No. _____

IN THE
Supreme Court of the United States

PEOPLECONNECT, INC.,
Applicant,
v.

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

APPLICATION FOR STAY PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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RULE 29.6 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.

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TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT:

INTRODUCTION

Pursuant to 28 U.S.C. § 1651 and Supreme Court Rule 23, Applicant PeopleConnect, Inc. respectfully seeks an order staying proceedings in *Knapke v. PeopleConnect, Inc.*, No. 21-cv-00262 (W.D. Wash.), pending disposition of PeopleConnect's petition for certiorari.

This stay application arises from a putative class action filed by respondent Barbara Knapke against PeopleConnect. 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. The district court and Ninth Circuit both denied a stay.

In PeopleConnect's petition for certiorari, PeopleConnect is seeking review of the Ninth Circuit's order denying PeopleConnect's requested stay. In this application, PeopleConnect seeks a stay of district court proceedings pending disposition of that petition for certiorari. The Court should grant the stay application because the Court is likely to grant certiorari and reverse the Ninth Circuit, and a stay is necessary to avoid irreparable harm.

The Court is likely to grant certiorari because there is a longstanding circuit split on whether district courts are ousted of jurisdiction pending a non-frivolous appeal of the denial of a motion to compel arbitration. In the Second, Fifth, and Ninth Circuits, district courts are not ousted of jurisdiction. In those circuits, the movant must establish its entitlement to a stay under the traditional discretionary test. In the decision below, the Ninth Circuit applied that legal standard and concluded that PeopleConnect was not entitled to a stay.

By contrast, in the Third, Fourth, Seventh, Tenth, and Eleventh Circuits, a stay of district court proceedings is automatic. Once a non-frivolous appeal is filed, the district court is ousted of jurisdiction, and district court proceedings must halt.

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 case is an ideal vehicle to resolve the circuit split because the Ninth Circuit's legal standard was outcome-determinative. Had this case arisen in the Third, Fourth, Seventh, Tenth, and Eleventh Circuits, PeopleConnect's appeal would have automatically halted proceedings in the district court. But because this case arose in the

Ninth Circuit, PeopleConnect was subjected to a less favorable legal standard that resulted in its stay motion being denied.

If the Court grants certiorari, it is likely to reverse the Ninth Circuit. The majority rule is correct. 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.

Finally, PeopleConnect would encounter irreparable harm if its stay application is denied. The purpose of arbitration is to avoid burdensome discovery and court procedures. PeopleConnect's requested stay seeks to avoid those procedures pending a decision on whether to compel arbitration. If district court proceedings continue while PeopleConnect's petition for certiorari is pending, PeopleConnect will encounter the very burdensome discovery procedures the stay is designed to avoid. That harm cannot be

undone even if PeopleConnect prevails in this Court. The Court has previously granted stays in closely similar procedural postures, and it should adhere to its prior practice.

Because this case concerns the legal standard for stays pending appeal, it will become moot when the court of appeals issues its mandate. Hence, if the Court grants this stay application, PeopleConnect respectfully requests that the Court ensure the case is heard expeditiously.

In particular, PeopleConnect proposes that the Court construe this stay application as a petition for certiorari, grant the stay application, grant certiorari, and issue an expedited briefing on the schedule. The Court took that path in a previous case that addressed the legal standard for stays pending appeal. In *Nken v. Holder*, 556 U.S. 418 (2009), the applicant filed a stay application, seeking review of a circuit split on the appropriate legal standard for stays pending appeal in immigration cases. Like this case, *Nken* (and any other case raising the same issue) would become moot once the court of appeals ruled. The Court granted the stay application, treated the stay application as a petition for certiorari, granted certiorari, and set an expedited briefing schedule. If the Court proceeds in that fashion, PeopleConnect would dismiss its separately-filed petition for certiorari. Alternatively, if the Court declines to treat this stay application as a petition for certiorari, the Court should grant PeopleConnect's motion to expedite consideration of PeopleConnect's separately-filed petition for certiorari.

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 by presenting excerpts from her school yearbook on Classmates.com that include her "name and photo," PeopleConnect improperly uses "her identity to advertise" its services in violation of the Ohio Right of Publicity Statute. Ex. D, ¶¶6, 14, 20, 33–41.

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 respondent on the website. Ex. F, ¶¶12–13; Ex. D, ¶¶6–8. 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." *See* Ex. F, ¶7. 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." *See* Ex. E at 2–3. The Terms of Service grant all users a right to opt out of the contractual arbitration agreement within 30 days of registration. *See* Ex. G, §13(D).

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. *See* Ex. F, ¶¶12–14.

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

The district court, however, declined to compel arbitration. Ex. C. 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. *Id.* at 4–5.

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. Ex. B. 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." *Id.* at 6. The court nevertheless found "a stay is unwarranted on this record." *Id.* at 8.

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. Mot. for Stay at 5, 7 n.2, *Knapke v. PeopleConnect, Inc.*, No. 21-35690 (9th Cir.

Oct. 4, 2021), ECF No. 8-1. 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. *Id.* at 21–22.

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

ARGUMENT

This case presents the question whether PeopleConnect is entitled to a stay as a matter of right of the district court's proceedings pending appeal of the denial of PeopleConnect's motion to compel arbitration. PeopleConnect's position on the merits is that it is entitled to a stay as a matter of right, and hence need not establish the requirements of the traditional discretionary test for a stay.

Nevertheless, PeopleConnect recognizes that the Court may be reluctant to resolve the merits of this case in connection with the antecedent inquiry of whether PeopleConnect is entitled to a stay pending review. PeopleConnect will therefore assume, for purposes of this application, that the more stringent discretionary test for a stay applies. If PeopleConnect satisfies that standard, then it would, *a fortiori*, be entitled to a stay under the position it intends to advance in this Court that it is entitled to a stay as a matter of right.

Under the traditional discretionary standard, a stay is warranted when there is "(1) a reasonable probability that this Court will grant certiorari, (2) a fair prospect that the Court will then reverse the decision below, and (3) a likelihood that irreparable harm

[will] result from the denial of a stay." *Maryland v. King*, 133 S. Ct. 1, 2 (2012) (Roberts, C.J., in chambers).

These criteria are met in this case. There is a reasonable probability that the Court will grant certiorari to resolve the entrenched and well-recognized conflict of authority over whether a district court is ousted of jurisdiction pending appeal of the denial of a motion to compel arbitration. There is a fair prospect that the Court will reverse the Ninth Circuit's decision and adopt the majority approach. Finally, PeopleConnect would be irreparably harmed if a stay is denied: it would suffer the very discovery burdens that the sought-after stay is designed to prevent.

I. THIS COURT IS LIKELY TO GRANT CERTIORARI TO REVIEW THE NINTH CIRCUIT'S DENIAL OF A STAY PENDING APPEAL.

This case meets all of the Court's criteria for certiorari. There is a square and longstanding circuit split on the question presented, the issue is important and arises regularly, and this case is a perfect vehicle.

A. 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 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.

i. 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.*

ii. 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, LLC*, 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 "whether 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.*. "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* at 265. 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.*.

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.

B. 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.[1] The arguments on both sides of the split have

[1] 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 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

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 1161. "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 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.

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

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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 (ECT/TNL), 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).

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.

II. THIS COURT IS LIKELY TO REVERSE THE NINTH CIRCUIT.

If this Court grants certiorari, it is likely to reverse the Ninth Circuit.

In the decision below, the Ninth Circuit was bound 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 506. *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.

III. ABSENT A STAY, PEOPLECONNECT WILL INCUR IRREPARABLE HARM.

If the Court denies a stay, PeopleConnect will incur the very expenses and burdens of litigation that arbitration—and PeopleConnect's sought-after stay—are designed to prevent. As this Court has previously concluded in a similar procedural posture, those expenses and burdens qualify as irreparable harm warranting a stay.

Because PeopleConnect's motion for stay was denied, the parties are proceeding to active discovery. By contrast, if the case proceeded to arbitration, discovery would be much less burdensome. 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." Ex. G, § 13(B)(i).

Moreover, PeopleConnect is seeking to compel individualized arbitration, whereas 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").

In addition to being costly, discovery "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." *Levin*, 634 F.3d at 265. That risk is particularly acute in the context of class discovery, in which respondent may seek sensitive information about PeopleConnect's business in her effort to persuade the court to certify a class. In an individualized arbitration, that discovery would never occur.

Without a stay, these harms will be irreparable. The parties have submitted a joint discovery plan proposing that a motion for class certification be due on August 8, 2022. Joint Status Report and Discovery Plan at 4, *Knapke v. PeopleConnect, Inc.*, No. 21-cv-00262 (W.D. Wash. Oct. 28, 2021), ECF No. 44. Thus, all class certification discovery will be completed by August 8, 2022. If the Court declines to issue a stay and

then decides this case in June 2022, most class certification discovery will already be complete. Moreover, the parties' discovery plan states that discovery will not be conducted in phases, which means that the parties may also engage in immediate merits discovery. *Id.* at 2–3.

If PeopleConnect is forced to engage in discovery while this case is pending in this Court, any victory would be tantamount to closing the barn door after the horse has bolted. If PeopleConnect wins in this Court, it will obtain a stay of discovery—and yet the discovery sought to be stayed, including almost all class certification discovery, will already have occurred. Those expenses and burdens cannot be undone. *Levin*, 634 F.3d at 265 ("[T]he 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."). PeopleConnect will have permanently lost the benefit of what it bargained for: low-cost individualized arbitration procedures. *See, e.g.*, *Alascom, Inc. v. ITT N. Elec. Co.*, 727 F.2d 1419, 1422 (9th Cir. 1984) ("If [a] party must undergo the expense and delay of a trial before being able to appeal, the advantages of arbitration—speed and economy—are lost forever" and the resulting harm is "serious, perhaps, irreparable").

