on August 5, 2009. *See* ER 599. Despite stating "in my view this is one of the dumbest statutes around" (ER 106 p. 19, line. 203), the district court denied Defendant's Motion to Dismiss on October 27, 2009 and allowed Plaintiffs to proceed under § 3344.[1] ER 582.

On January 13, 2010, the district court denied Plaintiffs' Amended Motion for Class Certification based upon Plaintiffs' failure to satisfy Fed R. Civ. P 23. ER 51. On April 29, 2010, the district court entered an order granting summary judgment in favor of Corbis ruling that the applicable statute of limitations barred Plaintiffs' claims. ER 27.

On July 22, 2010, August 9, 2010, and August 20, 2010 the district court entered orders denying Plaintiffs' Motion for Leave to file an Amended Complaint naming Shirley Jones as an additional Plaintiff and to Alter or Amend the

[1] Unfortunately, this expression toward § 3344 may have colored the district court's attitude and affected his rulings upon which this appeal is based.

Summary Judgment and further imposed attorneys' fees and costs on Plaintiffs of $219,001.83. ER 3.

STATEMENT OF FACTS

Introduction

Plaintiffs' claim concerns Corbis' sale and soliciting for sale of Plaintiffs' photographs without their consent. ER 600, ¶ 2. This sale and soliciting is expressly condemned under California common law and Cal. Civ. Code § 3344, which states:

> "Any person who knowingly uses another's name, voice, signature, *photograph*, or *likeness*, *in any manner*, on or in products, merchandise, or goods, or for purposes of advertising *or selling*, or *soliciting purchases of, products*, merchandise, goods or services, without such person's prior consent, or, in the case of a minor, the prior consent of his parent or legal guardian, shall be liable for any damages sustained by the person or persons injured as a result thereof."

§ 3344(a) (emphasis added). Under Section 3344 the damages are the gross receipts received by Corbis less expenses or $750, whichever is greater. *Id*.

Plaintiffs' Complaint contained two counts: Count I, Violation of §3344 and Count II, Common Law Unjust Enrichment. ER 601-11. Corbis argued and the district court found, that Plaintiffs' claims under §3344 and common law unjust enrichment were barred under the Statute of Limitations and "Single Publication Rule." ER 27, ¶ 2. The district court granted summary judgment in favor of

Defendant as to both § 3344 and common law unjust enrichment, even though § 3344(g) states "[T]he remedies provided for in this section are *cumulative* and *shall be in addition to any others provided by law.*" (emphasis added).

Use of Corbis' Website.

Corbis derives profit off of Plaintiffs' images by allowing users to access its websites and search for a particular celebrity by typing the name in a search bar on the website. According to Corbis' Vice President, Drew MacLean:

> The client then reports to Corbis ***the intended use of the image***, the size of the use, the industry, and other identifying information, and, on the website, is able to calculate a price for the license. Once the license transaction is completed, the licensed image is immediately downloadable by the client either directly from the website (in the case of a web order), or from a secure FTP site. If an image is licensed over the web, the license invoice will reflect that it was made via a web order.

ER 279, ¶ 10 (emphasis added).

As Corbis is offering a customizable product, it enters into a series of separate sales transactions, each of which governs the use of the image as well as its duration, geography etc. After finalizing the purchase with Corbis, the user is then free to use the image differently than portrayed on Corbis' website. *See, e.g.*, ER 284-343. This means that the purchaser could use one of Plaintiffs' pictures in any of a number of different products well past the date this litigation was filed.

Plaintiffs argued unsuccessfully in the district court that the subsequent use by a Corbis customer constituted a republication of the originally posted picture.

District Court's Summary Judgement Ruling.

The district court granted summary judgment on the basis of the statue of limitations and said:

> It is well-established that the act of posting material on the internet constitutes a 'publication' for purposes of the statute of limitations. . . It is also well-established that the posted content constitutes a 'single publication' for purposes of the single publication rule as long as it is not later removed and re-posted or otherwise materially altered…

ER 43, ¶ 3. (internal citations omitted).

