Steven A. Zalesin (*pro hac vice*)
sazalesin@pbwt.com
Jonah M. Knobler (*pro hac vice*)
jknobler@pbwt.com
PATTERSON BELKNAP WEBB & TYLER LLP
1133 Avenue of the Americas
New York, New York 10036
Telephone: (212) 336-2838
Facsimile: (212) 336-2222

Gary T. Lafayette (SBN 88666)
glafayette@lkclaw.com
Brian Chun (SBN 215417)
bchun@lkclaw.com
LAFAYETTE & KUMAGAI LLP
1300 Clay Street, Suite 810
Oakland, California 94612
Telephone: (415) 357-4600
Facsimile: (415) 357-4605

Attorneys for Defendant Change.org, PBC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SEAN D. RANDALL, on behalf of himself and all others similarly situated,

Plaintiff,

vs.

CHANGE.ORG, PBC,

Defendant.

Case No.: 3:20-cv-03863-EMC

Assigned to the Hon. Edward M. Chen

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS OR STRIKE CLASS ALLEGATIONS

Hearing Date: November 19, 2020
Time: 1:30 p.m.
Pretrial Conference:
Trial Date:

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Change.org respectfully submits this reply in support of its motion to dismiss or, in the alternative, to strike class allegations (ECF No. 28).

PRELIMINARY STATEMENT

In its opening brief ("Opening Br."), Change.org showed that it did not breach the parties' contract; that, if it did, the 2AC fails to plead any resulting damages; and that in all events, this case cannot proceed on a class-wide basis. Randall's perfunctory opposition ("Opp. Br."), which offers just four pages of argument, does not rebut—or even respond meaningfully to—any of these three showings.

As to breach, Randall now concedes that Change.org was within its rights to deliver the promised advertising displays via its own website. However, he continues to maintain that Change.org breached the contract by pledging some contributed funds to "laudable" racial justice causes, rather than spending every cent it received advertising the Floyd Petition. As Change.org has shown, the parties' agreement ***did not require*** Change.org to spend all contributed funds on advertising. Rather, it said the funds would allow Change.org to advertise the Floyd Petition via billboards, social media, emails, and the Change.org website—and Randall does not dispute that Change.org did all of these things. Change.org further promised to advertise the Floyd Petition a specified number of times—and Randall does not dispute that it exceeded that number of advertisements. Tellingly, although Randall insists that "the [c]lear [t]erms" of the agreement required Change.org to exhaust all contributed funds advertising the petition, the argument section of his brief cites no contractual language whatsoever in support of that construction. That is because no such language exists.

As to damages, Randall merely quotes the definition of "expectation damages" from the Restatement (Second) of Contracts and asserts that it applies here. That is non-responsive. Change.org agrees that expectation damages are generally available in contract cases; its point is that nothing in the 2AC gives rise to a plausible inference that Randall ***actually suffered*** any such damages. Perhaps seeing the writing on the wall, Randall then pivots and attempts to inject a claim for contractual rescission into the case. But that is too little, too late: not only is such a claim not pleaded, it would be futile for multiple reasons.

Finally, as to class certification, Randall argues that Change.org's motion is premature, ignoring the bevy of authorities in Change.org's opening brief holding that a pleadings-stage motion to strike class allegations is entirely proper in appropriate cases. And Randall's single page of argument fails to refute Change.org's showing that he is an atypical and inadequate class representative, or that individualized questions would inevitably predominate over common ones in any class-wide proceeding.

The 2AC should be dismissed with prejudice. At minimum, its class allegations should be stricken and this case should proceed as a $3 individual claim.

ARGUMENT

I. RANDALL FAILS TO STATE A CLAIM FOR BREACH OF CONTRACT

A. Randall Fails To Plead That Change.org Breached the Contract

1. Change.org Did Not Breach the Contract by Advertising the Floyd Petition on its Own Website

In his 2AC, Randall alleged that the parties' agreement forbade Change.org from delivering any of the promised advertising via its own website, and that all of that advertising was required to be rendered via "billboards …, social media … and email[s]." *See* 2AC ¶¶ 3, 10, 11, 13-15, 29. Randall has now abandoned that theory of breach, conceding that the Change.org website was among the places in which purchased advertising was permitted to appear. *See, e.g.*, Opp. Br. at 5 ("Defendant explicitly promised … to purchase billboards, promote the petition on social media, send emails, ***and advertise on its own website***." (emphasis added)). The 2AC, therefore, must be dismissed to the extent it alleges that Change.org breached the contract by conducting advertising on its website.

