

No. \_\_\_\_\_

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IN THE  
*Supreme Court of the United States*

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PEOPLECONNECT, INC.,  
*Petitioner,*

v.

BARBARA KNAPKE, INDIVIDUALLY AND ON BEHALF OF  
ALL OTHERS SIMILARLY SITUATED,  
*Respondent.*

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On Petition for a Writ of Certiorari  
to the United States Court of Appeals  
for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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DEBBIE L. BERMAN  
WADE A. THOMSON  
CLIFFORD W. BERLOW  
GABRIEL K. GILLET  
JENNER & BLOCK LLP  
353 N Clark St.  
Chicago, IL 20654  
(312) 222-9350

IAN HEATH GERSHENGORN  
ADAM G. UNIKOWSKY  
*Counsel of Record*  
JENNER & BLOCK LLP  
1099 New York Ave., NW  
Suite 900  
Washington, DC 20001  
(202) 639-6000  
aunikowsky@jenner.com

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**QUESTION PRESENTED**

Under the Federal Arbitration Act, when a motion to compel arbitration is denied, the party seeking arbitration may file an immediate appeal of that decision. This case concerns the legal standard for stays of district court proceedings pending appeal of denials of motion to compel arbitration. The question presented is:

Does a non-frivolous appeal of a denial of a motion to compel arbitration divest district courts of jurisdiction, causing proceedings to be stayed automatically, as the Third, Fourth, Seventh, Tenth, and Eleventh Circuits have held, or does the appealing party have to satisfy the traditional discretionary test for a stay, as the Second, Fifth, and Ninth Circuits have held?

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Supreme Court Rule 29.6, PeopleConnect, Inc. (“PeopleConnect”) hereby states that it is a wholly-owned subsidiary of PeopleConnect Holdings, Inc., a non-public Delaware corporation, and PCHI Parent, Inc., a non-public Delaware corporation. No publicly held corporation owns 10% or more of PeopleConnect’s stock. PeopleConnect, Inc. has no publicly held affiliates.

**STATEMENT OF RELATED CASES**

Pursuant to Supreme Court Rule 14, PeopleConnect hereby states that there are no related cases.

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## **PETITION FOR WRIT OF CERTIORARI**

PeopleConnect, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

### **OPINIONS BELOW**

The Ninth Circuit's decision denying a stay pending appeal (Pet. App. 1a) is unreported. The district court's order denying a stay pending appeal (Pet. App. 2a–11a) is reported at 2021 WL 4439479. The district court's order denying the motion to dismiss (Pet. App. 12a–35a) is reported at 2021 WL 3510350.

### **JURISDICTION**

The judgment of the Ninth Circuit was entered on October 20, 2021. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

### **INTRODUCTION**

Under the Federal Arbitration Act, when a federal district court denies a motion to compel arbitration, the proponent of arbitration may file an immediate appeal. 9 U.S.C. § 16(a). But what happens to the district court proceedings while the appeal is pending? Do they continue, or do they halt?

The circuits are divided 5 to 3 on that question. The Third, Fourth, Seventh, Tenth, and Eleventh Circuits hold that when a non-frivolous appeal is filed of the denial of a motion to compel arbitration, the district court is divested of jurisdiction over the underlying litigation. Hence, proceedings in the district court halt automatically.

By contrast, the Second, Fifth, and Ninth Circuits hold that an appeal of the denial of a motion to compel arbitration does not divest the district court of jurisdiction over the underlying litigation. In those circuits, litigation continues in the district court unless the traditional, discretionary standard for a stay is satisfied.

This circuit split has been widely acknowledged. Indeed, aside from the Ninth Circuit (the first appellate court to consider the issue), every appellate decision has expressly noted the conflict of authority. *See, e.g., Weingarten Realty Invs. v. Miller*, 661 F.3d 904, 907 (5th Cir. 2011) (noting that question presented is “the subject of a circuit split”); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 54 (2d Cir. 2004) (“Other circuits are divided on this question.”); *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249, 1251 (11th Cir. 2004) (“The circuit courts that have considered the issue are split.”)

This petition presents an ideal vehicle to resolve the split. In the underlying dispute, respondent Barbara Knapke filed a putative class action against petitioner PeopleConnect, Inc. PeopleConnect filed a motion to compel arbitration, which the district court denied. PeopleConnect appealed that ruling. That appeal is currently pending in the Ninth Circuit.

After filing its notice of appeal, PeopleConnect sought a stay of district court proceedings pending disposition of its appeal. Under circuit precedent, PeopleConnect was required to satisfy the traditional discretionary test for a stay. The district court denied a stay. The Ninth Circuit did too, and also denied PeopleConnect’s alternative request for an

administrative stay so the Ninth Circuit's circuit precedent on stays could be considered en banc.

If this case had arisen in the Third, Fourth, Seventh, Tenth, and Eleventh Circuits, PeopleConnect would automatically have been entitled to a stay. But the Ninth Circuit denied a stay because of its less favorable legal standard.

The Court should grant certiorari to resolve the circuit split. This case meets all of the Court's criteria for certiorari. The circuit split is longstanding. There are detailed opinions on both sides of the split. The issue recurs regularly—in literally all cases involving appeals of denials of motions to compel arbitration, the district court must decide whether the litigation should continue or stop.

Notably, this Court previously granted review of a different circuit split on the legal standard for stays pending appeal. *Nken v. Holder*, 556 U.S. 418 (2009) (resolving test for stays of removal pending disposition of appeals of adverse immigration appeals). Review is warranted to resolve this circuit split as well.

Finally, review is warranted because the Ninth Circuit's decision is wrong. As the Third, Fourth, Seventh, Tenth, and Eleventh Circuits have held, this case merely requires a straightforward application of the bedrock principle that an appeal divests a district court of jurisdiction over the case being appealed. Although there is an exception to that principle for matters that are collateral to the issue on appeal, that exception does not apply here. The purpose of the appeal is to determine whether the case should proceed

to arbitration, or whether district court proceedings should instead occur. Those very proceedings are thus at the core of—not collateral to—the appeal.

Moreover, the Ninth Circuit’s approach would nullify Congress’s decision to authorize immediate appeals of denials of motions to compel arbitration. Immediate appeals serve to avoid the prospect of litigating a case to judgment, only to be sent to arbitration following an appeal. Yet permitting litigation to proceed while an appeal is pending risks precisely that outcome.

### STATEMENT OF THE CASE

#### A. PeopleConnect’s Motion to Compel Arbitration.

PeopleConnect owns and operates Classmates.com, which includes an online library of over 450,000 school yearbooks viewable by its 70 million members. Respondent filed a putative class action against PeopleConnect, alleging that it presented excerpts from her school yearbook on Classmates.com that include her “name and photo.” According to the complaint, PeopleConnect improperly uses “her identity to advertise” its services in violation of the Ohio Right of Publicity Statute.<sup>1</sup>

No names or photos are displayed on Classmates.com unless and until a user enters such information into a search bar. So to create respondent’s claim, her counsel registered for a free Classmates.com account, upgraded to a paid subscription, and performed searches for

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<sup>1</sup> Complaint ¶¶ 6, 14, 20, 33–41, *Knapke v. PeopleConnect, Inc.*, No. 21-cv-00262 (W.D. Wash. Mar. 2, 2021), ECF No. 1.

respondent on the website.<sup>2</sup> At each step, the website prompted counsel with the following message: “By accessing and using the Websites and Services you are agreeing to the following Terms of Service.”<sup>3</sup> The Terms of Service, which are hyperlinked to that message, contain a mandatory arbitration provision stating the parties agree to arbitrate “any and all disputes.”<sup>4</sup> The Terms of Service grant all users a right to opt out of the contractual arbitration agreement within 30 days of registration.<sup>5</sup>

Respondent’s counsel did not opt out. Instead, counsel included in respondent’s Complaint and in opposition to PeopleConnect’s motion to dismiss screenshots available only to a user that accepted the Terms of Service.<sup>6</sup>

PeopleConnect moved to dismiss respondent’s claim in favor of arbitration. PeopleConnect argued, among other things, that respondent’s lawyer acted as respondent’s agent when the lawyer registered for an

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<sup>2</sup> *Id.* ¶¶ 6–8; *see also* Declaration of Tara McGuane in Support of Defendant’s Motion to Dismiss ¶¶ 12–13, *Knapke v. PeopleConnect, Inc.*, No. 21-cv-00262 (W.D. Wash. May 3, 2021), ECF No. 13-1.

<sup>3</sup> McGuane Declaration, *supra* n.2, ¶ 7.

<sup>4</sup> Defendant’s Motion to Dismiss at 2–3, *Knapke v. PeopleConnect, Inc.*, No. 21-cv-00262, ECF No. 13 (W.D. Wash. May 3, 2021), ECF No. 13.

<sup>5</sup> Exhibit 1 to Defendant’s Motion to Dismiss §13(D), *Knapke v. PeopleConnect, Inc.*, No. 21-cv-00262 (W.D. Wash. May 3, 2021), ECF No. 13-1.

<sup>6</sup> McGuane Declaration, *supra* n.2, ¶¶ 12–14.

account on Classmates.com, searched for respondent's name, and took screenshots of the resulting website.

The district court, however, declined to compel arbitration. The district court found "no evidence" respondent's counsel had acted at respondent's direction, created a Classmates account on her behalf, or had been given "any authority to bind her" to the Terms of Service. Pet. App. 16a–17a.

PeopleConnect immediately noticed an appeal, as authorized by the Federal Arbitration Act. 9 U.S.C. §16(a)(1). That appeal remains pending. *Knapke v. PeopleConnect, Inc.*, No. 21-35690 (9th Cir.).