Indeed, Congress has authorized interlocutory appeals of denials of motion to compel arbitration precisely because awaiting final judgment would cause irreparable harm. *See Ehleiter*, 482 F.3d at 214 ("[T]he availability of interlocutory review under Section 16 of decisions favoring litigation avoids the possibility that a litigant seeking to invoke his arbitration rights will have to endure a full trial on the underlying controversy before he can receive a *definitive* ruling on whether he was legally obligated to participate

in such a trial in the first instance" (quotation marks and alterations omitted)). For the identical reason, denying PeopleConnect's requested stay here would cause irreparable harm: PeopleConnect would have to endure months of class discovery while awaiting resolution of its claim that the claim should be individually arbitrated.

Twice in recent years, this Court has granted stays of district court proceedings in a similar procedural posture. In *Henry Schein, Inc. v. Archer and White Sales, Inc.*, No. 19A766, as well as in *Henry Schein, Inc. v. Archer and White Sales, Inc.*, No. 17A859, the petitioner sought review of lower-court rulings denying its motion to compel arbitration, and also filed applications in this Court to stay proceedings in the district court pending resolution of its petitions for certiorari. In both cases, this Court granted the petitioner's stay applications and stayed district court proceedings. The Court should follow that practice and grant PeopleConnect's stay application here.[2]

IV. TO AVOID MOOTNESS, THE COURT SHOULD ENSURE THAT THIS CASE IS HEARD THIS TERM.

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

[2] When deciding whether to grant a stay pending certiorari review, "in a close case it may be appropriate to 'balance the equities'—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Conkright v. Frommert*, 556 U.S. 1401, 1402 (2009) (Ginsburg, J., in chambers). Here, the balance of equities favors PeopleConnect. As explained above, PeopleConnect would face irreparable harm. By contrast, respondent would not be substantially harmed by the temporary stay of class discovery that PeopleConnect seeks, especially given that PeopleConnect is seeking expedited review. Finally, staying class discovery would cause no discernable harm to the public interest.

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, it can construe this stay application as a petition for certiorari, grant certiorari, and set an expedited briefing schedule. This would be PeopleConnect's preference because it would be the most expeditious and efficient option.

The Court took that path the last time a similar situation arose. In *Nken v. Holder*, 556 U.S. 418 (2009), the applicant filed a stay application, seeking review of a circuit split on the appropriate legal standard for stays pending appeal in immigration cases. Like this case, *Nken* (and any other case raising the same issue) would inherently become moot once the court of appeals ruled. The Court granted the stay application, treated the stay application as a petition for certiorari, granted certiorari, and set an expedited briefing schedule that allowed the case to be argued less than two months after the stay application was granted. If the Court proceeds similarly here, PeopleConnect would be prepared to brief this case on whatever expedited schedule the Court deems appropriate.

In an abundance of caution, PeopleConnect has also filed, in conjunction with this stay application, a separate petition for certiorari as well as a motion to expedite consideration of that petition. If the Court treats this stay application as a petition for certiorari, PeopleConnect would dismiss that separate petition and motion. Alternatively, if the Court declines to treat this stay application as a petition for certiorari, PeopleConnect respectfully requests that the Court grant this stay application and set an expedited briefing schedule for the petition for certiorari. PeopleConnect would propose that the brief in opposition be due on November 29, 2021. PeopleConnect would file its reply brief by December 3, 2021, which would allow this Court to consider the petition at its December 10, 2021 Conference. PeopleConnect would then respectfully request a briefing schedule that would allow the case to be argued in February or March 2022.

CONCLUSION

The application for stay should be granted.

Respecfully Submitted,

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EXHIBIT A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BARBARA KNAPKE, Plaintiff-Appellee, v. PEOPLECONNECT, INC., Defendant-Appellant.	No. 21-35690 D.C. No. 2:21-cv-00262-MJP Western District of Washington, Seattle ORDER

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.

EXHIBIT B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BARBARA KNAPKE,

Plaintiff,

v.

PEOPLECONNECT INC,

Defendant.

CASE NO. C21-262 MJP

ORDER DENYING MOTION TO STAY

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. PeopleConnect, 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 arbitrated on an individual basis poses an irreparable harm. While this evidence of harm remains attenuated and runs against the general principal 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. One 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).

* * *

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 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.

Marsha J. Pechman
United States Senior District Judge

EXHIBIT C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BARBARA KNAPKE, Plaintiff, v. PEOPLECONNECT INC, Defendant.	CASE NO. C21-262 MJP ORDER DENYING MOTION TO DISMISS

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. Wyler 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 whether the claims 'inherently require[ ] the court to treat the defendant as the 'publisher or speaker' 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 Hous. 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 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.

Marsha J. Pechman
United States Senior District Judge

EXHIBIT D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

BARBARA KNAPKE, individually and on behalf of all others similarly situated,

Plaintiff,

v.

PEOPLECONNECT, INC., a Delaware Corporation,

Defendant.

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Barbara Knapke ("Plaintiff") brings this action on behalf of herself and all others similarly situated against Defendant PeopleConnect, Inc. ("Classmates" or "Defendant"). Plaintiff makes the following allegations pursuant to the investigation of her counsel and based upon information and belief, except as to the allegations specifically pertaining to herself, which are based on personal knowledge.

NATURE OF ACTION

1. Plaintiff brings this class action complaint against Defendant for willfully misappropriating the photographs, likenesses, images, and names of Plaintiff and the class; willfully using those photographs, likenesses, images, and names for the commercial purpose of selling access to them in Classmates products and services; and willfully using those photographs, likenesses, images, and names to advertise, sell, and solicit purchases of Classmates services and products; without obtaining prior consent from Plaintiff and the class.

2. Classmates' business model relies on extracting personal information from school yearbooks, including names, photographs, schools attended, and other biographical information. Classmates aggregates the extracted information into digital records that identify specific individuals by name, photograph, and other personal information, and stores those digital records in a massive online database. 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.

3. Defendant sells its products on its website: www.classmates.com.

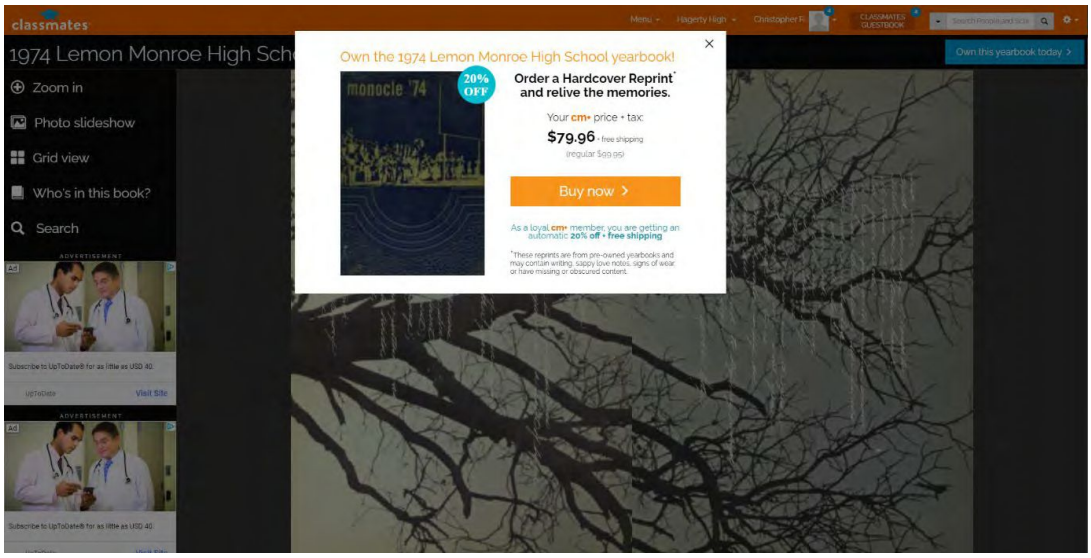
4. Upon accessing Classmates' website, the public-at-large is free to enter the information of a particular school.

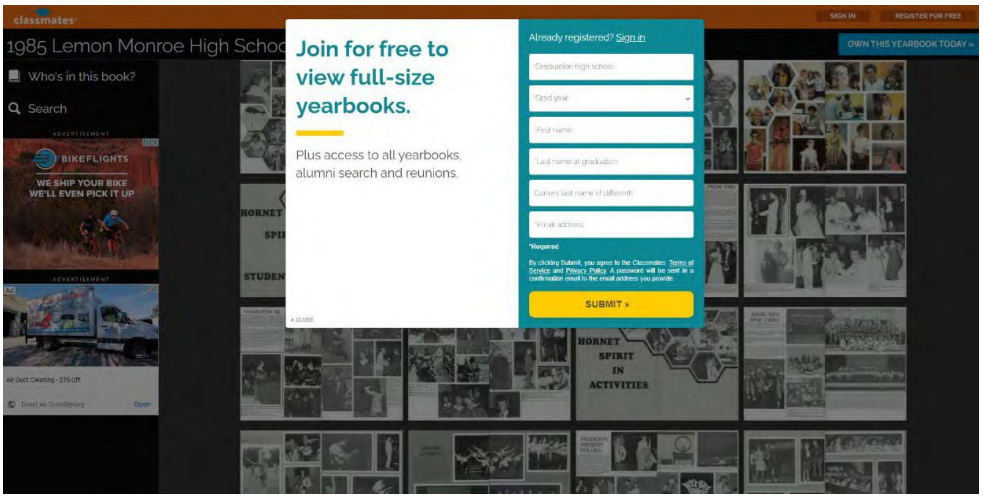
5. After entering this information, any public user of Classmates' website is provided with a listing of search results. Each search result corresponds to a school of which Classmates sells their yearbook service.