The district also granted Corbis summary judgment on Count II, Unjust Enrichment. *See* ER 27, ¶ 2. It ruled the sale of a Plaintiff picture after expiration of a two year statute of limitations barred survival of the Complaint even though "unjust" proceeds of the sale were realized within the statute of limitations. ER 50, ¶ 2. The district court said:

> Under Plaintiff's unjust enrichment theory, 'a new publication of the defamation could occur if a copy of the newspaper or book were preserved for many years and then came into the hands of a new reader. The statute of limitations could be tolled indefinitely, perhaps forever, under this approach.'
> . . .
> Plaintiffs cite to a single case to support their unjust enrichment theory: First Nationwide Savings v. Perry, 11 Cal. App. 4th 1657 (1992).
> . . .
> Here it is undisputed that the gravamen of the Complaint is Defendant's infringement of Plaintiffs' rights of publicity.

> Accordingly, the relevant statute of limitations is provided in Cal. Civ. Code § 3425.3, and as discussed *supra*, Plaintiffs' claims are time-barred under this statute of limitations. Plaintiffs' arguments, while creative, are unavailing.

ER 48-50.

The Discovery Rule.

When this case was filed on August 5, 2009, the "discovery rule" in California was governed by the California Appellate Court's ruling in *Christoff v. Nestle USA, Inc.*, 62 Cal. Rptr. 3d 122 (Cal. Ct. App. 2007). On August 17, 2009, just 12 days after this case was filed, the California Supreme Court superseded the appellate court's opinion in *Christoff* and established a new "discovery rule." *See Christoff v. Nestle USA, Inc.*, 213 P.3d 132 (Cal. 2009). The district court applied, retroactively, the Supreme Court's *Christoff* opinion to Plaintiffs.

Attorney's Fees and costs.

The district court ordered Plaintiffs to pay costs and attorneys' fees of $219,001.83 after granting Defendant summary judgment. The district court denied Plaintiffs' Motion for Leave to file an Amended Complaint naming Shirley Jones as a new Plaintiff and to Alter or Modify its final judgment of summary judgment and attorney's fees and costs. ER 3.

SUMMARY OF ARGUMENT

The district court abused its discretion in denying Plaintiffs the right to amend their Complaint under Rule 15(a) of the Federal Rules of Civil Procedure.

If the district court had allowed this motion along with Plaintiffs' timely filed Motion to Alter or Amend its Final Judgement of Summary Judgment adding Shirley Jones as a Plaintiff, the statute of limitations issue could have been avoided. Justice and proper application of the purpose behind Federal Rules of Civil Procedure demanded this result.

Moreover, the district court committed reversible error when it granted Defendant's Motion for Summary Judgment based upon the statute of limitations on both Defendant's violation of §3344, the California Statute on Rights of Publicity, and California Common Law on Unjust Enrichment. A republication of Plaintiffs' unauthorized pictures on Defendant's websites was triggered by the Corbis business model and thus republication occurred within the applicable statute of limitations.

Lastly, the district court abused its discretion as to denial of Plaintiffs' Amended Motion for Class Certification based upon its misapplication of unrelated case law to any alleged short comings of Plaintiffs as putative class representatives.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' MOTION FOR LEAVE TO AMEND THEIR COMPLAINT WHICH WOULD HAVE RESOLVED THE MERITS TO BE REACHED AND WOULD HAVE AVOIDED THE GROSSLY UNFAIR RESULT BELOW.

Rule 1 of the Federal Rules of Civil Procedure for the United States District Courts provides:

> These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the *just, speedy and inexpensive determination of every action and proceeding.*

Fed. R. Civ. P. 1 (emphasis added). Unfairness here could have been cured – and the merits finally reached – had the district court simply granted Plaintiffs leave to amend their Complaint. Rule 15 provides that a court, when utilizing its discretion in considering a motion to amend a complaint, "…should freely give leave when justice so requires." Fed. R. Civ. P. 15.

Under the rather unique chronology presented in this case, justice surely required that the district court grant Plaintiffs' motion to add Shirley Jones as an additional Plaintiff to cure the statute of limitations issue (imposed retroactively on Plaintiffs by *Christoff)*. Had the court below simply permitted the amendment to add a new Plaintiff, Shirley Jones, the merits of the case would have been reached, the unfair retroactive change in the case law mooted, and the imposition of a huge statutory attorney fee award against the victimized Plaintiffs avoided. After all, courts in two states – California and Illinois – had held that Corbis' offering for sale of celebrity photographs, without consent, facially violates the rights-of-

publicity statutes of those states. *See Brown v. ACMI Pop Div.*, 873 N.E.2d 954 (Ill. App. Ct. 2007); and the district court's order here, ER 582-594.