PeopleConnect respectfully disagrees with the district court's decision denying arbitration and believes it has a strong chance of prevailing on appeal. Respondent's attorney agreed to PeopleConnect's Terms of Service by accessing the Classmates.com website, then used that access to procure screenshots used in the Complaint and opposition to PeopleConnect's motion to dismiss. Because respondent's attorney acted as respondent's agent when agreeing to PeopleConnect's Terms of Service, respondent should have been bound to arbitrate. *See Tamsco Props., LLC v. Langemeier*, 597 F. App'x 428, 429 (9th Cir. 2015) (principal bound by agent's agreement to arbitrate). While the district court held that respondent's attorney lacked apparent authority to enter into an agreement to arbitrate, the court ignored that the attorney had implied actual authority to do so, and that, in any event, respondent ratified the attorney's agreement.

Further, by effectively holding that attorneys require express authorization to bind their clients to arbitration agreements, even though implied authorization suffices for other contracts, the court violated the Federal Arbitration Act's ban on state-law contract "defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011); see *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426, 1429 (2017) (preempting state rule requiring express authority for arbitration agreements). In sum, bedrock contract principles and the Federal Arbitration Act bar respondent from escaping arbitration merely by delegating the task of signing an arbitration agreement to her lawyer.

#### **B. PeopleConnect's Motion to Stay Pending Appeal.**

After PeopleConnect filed its notice of appeal, PeopleConnect moved the district court for a stay of litigation pending appeal. On September 28, 2021, the district court denied the stay motion. Pet. App. 2a–11a. The court recognized PeopleConnect had "advanced a colorable claim of possible irreparable harm premised on the theory that defending against class claims that may have to [be] arbitrated on an individual basis poses an irreparable harm." Pet. App. 8a. The court nevertheless found "a stay is unwarranted on this record." Pet. App. 10a.

On October 4, 2021, PeopleConnect moved the Ninth Circuit to stay the district court action. PeopleConnect sought a stay under the Ninth Circuit's legal standard in

*Britton v. Co-op Banking Group*, 916 F.2d 1405 (9th Cir. 1990). However, PeopleConnect’s stay motion expressly noted the circuit conflict on the legal standard for a stay.<sup>7</sup> It urged the Court to revisit *Britton* and join the view of the majority of courts of appeals that stays of district court proceedings are mandatory pending appeals of denials of motions to compel arbitration.<sup>8</sup>

On October 20, 2021, the Ninth Circuit denied PeopleConnect’s motion for stay pending appeal. Pet. App. 1a. The court also denied PeopleConnect’s request for an administrative stay to permit en banc reconsideration of *Britton*. *Id.*

### **REASONS FOR GRANTING THE WRIT**

This Court should grant certiorari to resolve the well-recognized circuit split over whether a district court is ousted of jurisdiction pending appeal of the denial of a motion to compel arbitration.

#### **I. THE CIRCUITS ARE SPLIT ON WHETHER DISTRICT COURT PROCEEDINGS MUST BE STAYED PENDING APPEAL OF A DENIAL OF A MOTION TO COMPEL ARBITRATION.**

There is an entrenched circuit split over whether district courts are ousted of jurisdiction pending appeal of the denial of a motion to compel arbitration. In the Second, Fifth, and Ninth Circuits, when an appeal is

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<sup>7</sup> Mot. for Stay at 5, 7 n.2, *Knapke v. PeopleConnect, Inc.*, No. 21-35690 (9th Cir. Oct. 4, 2021), ECF No. 8-1.

<sup>8</sup> *Id.* at 21–22.



filed, the district court maintains jurisdiction over the case, and a stay is granted only if a movant can satisfy the traditional test for a stay. By contrast, in the Third, Fourth, Seventh, Tenth, and Eleventh Circuits, the filing of a non-frivolous appeal ousts the district court of jurisdiction, and district court proceedings must automatically halt.

**A. Three circuits hold that district courts maintain jurisdiction while an appeal of the denial of motion to compel arbitration is pending.**

In the decision below, the **Ninth Circuit** followed its binding precedent in *Britton v. Co-op Banking Group*, 916 F.2d 1405 (9th Cir. 1990). In *Britton*, the Ninth Circuit concluded that a district court was not ousted of jurisdiction pending the appeal of a denial of a motion to compel arbitration. The court acknowledged “the general rule that the filing of a notice of appeal divests the district court of jurisdiction and transfers jurisdiction to the appellate court.” *Id.* at 1411. But the court also noted that “where an appeal is taken from a judgment which does not finally determine the entire action, the appeal does not prevent the district court from proceeding with matters not involved in the appeal.” *Id.* (quotation marks omitted). The court observed: “Absent a stay, an appeal seeking review of collateral orders does not deprive the trial court of jurisdiction over other proceedings in the case, and an appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal.” *Id.* at 1412. The court deemed the “issue of arbitrability”

to be collateral to the merits, and hence held that notwithstanding the appeal, “the district court was not divested of jurisdiction to proceed with the case on the merits.” *Id.* The court further observed that a contrary rule “would allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration.” *Id.*

The Ninth Circuit instead held that the traditional discretionary test for a stay applies. In the Ninth Circuit’s view, a court should “evaluate the merits of the movant’s claim, and if, for instance, the court finds that the motion presents a substantial question, to stay the proceedings pending an appeal from its refusal to compel arbitration.” *Id.* “This is a proper subject for the exercise of discretion by the trial court.” *Id.*

The **Second Circuit** took the same view as the Ninth Circuit in *Motorola Credit Corp. v. Uzan*, 388 F.3d 39 (2d Cir. 2004). In that case, the Second Circuit denied the defendant’s motion for a stay of district court proceedings pending appeal. The court recognized that “[o]ther circuits are divided on this question.” *Id.* at 54. In the Ninth Circuit, “either the district court or the court of appeals may—but is not required to—stay the proceedings upon determining that the appeal presents a substantial question.” *Id.* By contrast, in other circuits, “a district court may not proceed after the filing of a nonfrivolous appeal from an order denying arbitration.” *Id.* The Second Circuit “explicitly adopt[ed] the Ninth Circuit’s position that further district court proceedings in a case are not ‘involved in’ the appeal of an order refusing arbitration, and that a district court therefore has jurisdiction to proceed with a case absent a stay from this Court.” *Id.*

Finally, the **Fifth Circuit** adopted the same position as the Second and Ninth Circuits in *Weingarten Realty Investors v. Miller*, 661 F.3d 904 (5th Cir. 2011). The Fifth Circuit recognized that “[w]hether an appeal from a denial of a motion to compel arbitration divests the district court of jurisdiction to proceed to the merits is the subject of a circuit split.” *Id.* at 907. “The Second and Ninth Circuits have held that a stay is not automatic.” *Id.* By contrast, “[t]he Seventh Circuit, later joined by the Third, Fourth, Tenth, and Eleventh, has held that a notice of appeal automatically stays proceedings in the district court.” *Id.* at 908.

The court explained that the debate turned on “whether the merits of an arbitration claim are an aspect of a denial of an order to compel arbitration.” *Id.* Under the Ninth Circuit’s approach, “because answering the question of arbitrability does not determine the merits of the case, the merits are not an aspect of the case that is involved in the appeal on arbitrability.” *Id.* Under the Seventh Circuit’s approach, “because an appeal on arbitrability concerns whether the case will be heard in the district court at all, the merits in district court are an aspect of the case that is involved in the appeal.” *Id.* The court adopted the Ninth Circuit’s approach, holding that “[a]n appeal of a denial of a motion to compel arbitration does not involve the merits of the claims pending in the district court.” *Id.* at 909. In the Fifth Circuit’s view, “[a] determination on the arbitrability of a claim has an impact on what arbiter — judge or arbitrator — will decide the merits, but that determination does not itself decide the merits.” *Id.*

**B. Five circuits hold that district courts maintain jurisdiction while an appeal of the denial of motion to compel arbitration is pending.**

Five circuits have reached the opposite conclusion from the Second, Fifth, and Ninth Circuits. Those circuits have held that a non-frivolous appeal of a denial of a motion to compel arbitration divests the district court of jurisdiction, and district court proceedings must therefore halt.

In *Bradford-Scott Data Corp. v. Physician Computer Network, Inc.*, 128 F.3d 504 (7th Cir. 1997) (Easterbrook, J.), the **Seventh Circuit** concluded that a district court is automatically divested of jurisdiction over a case while a motion to compel arbitration is pending. The court applied the principle that “a federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Id.* at 505 (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982)). The Seventh Circuit acknowledged that “[t]he qualification ‘involved in the appeal’ is essential—it is why the district court may award costs and attorneys’ fees after the losing side has filed an appeal on the merits, why the court may conduct proceedings looking toward permanent injunctive relief while an appeal about the grant or denial of a preliminary injunction is pending.” *Id.* But the court explained that “[w]hether

the case should be litigated in the district court is not an issue collateral to the question presented by an appeal under § 16(a)(1)(A), however; it is the mirror image of the question presented on appeal.” *Id.* “Continuation of proceedings in the district court largely defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals.” *Id.*

The Seventh Circuit expressly rejected the Ninth Circuit’s reasoning in *Britton*. As the Seventh Circuit noted, the Ninth Circuit gave two reasons for its conclusion, “neither of which persuades.” *Id.* at 506. “The first is that arbitrability is distinct from the merits of the litigation, which the ninth circuit took to imply that an appeal concerning arbitrability does not affect proceedings to resolve the merits.” *Id.* According to the Seventh Circuit, “[t]he premise may be correct, but the conclusion does not follow.” *Id.* (citation omitted). The Seventh Circuit observed that “[w]hether the litigation may go forward in the district court is precisely what the court of appeals must decide.” *Id.* “The ninth circuit’s second reason is that an automatic stay would give an obstinate or crafty litigant too much ability to disrupt the district judge’s schedule by filing frivolous appeals.” *Id.* In the Seventh Circuit’s view, “[t]hat is a serious concern, but one met by the response that the appellee may ask the court of appeals to dismiss the appeal as frivolous or to affirm summarily.” *Id.*

The **Eleventh Circuit** adopted the Seventh Circuit’s approach in *Blinco v. Green Tree Servicing, LLC*, 366 F.3d 1249 (11th Cir. 2004). The Eleventh Circuit observed that “[w]hether a party is entitled to a stay of all proceedings in the district court until resolution of an

appeal from a denial of arbitration is an issue of first impression for this Court. The circuit courts that have considered the issue are split.” *Id.* at 1251. The court was “persuaded by the reasoning of the Seventh Circuit.” *Id.* In the Eleventh Circuit’s view, “[t]he only aspect of the case involved in an appeal from an order denying a motion to compel arbitration is whether the case should be litigated at all in the district court.” *Id.* “The issue of continued litigation in the district court” is not “collateral to” the appeal: it is “the mirror image of the question presented on appeal.” *Id.* (quotation marks omitted).