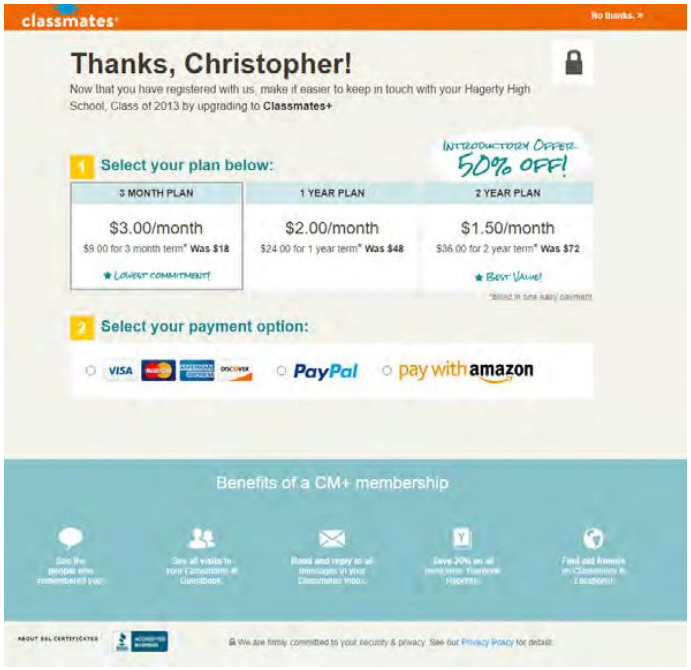
6. These search results provide a limited, free preview of Defendant's service. As shown in the images below, this free preview includes Plaintiff's name and photo:

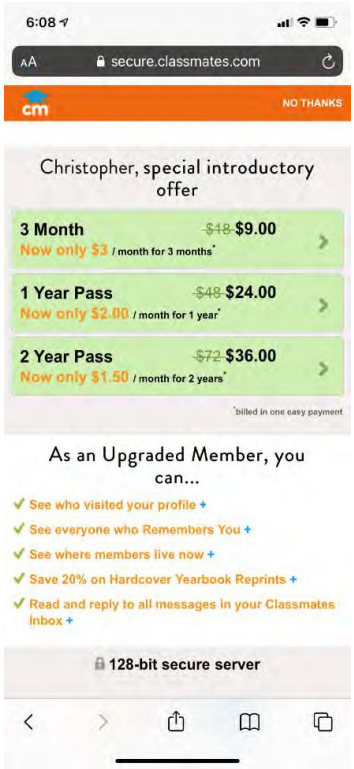
7. As shown in the above, Classmates' free preview provides enough information to identify an individual.

8. The purpose behind Classmates' free preview is singular: to entice users to purchase Defendant's services. These enticements are clear in the screenshots below:






classmates
No thanks. »
Thanks, Christopher!
Now that you have registered with us, make it easier to keep in touch with your Hagerty High School, Class of 2013 by upgrading to Classmates+.
1 Select your plan below:
INTRODUCTORY OFFER
50% OFF!
3 MONTH PLAN
$3.00/month
$9.00 for 3 month term* Was $18
★ LOWEST COMMITMENT!
1 YEAR PLAN
$2.00/month
$24.00 for 1 year term* Was $48
2 YEAR PLAN
$1.50/month
$36.00 for 2 year term* Was $72
★ BEST VALUE!
2 Select your payment option:
VISA
PayPal
pay with amazon
Benefits of a CM+ membership



9. When a user selects "Upgrade Your Membership" in the images above (while names and photographs of Plaintiff and the putative class are prominently displayed), users are given an offer to sign up for Classmates' monthly subscription service whereby a user is able to "keep in touch" with other classmates.

10. Classmates thus uses the identities of Plaintiff and the putative class to market its completely unrelated subscription services.

11. Classmates' most popular monthly subscription costs $3 per month.

12. Ohio's Right of Publicity law states that: "a person shall not use any aspect of an individual's persona for a commercial purpose." OH ST § 2741.02(A).

13. Neither Plaintiff nor class members provided Defendant with consent to use their identities in Defendant's advertisements. As detailed above, Classmates uses class members' identities to advertise its for-profit services. Thus, Defendant violates OH ST § 2741, *et seq.*

14. It would be simple for Classmates to maintain their business model while still complying with state law. For example, Classmates could sell Plaintiff's information on an individual basis without using her identity to advertise its subscription service.

PARTIES

15. Plaintiff Barbara Knapke is a citizen of Ohio who resides in Sidney, Ohio.

16. Defendant PeopleConnect, Inc. is a Delaware corporation with its principal place of business located in Seattle, Washington. Defendant PeopleConnect, Inc. owns and operates the website www.classmates.com.

JURISDICTION AND VENUE

17. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A) because this case is a class action where the aggregate claims of all members of the proposed class are in excess of $5,000,000.00, exclusive of interest and costs, and Plaintiff, together with most members of the proposed class, are citizens of states different from Classmates.

18. This court has specific personal jurisdiction over Defendant because its principal place of business is located in this district.

19. Pursuant to 28 U.S.C. § 1391, this Court is the proper venue for this action because a substantial part of the events, omissions, and acts giving rise to the claims herein occurred in this District.

FACTS COMMON TO ALL CAUSES OF ACTION

20. Plaintiff 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. These advertisements were the same or substantially similar to those shown in Paragraphs 6 and 8.

21. Plaintiff believes that it is reasonable for others to identify her because Defendant's advertisements include accurate details about her as well as her photograph.

22. Indeed, Plaintiff can confirm that the individual Defendant identified in paragraph 6 is herself.

23. Plaintiff never provided Classmates with consent to use any attribute of her identity in any advertisement or for any commercial purposes.

24. Plaintiff is not and has never been a Classmates customer. She has no relationship with Classmates whatsoever.

25. As the subject of a commercial transaction, Plaintiff's personal identifiable information disclosed by Classmates has commercial value. These aspects of Plaintiff's identity are valuable to online advertisers among others.

26. Plaintiff has not been compensated by Classmates in any way for its use of her identity.

CLASS REPRESENTATION ALLEGATIONS

27. Plaintiff seeks to represent a class defined as all Ohio residents who have appeared in an advertisement preview for a Classmates product (the "Class").

28. Members of the Class are so numerous that their individual joinder herein is impracticable. On information and belief, members of the Class number in the millions. The precise number of Class members and their identities are unknown to Plaintiff at this time but may be determined through discovery. Class members may be notified of the pendency of this action by mail and/or publication through the distribution records of Defendant and third-party retailers and vendors.

29. Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to:

a. Whether Classmates' uses class members' names and identities in advertisements for its own commercial benefit;

b. Whether the conduct described herein constitutes a violation of OH ST § 2741, *et seq.;*

c. Whether Plaintiff and the class are entitled to injunctive relief;

d. Whether Defendant was unjustly enriched; and

e. Whether Defendant violated the privacy of members of the class.

30. The claims of the named Plaintiff are typical of the claims of the Class.

31. Plaintiff is an adequate representative of the Class because her interests do not conflict with the interests of the Class members they seek to represent, they have retained competent counsel experienced in prosecuting class actions, and they intend to prosecute this action vigorously. The interests of Class members will be fairly and adequately protected by Plaintiff and her counsel.

32. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of the Class. Each individual Class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendant's liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In contrast, the class action device presents far fewer management difficulties and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court on the issue of Defendant's liability. Class treatment of the liability issues will ensure that all claims and claimants are before this Court for consistent adjudication of the liability issues. Defendant has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole.

COUNT I

Violation of Ohio's Right of Publicity OH ST § 2741, *et seq.*

33. Plaintiff incorporates by reference and re-allege herein all paragraphs alleged above.

34. Plaintiff brings this claim individually and on behalf of the members of the Class.

35. Ohio Revised Code Sec. 2741.01, *et. seq.,* prohibits using an individual's name for advertising or soliciting the purchase of products or services without written consent.

36. As shown above, Defendant used Plaintiff's and the putative class members' names and likenesses for the purpose of advertising or promoting its products without written consent.

37. The aspects of Plaintiff's persona that Defendant uses to advertise its product has commercial value.

38. Plaintiff is domiciled in Ohio.

39. Defendant had knowledge that Plaintiff's persona was being used in an advertisement without authorization.

40. Defendant intended for Plaintiff's persona to be used in an advertisement without authorization.

41. Based upon Defendant's violation of Ohio Revised Code Sec. 2741.01, *et. seq.*, Plaintiff and class members are entitled to (1) an injunction requiring Defendant to cease using Plaintiff's and members of the class' names and any attributes of their identities to advertise its products and services, (2) statutory damages in the amount of between $2,500 and $10,000 per violation to the members of the class, (3) an award of punitive damages or exemplary damages, and (4) an award of reasonable attorney's fees, court costs, and reasonable expenses under OH ST § 2741.07

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks judgment against Defendant, as follows:

a. For an order certifying the Class under Rule 23 of the Federal Rules of Civil Procedure and naming Plaintiff as the representative of the Class and Plaintiff's attorneys as Class Counsel to represent members of the Class;

b. For an order declaring the Defendant's conduct violates the statutes referenced herein;

c. For an order finding in favor of Plaintiff and the Class on all counts asserted herein;

d. For compensatory, statutory, and punitive damages in amounts to be determined by the Court and/or jury;

e. For prejudgment interest on all amounts awarded;

f. For an order of restitution and all other forms of equitable monetary relief;

g. For all injunctive relief the court finds appropriate; and

h. For an order awarding Plaintiff and the Class their reasonable attorneys' fees and expenses and costs of suit.