2. Change.org Did Not Breach the Contract by Spending Less Than All Contributed Funds Advertising the Floyd Petition

Randall continues to maintain that Change.org breached the contract because it did not expend every penny of the contributions it received on advertising for the Floyd Petition. As Change.org has shown, however, the only promises that Change.org made to Randall were (1) that it would advertise the Floyd Petition via billboards, social media, emails, or on the

Change.org website—all of which it undisputedly did; and (2) that it would advertise the petition 38 additional times as a result of Randall's $3 contribution—a commitment that Change.org undisputedly exceeded. At no point did Change.org state that it would keep advertising the Floyd Petition until all contributions had been expended on advertising—*i.e.*, that it was providing the advertising at cost and there would be no "margin" left over once it rendered the promised performance.

Tellingly, the portion of Randall's brief captioned "Defendant Breached the Clear Terms of the Written Contract" (Opp. Br. at 6-7) ***quotes no actual contractual language whatsoever***. That is because there are no "terms"—clear or otherwise—that impose on Change.org an obligation to do what Randall claims it should have done. Randall's conclusory insistence to the contrary, devoid of any reference to the words of the agreement, is woefully inadequate. *See In re Anthem Data Breach Litig.*, 162 F. Supp. 3d 953, 979 (N.D. Cal. 2016) (granting motion to dismiss where "Plaintiffs d[id] not refer to any contractual language" or "identify a specific contractual provision that [Defendants] breached," but instead offered "conclusory statements" that a breach had occurred); *Young v. Facebook, Inc.*, 790 F. Supp. 2d 1110, 1117 (N.D. Cal. 2011) (granting motion to dismiss where plaintiff failed to "allege the specific provisions in the contract creating the obligation the defendant is said to have breached").

3. The Promoted Petitions Page and FAQ Page are Incorporated by Reference into the Parties' Contract

Randall's opposition fails to address the question the Court posed at the recent Case Management Conference: whether the Promoted Petitions Page and FAQ Page (*see* Opening Br. at 5-7) should be deemed part of the parties' contract. Instead, for some reason, Randall addresses the final confirmation screen (*see id.* at 8) that contributors were shown "***after*** the donation was consummated." Opp. Br. at 10 (emphasis in original).

Change.org agrees that any text that users could have seen only after they finalized their contribution is not part of the contract. But Change.org has never argued for dismissal on the basis of such text. The two pages actually at issue were undisputedly made available for users to read ***before*** the "consummation" of their contributions. The FAQ Page was made available

via hyperlink from the Solicitation Screen (*i.e.*, the initial screen displayed to potential contributors), and the Promoted Petitions Page was made available via hyperlink from the Contribution screen (*i.e.*, the screen where contributors enter their financial information and "consummate" their contribution). All of this is set forth explicitly in the Joffe-Walt Declaration, which Randall has embraced and incorporated by reference into the 2AC.[1] *See* Declaration of Benjamin Joffe-Walt ("Joffe-Walt Decl.") (ECF No. 15-1) ¶¶ 12, 15-16 & Exs. B, C at 1-2, D.

It is well-settled in California and elsewhere that hyperlinked pages containing additional terms are incorporated into the parties' contract, whether or not the user actually clicks those links and reads those terms. *See Levin v. Caviar, Inc.*, 146 F. Supp. 3d 1146, 1157 (N.D. Cal. 2015) (holding that plaintiff was bound to arbitration clause "which only became visible upon clicking a hyperlink" from main screen where contract was consummated, and collecting cases holding same). As the Second Circuit put it, "[c]licking [a] hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket. In both cases, the consumer is prompted to examine terms of sale that are located somewhere else." *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 78 (2d Cir. 2017) (applying California law). "While it may be the case that many users will not bother reading the additional terms, that is the choice the user makes; the user is still on inquiry notice" of them. *Id.* at 79.