The Eleventh Circuit further noted that “the Federal Arbitration Act grants a party the right to file an interlocutory appeal from the denial of a motion to compel arbitration.” *Id.* “By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums. If the court of appeals reverses and orders the dispute arbitrated, then the costs of the litigation in the district court incurred during appellate review have been wasted and the parties must begin again in arbitration.” *Id.* “Thus, the underlying reasons for allowing immediate appeal of a denial of a motion to compel arbitration are inconsistent with continuation of proceedings in the district court, and a non-frivolous appeal warrants a stay of those proceedings.” *Id.* at 1252. The court was “unpersuaded by the two reasons articulated by the Ninth Circuit in refusing to stay proceedings in the

district court pending appeal,” instead endorsing the Seventh Circuit’s reasoning in rejecting the Ninth Circuit’s justifications. *Id.* The court noted that its rule is subject to an exception for frivolous appeals. *Id.*

The **Tenth Circuit** addressed the same issue in *McCauley v. Halliburton Energy Services, Inc.*, 413 F.3d 1158 (10th Cir. 2005). The court recognized that “[w]hether an interlocutory appeal from the denial of a motion to compel arbitration divests a district court of jurisdiction to proceed on the merits of the underlying claim while the appeal is pending is a question of first impression in this circuit.” *Id.* at 1160. Moreover, the “circuits that have addressed” this issue “are split.” *Id.* The court was “persuaded by the reasoning” of the circuits holding “that upon the filing of a non-frivolous § 16(a) appeal, the district court is divested of jurisdiction until the appeal is resolved on the merits.” *Id.* The court reasoned that “the failure to grant a stay ... results in a denial or impairment of the appellant’s ability to obtain its legal entitlement to avoidance of litigation,” in this case derived from “the contractual entitlement to arbitration.” *Id.* at 1162. The court “recognize[d] the Ninth Circuit’s legitimate concerns regarding potential exploitation of the divestiture rule through dilatory appeals,” but stated that those concerns could be addressed via an exception for frivolous appeals. *Id.*

In *Ehleiter v. Grapetree Shores, Inc.*, 482 F.3d 207 (3d Cir. 2007), the **Third Circuit** reached the same conclusion. Initially, the court issued an unpublished order staying district court proceedings pending appeal of the denial of a motion to compel arbitration. *Id.* at 215

n.6. In its subsequent published opinion, the court noted that “[t]here is a circuit split on the question of whether the filing of an interlocutory appeal pursuant to Section 16(a) of the FAA automatically deprives the trial court of jurisdiction to proceed until such time as the appeal is fully litigated or determined to be frivolous or forfeited.” *Id.* The court stated that in its stay order, it “expressed [its] agreement with the majority rule of automatic divestiture where the Section 16(a) appeal is neither frivolous nor forfeited.” *Id.*

Finally, in *Levin v. Alms & Associates, Inc.*, 634 F.3d 260 (4th Cir. 2011), the **Fourth Circuit** “join[ed] the position adopted by the majority of the circuits.” *Id.* at 263. As the court explained, “[t]he core subject of an arbitrability appeal is the challenged continuation of proceedings before the district court on the underlying claims.” *Id.* at 264. “Therefore, because the district court lacks jurisdiction over those aspects of the case involved in the appeal, it must necessarily lack jurisdiction over the continuation of any proceedings relating to the claims at issue.” *Id.* (quotation marks omitted). The court explained that this principle applied with full force in the context of a request to stay discovery: “Discovery is a vital part of the litigation process and permitting discovery constitutes permitting the continuation of the litigation, over which the district court lacks jurisdiction.” *Id.* at 264. “Furthermore, allowing discovery to proceed would cut against the efficiency and cost-saving purposes of arbitration.” *Id.* “Also, allowing discovery to proceed could alter the nature of the dispute significantly by requiring parties to disclose sensitive information that could have a



bearing on the resolution of the matter. If we later hold that the claims were indeed subject to mandatory arbitration, the parties will not be able to unring any bell rung by discovery, and they will be forced to endure the consequences of litigation discovery in the arbitration process.” *Id.* Like other circuits taking the majority position, the Fourth Circuit stated that its approach would be subject to a “frivolousness exception to the divestiture of jurisdiction.” *Id.* at 265.

There is therefore a 5-3 circuit split on whether a non-frivolous appeal of the denial of a motion to compel arbitration divests a district court of jurisdiction.

## **II. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE TO RESOLVE THE SPLIT.**

This case warrants this Court’s review. There is a clear circuit split on the question presented. The circuit split has existed since 1997, when the Seventh Circuit rejected the Ninth Circuit’s approach. Given that there are five circuits on one side and three on the other, there is no possibility that the split will go away without this Court’s intervention.

Additional percolation would serve no purpose. Eight courts of appeals have issued published opinions weighing in.<sup>9</sup> The arguments on both sides of the split

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<sup>9</sup> The D.C. Circuit has also issued an unpublished opinion following the Seventh Circuit’s approach. *Bombardier Corp. v. Nat’l R.R. Passenger Corp.*, No. 02-7125, 2002 WL 31818924, at \*1 (D.C. Cir. Dec. 12, 2002) (“Because the appeal is non-frivolous and because a non-frivolous appeal from the district court’s order divests the

have been fully aired. Indeed, 16 years ago, the Tenth Circuit observed that “the courts on each side of the divide have provided legal justifications as well as supporting prudential rationales related to the competing interests and concerns about potential abuse of litigation and appeals.” *McCauley*, 413 F.3d at 1160. “It is evident from this case law that the opposing circuit positions have each presented a reasoned response to the other’s prudential rationales.” *Id.* Since *McCauley*, additional circuits have issued published opinions on both sides of the circuit split. Rarely will the Court see a split as well-ventilated as this.

The question presented is important. This issue arises in literally every case in which a litigant appeals the denial of a motion to compel arbitration. In every single such case, the district court must decide whether

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district court of jurisdiction over those aspects of the case on appeal, this court has exclusive jurisdiction to resolve the threshold issue whether the dispute is arbitrable, and the district court may not proceed until the appeal is resolved.”); *see also* *Bombardier Corp. v. Nat’l R.R. Passenger Corp.*, 333 F.3d 250, 252 (D.C. Cir. 2003) (“Amtrak’s appeal of the motion to dismiss was facially non-frivolous and thus the district court was divested of jurisdiction over the underlying action until we could determine the threshold issue of whether the dispute between the parties is arbitrable under the FAA.”). District courts in the First, Sixth, Eighth, and D.C. Circuits have also followed the majority rule. *See Combined Energies v. CCI, Inc.*, 495 F. Supp. 2d 142, 143 (D. Me. 2007); *Christmas Lumber Co. v. NWH Roof & Floor Truss Sys., LLC*, No. 3:19-CV-55, 2020 WL 3052222, at \*2 (E.D. Tenn. June 8, 2020); *Engen v. Grocery Delivery E-Services USA Inc.*, No. 19-cv-2433, 2020 WL 3072316, at \*1–2 (D. Minn. June 10, 2020); *Kelleher v. Dream Cather, LLC*, No. 1:16-cv-02092, 2017 WL 7279397, at \*2 (D.D.C. July 24, 2017).

the parties should continue litigating or whether they should stop. It is remarkable that, over 30 years after *Britton*, there is still nationwide uncertainty over this basic question of federal arbitration law. This issue cries out for resolution by this Court.

Notably, this Court has previously granted certiorari to resolve a circuit split on the legal standard for stays pending appeal. *Nken v. Holder*, 556 U.S. 418 (2009). Like this case, *Nken* presented a dispute over whether the traditional discretionary test for stays applied, or instead a different legal standard applied. This circuit split is no less worthy of resolution by this Court.

This case is the perfect vehicle to decide the question. The district court and Ninth Circuit denied PeopleConnect's stay application. PeopleConnect sought a stay pending a petition for rehearing en banc to reconsider *Britton*, but the Ninth Circuit denied that too. Discovery is therefore proceeding in the district court. In the Third, Fourth, Seventh, Tenth, and Eleventh Circuits, the district court would have been divested of jurisdiction, and discovery would not be proceeding. This case is therefore an ideal vehicle to determine which side of the split is right.

Moreover, the facts of this case well illustrate why staying district court proceedings pending appeal is such a crucial protection for proponents of arbitration. If the parties conducted an individualized arbitration, as contemplated by the arbitration agreement, the scope of discovery would be narrow. Any information exchanges require the arbitrator's permission, the arbitrator may only allow "specific documents and other information [including identities of witnesses] to be shared between

the consumer and business,” and exchanges must comport with “a fast and economical process.”<sup>10</sup>

If the case proceeds in federal district court, discovery will be anything but “fast and economical.” Respondent’s suit is a putative class action. Hence, rather than engage in the low-cost individualized arbitration procedures that it bargained for, PeopleConnect will be compelled to participate in full-blown class certification discovery. This Court has repeatedly recognized that class proceedings are dramatically more complex and burdensome than individualized arbitration. *See, e.g., Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 141 (2019) (“[S]hifting from individual to class arbitration is a fundamental change that sacrifices the principal advantage of arbitration and greatly increases risks to defendants” (quotation marks and citations omitted)); *AT&T Mobility LLC*, 563 U.S. at 348 (class procedures “makes the process slower, more costly, and more likely to generate procedural morass than final judgment”). Without a stay, PeopleConnect faces the prospect of dealing with the very costly morass it bargained to avoid, all while waiting for the Ninth Circuit to rule on whether it has a right to arbitrate.