The statute of limitations is, of course, an affirmative defense which avoids the merits of a case. *Koch v. Rodlin Enter. Inc.*, 223 Cal. App. 3d 1591, 1596-1598 (Cal. Ct. App. 1990). Nevertheless, Plaintiffs Alberghetti and Pointer, who worked a lifetime to create value in their name and images, are now on the hook for a $219,001.83 fee award, despite their being, at least facially, victims of Corbis' unlawful conduct. This result is unfair and rewards Corbis for violating § 3344, a result surely not intended by the statute's authors.

Alberghetti and Pointer filed this case on August 5, 2009, soon after they discovered Corbis was selling their images without their consent. ER 600, ¶ 3. After their case was filed, the California Supreme Court held that the discovery rule in effect at the time was no longer the law of California. *Christoff*, 213 P.3d132. This ruling represented a dramatic reversal of the applicable law. Alberghetti and Pointer had no knowledge of the date of the *first* unauthorized soliciting for sale by Corbis of their photographs on Corbis' website. Such knowledge, if it existed at all, was known only by Corbis. Corbis was able to parlay the new *Christoff* change in law because it had the exclusive knowledge of its first offering date. As a result, Corbis was now able to obtain summary judgment under this new statute of limitations on April 29, 2010. ER 27.

Plaintiffs immediately located Shirley Jones, a putative class member, who knew the date of her first posting and whose case was not encumbered by the new limitations law. On May 7, 2010 she authorized counsel to file an Amended Complaint naming her as a putative class representative. On June 14, 2010, Plaintiffs requested leave to amend their Complaint to add Shirley Jones as a Plaintiff while simultaneously requesting relief under Fed.R.Civ.P. 59(e). *See* ER 204-217. Surely, "justice required" the amendment be "freely given" under these unique circumstances. *See* Fed. R. Civ. P. 1.

Instead, the court below not only denied Plaintiffs' necessary amendment, but also granted Corbis' petition for statutory attorneys' fees as the prevailing party. Shirley Jones then filed a case separately against Corbis.[2] Plaintiffs Alberghetti and Pointer had done nothing to deserve the sanction of a $219,001.83 attorney's fee judgment against them, even if the statute's fee-shifting provision is absolute. This is especially true since Corbis' business model violates §3344 and the cause of action now continues in Shirley Jones' name in front of the same judge.

A. Allowing Plaintiffs to amend their Complaint adding Shirley Jones as a new Plaintiff and modifying the final judgment of May20, 2010 is wholly consistent with the ends of justice and the

[2] Even though not in the record of this case, Shirley Jones' similar complaint is now pending in the district court as case number 10-8668 which was filed on November 12, 2010.

liberal standards upon which amendments are to be granted under the Federal Rules of Civil Procedure.

The district court abused its discretion in denying Plaintiffs leave to add Jones. The liberal standards of Rule 15(a) should have governed the district court's consideration of Plaintiffs' motions because:

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. – the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Foreman v. Davis, 371 U.S. 178 (1962). The district court's only justification for denial was that Plaintiffs could file another law suit naming Shirley Jones as Plaintiff and Class Representative. ER 9, ¶ 1, lines 15-17.

Had the district court granted Plaintiffs' motion, the case would have been adjudicated on the merits, and Defendant's statute of limitations defense obviated because Corbis posted pictures of Jones within the statute of limitations. Certainly Plaintiffs could not have been accused of "undue delay," "bad faith," or "dilatory motive" when bringing their Motion for leave to amend and modify the judgment.

This was the first request to amend the Complaint. It was filed on June 14, 2010, within 30 days of the district court's final order. *See* ER 25. There would have been no delay in the administration of justice, nor prejudice, had the district court granted Plaintiffs' Motion to Amend. This case was less than one year old when the district court ruled on summary judgment. It had a trial date of October 5, 2010. The only additional deposition that was necessary was that of Jones, the new Plaintiff. Given its familiarity with the issues presented, the district court would have been able to rule quickly on any potential new motions (which it will do with the new Jones' Complaint).