The only requirement that California law imposes is that the hyperlink appear with sufficient prominence that a "reasonably prudent user" would notice it. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1177 (9th Cir. 2014); *see also Meyer*, 868 F.3d at 79 ("As long as the hyperlinked text was itself reasonably conspicuous … a reasonably prudent smartphone user would have constructive notice of the [linked] terms."). Here, there is no assertion that the hyperlinks were "tucked away in [an] obscure corner[] of the website where users are unlikely to see [them]." *Nguyen*, 763 F.3d at 1177. To the contrary, the FAQ Page was accessible via a prominent, underlined link at the very top of the Solicitation Screen that read "More on how

[1] Randall does not dispute that the Joffe-Walt Declaration and its exhibits are "incorporate[d] … by reference" into the 2AC, such that the Court "may consider" them for all purposes in ruling on Change.org's motion. *See* Opening Br. at 4 n.3.

chipping in helps this petition," which was accompanied by an attention-grabbing red icon of a question mark in a circle. Joffe-Walt Decl. ¶ 15 & Ex. C at 1. And the Promoted Petitions Page was accessible via a red underlined link, immediately beneath the "Chip in" button that a user had to click to finalize the contribution, clearly stating: "[I]f you have any questions, please visit our refund policy & FAQ for more information." *Id.* ¶ 16 & Ex. C at 2.

As a matter of law, these links were noticeable to a "reasonably prudent user," and Randall has not argued otherwise, despite the Court's express invitation to address the question. *See, e.g.*, *Cordas v. Uber Techs., Inc.*, 228 F. Supp. 3d 985, 988-90 (N.D. Cal. 2017) (finding adequate notice of privacy policy linked to via a "clickable box" on "the same screen [that] required the new registrant to click 'DONE' in order to create an account"); *Guadagno v. E*Trade Bank*, 592 F. Supp. 2d 1263, 1271 (C.D. Cal. 2008) (finding adequate notice of arbitration clause linked to via a "highlighted, underlined link" that appeared "directly above the acknowledgment box" required to consummate the contract, along with text stating that the linked page "contain[ed] important information"); *Meyer*, 868 F.3d at 78 (finding adequate notice of terms of service and privacy policy linked to via underlined hyperlinks that "appear[ed] directly below the buttons for registration").

Accordingly, the contract between Change.org and Randall included not only the Solicitation Screen and Contribution Screen, but also the Promoted Petitions Page and FAQ Page—and all of the text that those pages contained. That text included: "The amount of money the supporter wants to give correlates to the number of times we'll display the petition. For example, contributing $8 will result in the petition being displayed to 100 people" (*i.e.*, 12.5 displays per dollar). Joffe-Walt Decl. ¶ 15 & Ex. D. Between this additional text and the Contribution Screen itself, which stated the same ratio, Randall was plainly on notice that his $3 would purchase 38 advertising displays—no more and no less.

B. Randall Fails to Plausibly Plead Damages

As Change.org has shown, even if Randall had pleaded a breach, he fails to plead any "appreciable and actual damage" flowing from that breach. Opening Br. at 17-19. Randall responds with mere legal boilerplate: an excerpt from the Restatement (Second) of Contracts' def-

inition of "expectation damages." Opp. Br. at 8. Change.org does not dispute that expectation damages are generally available in contract cases. *See* Opening Br. at 18. Its point is that the 2AC pleads no factual content plausibly demonstrating that Randall ***actually suffered*** such damages here.

In other words, even if Randall had credibly alleged that Change.org's performance was ***different*** in some material respect from what was promised, he still must plead non-conclusory facts establishing that there was a "difference between the value of what he should have received and the value of what he got." *S. M. Wilson & Co. v. Smith Int'l, Inc.*, 587 F.2d 1363, 1375 (9th Cir. 1978). That required Randall to plausibly plead that the "value" of Change.org's actual performance—39 ad displays on the Change.org website, millions of additional "offsite" ad displays, and millions of dollars in racial justice commitments—falls short of the "value" of what Change.org supposedly promised to do. Randall has altogether failed to meet this requirement. To the contrary, his pleading makes clear that what Change.org actually did was ***more*** valuable than what Randall claims Change.org should have done. *Cf. State ex rel. Dep't of Highways v. Lo Bue*, 611 P.2d 1077, 507-08 (Nev. 1980) (where plaintiff was promised construction of two "country roads," but received a freeway and an avenue instead, she failed to "sustain[] damage" because she actually "received more than she had bargained for").