This case therefore provides an ideal vehicle to resolve whether the Ninth Circuit’s minority rule on stays pending appeal is correct.

### III. THE NINTH CIRCUIT’S DECISION IS WRONG.

In the decision below, the Ninth Circuit was bound

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<sup>10</sup> Exhibit 1 to Defendant’s Motion to Dismiss, *supra* n.5, § 13(B)(i).

by *Britton* to apply the traditional test for a stay. But *Britton* is wrongly decided. To understand why, the Court need look no further than the published circuit opinions that have expressly repudiated every aspect of *Britton*'s reasoning.

In *Britton*, the Ninth Circuit relied on the principle that “[a]bsent a stay, an appeal seeking review of collateral orders does not deprive the trial court of jurisdiction over other proceedings in the case, and an appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal.” 916 F.2d at 1412. The court deemed the “issue of arbitrability” to be collateral to the merits, and hence held that notwithstanding the appeal, “the district court was not divested of jurisdiction to proceed with the case on the merits.” *Id.*

That reasoning is faulty. The appeal is not collateral to the merits. It has *everything* to do with the merits. The Seventh Circuit put it well: “Whether the case should be litigated in the district court is not an issue collateral to the question presented by an appeal under § 16(a)(1)(A), however; it is the mirror image of the question presented on appeal. Continuation of proceedings in the district court largely defeats the point of the appeal and creates a risk of inconsistent handling of the case by two tribunals.” *Bradford-Scott*, 128 F.3d at 505.

The *Britton* court further observed that a contrary rule “would allow a defendant to stall a trial simply by bringing a frivolous motion to compel arbitration.” 916 F.2d at 1412. Yet as the Seventh Circuit observed, “the

appellee may ask the court of appeals to dismiss the appeal as frivolous or to affirm summarily.” *Bradford-Scott*, 128 F.3d at 505. *Bradford-Scott* was decided 24 years ago, and there is no evidence of a flood of frivolous arbitration appeals in the Seventh Circuit. Indeed, other courts of appeals have more explicitly carved out exceptions for frivolous appeals, and there is no evidence those courts have endured any difficulty with frivolous appeals, either. District courts should not be permitted to exercise jurisdiction during the pendency of an appeal in *every* case merely because some fraction of those appeals will prove frivolous.

The Ninth Circuit’s rule would also defeat the purpose of the Federal Arbitration Act’s special rules governing appeals. Under the Federal Arbitration Act, when the district court denies a request for arbitration, the party seeking arbitration may immediately appeal rather than await final judgment. *See* 9 U.S.C. § 16(a). The policy rationale for this rule is straightforward: “By providing a party who seeks arbitration with swift access to appellate review, Congress acknowledged that one of the principal benefits of arbitration, avoiding the high costs and time involved in judicial dispute resolution, is lost if the case proceeds in both judicial and arbitral forums. If the court of appeals reverses and orders the dispute arbitrated, then the costs of the litigation in the district court incurred during appellate review have been wasted and the parties must begin again in arbitration.” *Blinco*, 366 F.3d at 1251.

Yet if litigation proceeds in court while the appeal is pending, the benefit of an interlocutory appeal may be lost. It may take years for an appeal to be fully

resolved—sufficient time for the parties to complete discovery and conduct a full trial on the merits. If the order denying arbitration is then reversed, then the parties will face the precise outcome that the FAA’s authorization of interlocutory appeals is designed to avoid: discovery and trial in federal district court, followed by arbitration of the same case. That outcome can be avoided merely by applying the standard rule that an appeal divests a district court of jurisdiction.

**IV. IF CERTIORARI IS GRANTED, THE COURT SHOULD ENSURE THAT THIS CASE IS HEARD EXPEDITIOUSLY.**

This case concerns the legal standard for a stay pending appeal. Hence, this case—and any other case raising the same question—will become moot once the court of appeals issues its mandate. If the Court grants certiorari, it should ensure that the case is decided before it becomes moot.

On the current briefing schedule, PeopleConnect’s Ninth Circuit reply brief would be due on January 10, 2022. Based on trends within the Ninth Circuit, PeopleConnect believes that this case is unlikely to be fully resolved in the Ninth Circuit by the end of the current Supreme Court Term (*i.e.*, June 2022), but the case is likely to be fully resolved prior to the end of the next Term (*i.e.*, June 2023).

To avoid mootness, the Court should ensure that the case is decided this Term, and ideally by the spring. To ensure that this case is heard expeditiously, the Court has two options.

First, PeopleConnect has also filed an application for stay pending disposition of this petition for certiorari. PeopleConnect's preferred option would be for the Court to treat that application as a petition for certiorari, grant the stay, grant certiorari, and issue a briefing schedule. If the Court does so, PeopleConnect would dismiss this petition.

Alternatively, the Court should grant the stay application and then expedite consideration of this petition for certiorari. PeopleConnect has filed a motion to expedite consideration of this petition for certiorari that would allow the petition to be considered at the Court's December 10, 2021 Conference.

### CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

DEBBIE L. BERMAN  
WADE A. THOMSON  
CLIFFORD W. BERLOW  
GABRIEL K. GILLET  
JENNER & BLOCK LLP  
353 N Clark St.  
Chicago, IL 20654  
(312) 222-9350

IAN HEATH GERSHENGORN  
ADAM G. UNIKOWSKY  
*Counsel of Record*  
JENNER & BLOCK LLP  
1099 New York Ave., NW  
Suite 900  
Washington, DC 20001  
(202) 639-6000  
aunikowsky@jenner.com



## APPENDIX

**Appendix A**

## UNITED STATES COURT OF APPEALS

## FOR THE NINTH CIRCUIT

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BARBARA KNAPKE,

Plaintiff-Appellee

v.

PEOPLECONNECT, INC.,

Defendant-Appellant.

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No. 21-35690

D.C. No. 2:21-cv-00262-MJP

Western District  
of Washington,

ORDER

Filed: October 20, 2021

Before: McKEOWN and W. FLETCHER, Circuit Judges.

Appellant's motion for a stay of lower court proceedings pending appeal (Docket Entry No. 8) is denied.

Appellant's request for an administrative stay to permit en banc reconsideration of *Britton v. Co-op Banking Group*, 916 F.2d 1405 (9th Cir. 1990) is denied.

The briefing schedule established previously remains in effect.

**Appendix B**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BARBARA KNAPKE	Case No. C21-262 MPJ
Plaintiff,	ORDER DENYING
v.	MOTION TO STAY
PEOPLECONNECT INC.,	
Defendant.	

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This matter comes before the Court on Defendant's Motion to Stay. (Dkt. No. 28.) Having reviewed the Motion, Plaintiff's Opposition (Dkt. No. 34), the Reply (Dkt. No. 36), and all supporting materials, the Court DENIES the Motion.

**BACKGROUND**

The Court denied PeopleConnect Inc.'s (Classmates) motion to dismiss, finding, in part, that Plaintiff was not bound by Classmates terms of service that might require arbitration. (Dkt. No. 25.) The Court rejected Classmates' strained theory that Plaintiff's counsel's pre-suit investigation to confirm the accuracy of the allegations as required by Rule 11 bound his client to Classmates' terms of service. The Court found no evidence of actual or apparent authority that might bind Plaintiff to her counsel's agreement to Classmates'

terms of service under Ohio law. Classmates has now appealed that portion of the Court's Order and asks the Court to stay the proceedings until the Ninth Circuit resolves the appeal.

### ANALYSIS

Whether to grant a stay pending an appeal of an order denying a motion to compel arbitration rests within the sound discretion of the trial court. *See Nken v. Holder*, 556 U.S. 418, 433 (2009); *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990). The party seeking the stay bears the burden to justify the request. *See Nken*, 556 U.S. at 433. In weighing such a request, courts considers: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Leiva-Perez v. Eric H. Holder*, 640 F.3d 962, 964 (9th Cir. 2011) (quoting *Nken*, 556 U.S. at 426 (citation omitted)). “The first two factors . . . are the most critical.” *Nken*, 557 U.S. at 434. The Court evaluates these factors on a “continuum,” and the party seeking the stay “must show that irreparable harm is probable and either: (a) a strong likelihood of success on the merits and that the public interest does not weigh heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips sharply in the petitioner's favor.” *Leiva-Perez*, 640 F.3d at 970.

### A. Likelihood of Success

Classmates argues that the Court erred in its finding that Classmates failed to show that counsel acted with any actual or apparent authority to bind his client to the terms of service. The Court stands by its analysis and sees no likelihood of success on appeal.

In its Motion to Stay, Classmates insinuates that the Court did not consider its argument that Plaintiff gave counsel actual authority to act on her behalf. But the Court rejected that argument finding that there was no evidence that could sustain such a claim. (Dkt. No. 25 at 4 (“There is no evidence that Knapke gave her counsel any authority to bind her to Classmates’ terms of service.”).)

Additionally, Classmates newly argues that Plaintiff ratified her counsel’s use of Classmates’ website, which binds her to the arbitration provision in the terms of service. But this argument was not made in the motion to dismiss, and the Ninth Circuit generally does not consider arguments that a party fails to raise before the district court. *See In re Mortg. Electronic Registration System, Inc.*, 754 F.3d 772, 780 (9th Cir. 2014) (“Generally, arguments not raised in the district court will not be considered for the first time on appeal.”). The Court finds this novel argument likely to be rejected by the Ninth Circuit and therefore unlikely to succeed.