Defendant is now defending a new case before the same district court. Shirley Jones was required to file a notice of a related case calling for determination of the same or substantially similar questions of law or fact under L.R. 83-1.3. At the same time, Defendant is in the Ninth Circuit defending this appeal. This procedural knot is flatly contrary to notions of judicial economy and the effective administrative of justice. A complete resolution of the issues before the district court would have made more sense and achieved the aims of the first rule of the Fed.R.Civ.P.

In *Bowles v. Reade*, this Court addressed a post judgment amendment that renamed a party (in a different capacity) stating:

> We review a district court's denial of a motion for leave to amend for abuse of discretion…Rule 15(a) of the Federal Rules of Civil Procedure provides that leave to amend 'shall be freely given when justice so requires.' We therefore review such a denial strictly in light of the strong policy permitting amendment. (internal citations omitted)
>
> * * *
>
> Here, the district court did not make any specific findings of prejudice, bad faith, or futility. The court merely explained that it denied The Plans' motion because they knew that Ms. Reade was acting in her capacity as trustee of the Robert B. Reade Trust. This explanation, however, does not satisfy the district court's duty to make findings supported by the record showing that the motion was prejudicial to the defendant, was made in bad faith, or was futile.

198 F.3d 752, 757-58 (9th Cir. 1999).

The district court made no such findings here either, and Defendant would not have been prejudiced below (being forced to litigate on the merits is not prejudicial). Indeed, Defendant would have been spared new litigation both below and before this Court. Given the almost identical allegations to be in the Proposed Amended Complaint which would have avoided any statute of limitations issue, Plaintiffs' efforts to amend were surely not futile.

Certainly the merit issues of the stated cause of action are novel to California celebrities and a photo internet posting company like Corbis. A merits decision in the district court would have had a profound impact on future rights of celebrities.

B. The district court's abuse of discretion was exacerbated since there had been no merits adjudication: only a statute of limitations decision.

Prior to its decision in this case, the same district court previously commented in *Young v. Maitles*, No. CV05-4794 (SVW) (C.D. Cal. Apr. 4, 2007) citing this Court's language in *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3rd 691 (9th Cir. 2001):

> The Ninth Circuit has recognized that Rule 60(b) is a 'remedial rule to be liberally construed,' 'especially in those instances where the order or judgment forecloses trial on the merits of a claim'. . . ('[W]here there has been no merits decision, appropriate exercise of *district court discretion under Rule 60(b) requires that the finality* interest should give way fairly readily, to further the competing interest in reaching the merits of the dispute.").

ER 22, ¶ 1 (emphasis added, internal citations omitted) The district court ignored this precedent here. Given that it followed the roadmap of *TCI Group* in *Young*, it is puzzling that the district court veered off that roadmap here, in exactly the same circumstances. Plaintiffs' reasons below were certainly not "weak" for seeking leave to file an Amended Complaint adding Shirley Jones as a Plaintiff and altering the final judgment. This case would have remained on schedule for the October 5, 2010 trial date. There would have been no "loss of evidence, increased difficulties of discovery, or greater opportunity for fraud or collusion" and the ordinary cost of continuing to litigate was not prejudicial to Defendant. *See TCI Group*, 244 F.3rd. at

701. This was especially true where, as here, the contested issues had already been briefed, and the statute of limitations did not affect Shirley Jones because Corbis posted ten pictures of her sometime after February 2010 without her prior consent. ER 9, ¶ 1, lines 17-20.

The district court's finding that the statute of limitations had run from the date Corbis first posted the photos of Alberghetti and Pointer was predicated upon: (1) facts known uniquely to Corbis when the suit was filed (Corbis' posting dates of the photos); and (2) a reversal by the California Supreme Court of existing law, *after* the suit was filed. *See Christoff*, 213 P.3d 132. The only ruling by the Court touching on the substantive merits of Plaintiffs' claims was favorable to Plaintiffs. In denying Corbis' motion to dismiss, the Court necessarily recognized that Corbis' postings for sale of celebrity photos, without consent, facially at least violated the California statute.