The relevant question is not, as Randall asserts, whether some part of the performance that Change.org rendered was "not spelled out in the written contract," or what "proportion" of the contributed funds Change.org spent rendering that part of the performance. Opp. Br. at 8. Rather, the question is whether the total performance that Change.org rendered provided less objective value than the total performance that Change.org ostensibly promised. On that key question, both the 2AC and Randall's opposition are silent. This, too, requires dismissal. *See Svenson v. Google, Inc.*, 65 F. Supp. 3d 717, 724 (N.D. Cal. 2014) (dismissing breach-of-contract claim where "Plaintiff d[id] not allege that what she received … was worth less than what she allegedly bargained for").

C. Randall Is Not Entitled to Rescission

As a Hail Mary, Randall argues that, if he cannot show any damages, the Court should order "rescission of the contract pursuant to Cal. Civ. Code § 1689(b)." Opp. Br. at 8-9. He concedes that the operative 2AC fails to plead a rescission claim. *Id.*; *see Moser v. Encore Capital Grp., Inc.*, 2011 U.S. App. LEXIS 23087, at *6 (9th Cir. Nov. 17, 2011) (rescission properly denied where plaintiff "did not seek rescission in his complaint"). However, he asks the Court's permission to "amend [his] Complaint" to insert one. Opp. Br. at 9. Randall is not entitled to a *third* amendment to request a remedy that he could have sought from the outset—especially given that Change.org pointed out his failure to plead any damages in its original Motion to Dismiss, two amendments ago. *See Carvalho v. Equifax Info. Servs., LLC*, 629 F.3d 876, 892-93 (9th Cir. 2010) (district court may "deny leave to amend due to … repeated failure to cure deficiencies by amendments previously allowed").

In any event, amendment would be futile because the proposed rescission claim would fail for multiple reasons. First, Randall's initial choice to affirm the contract and seek damages constitutes an "election of remedies" that bars him from changing tack and belatedly seeking to disavow the contract. *See LMNO Cable Grp., Inc. v. Discovery Commc'ns*, 2020 U.S. Dist. LEXIS 153747, at *45-46 (C.D. Cal. May 15, 2020) (party loses right to rescind if "he manifests … his intention to affirm [the contract] or acts … in a manner inconsistent with disaffirmance" (quoting Restatement (Second) Contracts § 380)); *Price v. McConnell*, 184 Cal. App. 2d 660, 666 (1960) ("[H]aving ratified the contract by suing upon it [for breach], appellant is now precluded from claiming a rescission.").

Second, rescission is not available to a plaintiff who cannot prove any harm resulting from the alleged breach. "Wh[ether] damages or rescission is sought, it must be alleged and proved that the complainant has suffered material injury." *Munson v. Fishburn*, 190 P. 808, 812 (Cal. 1920); *see also Schramm v. JPMorgan Chase Bank, N.A.*, 2012 U.S. Dist. LEXIS 195896, at *9 (C.D. Cal. Dec. 21, 2012) ("A party seeking to rescind a contract must show that he has suffered material injury or prejudice…." (quoting *Guthrie v. Times-Mirror Co.*, 51 Cal. App. 3d 879, 886 (1975))). For the reasons already discussed, Randall has failed to plead with plausibil-

ity that Change.org's alleged breach caused him any injury. That being so, his eleventh-hour pivot from a damages remedy to a rescission remedy cannot save his case.

Third, the only ground for rescission that Randall claims is failure of consideration. *See* Opp. Br. at 9 (citing Cal. Civ. Code § 1689(b)(2)). But a "failure of consideration" requires a breach so fundamental that it "go[es] to the 'essence' of the contract." *Dorado v. Shea Homes Ltd. P'ship*, 2011 U.S. Dist. LEXIS 97672, at *24 (E.D. Cal. Aug. 31, 2011) (quoting *Wyler v. Feuer*, 85 Cal. App. 3d 392, 403-04 (1978)); *see also Rano v. Sipa Press, Inc.*, 987 F.2d 580, 586 (9th Cir. 1993) ("A breach will justify rescission … only when it is 'of so material and substantial a nature that [it] affect[s] the very essence of the contract and serve[s] to defeat the object of the parties.'"). Here, the "object of the parties" was plain: to support the cause of justice for George Floyd and the movement sparked by his tragic death. It is simply not plausible that the parties' fundamental "object" was to see the Floyd Petition advertised as many times as possible ***for its own sake***. Thus, assuming Change.org breached the contract by directing some funds to racial justice activism—rather than continuing to advertise the Petition even after it became the largest online petition in history and its original goal (securing prosecution for Floyd's killers) had been accomplished—that breach did not "affect the very essence of the contract and serve to defeat the object of the parties." *Id.* At most, the breach "was subordinate and incidental to [the contract's] main purpose," and "consequently d[oes] not warrant a rescission." *Karz v. Dep't of Prof'l & Vocational Standards*, 11 Cal. App. 2d 554, 557 (1936); *see Dorado*, 2011 U.S. Dist. LEXIS 97672, at *24 (dismissing rescission claim where "Plaintiff's Complaint [did] not plead facts which demonstrate[d]" that the breach was "essential to the contract").