Lastly, Classmates argues that the Court improperly “relied” on a case that is pending in the Ninth Circuit—*Callahan v. PepopeConnect, Inc.*, No. 20-cv-09203, 2021 WL 1979161, at \*6–7 (N.D. Cal. May 18, 2021). But the Court merely cited to this nonbinding and unpublished

decision to highlight another district court's rejection of a similar argument (albeit under California law). (Dkt. No. 25 at 5 (noting that the outcome on the arbitration argument "finds support" in the outcome in *Callahan*). The Court did not rely on this case, which is itself not authority, to reach its decision. This argument evidences no likelihood of success on the merits.

### **B. Serious Legal Questions**

Classmates argues that even if the Court finds no likelihood of success, there are nonetheless serious legal questions that should be resolved by the Ninth Circuit before this case proceeds. Classmates frames the legal question presented on appeal as "whether under Washington (or Ohio) law an attorney has actual authority to bind his client to an arbitration agreement where doing so is within the scope of an authorized act." (Mot. at 6.) The Court does not find that this presents a serious legal question.

As Classmates argues, there are two ways to find a serious legal question. First, a serious legal question can exist where the matter presents a novel issue of first impression. *See Britton*, 916 F.2d at 1412. Second, a "split in legal authority" can serve to show a serious legal question. *See Wilson v. Huuuge, Inc.*, No. 3:18-CV-05276-RBL, 2019 WL 998319, at \*2 (W.D. Wash. Mar. 1, 2019). Classmates also argues that "[i]ssues relating to the formation of a contract containing an arbitration clause can present serious legal questions." (Mot. at 6 (quoting *Benson v. Double Down Interactive, LLC*, No. 2:18-CV-00525-RBL, 2019 WL 972482, at \*2 (W.D. Wash. Feb. 28, 2019)).)

The question Classmates frames on appeal does not present a novel issue of first impression. At its core, the question asks whether an attorney may have the authority as an agent to bind his client. That question can easily be resolved under Ohio's and Washington's well-established agency law. *See Master Consol. Corp. v. BancOhio Natl. Bank*, 61 Ohio St. 3d 570 (1991); *Larson v. Bear*, 38 Wn.2d 485, 489-90 (1951). Indeed, Classmates relied on a swath of Washington appellate caselaw to present its argument that an attorney can bind his client to an arbitration agreement. (*See* Mot. to Dismiss at 3-4.) Nor does the argument raise a unique question of contract formation through novel technology, as was at issue in *Wilson* and *Benson* on which Classmates principally relies. In *Wilson*, the novel issue was whether “assent to terms via a mobile app and the repetitive use of that app gives rise to actual or constructive notice.” *Wilson*, 2019 WL 998319, at \*3. And in *Benson*, the novel issue was “repetitive use of an app can give rise to actual or constructive notice.” *Benson*, 2019 WL 972482, at \*3. But no such novel issue is presented about contract formation given that there was no dispute presented that counsel accepted the terms of service. The only dispute is whether he bound his client, which can be determined using the guidance of well-established case law on the principal of agency. This does not show a novel issue that could present a serious legal question.

Classmates has also failed to identify a split of authority on this issue. Classmates tries to manufacture a conflict by suggesting that the Court's decision (and that in *Callahan*) cannot be squared with the outcome in

*Independent Living Resource Center San Francisco v. Uber Technologies, Inc.*, No. 18-cv-06503, 2019 WL 3430656 (N.D. Cal. July 30, 2019) and *Hui Ma v. Golden State Renaissance Ventures, LLC*, No. 21-cv-00856, 2021 WL 2190912, at \*4–5 (N.D. Cal. May 31, 2021). (See Mot. at 5-6.) But as the Court already explained, *Uber* presented a factually unique scenario (where the central factual predicate for the claims arose from the research of a paralegal who was bound by Uber’s terms of service) that proved unhelpful in resolving the argument Classmates made. And because *Uber* and *Hui Ma*, which Classmates only cited in its reply to the motion to dismiss, apply California law they simply do not guide the analysis here under Ohio or Washington law. The Court does not believe the cases. Classmates identify represent a “split” in authority that might raise a serious legal question.

The Court finds no basis on which to find that Classmates’ question on appeal presents a serious legal issue that might warrant a stay of the proceedings.

### **C. Probable Irreparable Harm**

In support of its mandatory showing of irreparable harm, Classmates argues that it will suffer an irreparable harm if it has to defend against a class action that the Ninth Circuit may later determine must be arbitrated on an individual basis.

In general, “[t]he impending cost of litigation is not considered an irreparable harm.” *Wilson*, 2019 WL 998319, at \*4. But a party who seeks to compel arbitration of claims could show a “significant hardship” if it might be forced to defend against claims the Ninth



Circuit later determines should be arbitrated. *Lowden v. T-Mobile USA, Inc.*, No. C05-1482P, 2006 WL 1896678, at \*2 (W.D. Wash. July 10, 2006).

Classmates has advanced a colorable claim of possible irreparable harm premised on the theory that defending against class claims that may have to be arbitrated on an individual basis poses an irreparable harm. While this evidence of harm remains attenuated and runs against the general principle that litigation costs are not evidence of irreparable harm, the Court considers it as evidence of irreparable harm in its analysis of the request for a stay.

#### **D. Balance of Harms**

The balance of harms does not point decisively towards either party.

Classmates argues that it faces serious harm because it might be forced to unnecessarily litigate class-wide claims in a public forum rather than in a private arbitration with limited discovery. (Mot. at 7-8.) In contrast, Plaintiff argues that Classmates may continue to use her likeness to advertise in violation of her rights under Ohio law. While Classmates has undercut this argument by apparently agreeing not to use her likeness, Plaintiff argues that there are no “assurances” this will always be the case. And the Court is not aware of any agreement from Classmates not to use the likeness of any Ohioans pending this litigation. Plaintiff also argues that evidence might be lost if the case is stayed, to which Classmates points out that there is a rigorous litigation hold in place to preserve evidence.

The relative harms in the presence or absence of a stay do not greatly favor one party or the other. On the one hand, the harms Classmates identify are mostly financial. In either forum, Classmates will incur the cost of defending against Plaintiff's claims. But the costs of defending against class claims would likely far exceed those in an individual arbitration with limited discovery. That said, the Court is not convinced that the public nature of this forum presents a harm to Classmates, which will be given every opportunity to publicly defend and explain the merit of its practices. On the other hand, the Court agrees with Plaintiff that a delay in obtaining an order or award enjoining Classmates from using her likeness presents an ongoing harm. Classmates' agreement not to use her likeness during the pendency of this case vitiates somewhat against this harm, but Classmates' agreement does not carry the same weight as a court order. And Classmates' agreement does not apparently reach the proposed class, whose harms the Court considers—just as it considers the potential that Classmates will have to defend against class claims. That said, the Court is not convinced that there will be any loss of evidence given the litigation hold. And Plaintiff has not identified any testimony from witnesses whose memory might fade during the pendency of a stay. Having considered the harms both parties identify, the Court finds this factor to be neutral.

#### **E. Stay in the Public Interest**

The parties both present reasonable arguments as to why a stay or not is in the public interest. Classmates argues that a stay serves the public because it will conserve judicial resources and ensure that valid

agreements to arbitrate claims are enforced. Plaintiff argues that Ohio has a strong public interest in making sure that its citizens' right to publicity is protected and that this interest would be undermined by a stay. The Court here finds that these competing public interests favor Plaintiff, given that her lawsuit seeks to vindicate both her individual right to publicity and the rights of similarly situated Ohioans. The right to publicity at issue in this case presents a more substantial public interest than concerns over judicial economy or the policy favoring arbitration (particularly where there is a substantial dispute over the applicability of the arbitration requirement).

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Considering the *Nken* factors, the Court finds no basis on which to grant the requested stay. While Classmates has identified possible irreparable harm, it has failed to show any likelihood of success on the merits or a serious legal question to be resolved on appeal. This is fatal to the motion. *Nken*, 557 U.S. at 434; *Leiva-Perez*, 640 F.3d at 970. And even if it had demonstrated a likelihood of success or serious legal question, Classmates has not shown that the public interest weighs heavily in favor a stay or that the balance of hardships tips sharply in its favor. *See Leiva-Perez*, 640 F.3d at 970. Considering the *Nken* factors on a "continuum," the Court finds that a stay is unwarranted on this record.

## CONCLUSION

Classmates fails to demonstrate the necessity of a stay of the proceedings pending its appeal of the Court's

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order on its motion to dismiss. The relevant factors disfavor Classmates' position and Classmates has not convinced the Court to stay this matter pending the appeal. The Court DENIES the Motion to Stay and ORDERS Classmates to file its answer within 14 days of entry of this Order, as previously required by the Order in Docket Entry 31.

The clerk is ordered to provide copies of this order to all counsel.

Dated: September 28, 2021

/s/

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Marsha J. Pechman  
United States Senior District Judge

**Appendix C**

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BARBARA KNAPKE	Case No. C21-262 MPJ
Plaintiff,	ORDER DENYING
v.	MOTION TO DISMISS
PEOPLECONNECT INC.,	
Defendant.	

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This matter comes before the Court on the Defendant's Motion to Dismiss. (Dkt. No. 13.) Having reviewed the Motion, Plaintiff Barbara Knapke's Opposition (Dkt. No. 18), the Reply (Dkt. No. 19), the notices of supplemental authority (Dkt. Nos. 23, 24), and all supporting materials, the Court DENIES the Motion.

**BACKGROUND**

PeopleConnect owns and operates Classmates.com, a website that offers visitors access to Classmates' digital records database that contains "information from school yearbooks, including names, photographs, schools attended, and other biographical information."