DEMAND FOR TRIAL BY JURY

Plaintiff demands a trial by jury of all issues so triable.

Dated: March 2, 2021

Respectfully submitted,

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Attorneys for Plaintiff

EXHIBIT E

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BARBARA KNAPKE, individually and on behalf of all other similarly situated, Plaintiff, v. PEOPLECONNECT, INC., a Delaware Corporation, Defendant.	Case No. 2:21-cv-00262-MJP DEFENDANT'S MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12 AND MEMORANDUM IN SUPPORT NOTE ON MOTION CALENDAR: MAY 28, 2021 ORAL ARGUMENT REQUESTED

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INTRODUCTION

Yearbooks are American institutions. They are the primary medium through which school communities memorialize the events, stories, and images of the prior year. Local libraries as well as national archives maintain yearbooks as valued artifacts, which both inform and entertain their readers for generations. PeopleConnect, Inc. ("PeopleConnect") operates one of the most comprehensive online libraries of yearbooks in the nation. Much of that material is available to any website user for free. Some of it is available to subscribing members. But all of it comes from that most ubiquitous of keepsakes—yearbooks.

Plaintiff submits in this case that PeopleConnect violates Ohio law by displaying excerpts from yearbooks on the internet. Plaintiff seeks to pursue a sweeping class action under the Ohio Right of Publicity Statute ("ORPS"). Initially, Plaintiff's claim goes nowhere in this Court as she agreed to resolve any disputes with PeopleConnect in arbitration. But, more fundamentally, given that Plaintiff seeks to remove from the internet documents that are already available to all at public libraries, it is no surprise that a host of legal doctrines bar Plaintiff's efforts. Federal law—specifically, Section 230 of the Communications Decency Act and Section 301 of the Copyright Act—prevents Plaintiff from pursuing her claim; Plaintiff cannot plead all the elements she must; and the claim violates the United States Constitution. The Court therefore should dismiss Plaintiff's Complaint.

BACKGROUND

PeopleConnect owns and operates Classmates.com, which includes an online library of over 450,000 school yearbooks that can be viewed by its 70 million members. Plaintiff alleges that when users access Classmates.com, a user can "enter the information of a particular school," and the website then provides the user with a "listing of search results," each of which "corresponds to a school of which [PeopleConnect] sells [its] yearbook service." Complaint ("Compl."), Dkt. 1, ¶¶ 4–5. Plaintiff alleges that these search results, which display excerpts from the relevant yearbook, "provide a limited, free preview of Defendant's service" that "include[] Plaintiff's name and photo." *Id.* ¶ 6. Plaintiff thus claims that PeopleConnect uses her identity to "market … [PeopleConnect's] subscription services." *Id.* ¶¶ 9–10. And, while Plaintiff concedes that

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PeopleConnect could "sell Plaintiff's information on an individual basis[,]" she argues that it cannot "us[e] her identity to advertise its subscription service." *Id.* ¶ 14. Plaintiff asserts a single claim under ORPS. *Id.* ¶¶ 33–41.

ARGUMENT

I. Plaintiff Agreed To Arbitrate Her Claims.

To start, Plaintiff is in the wrong forum. The Federal Arbitration Act ("FAA") "mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 213 (1985). And, where an arbitration agreement delegates questions of arbitrability to the arbitrator, the court's role is limited to determining if a valid agreement exists. *Debesay v. Sec. Indus. Specialists, Inc.,* No. 20-cv-00927, 2021 WL 962549, at *1 (W.D. Wash. Mar. 15, 2021). Here, Plaintiff's counsel assented to PeopleConnect's Terms of Service ("TOS") while acting as Plaintiff's agent, binding Plaintiff to the arbitration provision therein. The Complaint should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(3).

A. Plaintiff Is Bound By PeopleConnect's Terms Of Service.

Numerous courts have held that clickwrap agreements—like the one here—which require a website user to electronically assent to a website's terms of service—constitute valid and enforceable contracts.[1] *See, e.g.*, *In re Wyze Data Incident Litig.,* No. C20-0282, 2020 WL 6202724, at *2 (W.D. Wash. Oct. 22, 2020); *Levin v. Caviar, Inc.,* 146 F. Supp. 3d 1146, 1157 (N.D. Cal. 2015). The terms need not be displayed on the same page as the button to give the user sufficient notice of those terms. *See Harbers v. Eddie Bauer, LLC,* No. C19-1012, 2019 WL 6130822, at *6 (W.D. Wash. Nov. 19, 2019). In *Harbers,* before the plaintiff could place her order, she was taken to a screen that stated, just above a "Submit Order" button: "By ordering you agree to eddiebauer.com's Privacy Policy and Terms of Use." *Id.* The phrase "Terms of Use" was

[1] Washington law applies here because Defendant is located in Seattle, Washington. Compl. ¶ 16; *see Shanghai Com. Bank Ltd. v. Kung Da Chang*, 404 P.3d 62, 66–67 (Wash. 2017) (applying the Restatement (Second) Conflict of Laws). Further, there is no conflict between Washington and Ohio law on these issues. *See Ranazzi v. Amazon.com, Inc.*, 46 N.E.3d 213, 217–18 (Ohio Ct. App. 2015) (explaining that clickwrap agreements are valid and binding); *Javitch v. Prudential Sec., Inc.*, No. 02 CV 7072, 2011 WL 251099, at *8 (N.D. Ohio Jan. 25, 2011) (agents can consent to an arbitration provision on principal's behalf).

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hyperlinked to the full terms. *Id.* The court found that the plaintiff had sufficient notice of the terms of use and granted the defendant's motion to compel arbitration. *Id.* at *6, *9.

The same is true here. Before accessing the results of a search on the Classmates website or registering for a free or paid account, the user is prompted with the following message: "You may not use our site or the information we provide unless you agree to our Terms of Service." Declaration of Tara McGuane ("McGuane Decl.") ¶ 6.[2] The TOS are hyperlinked directly from that message, and the user must affirmatively select "I AGREE" to perform a search or finish registering for an account. *Id*. The TOS contains the following arbitration provision in bolded text:

> **YOU AND THE PEOPLECONNECT ENTITIES EACH AGREE THAT ANY AND ALL DISPUTES THAT HAVE ARISEN OR MAY ARISE BETWEEN YOU AND THE PEOPLECONNECT ENTITIES SHALL BE RESOLVED EXCLUSIVELY THROUGH FINAL AND BINDING ARBITRATION, RATHER THAN IN COURT[.]**

McGuane Decl. ¶ 8. Under controlling law, as set forth in *Harbers* and the other cases cited above, that is sufficient to create a valid and enforceable contract to arbitrate.

1. Plaintiff's Counsel Bound His Client To The Terms Of Service.

Plaintiff's counsel, Christopher Reilly of Bursor & Fischer, P.A., bound Plaintiff to the TOS and the arbitration provision when he assented to PeopleConnect's TOS on her behalf. A lawyer is his client's agent. *Clark v. Andover Sec.*, 44 F. App'x 228, 231 (9th Cir. 2002). Under Washington law, "[a]rbitration agreements may encompass nonsignatories under contract and agency principles." *Romney v. Franciscan Med. Grp.*, 349 P.3d 32, 42 (Wash. Ct. App. 2015) (*citing Comer v. Micor, Inc.,* 436 F.3d 1098, 1101 (9th Cir. 2006)); *see Powell v. Sphere Drake Ins., P.L.C.,* 988 P.2d 12, 14–15 (Wash. Ct. App. 1999)); *Letizia v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir. 1986) (arbitration agreement enforceable under "ordinary . . . agency principles"). And an agent's authority to "perform certain services on a principal's behalf results

[2] Because a motion to compel arbitration is brought pursuant to Rule 12(b)(3), the Court need not accept the pleadings as true and "may consider facts outside the pleadings." *Murphy v. Schneider Nat'l, Inc.*, 362 F.3d 1133, 1137 (9th Cir. 2004).

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in implied authority to perform the usual and necessary acts associated with the authorized services." *Hoglund v. Meeks*, 170 P.3d 37, 44 (Wash. Ct. App. 2007) (citing *Larson v. Bear*, 230 P.2d 610, 613 (Wash. 1951)).

On January 7, 2021, Reilly registered for a free Classmates.com account, which he then upgraded to a paid subscription. McGuane Decl. ¶ 12. Reilly could not have created this account or upgraded to a paid subscription without first accepting the TOS. *Id.* ¶ 13. Further, the Complaint includes screenshots accessible to a user only after accepting the TOS. Compl. ¶ 6, 8, images 1, 3–5; McGuane Decl. ¶ 13. *See Tompkins v. 23andMe, Inc.*, 13-CV-05682, 2014 WL 2903752, at *7 (N.D. Cal. June 25, 2014), *aff'd*, 840 F.3d 1016 (9th Cir. 2016) (plaintiff's access to portions of website requiring assent to terms of use constitutes sufficient evidence that plaintiff assented); *Feldman v. Google, Inc.*, 513 F. Supp. 2d 229, 237 (E.D. Pa. 2007) (same). Reilly's creation of an account and the screenshots in the Complaint confirm that Plaintiff's counsel, who was "authorized" to draft and file the Complaint, took the "usual and necessary acts" to do so and thereby bound Plaintiff to the TOS and the arbitration provision therein. *Hoglund*, 170 P.3d at 44.