To be sure, "[A] civil judgment based solely on the statute of limitations is not on the merits and if new facts may be pleaded to cure the defect, the prior judgment will not bar a new action." *Koch v. Rodin*, 223 Cal.App. 3d 1591 at1596-1598. "Termination of an action by a statute of limitations is deemed a technical or procedural, rather than a substantive, termination…Thus the purpose served by dismissal on limitations grounds is in no way dependent or reflective of the merits- or lack thereof- in the underlying action." *Id.* at 1596.

C. Plaintiffs had no way of knowing that the statute of limitations would bar their claims.

As stated, on August 17, 2009, 12 days after this case was filed, the California Supreme Court established a new “discovery rule" under the statute of limitations. When Plaintiffs filed this case, the controlling law in the State of California was *Christoff v. Nestle USA, Inc.*, 62 Cal.Rptr.3 122 (Cal. Ct. App. 2007) which held:

> [T]he trier of fact must consider whether a reasonable person in Christoff’s position had a meaningful ability to discover the use of his likeness and whether any republications occurred within the two-year limitations period. With respect to each republication prior to two years before the filing of the complaint, the trier of fact must consider whether a reasonable person in Christoff’s position had a meaningful ability to discover the use of his likeness on that occasion.”

Id. at 122. On August 17, 2009 the Supreme Court of California reversed the Appellate Court in *Christoff* and declared that the delayed "discovery rule" could not defeat a statue of limitations defense. *See Christoff*, 213 P.3d 132. The court eliminated the reasonable person standard, a jury question, to determine the application of the statute of limitations. That was a radical reversal of existing law upon which Plaintiffs had relied. The new rule was applied retroactively to Plaintiffs.

In California a new rule of law will not always be applied retroactively. Reliance by the parties on the prior rule is taken into consideration, *Poire v. C.L.*

Peck/Jones Brothers Construction Corp., 39 Cal. App. 4th 1832 (1995). Also, Plaintiffs could not have foreseen the reversal by the California Supreme Court which is also another consideration. *Busboom v. Superior Court,* 193 Cal. App. 350 (1980).

The district court did not have to reach the novel issue of retroactivity applied to this situation, however, if it had granted Plaintiffs' Motion for leave to file an Amended Compliant naming Jones as plaintiff. Had Plaintiff won on the merits (an outcome suggested by the court's denial of Defendant's first motion to dismiss), Defendant would not have been considered the "prevailing party" and Plaintiffs would have avoided a $219,001.83 judgment.

Plaintiffs as putative class representatives only sought to redress wrongs visited upon their colleagues. Instead, the chilling effect of the fee award at the early stage of the litigation might eviscerate the purposes of the California rights of publicity law. Obviously, fear is now in the minds of those seeking to enforce their rights of publicity. Success in the litigation at each stage should have been considered by the district court in the exercise of sound discretion. *See, generally, Champion v. Ruby Robinson Co.*, 342 F.3d 1016, (9th Cir. 2003)

Not only was there was no way Plaintiffs could have determined before August 5, 2009 that a change in the statute of limitations would affect their claims, they could not have known even *after* the California Supreme Court changed the

law. Corbis was the only one who knew of evidence regarding the initial posting of pictures. It was only a declaration in support of Defendant's summary judgment motion which first informed Plaintiffs as to the date their pictures were initially posted on the Corbis websites. ER 280, ¶¶ 2-3.

District courts are encouraged to reduce their caseloads by moving their cases speedily to adjudication and that is a good thing. However, an interest in judicial efficiency is not an excuse for district courts to abuse their discretion.

II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT ON THE BASIS OF THE STATUTE OF LIMITIONS.

A. The California two-year statute of limitations does not apply to Plaintiffs' cause of action for unjust enrichment.

Drew Maclean's Declaration demonstrates that Corbis sold pictures within two years of August 5, 2009, this case's filing date. ER 278, ¶ 4. Plaintiffs' unjust enrichment claim could not possibly accrue until money for these pictures found its way into Corbis' revenue string. Unjust enrichment is a separate and distinct cause of action apart from Plaintiffs' cause of action for violation of their rights of publicity.[3] Under California law, the elements of unjust enrichment are: (1) receipt of a benefit; and (2) unjust retention of the benefit at the expense of another. *Peterson v. Cellco P'ship,* 164 Cal. App. 4th 1583, 1593 (Cal. Ct. App. 2008). The benefit to Corbis was its mere posting of a Plaintiff's picture on its website for

[3] As stated, under § 3344(g), "The remedies provided for in this section are cumulative and shall be in addition to any others provided by law."

sale. But that alone is not sufficient to require Corbis' restitution. *The receipt of sale proceeds* by Corbis triggers restitution. *Cal. Med. Ass'n., Inc. v. Aetna U.S. Healthcare of Cal., Inc.*, 94 Cal. App. 4th 151, 171 (Cal. Ct. App. 2001). Thus, one cannot be required to make restitution until money is received.