(Complaint ¶¶ 2-3.) (Note: the Court refers to Defendant as Classmates.) "Classmates provides free access to some of the personal information in its database to drive users to purchase its two paid products

– reprinted yearbooks that retail for up to \$99.95, and a monthly subscription to Classmates.com that retails for approximately \$3 per month—and to get page views from non-paying users, from which Classmates profits by selling ad space on its website.” (*Id.* ¶ 2.) Classmates allows internet visitors to search for their school from Classmates’ database for free, which may return a result corresponding to a school of which Classmates sells their yearbook services. (*Id.* ¶ 4-6.) The search results provide a free preview of the services and products with a photo and name of an individual to entice the user to purchase Classmates’ services and products. (*Id.* ¶¶ 6-8.)

Knapke alleges she “discovered that Classmates uses her name and photo in advertisements on the Classmates website to advertise and/or actually sell Defendant’s products and services.” (Compl. ¶ 20.) Knapke identified herself from the image and believes that others could reasonably do so, as well. (*Id.* ¶ 21.) She has not consented to the use. (*Id.* ¶ 23.) Knapke is not a customer of Classmates and has no relationship to Classmates. (*Id.* ¶ 24.) Knapke alleges that her image and identity have commercial value to Classmates to sell its online services. (*Id.* ¶ 25.) Yet Knapke has not been compensated by Classmates for the use of her identity. (*Id.* ¶ 26.) Knapke, a resident of Ohio, seeks to represent a class of similarly-situated Ohio residents who have appeared in an advertisement preview on Classmates. (*Id.* ¶¶ 15, 27.) She pursues a single claim under the Ohio Right of Publicity Law, Ohio Rev. Code Ann. § 2741.02 (West).

## ANALYSIS

Classmates presents seven arguments in favor of dismissal, as follows: (A) Knapke agreed to arbitrate her claim; (B) Knapke's claim is barred by the Communications Decency Act; (C) Knapke's claim is preempted by the Copyright Act; (D) Knapke has not alleged a viable claim under the Ohio Right of Publicity Law; (E) Knapke's claims fall within an exemption under the Ohio Right of Publicity law; (F) the First Amendment protects Classmates from Knapke's claims; and (G) the "dormant" Commerce Clause renders Knapke's claims subject to dismissal. The Court reviews these arguments, none of which convinces the Court dismissal is proper.

### A. Legal Standard

The Court may dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "A complaint may fail to show a right of relief either by lacking a cognizable legal theory or by lacking sufficient facts alleged under a cognizable legal theory." *Woods v. U.S. Bank N.A.*, 831 F.3d 1159, 1162 (9th Cir. 2016). In ruling on a Rule 12(b)(6) motion, the Court must accept all material allegations as true and construe the complaint in the light most favorable to the non-movant. *Wylar Summit P'Ship v. Turner Broad. Sys., Inc.*, 135 F.3d 658, 661 (9th Cir. 1998). The complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

## B. Arbitration

Classmates argues that while acting as Knapke's agent, Knapke's counsel assented to Classmates' terms of service which require arbitration of the present claims. This argument lacks merit.

Though neither party provides adequate briefing on what state's law should apply to resolve this argument, the Court finds Ohio law applies. The Court so concludes because Knapke resides in Ohio and Ohio law should apply to interpreting any attorney-client relationship that she entered into from her domicile. Classmates suggests that Washington law applies because that is the location of its headquarters. (Mot. at 2 n.2.) But Washington law only applies to interpreting the terms of service, not the question of whether Knapke's attorney was acting as her agent when he assented to the terms of service.

Under Ohio law "for a principal to be bound by the acts of his agent under the theory of apparent agency, evidence must affirmatively show: (1) [t]hat the principal held the agent out to the public as possessing sufficient authority to embrace the particular act in question, or knowingly permitted him to act as having such authority, and (2) that the person dealing with the agent knew of the facts and acting in good faith had reason to believe and did believe that the agent possessed the necessary authority." *Master Consol. Corp. v. BancOhio Natl. Bank*, 61 Ohio St. 3d 570, 576, 575 N.E.2d 817, 822 (1991) (citation and quotation omitted). "The apparent power of an agent is to be determined by the act of the principal and not by the acts of the agent; a principal is responsible for the acts of an



agent within his apparent authority only where the principal himself by his acts or conduct has clothed the agent with the appearance of the authority and not where the agent's own conduct has created the apparent authority." *Id.* at 576-77.

There is no evidence that Knapke gave her counsel any authority to bind her to Classmates' terms of service. Knapke alleges she has never used Classmates' services and there is no evidence she agreed to the terms of service. Nor is there any evidence that her counsel acted at her direction. Knapke's Opposition to the Motion states that Knapke did not discuss with counsel creating an account on Classmates. (Opp. at 24 (Dkt. No. 18 at 30).) And Classmates has failed to provide any evidence that Classmates viewed counsel's creation of an account to have been undertaken on Knapke's behalf. As Knapke points out, the terms of service themselves forbid the creation of accounts on the behalf of others. Moreover, as counsel notes, his use of the Classmates account was done to satisfy his obligations to the Court under Rule 11 to ensure an adequate investigation of the claim presented. In sum, Classmates has not carried its burden to show counsel bound his client when he agreed to the terms of service.

This outcome finds support from a similar case brought against Classmates that rejected a nearly identical argument under California law. *See Callahan v. PeopleConnect, Inc.*, 2021 WL 1979161, at \*6-\*7 (N.D. Cal. May 18, 2021). In *Callahan*, the court found that an attorney cannot act on implied authority to impair his client's "substantial rights," which includes waiving judicial review and agreeing to arbitration merely by

performing some pre-suit investigation. *See id.* at \*5. The court explained that “absent client consent or ratification, a lawyer cannot bind a client to an arbitration agreement by virtue of the attorney-client relationship alone.” *Id.* at \*6-\*7. The same is true here applying Ohio law given the lack of evidence that Knapke gave any authority to counsel to create an account for her or that Classmates knew counsel was acting on her behalf. *See Master*, 61 Ohio St. 3d at 576; (Opp. at 24 (Dkt. No. 18 at 30)).

Classmates misplaces its reliance on *Independent Living Resource Center San Francisco v. Uber Technologies, Inc.*, No. 18-cv-06503, 2019 WL 3430656 (N.D. Cal. July 30, 2019). In that case, the central factual predicate for the claims stemmed from a paralegal’s research on behalf of the client using defendant’s “app” that compelled arbitration of the claims. But here neither Knapke nor her counsel needed to create an account to understand the basis of her claim. Knapke’s claim stems instead from the fact she “discovered that Classmates uses her name and photo in advertisements on the Classmates website to advertise and/or actually sell Defendant’s products and services.” (Compl. ¶ 20.) This aligns with the outcome in Callahan where arbitration could not be compelled in part because counsel’s investigation did “not serve as the basis of Plaintiffs’ claims—i.e., counsel’s use of the Classmates.com website is not the factual predicate for Plaintiffs’ claims.” 2021 WL 1979161, at \*6. Nor is there any evidence backing Classmates’ speculation that counsel alone encountered Knapke’s image and that “Counsel created an account so his client would not have

to create one herself.” (Reply at 2.) The Complaint plainly contradicts this guesswork. (Compl. ¶¶ 1, 20.)

Lastly, the Court rejects Classmates’ request for discovery on this issue. In a footnote, Classmates suggests that it should be entitled to discovery to learn about Knapke’s knowledge and acquiescence to counsel’s use of the account and the identity of who took the screenshots included in the Complaint. (Mot. at 5 n.3.) That information has already been provided in the Opposition, rendering the requested discovery a nullity. (See Dkt. Nos. 18, 18-1.) The Court thus rejects Classmates’ argument that Knapke must arbitrate her claim.

### **C. Communications Decency Act**

Classmates unsuccessfully argues that it is entitled to immunity under the Communications Decency Act, 47 U.S.C. § 230(c)(1).

To be entitled to dismissal based on this affirmative defense, Classmates must show that the Complaint’s allegations demonstrate that Classmates is: (1) an interactive computer service provider; (2) publishing information “provided by another information content provider.” 47 U.S.C. § 230(c)(1). The CDA defines “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(c)(1). As to the first element, the Ninth Circuit interprets the term “interactive computer service provider” expansively. See *Dyroff v. Ultimate Software Grp., Inc.*, 934 F.3d 1093, 1097 (9th Cir. 2019),

*cert. denied*, 140 S. Ct. 2761, 206 L. Ed. 2d 936 (2020). And as to the second element, “what matters is peaker’ of content provided by another.” *Id.* at 1098 (quoting *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, (9th Cir. 2009)).

“The prototypical service qualifying for [CDA] immunity is an online messaging board (or bulletin board) on which Internet subscribers post comments and respond to comments posted by others.” *Kimzey v. Yelp! Inc.*, 836 F.3d 1263, 1266 (9th Cir. 2016) (internal quotations omitted). “Taking the relevant statutory definitions and case law in account, it becomes clear that, in general, Section 230(c)(1) ‘protects websites from liability [under state or local law] for material posted on the[ir] website[s] by someone else.’” *Dyroff*, 934 F.3d at 1097 (quoting *Doe v. Internet Brands, Inc.*, 824 F.3d 846, 850 (9th Cir. 2016)). When the interactive computer service provider creates the content itself it “is also a content provider” and not entitled to protection under the CDA. *See Fair bous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008). In other words, the CDA’s “grant of immunity applies only if the interactive computer service provider is not also an information content provider, which is defined as someone who is responsible, in whole or in part, for the creation or development of the offending content.” *Id.* (internal citations omitted).

Based on the Court’s review of the Complaint, Classmates is not entitled to protection under the CDA. The sole issue in this case is whether Classmates’ decision to create advertisements using Knapke’s identity violates Ohio law. (Compl. ¶¶ 1-10.) The

offending content is generated by Classmates and the advertisement is not merely some passive display of content created by another entity, even if it contains a picture from a school yearbook. In this context, Classmates is the content creator and not entitled to immunity under the CDA. *See Roomates.Com*, 521 F.3d at 1162.