Independent Living Resource Center San Francisco v. Uber Technologies, Inc., No. 18-cv-06503, 2019 WL 3430656 (N.D. Cal. July 30, 2019), is instructive. There, Uber moved to compel arbitration on the grounds that the plaintiffs' agent—a paralegal at the law office representing the plaintiffs—agreed to Uber's terms of service. *Id.* at *3–4. The *Independent Living* court held that, because the plaintiffs had "dispatched their agents to affirmatively test the Uber application in order to bolster their claim of discrimination," the plaintiffs were "bound by the arbitration agreement to the same extent as their agent." *Id.* at *4. This case is no different. Instead of accessing Classmates.com herself, Plaintiff "dispatched" Reilly to "affirmatively test the [Classmates.com website] in order to bolster [her] claim." *Id.* So it was through her agent Reilly that Plaintiff gained access to portions of Classmates.com she would not have been able to view without assenting to the TOS. Plaintiff cannot avoid the arbitration agreement by having her

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attorney do what she otherwise would have had to do herself. Rather, as in *Uber*, Plaintiff is "bound to the arbitration agreement [in the TOS] to the same extent as [her] agent." *Id*. at *4[3]

B. The Arbitrator Must Decide If This Dispute Is Subject To Arbitration.

When an arbitration agreement "clearly and unmistakably" contains a "delegation provision"—one that delegates threshold issues of arbitrability to the arbitrator—the FAA requires a court to "compel[] arbitration" of that threshold issue. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–70, 70 n.1 (2010) (citation omitted). The Ninth Circuit has held that "incorporation of the AAA [American Arbitration Association] rules constitutes 'clear and unmistakable' evidence that contracting parties agreed to arbitrate arbitrability." *Brennan v. Opus Bank*, 796 F.3d 1125, 1130 (9th Cir. 2015). That precedent squarely applies here, as the TOS states "[t]he arbitration will be governed by the Consumer Arbitration Rules of the American Arbitration Association ('AAA'), if applicable, as modified by this section." McGuane Decl. ¶ 9.

Even if this Court were to determine arbitrability, the arbitration provision in the TOS plainly applies to Plaintiff's claim, as it encompasses "any and all disputes that have arisen or may arise between [Plaintiff] and the PeopleConnect entities." McGuane Decl. ¶ 8.

II. Plaintiff's Claim Is Barred By Federal Law.

Because the motion to compel arbitration is dispositive, the Court need not reach any other issue in this case and should dismiss on that basis alone. But assuming *arguendo* that Plaintiff is not bound by her arbitration agreement, the Court should dismiss the Complaint for the same reason the court in *Ancestry.com* dismissed that Complaint: federal law bars Plaintiff's claim. First, the Communications Decency Act of 1996 makes PeopleConnect immune from Plaintiff's claim. 47 U.S.C. § 230(c)(1). Second, Plaintiff's claim is preempted by the Copyright Act. 17 U.S.C. § 301. These defenses are plain from Plaintiff's allegations alone, so the Court should dismiss the

[3] If the Court does not grant PeopleConnect's motion, PeopleConnect requests leave to engage in limited discovery regarding: (1) Plaintiff's knowledge of and acquiescence to counsel's use of Classmates.com on her behalf, and (2) the identity of the person who took the screenshots that appear in the complaint. Order Den. Mot. to Compel Arb. & Granting Leave to Seek Ltd. Disc. at 1, *Indep. Living Res. Ctr. San Francisco*, No. 18-cv-06503 (N.D. Cal. May 6, 2019), ECF No. 35 (denying motion to compel arbitration without prejudice and allowing "limited discovery" to "clarify the issue" of whether the app "testers were Plaintiffs' agents"); *see also Hesse v. Sprint Spectrum, L.P.,* No. C06-0592, 2012 WL 37399, at *2 (W.D. Wash. Jan. 9, 2012) (granting limited discovery into the issue of arbitrability).

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Complaint pursuant to Rule 12(b)(6). *See e.g.*, *Kimzey v. Yelp Inc.,* 21 F. Supp. 3d 1120, 1123 (W.D. Wash. 2014)*, aff'd sub nom. Kimzey v. Yelp! Inc.*, 836 F.3d 1263 (9th Cir. 2016) (granting motion to dismiss based on Section 230 immunity); *Milo & Gabby, LLC v. Amazon.com, Inc.,* 12 F. Supp. 3d 1341, 1350 (W.D. Wash. 2014) (granting motion to dismiss right of publicity claim based on Copyright Act preemption).

A. The Communications Decency Act Bars Plaintiff's Claim.

Section 230 of the Communications Decency Act provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1).

Another court in this Circuit recently held that Section 230 bars a virtually identical claim. *Callahan v. Ancestry.com,* No. 20-cv-08437, 2021 WL 783524, at *1, *6, *6 n.13 (N.D. Cal. Mar. 1, 2021). In *Ancestry.com,* plaintiffs "object[ed] to Ancestry.com's inclusion of their decades-old yearbook photographs and information in Ancestry's Yearbook Database." *Id.* at *1. Ancestry.com moved to dismiss, in part based on Section 230, and the court held that because "Ancestry—by taking information and photos from the donated yearbooks and republishing them on its website in an altered format—engaged in 'a publisher's traditional editorial functions'" and did "not contribute 'materially' to the content," Section 230 applied. *Id.* at *6.

The *Ancestry.com* decision flows directly from Ninth Circuit precedent. When the underlying content complained of is provided by third parties, it makes no difference that a website "provide[s] neutral tools" that allow people to find that republished information through "their voluntary inputs." *See Fair Hous. Council of San Fernando Valley v. Roommates.Com, LLC*, 521 F.3d 1157, 1172 (9th Cir. 2008) (en banc). Indeed, it is for largely that same reason the Ninth Circuit in *Kimzey v. Yelp! Inc*. rejected the argument that "Yelp transformed [a] review by [a user] into its own 'advertisement' or 'promotion' on Google." 836 F.3d 1263, 1269 (9th Cir. 2016). The court "fail[ed] to see how Yelp's rating system, which is based on rating inputs from third parties and which reduces this information into a single, aggregate metric is anything other than user-generated data." *See id.* at 1270; *accord Force v. Facebook, Inc*., 934 F.3d 53, 65–71 (2d Cir. 2019) (affirming Facebook's status as a "publisher" under Section 230); *Jones v. Dirty World Ent.*

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Recordings LLC, 755 F.3d 398, 413–16, 417 (6th Cir. 2014) (finding defendant website immune from suit because it exercised a "publisher's traditional editorial functions") (citation omitted).

This Court should reach the same result. Section 230 makes a defendant immune from a claim that would impose liability on: "(1) a provider or user of an interactive computer service (2) whom a plaintiff seeks to treat, under a state law cause of action, as a publisher or speaker (3) of information provided by another information content provider." *Kimzey*, 836 F.3d at 1268 (citation omitted). This test is met here.

First, PeopleConnect, as owners of a website used by millions, are "provider[s] … of an interactive computer service." *Id.* ("[T]oday, the most common interactive computer services are websites.") (citation omitted).

Second, Plaintiff's claim is premised on PeopleConnect's republication and distribution of content from student yearbooks, Compl. ¶¶ 2, 6–7, 13–14, and thus is "directed against [PeopleConnect] in its capacity as a publisher or speaker," *Kimzey*, 836 F.3d at 1268. That is, because Plaintiff's claim depends on PeopleConnect's dissemination of Plaintiff's information from her yearbooks, it triggers Section 230 immunity. *See, e.g.*, *Liberi v. Taitz*, No. 11-0485, 2011 WL 13315691, at *11 (C.D. Cal. Oct. 17, 2011) (Section 230 would bar claims that Intelius, Reed Defendants, and LexisNexis sold information for credit reports without proper security precautions). Indeed, the recent decision in *Ancestry.com* barred virtually identical claims for that very reason. 2021 WL 783524, at *6.

Third, Plaintiff's allegations confirm that PeopleConnect is a publisher "of information provided by another information content provider." *Kimzey*, 836 F.3d at 1268 (citation omitted). The Complaint alleges that PeopleConnect "extract[s]" and "aggregates" "personal information *from school yearbooks*, including names, photographs, schools attended, and other biographical information." Compl. ¶ 2 (emphasis added). Based on similar allegations, the *Ancestry.com* court held that Ancestry was immune because it "did not create the underlying yearbook records and instead obtained them from third parties." 2021 WL 783524, at *1, *5. That follows from the many other courts that have held that businesses that search or ask for information from other sources and republish it in new forms receive Section 230 immunity. *E.g.*, *Marshall's Locksmith Serv. Inc.*

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v. Google, LLC, 925 F.3d 1263, 1268–69 (D.C. Cir. 2019) (search engines pulling information from fake locksmiths' websites for search results); *Ben Ezra, Weinstein, & Co. v. Am. Online Inc.*, 206 F.3d 980, 983, 985–86 (10th Cir. 2000) (AOL publishing stock price information pulled for AOL by third-party providers); *accord Obado v. Magedson*, No. 13-2382, 2014 WL 3778261, at *1, * 4–7 (D.N.J. July 31, 2014), *aff'd*, 612 F. App'x 90, 93–94 (3d Cir. 2015); *Liberi*, 2011 WL 13315691, at *11.

"[R]eviewing courts have treated § 230(c) immunity as quite robust." *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003). Section 230 easily covers Plaintiff's claim, which seeks to punish PeopleConnect for disseminating information about Plaintiff created by others. *See Ancestry.com*, 2021 WL 783524, at *6.