This record demonstrates that sales of Plaintiffs' photographs occurred within the three year unjust enrichment statute of limitations. (Cal. Code Civ. Proc § 339(1). ER 278 ¶ 4. The discovery rule applies to unjust enrichment causes of action. *FDIC v. Dintino*, 167 Cal. App. 4th 333 (Cal. Ct. App. 2008). In applying the statute of limitations to an unjust enrichment claim, it is crystal clear that Plaintiffs' cause of action was filed timely. The statute commences when the "unjust retention of the benefit at the expense of another" is received. *Brooks v. Motsenbocker Advanced Developments, Inc.*, 2008 WL 2826392, at * 9 (S.D. Cal. July, 21, 2008). In *First Nationwide Savings v. Perry*, the court held that the statute of limitations did not bar a beneficiary's unjust enrichment claim because the statute of limitations did not commence until the date the property *was sold.* 11 Cal. App. 4th 1657, 1670 (Cal. Ct. App. 1992). The court reasoned that the point of sale is when a party becomes 'unjustly enriched.' *Id.*

Similarly, here, the statute of limitations for Plaintiffs' unjust enrichment claim commenced on the date of the last sale of Plaintiffs' pictures. Like property

sold in *First National Savings*, Corbis' sale of pictures constitutes sale of property. *See* ER 285-305.

In granting Defendants' motion for summary judgment, the district court, although stating Plaintiffs' argument was "creative", made short shrift of it when stating:

> [T]he First Nationwide Savings court . . . implicitly held that unjust enrichment … [is] governed by the relevant statute of limitations applicable to the central contentions in the complaint. . . In other words, . . .requires the court to determine the 'gravamen' of the complaint and apply the appropriate analogous statute of limitations… (internal citations omitted)

ER 49-50. The district court's perception of the "gravaman" of Plaintiffs' Complaint was mistaken, as was its understanding of *FDIC v. Dintino*, 167 Cal. App. 4th 331 (2008) demonstrates support for every contention in Plaintiffs' Unjust Enrichment Count. It also applies the discovery rule to unjust enrichment.

Moreover, the "gravaman" of Plaintiffs' Complaint was not only the *initial* unauthorized posting of Plaintiffs' pictures by Corbis. The *continuous sale* of Plaintiffs' pictures to different *users* on *different products* is unjust. Corbis, the *originator*, is responsible for these republications. *See, Oja v. U.S. Army Corp*, 440 F.3d 1122 (2006). The *same picture* may be sold at different times to different purchasers for *use* in different products in different locations. Nevertheless, the district court reasoned that:

> [U]nder Plaintiffs' novel theory, the overstocked book publisher in the seminal *Gregoire* case would have been liable if it negotiated a new contract when selling its remainders,… under Plaintiff's theory, every time a publisher enters into a distinct contract …the publisher's actions have re-started the statute of limitations.

ER 45, ¶2, lines 14-22. Such reasoning simply has no application here. First of all, the record clearly demonstrates that Corbis is not a "publisher" or a "media outlet" which under § 3344(d) or (f) might make it exempt. Secondly, Corbis' business model encourages its purchasers to use Plaintiffs' unauthorized pictures in *different products*. Multiple releases of a *same book* or a *same newspaper edition* are not an issue here. It is the end user's *multiple uses* on *different products* for which Corbis, the *originator*, remains responsible. As this Court in *Oja* stated:

> "If, in fact, the USACE published the same private information at a different address, then that disclosure constitutes a separate and distinct publication - one not foreclosed by the single publication rule. . ."