Classmates misplaces reliance on *Callahan v. Ancestry.com, Inc.*, No. 20-CV-08437-LB, 2021 WL 783524, at \*5 (N.D. Cal. Mar. 1, 2021) to argue that posting yearbooks online is protected by the CDA. (Mot. at 6.) The case is factually distinguishable because the court focused on defendant's online display of yearbooks created by third parties. *See Callahan*, 2021 WL 783524, at \*5. Here, the focus is on Classmates' use of a yearbook photo in stand-alone advertisements it uses to lure in potential customers. That form of customized advertisement is not protected under the CDA. As the Ninth Circuit recently explained "[w]hat matters . . . is 'whether the cause of action inherently requires the court to treat the defendant as the 'publisher or speaker' of content provided by another.'" *Gonzalez v. Google LLC*, 2 F.4th 871, 891 (9th Cir. 2021) (quoting *Barnes*, 570 F.3d at 1102). That cannot be said of the present matter. As alleged, Classmates is the publisher of its own content, which is unprotected by the CDA.

The Court rejects application of the CDA as a basis to dismiss the Complaint.

#### **D. Copyright Act**

The Copyright Act provides that "the owner of copyright ... has the exclusive rights to do and to

authorize” others to display, perform, reproduce or distribute copies of the work and to prepare derivative works. 17 U.S.C. § 106. “Section 301 of the Act provides for exclusive jurisdiction over rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified in the Act.” *Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1152 (9th Cir. 2010). The Ninth Circuit employs a two-part test to measure preemption: (1) does the subject matter of the state law claim fall within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103; and (2) if so, are the rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106? *See id.* at 1153 (quoting *Laws v. Sony Music Entm’t, Inc.*, 448 F.3d 1134, 1137-38 (9th Cir. 2006)).

As set forth in Section 102, “[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device [and w]orks of authorship include . . . pictorial, graphic, and sculptural works.” 17 U.S.C. § 102. “Section 103 provides that the subject matter specified in § 102 also includes compilations and derivative works, ‘but the copyright in a compilation or derivative work extends only to the material contributed by the author of such works as distinguished from the preexisting material employed in the work.’” *Id.* at 1003 (quoting 17 U.S.C. § 103).

A “person’s name or likeness is not a work of authorship within the meaning of 17 U.S.C. § 102.” *Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1004 (9th

Cir. 2001). This is true even if the plaintiff's "names and likenesses are embodied in a copyrightable photograph." *Id.* Thus, "a publicity-right claim is not preempted when it targets non-consensual use of one's name or likeness on merchandise or in advertising." *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1010 (9th Cir. 2017). "But when a likeness has been captured in a copyrighted artistic visual work and the work itself is being distributed for personal use, a publicity-right claim interferes with the exclusive rights of the copyright holder, and is preempted by section 301 of the Copyright Act." *Id.*

Classmates has failed to satisfy the first step of the inquiry under Copyright Act preemption. The non-consensual use of Knapke's name and likeness for advertising causes the claim to fall outside of the Copyright Act's preemption. Knapke alleges that Classmates has misused her likeness for advertisements, which are not works or authorship under Section 102 of the Copyright Act. *See Downing*, 265 F.3d at 1004. Moreover, Knapke's Right to Publicity Law claim seeks to prevent the commercial exploitation of her identity for a commercial purpose through advertisements, which is not subject to the Copyright Act's preemption. *See Maloney*, 853 F.3d at 1010. The Court rejects this as a basis for dismissal of the Complaint.

#### **E. Ohio Right of Publicity Law**

Under Ohio's Right of Publicity Law, "a person shall not use any aspect of an individual's persona for a commercial purpose." Ohio Rev. Code Ann. § 2741.02 (West). "Persona" is defined as "an individual's name, voice, signature, photograph, image, likeness, or

distinctive appearance, if any of these aspects have commercial value.” Ohio Rev. Code Ann. § 2741.01(A) (West). “‘Commercial purpose’ means the use of or reference to an aspect of an individual's persona . . . [f]or advertising or soliciting the purchase of products ... services, or other commercial activities.” Ohio Rev. Code Ann. § 2741.01(B). The law grants a private right of action to “individual[s] whose right of publicity is at issue” absent consent. Ohio Rev. Code Ann. § 2741.06(A). “The right of publicity in the persona of an individual whose domicile or residence is in this state.” Ohio Rev. Code Ann. § 2741.03.

Knapke has stated a claim under the Right of Publicity Law. She has alleged that Classmates has used her persona—name and photograph—for a commercial purpose—selling Classmates’ products and services. The Complaint’s allegations more than satisfy these elements. (*See* Compl. ¶¶ 1, 6-10, 20-22, 36-37.)

Notwithstanding the adequacy of the Complaint, Classmates makes several arguments in favor of dismissal, none of which has merit. First, Classmates argues that Knapke has not alleged a “use” of her persona in violation of the Law because she has not alleged that anyone else has seen this same image. Classmates relies on common law claims that require some allegation that members of the public saw the offending image. (*See* Mot. at 11 (Dkt. No. 13 at 20) (citing *Jackson v. Playboy Enters., Inc.*, 574 F. Supp. 10, 13 (S.D. Ohio 1983); *Fox v. Nationwide Mut. Ins. Co.*, 117 N.E.3d 121, 145 (Ohio Ct. App. 2018)).) Classmates fails to explain why this element from common law false light claims should be imputed into the Right of Publicity



Law. While courts may look to common law claims to help understand the Right of Publicity Law, none has imputed a new element into the Law from common law tort. (*See* Reply at 6-7 (citing cases).) The Court finds no valid basis to write a new provision into the Right of Publicity Law. And accepting the allegations of the Complaint as true, Knapke has alleged a “use” of her image—she alleges that she discovered Classmates using her image to market its products and services on the internet, which is available to the public at large. (Compl. ¶¶ 6, 10, 20-26.) This satisfies her burden under the Law.

Second, Classmates argues Knapke fails to plead that her persona has “commercial value,” as required by the Right of Publicity Law. To satisfy this element, the plaintiff need only plead that there is some value in associating a good or service with her identity. *See Harvey v. Systems Effect, LLC*, 154 N.E. 3d. 293, 306 (Ohio App. 2020). “While plaintiffs need not be national celebrities to assert a right of publicity claim, they must at least ‘demonstrate that there is value in associating an item of commerce with [their] identity.’” *Roe v. Amazon.com*, 714 F. App'x 565, 568 (6th Cir. 2017) (unpublished) (citing *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 624 (6th Cir. 2000); *McFarland v. Miller*, 14 F.3d 912, 919-20 (3d Cir. 1994) (stating that the right of publicity is worthless without association)). “The mere incidental use of a person’s name or likeness is not actionable in an appropriation claim.” *Id.* (citing *Vinci v. Am. Can Co.*, 69 Ohio App.3d 727, 591 N.E.2d 793, 794 (1990) (per curiam)). Here, the use of Knapke’s persona is not incidental to the advertisement. Her

persona is used to make the advertisement, which shows its commercial value. This differs from the use of a plaintiff's photograph as a book cover in *Roe*, which was incidental to the publication and sale of a book. The Court finds Knapke has alleged a commercial value to her persona.

Third, Classmates argues that Knapke has not shown that the use of her persona was for anything other than an informational purpose, which it claims falls outside of the Law. This argument wholly ignores the allegations in the Complaint and asks the Court to consider a potential defense that relies on facts outside of the Complaint. The Court rejects this inappropriate attack to the Complaint

Fourth, Classmates argues that Knapke has not pleaded conduct that occurred in Ohio and that the Right of Publicity Law can only apply in Ohio—i.e., it has no extraterritorial effect. (Mot. at 10. (citing *Mitchell v. Abercrombie & Fitch*, No. C2-04-306, 2005 WL 1159412, at \*3 (S.D. Ohio May 17, 2005)).) According to Classmates, this means Knapke must allege that the violation occurred in Ohio by alleging someone in Ohio saw her identity in an advertisement. (*Id.*) The Court disagrees. First, there is no express element that someone in Ohio view the misappropriated likeness. Rather, it only requires that the plaintiff be domiciled in Ohio, and Knapke has alleged she is an Ohio resident. *See* Ohio Rev. Code Ann. § 2741.03; Compl. ¶ 15. As alleged, there is no “extraterritorial” application of the law. Second, the Complaint alleges that Knapke herself discovered Classmates is using her likeness. (Compl. ¶ 20.) While the Complaint does not say precisely where

this occurred, Knapke is a resident of Ohio and Classmates operates a website that is available to Ohioans generally. As such, the Court reasonably infers that the discovery occurred in Ohio. The Court rejects this argument.

#### **F. Exemptions to the Ohio Right of Publicity Law**

Classmates argues that its advertisement is exempted from the Ohio Right of Publicity Law because is a “literary work” or a matter of “public affairs.” (Mot. at 15-17.) The Court is only partially convinced.

##### **1. Literary Work**

First, Classmates argues that its advertisements are exempt because they advertise literary works. The Court agrees in part, though this does not merit dismissal of the claim.

The Ohio Right of Publicity Law does not apply to “[a] literary work, dramatic work, fictional work, historical work, audiovisual work, or musical work regardless of the media in which the work appears or is transmitted, other than an advertisement or commercial announcement” for such a work. Ohio Rev. Code § 2741.09(A)(1)(a), (d). Invoking the federal Copyright Act, Classmates argues that its yearbook products and services are literary works, which generally includes “works . . . expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied.” (*See* Mot. at 16 (citing 17 U.S.C. § 101).)