B. The Copyright Act Preempts Plaintiff's Claim.

When a copyrightable work is disseminated to the public and an individual allegedly suffers harm as a result, federal copyright law is the exclusive means of redress. This is true regardless of whether the work at issue is actually copyrighted, *Firoozye v. Earthlink Network*, 153 F. Supp. 2d 1115, 1124 (N.D. Cal. 2001), or whether either party owns the copyright, *Maloney v. T3Media, Inc.*, 94 F. Supp. 3d 1128, 1139 n.9 (C.D. Cal. 2015), *aff'd*, 853 F.3d 1004 (9th Cir. 2017); *see Jules Jordan Video, Inc. v. 144942 Canada Inc.*, 617 F.3d 1146, 1154–55 (9th Cir. 2010). Under 17 U.S.C. § 301, a claim is preempted if: (1) the "'subject matter' of the state law claim falls within the subject matter of copyright as described in 17 U.S.C. §§ 102 and 103," and (2) the "rights asserted under state law are equivalent to the rights contained in 17 U.S.C. § 106." *Maloney v. T3Media, Inc.*, 853 F.3d 1004, 1010 (9th Cir. 2017) (citation omitted); *see also Milo & Gabby, LLC,* 12 F. Supp. 3d at 1350. Plaintiff's claim satisfies this test and is preempted by the Copyright Act.

First, the "subject matter" of Plaintiff's claim falls within 17 U.S.C. §§ 102 and 103. Plaintiff's claim concerns PeopleConnect's use of her "name," "photograph," and "likeness[]," Compl. ¶¶ 1–2, 6, 9, which "falls within the subject matter of copyright." *Maloney*, 853 F.3d at 1010; *see also Milo & Gabby, LLC* 12 F. Supp. 3d at 1349. Yearbooks are copyrightable because they are "[w]orks of authorship" containing "pictorial, graphic," and "literary works," 17 U.S.C.

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§ 102; or "compilations" thereof, *id.* § 103; *see id.* § 101 (defining "[l]iterary works" to include "books" and defining "pictorial" and "graphic" works to include "photographs"). That is why the Copyright Office has granted copyright protection for school yearbooks. *E.g.*, Don Novello, *Shellville High School, The Blade*, TX0001451935, Public Catalog, U.S. Copyright Office (Oct. 30, 1984), https://bit.ly/2NE5Aui. Excerpted portions of yearbooks are no different, regardless of whether they contain photographs or text. Photographs are copyrightable. 17 U.S.C. §§ 101; 102; *Maloney*, 94 F. Supp. 3d at 1135–36 (plaintiffs' right of publicity claims challenging website's use of photographs preempted). So too are excerpted pages from yearbooks containing photographs and other identifying information. 17 U.S.C. § 102; *see* Compl. ¶¶ 6, 8, images 2, 4. That the excerpted pages constitute a portion of a yearbook makes no difference. *See Jules Jordan Video*, 617 F.3d at 1154–55 (right of publicity claims preempted with respect to "'still shots' of the copyrighted video performance" used "on the covers of the counterfeit DVDs"); *Laws v. Sony Music Ent., Inc.*, 448 F.3d 1134, 1136, 1141 (9th Cir. 2006) (right of publicity claims preempted where defendant used "brief samples" of plaintiff's voice recording).

Second, the rights asserted under Plaintiff's ORPS claim is the same "rights governed exclusively by copyright law." *Maloney*, 853 F.3d at 1011. These "exclusive rights" include the right to publicly "display" the work and "reproduce" it. *Id.* at 1019. These are the rights Plaintiff seeks to hold PeopleConnect liable for exercising—reproducing and displaying the excerpts of the yearbooks to the public on Classmates.com. *See, e.g.*, Compl. ¶¶ 6–9.[4]

Plaintiff's claim is preempted because the subject matter of her claim—PeopleConnect's excerpts of her yearbook featuring her photo and name—"fall directly within the scope of federal copyright protection" and the rights asserted under ORPS are "equivalent" to those contained in the Copyright Act. *Milo & Gabby, LLC*, 12 F. Supp. 3d at 1347, 1349–50.

[4] Plaintiff's inaccurate use of the word "advertising" throughout her Complaint makes no difference to this analysis—in *Maloney*, for example, the plaintiffs alleged the defendant used their "names, images, and likenesses … for the purpose of advertising" and both the district court and the Ninth Circuit nonetheless held that those claims were preempted. 94 F. Supp. 3d at 1138–39; *see also* 853 F.3d at 1011.

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III. Plaintiff Has Failed To State A Claim Under ORPS.

The Complaint also should be dismissed because it fails to state a claim under ORPS. First, Plaintiff fails to plead a violation within the jurisdictional reach of ORPS. Second, the Complaint fails to plead all of the elements of a *prima facie* ORPS claim. Third, Plaintiff's claim is barred by ORPS's statutory exemptions.

A. Plaintiff Fails To Plead Conduct Within The Territorial Scope Of ORPS.

Ohio statutes "are presumed not to have an extraterritorial effect unless the legislature clearly manifests a contrary intent." *Mitchell v. Abercrombie & Fitch*, No. C2-04-306, 2005 WL 1159412, at *3 (S.D. Ohio May 17, 2005). The legislature did not express that ORPS would have extraterritorial reach. When a statute does not have extraterritorial reach, a plaintiff must plead that the alleged violation occurred in Ohio. *See id.* at *4.

Plaintiff has not done so. She alleges PeopleConnect violated ORPS only by "includ[ing] Plaintiff's name and photo" to advertise a membership to Classmates.com. Compl. ¶ 6. The only other mention of Ohio is Plaintiff's allegation that she is an Ohio citizen. *Id.* ¶¶ 15, 38. That is not enough to show that the alleged violation occurred in Ohio. To the contrary, Plaintiff acknowledges that the location and state of incorporation of PeopleConnect do not provide any connection to Ohio. *Id*. ¶¶ 16, 18. Given Plaintiff's claim, PeopleConnect only could have "used" her identity in Ohio if it displayed such a search result to a user physically located *in Ohio*. Yet the Complaint contains no such allegation.

B. Plaintiff Fails To Plead A *Prima Facie* ORPS Claim.

ORPS provides that "a person shall not use any aspect of an individual's persona for a commercial purpose." Ohio Rev. Code § 2741.02(A). To plead a *prima facie* claim under ORPS, a plaintiff must allege: (1) the "use" of (2) "any aspect of an individual's persona" for (3) "a commercial purpose." *id.*; *see* § 2741.01(B); *Harvey v. Sys. Effect, LLC*, 154 N.E.3d 293, 306–07 (Ohio Ct. App. 2020). Plaintiff fails to plead the "use" of her persona for a commercial purpose.

1. Plaintiff Fails To Plead "Use" Of Her Persona.

To state a claim, Plaintiff must allege that PeopleConnect engaged in a "use" of her identity. Ohio Rev. Code § 2741.02(A). This requires the actual publication of the person's

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identity. *See, e.g.*, *Jackson v. Playboy Enters., Inc.*, 574 F. Supp. 10, 13 (S.D. Ohio 1983) (dismissing common law misappropriation of likeness claim because plaintiffs had not "alleged that their names or identities were publicized"); *Fox v. Nationwide Mut. Ins. Co.*, 117 N.E.3d 121, 145 (Ohio Ct. App. 2018) (rejecting common law misappropriation of likeness claim for failure to show misappropriation was publicized). Yet Plaintiff's Complaint never alleges that anyone ever conducted a search for Plaintiff's high school or viewed a yearbook excerpt that contained her name or photograph. *See* Compl. ¶ 9. All Plaintiff alleges is that she "discovered that Classmates uses her name and photo" on its website and that Classmates.com users are "free to enter the information of a particular school." Compl. ¶¶ 4, 20. She then proceeds to supply self-generated images that do nothing more than confirm that Plaintiff's agent—her attorney—performed searches for her on Classmates.com. *See id.* ¶¶ 6, 8.

That is not enough. Plaintiff does not identify *who* other than Plaintiff herself, or her agent, allegedly viewed her identity on Classmates.com. A self-generated, nonpublic "use" of a person's identity is not actionable under ORPS, as nothing in the statute's text or case law suggests that it was intended to apply where the defendant showed the plaintiff her *own* identity *to her or her agents* in response to *an inquiry from her or her agents on her behalf*. To the contrary, ORPS's "primary focus is the value of a person's name, vis-à-vis his or her ability to market it for commercial purposes." *Harvey*, 154 N.E.3d at 308. Plaintiff's proposed application is far afield from this purpose, and PeopleConnect is not aware of any precedent allowing a claim to proceed under analogous circumstances.

2. Plaintiff Does Not Allege Her Persona Has Commercial Value.

Plaintiff also fails to plead that her persona has "commercial value." Ohio Rev. Code § 2741.01(A). To state an ORPS claim, a plaintiff must allege facts showing a "significant 'commercial value"' in associating an item of commerce with her identity. *See Harvey*, 154 N.E.3d at 306 (citation omitted). Absent such a showing, an ORPS claim fails. *See Jackson*, 574 F. Supp. at 13 (dismissing Ohio common law misappropriation of likeness claim for failure to plead likeness had "intrinsic value"); *Harvey*, 154 N.E.3d at 306 (rejecting ORPS claim where plaintiff did not show her name "had significant value or, indeed, any commercial value"); *Roe v. Amazon.com*,

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714 F. App'x 565, 568–69 (6th Cir. 2017) (rejecting ORPS claim where plaintiffs failed to show their likenesses had commercial value); *Landham v. Lewis Galoob Toys, Inc.*, 227 F.3d 619, 623–24 (6th Cir. 2000) (same, Kentucky common law right of publicity claim).