Fourth, because rescission is an unwinding of the contract, it is a two-way street: a plaintiff seeking it must "return everything of value that he has received from the [defendant] under the contract." *Simulados Software, Ltd. v. Photon Infotech Private, Ltd.*, 771 F. App'x 732, 735 (9th Cir. 2019) (Bea, J., concurring); *see also Beckwith v. Sheldon*, 131 P. 1049, 1051 (Cal. 1913) ("[A]s a condition of rescission the rescinding party must first place the other [party] *in statu quo*."). Thus, if Randall desires rescission, he must first return the full benefit he has received from Change.org's website ad displays, "offsite" advertising, and racial justice contribu-

tions. He has not met that requirement, nor even offered to do so. That precludes a rescission claim. *See Moser*, 2011 U.S. App. LEXIS 23087, at *6 (district court properly dismissed rescission claim where plaintiff "failed, upon discovering the facts which [allegedly] entitle[d] him to rescind, to … restore" benefit defendant had conferred on him). Indeed, it is not even apparent how Randall *could* return that purely intangible benefit, and "rescission is not an appropriate remedy" where "the complete restoration of the parties to the *status quo ante* [is] difficult if not impossible." *LMNO Cable*, 2020 U.S. Dist. LEXIS 153747, at *47-48.

Finally, "[i]t is … fundamental that, where … rescission may not be decreed without injury to [third] parties and their rights, rescission will be denied." *Id.* (quoting *Beckwith*, 131 P. at 1051); *see also Angle v. U.S. Fid. & Guar. Co.*, 201 Cal. App. 2d 758, 763 (1962) ("[T]here can be no rescission where the rights of third parties would be prejudiced."). Here, rescission would take millions of dollars away from the "laudable" organizations and causes to which Change.org has already pledged the disputed funds, thereby setting back the cause of racial justice. Under such circumstances, rescission is unavailable as a matter of law. *See, e.g.*, *Kucharczyk v. Regents of Univ. of Cal.*, 946 F. Supp. 1419, 1433 (N.D. Cal. 1996) (denying rescission where the rights of a third party and its sublicensees would be prejudiced by rescission of plaintiff's contract assigning patent rights to defendant); *Conservatorship of O'Connor*, 48 Cal. App. 4th 1076, 1099 (1996) (denying rescission where it "would adversely and unfairly injure the beneficiaries of [decedent's] estate"); *Beckwith*, 131 P. at 1051 (denying rescission where "innocent stockholders and bondholders" would be prejudiced thereby).

II. THE COURT SHOULD STRIKE THE 2AC'S CLASS ALLEGATIONS

As Change.org has shown, if the 2AC escapes dismissal, the Court should strike its class allegations, as it is clear that Randall will never be able to satisfy his class-certification burden under Rule 23. Randall's perfunctory one-page argument in opposition is meritless.

As a threshold matter, Randall cites a single, unpublished district court decision for the proposition that motions to strike class allegations are "premature before the filing of a motion for class certification." Opp. Br. at 9. Change.org agrees that in *most* cases, it is prudent to await the development of a factual record before ruling on class issues. At the same time, the

Supreme Court has stressed that "[s]ometimes the issues are plain enough from the pleadings" to do so; the Ninth Circuit has endorsed pleadings-stage motions to strike class allegations; and district courts in this circuit have granted such motions repeatedly. *See* Opening Br. at 19-21. Randall fails to distinguish—or even address—any of these authorities. Nor could he: this is precisely the type of case where early resolution is warranted.

For example, as Change.org showed in its opening brief, most members of the putative class would not deem Change.org to be in material breach, let alone consider themselves "damaged." *Id.* at 19-20. Again, Change.org undisputedly provided every class member with the promised number of website ad displays; provided millions of additional ad displays via billboards, social media, and email; and then, ***on top of that***, pledged millions of dollars to "laudable" racial justice efforts. A typical class member signing a racial justice petition would not consider herself aggrieved by the fact that Change.org supported those efforts, rather than spending every last cent of her contribution advertising a petition that had already recruited a record-setting number of signatories and whose original goal had already been accomplished.