Oja, 440 F.3d at 1133-34. The California Supreme Court in *Shivley v. Bocanicah*, 80 P.3d 676 (Cal. 2003) also clarified the application of the single publication rule even though time barring the Plaintiffs' claim:

> In general, the repetition by a new party of another person's earlier defamatory remake also gives rise to a separate cause of action for defamation against the *original defamer* , when the repetition was reasonably foreseeable it is the foreseeable *subsequent repetition* of the remark that constitutes publication and an actionable wrong in this

> situation, even though it is the original author of the remark being held accountable.

Id at 683 (citations omitted). The Court went on to state in a footnote that:

> "Notwithstanding the single-publication rule, a *new edition* or new *issue* of a newspaper or book still constitutes a new publication, giving rise to a new and separate cause of action and a new accrual date for the purpose of the statute of limitations… (internal citations omitted)

Id. at 685, n. 7.

B. The Statue of Limitations does not apply to Plaintiffs under Counts I *or* II.

After Corbis' sale to the end user, that end user *republishes* the image. This subsequent use by the end user is a *republication* starting new the statute of limitations. *Kanarek v. Bugliosi*, 108 Cal App. 3d 327, 333 (Cal. Ct. App. 1980). The statute of limitations is an affirmative defense. The burden is on Corbis to prove its customers did not "republish" within two years of August 5, 2009 under Rule 56(c). *Adickes v. S.H. Kress & Co*. 398 U.S. 144, 157 (1970). The MacLean declaration proves otherwise. Plaintiffs' pictures appear in different products well past the date this lawsuit was filed. *See* ER 285-305. Corbis submitted *no evidence* in any form that republication had not occurred by Corbis customers anywhere or at any time after August 5, 2007.

Corbis' own business model negates the single publication rule and exposes its Corbis' violation of § 3344 and common law unjust enrichment. Corbis encourages buyers to republish pictures. The user is purchasing the photo to put it to some use different than how its presented on Corbis' website. The amount of revenue Corbis receives increases with each republication. As Corbis' Vice President Maclean explains, "The client then reports to Corbis the intended use of the image, the size of the use, the industry, and other identifying information and, on the website to calculate a price for the license.ER 279, lines 16-22.

So, Corbis is the driving force behind the republication of the picture because it encourages its customers to use the picture in a variety of ways, be it on a T-shirt, a coffee mug, a billboard, a magazine, an electronic game, etc., so that it will reap a profit for every additional use.

Contrary to the district court's view, Plaintiffs never argued that each of Defendant's "photo licenses is a distinct product." Plaintiffs did not argue that each *new contract* was an "infringing publication." It is the enduser's *use* in a *different product* that is a republication for which Corbis remains liable. The district court also misapplied *Yeager v. Bowlin*, 2010 WL 95242 (E.D. Cal. Jan 6, 2010. In that case Yeager initially consented to defendant selling his pictures. A dispute then arose as to the ownership of the pictures. *Id.* at 6. No one who purchased Yeager's pictures claimed to have used them for any other purpose than

viewing. As a result, the court found that the date of sale could not revive the statute of limitations for a rights of publicity cause of action.

Our scenario is quite different. Future republication is what Corbis promotes and is how it charges different prices for different users for different products. Corbis in no way encourages its customers to simply buy the pictures and look at them. In fact, Corbis' effort is to sell pictures and have the customer *use* them in different products is so that the user will pay more money for a longer "license."

When the district court granted Corbis summary judgment, neither the district court nor Plaintiffs could determine the republication uses or absence of the same. Corbis did not do so. Instead, MacLean's declaration provides evidence to the contrary. (ER, 280-359 Exhibits A – K: different sales on different dates to different customers.)

In *Miller v. Collectors Universe, Inc.*, 159 Cal. App. 4th 988, 999 (Cal. Ct. App. 2008) the defendant sold a series of identical certificates than only differed in serial number. There the Court ruled that the defendant's "conduct involved a series of separate transactions rather than the identical communication or display of identical content to multiple persons." *Id.* at 999. It therefore, refused to allow the single publication rule to support a statute of limitations defense. *Id.* Here, more

than in *Miller*, the record is replete with evidence of different uses by different Corbis purchasers, on different products, at different times.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS' AMENDED MOTION FOR CLASS CERTIFICATION.

The district court acknowledged the numerosity, commonality, and typicality requirements were satisfied under Rule 23 by Plaintiffs: no issue here.

A. That only California Law applies to this case should have erased any concerns by the district court as to the rights of non-resident Californians.