To determine if a persona has "commercial value," courts consider: (1) "the distinctiveness of the identity"; and (2) "the degree of recognition of the person among those receiving the publicity." *Harvey*, 154 N.E.3d at 306 (citation omitted). Plaintiff alleges no facts showing that her persona has significant commercial value. She does not allege anything "distinctive[]" about her persona. Nor does Plaintiff allege she has any "degree of recognition" among the public or other group. *Id.* (plaintiff must have "notoriety which is strong enough to have commercial value within an identifiable group") (citation omitted). Plaintiff alleges the yearbook excerpts are used to "entice users to purchase [PeopleConnect]'s services. Compl. ¶ 8. But these allegations fail to show that *Plaintiff's* identity was distinct or recognizable enough to "entice" the purchase of PeopleConnect's services. *See Harvey*, 154 N.E.3d at 306; *Landham*, 227 F.3d at 624 (plaintiff "must show that a merchant would gain significant commercial value by associating an article of commerce *with him*") (emphasis added). At bottom, ORPS is designed to protect persons who are famous within—at the very least—an identifiable group. Plaintiff does not allege that is true of her.

C. Plaintiff Has Not Pleaded Unlawful Advertising Or Solicitation.

Plaintiff also has not adequately pleaded that PeopleConnect used her identity for a "commercial purpose." Ohio Rev. Code §§ 2741.02(A); 2741.01(B)(2).

1. PeopleConnect's Yearbook Previews Have An Informational Purpose.

Plaintiff alleges that PeopleConnect used her identity for a commercial purpose by displaying her "name and photo" in a yearbook excerpt in a "limited, free preview," which Plaintiff alleges "entice[s] users to purchase" a subscription to Classmates.com. *Id.* ¶¶ 6, 8. But her allegations in the Complaint fall short because PeopleConnect's yearbook excerpts have an informational, not a commercial, purpose.

Content that has an informational purpose cannot be the basis of an ORPS claim. As the Sixth Circuit has held, Ohio right of publicity law follows the Restatement (Third) of Unfair

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Competition, under which "the use of a person's identity primarily for the purpose of communicating information or expressing ideas is not generally actionable," to hold that where the "informational and creative content of the defendant's use" outweighs any "adverse effect" on the market, that use does not constitute a statutory violation. *ETW Corp. v. Jireh Publ'g, Inc.*, 332 F.3d 915, 930, 937 (6th Cir. 2003) (citation omitted). Thus, one court has held that even a claim arising from the dissemination of nude photographs by a for-profit website was not for "a commercial purpose" under ORPS because the photographs contained "factual and historical information of [p]laintiff's public activities." *Balsley v. LFP, Inc.*, No. 08 CV 491, 2010 WL 11561844, at *9 (N.D. Ohio Jan. 26, 2010); *see Vinci v. Am. Can Co.*, 591 N.E.2d 793, 794 (Ohio Ct. App. 1990) (rejecting right of publicity claim for use of Olympic athletes' names and likenesses on Dixie cups because they provided "accurate, historical information").

This rule applies with added force where, as here, PeopleConnect did not use Plaintiff's likeness "in a way that would suggest that Plaintiff endorsed or promoted" its product. *Balsley*, 2010 WL 11561844, at *9; *see Vinci*, 591 N.E.2d at 794 ("[T]here was no implication that the athletes used, supported, or promoted the product."). Under such circumstances, the use of a person's identity is "incidental," which cannot be the basis of a right of publicity claim. *See Balsley*, 2010 WL 11561844, at *9; *Vinci*, 591 N.E.2d at 794; *Zacchini v. Scripps-Howard Broad. Co.*, 351 N.E.2d 454, 458 (Ohio 1976), *overruled on other grounds*, 433 U.S. 562 (1977) (distinguishing the "mere incidental use of a person's name and likeness, which is not actionable, from appropriation of the benefits associated with the person's identity, which is"); *Roe*, 714 F. App'x at 569 (rejecting ORPS claim based on "incidental" use of plaintiff's images).

Here, Plaintiff's allegations show that the free preview of a yearbook excerpt has a clear informational purpose: the yearbook excerpts are generated in response to a user search. *See* Compl. ¶ 4. The "search results" indicate whether the user's search "corresponds to a school of which Classmates sells their yearbook service." Compl. ¶¶ 4–5. The information underlying Plaintiff's claim—her "name and photo" (*id.* ¶ 6)—also is informational, in that it is "factual" information about a person. *Balsley*, 2010 WL 11561844, at *9. Absent this information, PeopleConnect would have no way to inform users whether Classmates.com sells a copy of the

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relevant yearbook. Moreover, Plaintiff does not and cannot allege that PeopleConnect's display of yearbook excerpts suggests that she endorses PeopleConnect's products.

Consistent with these principles, courts have found that a website does not use a person's identity for a "commercial purpose" by identifying the person as the subject of the work or online record in response to a user query. *E.g.*, *Dobrowolski v. Intelius, Inc.*, No. 17 CV 1406, 2018 WL 11185289, at *3 (N.D. Ill. May, 21 2018) (dismissing Illinois right of publicity claim against website that displayed plaintiff's likeness to promote sale of background reports because "plaintiffs' identities are not used to promote a separate product"); *Obado*, 2014 WL 3778261, at *7 (dismissing New Jersey right of publicity against websites that display plaintiff's likeness to promote sale of access to "publically available materials connected to plaintiff's name") (citation omitted). Put otherwise, right of publicity statutes "prohibit[] the use of an individual's image [or identity] to promote or entice the purchase of *some other product*," but do not prohibit using an individual's identity when "a photograph of [the] person" or another work about the person is the very thing the consumer "is considering whether to buy." *Thompson v. Getty Images (US), Inc.*, No. 13 C 1063, 2013 WL 3321612, at *2 (N.D. Ill. July 1, 2013) (emphasis added); *see Gionfriddo v. Major League Baseball*, 94 Cal. App. 4th 400, 413 (Cal. Ct. App. 2001) ("[A]dvertisements are actionable when the plaintiff's identity is used, without consent, to promote an *unrelated* product.").[5] Because Plaintiff alleges that PeopleConnect uses her persona only in connection with a product that contains access to *her* yearbook, she has failed to plead the "commercial purpose" element. Ohio Rev. Code § 2741.02(A).

2. Referencing A "Monthly Subscription Service" Does Not Plead A Commercial Purpose.

Plaintiff's identity was used in a search result only as "part of the product [*i.e.*, the membership to Classmates.com] offered for sale," which is not a "commercial purpose."

[5] *See also Nieman v. Versuslaw, Inc.*, No. 12-3104, 2012 WL 3201931, at *4, *7 (C.D. Ill. Aug. 3, 2012), *aff'd*, 512 F. App'x 635 (7th Cir. 2013) (dismissing Illinois right of publicity claim against online search database of court records who displayed plaintiff's name in online search results and "link[ed] to copies of [documents] . . . in the [p]laintiff's case" which a user could "access[] for a fee" because plaintiff's "name is used only to find documents related to his case").

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Dobrowolski, 2018 WL 11185289, at *3; *see Almeida v. Amazon.com, Inc.*, 456 F.3d 1316, 1326 (11th Cir. 2006) (book cover containing plaintiff's photo did not use plaintiff's identity for "commercial purpose" under Florida right of publicity law); *Thompson,* 2013 WL 3321612, at *2; *Gionfriddo*, 94 Cal. App. 4th at 413 (in right of publicity cases, "advertisements are actionable when the plaintiff's identity is used, without consent, to promote an *unrelated* product").

First, Plaintiff's conclusory assertions that PeopleConnect uses her identity to "advertise" its "subscription service" are refuted by her actual allegations. Compl. ¶ 14. Many of the screenshots Plaintiff cites reference the sale of yearbooks or a free membership, *not* a paid "subscription service." *See, e.g., id.* ¶ 8, images 1 ("Order a Hardcover Reprint"), 2 ("Join for free . . . ."). Those that do reference a paid membership plan either do not include Plaintiff's identity (*e.g.,* Compl. ¶ 8, images 3, 5) or are generic menu options like "Help" and "Account," not advertisements (*e.g.,* Compl. ¶ 8, image 4). None of these constitute advertisements for a "subscription service."

Second, even if Plaintiff's identity had been used to advertise a "subscription service," Plaintiff still could not show a commercial purpose because the yearbook excerpts in which Plaintiff appears are "*part* of the product"—the membership subscription—"offered for sale." *Dobrowolski,* 2018 WL 11185289, at *3 (emphasis added). Plaintiff makes the conclusory assertion that the "subscription service" is "completely unrelated" to the yearbooks themselves. Compl. ¶¶ 9, 10. Not so. Plaintiff's allegations make clear that access to the yearbooks (which contain Plaintiff's identity) is part of its subscription service. *See* Compl. ¶ 8, images 1, 3, 5 ("[s]ave" on "[y]earbook [r]eprints").

D. Plaintiff's Claim Falls Within ORPS's Exemptions.

Finally, ORPS exempts various uses of an individual's identity to which the Act does not apply. *See* Ohio Rev. Code § 2741.02(D)(1); *id*. § 2741.09(A). "[A]ny one of these grounds would suffice to preclude liability." *Harvey*, 154 N.E.3d at 309. Several of them do here.

1. The "Literary Work" Exemption Bars Plaintiff's Claim.

ORPS 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

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transmitted" or "[a]n advertisement or commercial announcement" for such a work. Ohio Rev. Code § 2741.09(A)(1)(a), (d). "Literary work[]" is commonly understood to include works "expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects," including "books," "periodicals," and "manuscripts." *E.g.*, 17 U.S.C. § 101. PeopleConnect's yearbook previews fall within the broad category of "literary work[]," as they are written documents that provide factual, biographical information to a reader about a particular person. *See* Ohio Rev. Code § 2741.09(A)(1)(a); *see also* Compl. ¶¶ 1, 6–7, 23.