Additionally, as Change.org has shown, many (if not most) putative class members would oppose the relief that Randall seeks in this action. Opening Br. at 20. Randall insists that this "does not present a conflict" because Change.org can simply "return[]" all contributions and let "each individual class member" decide whether to keep their money or "donate [it back] to the same causes" to which Change.org has pledged it. Opp. Br. at 9-10. But it is not that simple. Under Randall's plan, much of the disputed funds would be lost to "[t]he transaction costs of a class action," such as delivering notice, mailing thousands of *de minimis* checks to class members, and paying fees to Randall's counsel. Opening Br. at 20. Randall does not argue otherwise; he simply ignores these costs. Moreover, because class members would not get their checks until the very end of this case (including all appeals), those charities would not see any money returned to them for years. Finally, transferring the money from class members back to the charities would entail still further inefficiencies. Compared to simply leaving things the way they are, this lengthy and wasteful process would plainly disserve the causes that most Floyd Petition signers care deeply about. *Cf. In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748,

752 (7th Cir. 2011) ("A [class] representative who proposes that high transaction costs … be incurred at the class members' expense to obtain [something] already on offer is not adequately protecting the class members' interests.").

Change.org has also shown that, if the Court decides that putative class members were not on *inquiry* notice of the Promoted Petitions Page and FAQ Page, the key question of whether they had *actual* notice of those pages is inherently individualized. Opening Br. at 20-21. Once again, Randall's response confuses these pages with the final confirmation screen, which "appeared [only] ***after*** the donation was consummated." Opp. Br. at 10 (emphasis in original). As discussed above, the hyperlinks to both the Promoted Petitions Page and FAQ Page appeared ***before*** "the donation was consummated," not after it. *See supra* at 3-4. Change.org's argument for striking the class allegations, therefore, is effectively unopposed.

Finally, now that Randall attempts to pivot to a rescission theory to save his case, the impropriety of class treatment is even clearer. "Courts are in uniform agreement that rescission may not be sought on a class-wide basis." *Amparan v. Plaza Home Mortg.*, 678 F. Supp. 2d 961, 979 (N.D. Cal. 2008); *see also Schramm v. JPMorgan Chase Bank, N.A.*, 2011 U.S. Dist. LEXIS 122440, at *34-36 (C.D. Cal. Oct. 19, 2011) (holding that "a class-wide rescission remedy is not appropriate" because "the equitable nature of rescission" requires "consideration of [each class member's] individual circumstances"); *Andrews v. Chevy Chase Bank*, 545 F.3d 570, 574 (7th Cir. 2008) (stating that "[r]escission is a highly individualized remedy" and "an extremely poor fit for the class-action mechanism").

For instance, does each class member actually believe that Change.org's alleged breach is so fundamental that it justifies unwinding his or her contract? *See Feske v. MHC Thousand Trails L.P.*, 2013 U.S. Dist. LEXIS 37232, at *37-48 (N.D. Cal. Mar. 28, 2013) ("Determining which class members want rescission … must be dealt with on a class-member-by-class-member basis."). Is each class member in a position to return the benefit he or she received from Change.org's performance, and how much must they return? *See Campion v. Old Republic Home Prot. Co.*, 272 F.R.D. 517, 531 (S.D. Cal. 2011) (denying class certification of rescission claim, which would "necessitat[e] an individualized inquiry … to determine whether bene-

fits were received by class members" and what their "value" was). No discovery is needed to see that these questions, among others, make class-wide adjudication impossible.

CONCLUSION

For the reasons stated, Change.org respectfully requests that the Court dismiss this action in its entirety. Because Randall has already had multiple opportunities to plead a valid claim, and because any further amendment would be futile, the dismissal should be with prejudice. *Salameh v. Tarsadia Hotel*, 726 F.3d 1124, 1133 (9th Cir. 2013). At minimum, however, the Court should strike the 2AC's class allegations and order that this suit be maintained as an individual action only.

Dated: October 30, 2020

Respectfully submitted,

PATTERSON BELKNAP WEBB & TYLER LLP

LAFAYETTE & KUMAGAI LLP

By: */s/ Steven A. Zalesin*
Steven A. Zalesin (*pro hac vice*)

Attorneys for Defendant Change.org, PBC

12085680