The legal basis for Plaintiffs' claims is California Civil Code §3344 and the California Common Law. Members of the putative class are limited to either California residents or non-resident subjects of pictures sold in California. In *Downing v. Abercrombie & Fitch*, the court said, "In a diversity case, 'federal courts apply the substantive law of the forum in which the court is located, including the forum's choice of law rules.'" 265 F.3d 994, 1005 (9th Cir. 2001) (internal citations omitted). Alberghetti and Pointer do not and would not have reason to not represent out-of-state residents vigorously as the district court hypothesized.

California residents bought unauthorized pictures of putative class members. Those non-resident California class members' rights of publicity were violated in California under California Law. If a non-resident Californian drives his car in

California and is injured in California by virtue of negligence by a California resident, California law applies. No difference here and California sales off the Corbis websites are easily determined by Corbis' records.

B. The district court's concerns with inadequate notice to the class were not justified.

The district court was concerned that a Corbis purchaser "may" be buying a picture of unknown "Rescue workers", unknown "East German Soldiers" unknown "couples watching building", an "impersonator," or a "white glove." ER. 62. But the initial name search on the Corbis website is triggered by a click leading to a purchase. Only putative class members are subject to such a click. Names of unknown individuals cannot be clicked. Corbis' own records offer a way to readily identify the putative class members.

C. Injunctive relief.

The district court's denial of class certification on the basis that certain putative class members might not want their name removed from Corbis' websites was yet another abuse of its discretion. Those class members could opt out or object: not unusual in the class action arena. Reliance by the district court on *East Texas Mutual Freight v. Rodriguez*, 431 U.S. 395 (1977) was a stretch. The relevant facts of that 1977 Supreme Court case are:

> …[T]he plaintiffs did not move prior to trial to have the action certified as a class action pursuant to Fed.Rule Civ.Proc. 23…Indeed, the plaintiffs had stipulated before trial that "'the only issue presently before the Court pertaining to the company is whether the failure of the Defendant East Texas Motor Freight to consider Plaintiffs' line driver applications constituted a violation of Title VII and 42 U.S.C.s 1981.'"… Following trial, the District Court dismissed the class-action allegations. It stressed the plaintiffs' failure to move for a prompt determination of the propriety of class certification, their failure to offer evidence on that question, their concentration at the trial on their individual claims, their stipulation that the only issue to be determined concerned the company's failure to act on their applications, and the fact that, contrary to the relief the plaintiffs sought, see n. 3, supra, a large majority of the membership of Local 657 had recently rejected a proposal calling for the merger of city-driver and line-driver seniority lists with free transfer between jobs.

The facts are significantly different here. Here there had been no vote by *any* putative class member preferring to receive no compensation for the unauthorized use of their pictures. Here, there had been no vote by *any* putative class member to have their pictures remain on the Corbis website. Further, Alberghetti and Pointer moved for class certification on October 14, 2009, within n*ine weeks* of initiating this litigation.

That Alberghetti may not have wanted injunctive relief but only monetary damages and raising that fact to the level of conflict with Pointer and class counsel to justify denial of class certification, as the district court did, was unfair, unwarranted, and not supported by law.

D. Plaintiffs are more than adequate representatives.

Plaintiffs had no reason not to aggressively pursue all claims for all class members. Their claims are similar. Rule 23 does not mandate that the named plaintiffs' interests be ***identical*** to the class. Rule 23 directs that the named representative's interests "*align* with the interests of the class." *Hannon v. Data Products Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (emphasis added). Individuals become class representatives because they are victims, just the same as the members of the class they seek to represent.

CONCLUSION

The district court abused its discretion in denying Plaintiffs' Motion for Leave to Amend naming Shirley Jones as an additional Plaintiff as well as their Motion to Modify or Amend the final judgment. The judgment for attorney's fees against Alberghetti and Pointer was not justified. Plaintiffs were more than adequate class representatives and the class as defined, or a modification of same, should have been certified.

Plaintiffs request that the summary judgment be vacated, the award of attorney's fees be vacated and the case be sent back to the district court to be consolidated with *Shirley Jones v. Corbis*, case number 10-8668, to be determined on the merits. Plaintiffs also ask the Court for such other and further relief as it deems appropriate.