Applying that definition, the Court agrees with Classmates that advertising yearbooks for purchase is an advertisement of a literary work and exempt from the Law. Plaintiffs offer no reasoning why the advertisements of a yearbook would not fall within this exemption, relying instead on a case applying an Illinois law that is substantively different from the Ohio Right of Publicity Law. (Opp. at 9 (citing *Lukis v. Whitepages Inc.*, No. 19 C 4871, 2020 WL 6287369, at \*1 (N.D. Ill. Oct. 27, 2020)). The Court agrees with Classmates that the advertisement for the sale of reprinted yearbooks is exempt. But Classmates also advertises a subscription service to “keep in touch’ with other classmates.” (Compl. ¶ 10.) That form of advertisement does not advertise a literary work and is not exempt from the Law. As such, the Court finds that the claim cannot be based on the advertisement of the sale of yearbooks, but it can attack the advertisement of Classmates’ other subscription services. On that basis, the Court finds the claim falls outside of this exemption and may move forward.

## **2. Public Affairs**

Second, Classmates argues that its advertisements are exempt because they are matters of public affairs. This argument fails.

The Right of Publicity Law exempts: (1) “use of an aspect of an individual’s persona in connection with any news, public affairs, sports broadcast or account”; (2) “[m]aterial that has political or newsworthy value”; and (3) “use of an aspect of an individual’s persona in connection with the broadcast or reporting of an event or topic of general or public interest.” Ohio Rev. Code

§§ 2741.02(D)(1); 2741.09(A)(1)(b), (A)(3). Under these exemptions, the “use of a person’s identity primarily for the purpose of communicating information . . . is not generally actionable.” *See Harvey*, 154 N.E.3d at 308 (quotation and citation omitted)

This exemption does not apply to the allegations in the Complaint, which assert that the use of Knapke’s persona to sell Classmates’ subscription service is for a commercial purpose and not to communicate news. The Court finds no merit in Classmates argument on this point.

#### **G. First Amendment**

Classmates argues that “where a person’s name, image, or likeness is used in speech for ‘informative or cultural’ purposes, the First Amendment renders the use ‘immune’ from liability.” (Mot. at 18 (citing *New Kids on the Block v. News Am. Publ’g, Inc.*, 745 F. Supp. 1540, 1546 (C.D. Cal. 1990), *aff’d*, 971 F.2d 302 (9th Cir. 1992)).) And, quoting a Sixth Circuit decision, Classmates also argues that a yearbook “serves as a forum in which student editors present pictures, captions, and other written material.” (*Id.* (quoting *Kincaid v. Gibson*, 236 F.3d 342, 351 (6th Cir. 2001)).) The Court construes Classmates’ First Amendment challenge to be limited to the specific claim Knapke makes, and not to the Right of Publicity Law generally. Had Classmates sought that broader relief it would have had and has failed to provide notice to the Ohio Attorney General under Rule 5.1.

The first question is whether the advertisement of Classmates’ subscription services is core First

Amendment speech or commercial speech. Commercial speech is “defined as speech that does no more than propose a commercial transaction.” *United States v. United Foods, Inc.*, 533 U.S. 405, 409 (2001). The Supreme Court has noted that “advertising which ‘links a product to a current public debate’ is not thereby entitled to the constitutional protection afforded noncommercial speech.” *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67–68 (1983) (holding that “information pamphlets are properly characterized as commercial speech.”). “Where the facts present a close question, ‘strong support’ that the speech should be characterized as commercial speech is found where the speech is an advertisement, the speech refers to a particular product, and the speaker has an economic motivation.” *Hunt v. City of Los Angeles*, 638 F.3d 703, 715 (9th Cir. 2011) (citing *Bolger*, 463 U.S. at 66–67). But “[c]ommercial speech does not retain its commercial character ‘when it is inextricably intertwined with otherwise fully protected speech.’” *Id.* (quoting *Riley v. Nat’l Fed. of the Blind of N. Car., Inc.*, 487 U.S. 781, 796 (1988)).

Classmates’ advertisement at issue is commercial speech. The use of Knapke’s image and name is alleged to be done for the purpose of enticing viewers into buying or subscribing to Classmates’ products and services. The challenged conduct is not the offer of access to yearbooks or even buying reprinted copies. In fact, Knapke expressly does not challenge the sale of her information in the yearbooks. (Compl. ¶ 14.) Rather, she seeks to prevent the commercial use of her images to sell access to yearbooks and other subscription services to

connect old classmates. That is commercial speech. And there is nothing showing that the Classmates-created advertisement using a yearbook photo is intertwined with otherwise fully protected speech.

The second question is whether the Ohio Right of Public Law violates the First Amendment's protections on commercial speech. "Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest." *Zauderer v. Off. of Disciplinary Couns. of Supreme Ct. of Ohio*, 471 U.S. 626, 638 (1985). "The protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation." *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563 (1980). The Court engages in a multi-step analysis. "First, we determine whether the expression is constitutionally protected." *Bolger*, 463 U.S. at 68. "For commercial speech to receive such protection, 'it at least must concern lawful activity and not be misleading.'" *Id.* (quoting *Central Hudson*, 447 U.S. at 566). In the context of the claim presented here, at least one court has concluded, "the informational function of advertising is impaired when one wrongfully appropriates another's image for commercial purposes." *Bosley v. Wildwett.com*, 310 F. Supp. 2d 914, 926 (N.D. Ohio 2004). "Second, we ask whether the governmental interest is substantial [and i]f so, we must then determine whether the regulation directly advances the government

interest asserted, and whether it is not more extensive than necessary to serve that interest.” *Id.* at 68-69.

Here, Knapke has the better argument that the Ohio Right of Publicity Law comports with the First Amendment. It is questionable that the commercial speech at issue here is entitled to any protection, given that it misappropriates Knapke’s persona and potentially misleads the public. *See Zauderer*, 471 U.S. at 638. But even if the advertisement is entitled to protection as commercial speech, the Right of Publicity Law directly and appropriately advances Ohio’s substantial interest in enabling its citizens to protect the non-consensual commercial exploitation of their likeness without overbroadly prohibiting commercial speech. The court in *Bosley* considered this same issue in the context of the Ohio Right of Publicity Law and explained:

Laws governing the right to publicity have a substantial interest in regulating commercial speech. Individuals have a property right in their own identity. Allowing individuals the exclusive right to capitalize on their persona, like copyright law, encourages them to invest in developing their skills and talents. The right to publicity prevents others from depleting the economic value of one's persona without internalizing the costs. Furthermore, the right to publicity helps prevent deceptive commercial uses. In turn, remedies under the law advance that governmental interest without being more extensive than necessary.



*Bosley*, 310 F. Supp. 2d at 929. The Court adopts this reasoning and finds that the Right of Publicity Law comports with First Amendment and Knapke’s claim does not infringe upon it.

### **H. Dormant Commerce Clause**

Classmates argues that Knapke’s claim violates the “dormant” Commerce Clause. This argument falls short.

Implicit in the Commerce Clause (U.S. Const. art. I, sec. 8, cl. 3) is the negative or “dormant” Commerce Clause principle that the states impermissibly intrude on this federal power when they enact laws that unduly burden interstate commerce. “Although the Commerce Clause is by its text an affirmative grant of power to Congress to regulate interstate and foreign commerce, the Clause has long been recognized as a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce.” *South-Central Timber Dev., Inc. v. Wunnicke*, 467 U.S. 82, 87 (1984). But the Supreme Court has recognized that “under our constitutional scheme the States retain broad power to legislate protection for their citizens in matters of local concern such as public health” and has held that “not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States.” *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976).

“Modern dormant Commerce Clause jurisprudence primarily ‘is driven by concern about economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.’” *Dep’t of Revenue v. Davis*, 553 U.S.

328, 337–38 (2008). “Given the purposes of the dormant Commerce Clause, it is not surprising that a state regulation does not become vulnerable to invalidation under the dormant Commerce Clause merely because it affects interstate commerce.” *Nat’l Ass’n of Optometrists & Opticians v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012). “A critical requirement for proving a violation of the dormant Commerce Clause is that there must be a substantial burden on interstate commerce.” *Id.* “Most regulations that run afoul of the dormant Commerce Clause do so because of discrimination, but in a small number of dormant Commerce Clause cases courts also have invalidated statutes that imposed other significant burdens on interstate commerce.” *Id.*

Though difficult to apply, courts still employ a balancing test enunciated by the Supreme Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). “Where [a state] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Pike*, 397 U.S. at 142. “If a legitimate local purpose is found, then the question becomes one of degree . . . . [a]nd the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.” *Id.* “If a regulation merely has an effect on interstate commerce, but does not impose a significant burden on interstate commerce, it follows that there cannot be a burden on interstate commerce that is ‘clearly excessive in relation

to the putative local benefits' under Pike." *Harris*, 682 F.3d at 1155.

Classmates fails to offer any convincing rationale why the burden imposed on its interstate business is clearly excessive in light of Ohio's desire to prevent non-consensual commercial use of Ohioans' personas. The burden on Classmates itself is incidental to the Right of Publicity Law's attempt to protect Ohioan's property interest in their own persona. This protective measure serves the core, individual rights of Ohioans and Classmates provides no evidence the law was designed as an economic barrier to favor Ohio economic interests. Nor has Classmates shown that there is some less burdensome approach that could satisfy Ohio's interests as to publicity rights. And it is worth noting that Classmates has availed itself of the benefits of doing business in Ohio by acquiring Ohio yearbooks expressly for the purpose of marketing access to them and related services to—by and large—Ohioans. And given the nature of the offending advertisement at issue—which Classmates created—it would appear that Classmates has the ability to simply alter the way in which it advertises its services to avoid the nonconsensual use of Ohioans' personas. There is no evidence of a significant burden and the Court rejects this argument.

### CONCLUSION

Classmates' raises a substantial number of arguments in its efforts to obtain dismissal of Knapke's complaint. These arguments all fall short of the mark. Knapke has adequately pleaded her claim that Classmates' use of her persona to advertise its

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subscription services violates the Ohio Right of Publicity Law. As such, the Court DENIES the Motion.

The clerk is ordered to provide copies of this order to all counsel.

Dated August 10, 2021.

/s/

Marsha J. Pechman  
United States Senior District Judge