To be sure, Plaintiff does not claim the online publication of yearbooks are unlawful—only the yearbook excerpts, which she alleges constitute an "advertisement[] on the Classmates website to advertise and/or actually sell [PeopleConnect]'s products and services." Compl. ¶ 20. But even if this description of the yearbook excerpts was accurate, though it is not, it would not help Plaintiff, as ORPS expressly exempts any "advertisement or commercial announcement" for literary works. Ohio Rev. Code § 2741.09(A)(1)(a), (d). So even if Plaintiff were correct that the preview of yearbook excerpts are "advertisements," because the materials they purportedly promote—the sale of reprinted yearbooks—are exempt, the limited preview of yearbook excerpts also would be exempt.

2. The "Newsworthy Value," "Public Affairs," And "General Public Interest" Exemptions Bar Plaintiff's Claim.

ORPS also carves out the: (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). Any "advertisement or commercial announcement" for material with "political or newsworthy value" is likewise exempted. *Id.* § 2741.09(A)(1)(d), (b). Information and events can be in the "public interest" under ORPS even if they "involve[] the publication of a purely private person's name or likeness." *Balsley*, 2010 WL 11561844, at *10 (citation omitted).

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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 (quoting *ETW Corp.*, 332 F.3d at 930) (emphasis omitted). Courts in Ohio and elsewhere have held that such exemptions apply to the republication of documents that already have been published. *E.g. id*. at 309 (applying exemption where use of plaintiff's identity involved facts relating to prior legal proceeding that "had been reported in various publications"); *Aronson v. Dog Eat Dog Films, Inc*., 738 F. Supp. 2d 1104, 1114 (W.D. Wash. 2010) (reasoning that if purpose of use of plaintiff's likeness is "informative or cultural, the use is immune" from suit under Washington's right of publicity statute); *Nieman v. Versuslaw, Inc.*, No. 12-3104, 2012 WL 3201931, at *4 (C.D. Ill. Aug. 3, 2012), *aff'd*, 512 F. App'x 635 (7th Cir. 2013) (applying similar exemption to dismiss right of publicity claim against online searchable database of court records because "[p]laintiff's prior litigation is a matter of public record and public interest"); *Best v. Berard*, 776 F. Supp. 2d 752, 758–59 (N.D. Ill. 2011) (applying similar exemption to dismiss right of publicity claim against TV show depicting plaintiff's "arrest on criminal charges and facts concerning prior arrests or citations"); *Baugh v. CBS, Inc*., 828 F. Supp. 745, 753 (N.D. Cal. 1993) (holding that the "appropriate focus is on the use of the likeness itself" such that if plaintiff's "face was used 'in connection' with a news account, then no liability may be found").

PeopleConnect's yearbook excerpts fall within all of these exemptions. As discussed above, these excerpts are informational and do not propose a commercial transaction. *See Harvey*, 154 N.E.3d at 308. Plaintiff does not allege that the publication of the yearbook itself is unlawful. Compl. ¶ 14 ("It would be simple for Classmates to maintain their business model while still complying with state law.…Classmates could sell Plaintiff's information on an individual basis…."). These yearbook excerpts are newsworthy and relate to "public affairs." Ohio Rev. Code § 2741.02(D)(1). *See Harvey*, 154 N.E.3d at 308; *Balsley*, 2010 WL 11561844, at *10.

3. The First Amendment Exemption Bars Plaintiff's Claim.

The ORPS also exempts the use of an individual's persona that is "protected by the First Amendment to the United States Constitution as long as the use does not convey or reasonably suggest endorsement by the individual whose persona is at issue." Ohio Rev. Code

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§ 2741.09(A)(6). Plaintiff does not and cannot allege that PeopleConnect's free preview of yearbook excerpts "convey or reasonably suggest endorsement" by the Plaintiff. *Id.* And for reasons discussed below, PeopleConnect's use of Plaintiff's persona is protected speech under the First Amendment.

IV. Plaintiff's Claim Is Barred By The United States Constitution.

Finally, even if Plaintiff could overcome the other failings of her Complaint, it still would not be viable because applying ORPS here violates at least two provisions of the United States Constitution.

A. The Conduct Alleged Is Core First Amendment Speech.

The Sixth Circuit has recognized that the reach of ORPS is "fundamentally constrained by the public and constitutional interest in freedom of expression" and that courts applying ORPS must therefore "give substantial weight to the public interest in freedom of expression when balancing it against the personal and proprietary interests recognized by the right of publicity." *ETW Corp.*, 332 F.3d at 930–31 (citation omitted). That plainly is called for in this case. "[T]he creation and dissemination of information are speech within the meaning of the First Amendment." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011). As courts have long recognized, 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. *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).

The yearbook excerpts Plaintiff takes issue with easily qualify as core constitutionally protected speech under this standard. Indeed, "[t]here can be no serious argument about the fact that, in its most basic form, the yearbook serves as a forum in which student editors present pictures, captions, and other written material." *Kincaid v. Gibson*, 236 F.3d 342, 351 (6th Cir. 2001). And the "written material" within those yearbooks, *id.*, such as the "biographical information" Plaintiff seeks to prevent PeopleConnect from releasing, are likewise protected. *See* Compl. ¶ 2; *see Sorrell,* 564 U.S. at 570; *Vrdolyak v. Avvo, Inc.,* 206 F. Supp. 3d 1384, 1388–89 (N.D. Ill. 2016) (holding that the First Amendment protects online directory of attorneys, and that the directory constitutes expression for purposes of the First Amendment); *Dex Media W., Inc. v.*

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City of Seattle, 696 F.3d 952, 954 (9th Cir. 2012) (concluding that "the yellow pages directories qualify for full protection under the First Amendment"). As Plaintiff's Complaint makes clear, the materials she seeks to suppress are a source of information and interest for millions of readers. *See, e.g.,* Compl. ¶¶ 2, 28.

Moreover, the publication of information already in the public domain is particularly sacrosanct. *Nieman*, 512 F. App'x at 638; *see Willan v. Columbia Cnty.*, 280 F.3d 1160, 1163 (7th Cir. 2002). Indeed, it is axiomatic that the First Amendment protects the dissemination of information drawn from public records. *E.g.*, *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495 (1975); *see also Ostergren v. Cuccinelli*, 615 F.3d 263, 286–87 (4th Cir. 2010). Here, the screenshots Plaintiff includes in her Complaint are excerpts of her already published school yearbook. Compl. ¶ 8, images 1, 2, and 4. That is exactly the type of information that is by its very nature already in the public domain, and commonly found in public records. *See Vrdolyak*, 206 F. Supp. 3d at 1386, 1389 (holding that First Amendment precludes IRPA liability for online directory of attorneys with identifying "information gleaned from public records"). So, although, as noted above, the dissemination of truthful, factual information about individuals need not be in the public domain to merit full First Amendment protection, *e.g.*, *Dex*, 696 F.3d at 962, the fact the challenged information here *is* in the public domain makes this case a straightforward one.

The protected nature of PeopleConnect's speech does not vanish because Plaintiff characterizes the yearbook excerpts as "free preview[s]" that "advertise" PeopleConnect's services. Compl. ¶ ¶ 6, 13. *E.g.*, *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564–66 (1980). But more fundamentally, even if the yearbook excerpts could be properly characterized as "advertisements," when an advertisement promotes an activity that is "protected by the First Amendment," the advertisement receives the same protection as the underlying activity. *See Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 67 n.14 (1983); *Cher v. Forum Int'l, Ltd.*, 692 F.2d 634, 637–39 (9th Cir. 1982), *abrogated on other grounds as recognized in McQuiston v. Marsh*, 790 F.2d 798, 801 (9th Cir. 1986); *William O'Neil & Co. v. Validea.com Inc.*, 202 F. Supp. 2d 1113, 1118–19 (C.D. Cal. 2002); *Page v. Something Weird*

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Video, 960 F. Supp. 1438, 1443 (C.D. Cal. 1996).[6] Here, the underlying activity is already published high school yearbooks, which is plainly protected speech. *See Kincaid*, 236 F.3d at 351.

1. Plaintiff's Proposed Restriction On Speech Triggers Strict Scrutiny.

Plaintiff's proposed application of ORPS to protected First Amendment speech amounts to a content-based restriction, to which strict scrutiny applies. *See Sarver v. Chartier*, 813 F.3d 891, 903 (9th Cir. 2016) (California's right of publicity law "restricts speech based upon its content"); *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020) (restriction of dissemination of age information restricts speech based on content). Under strict scrutiny, laws restricting content are "presumptively unconstitutional" and must be "narrowly tailored to serve compelling state interests" to survive. *Reed v. Town of Gilbert,* 576 U.S. 155, 163 (2015); *see Sorrell*, 564 U.S. at 571 (fact that law is content-based is "all but dispositive"). Here, Plaintiff cannot show that applying ORPS to PeopleConnect's yearbook previews serves a compelling state interest, let alone that it is narrowly tailored.

Because Plaintiff cannot overcome strict scrutiny, Plaintiff likely will argue that yearbook previews are subject to the less demanding review associated with regulations of commercial speech. That is incorrect. Commercial speech is speech that "does no more than propose a commercial transaction." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (internal quotation marks and citation omitted). But PeopleConnect's display of yearbook excerpts do not "propose a commercial transaction" at all. *Id*. Not all of the screenshots Plaintiff provides mention a commercial transaction—at most those webpages provide links to other webpages which eventually propose commercial transactions. Compl. ¶ 8, images 2, 3. And, in the lone circumstance where a proposal for a commercial transaction appears on the same page as identifying information about Plaintiff, that information appears as a pop up on the screen, rather than a part of, the proposal itself. *Id*. image 2.

Yet even if the limited preview of yearbook excerpts did "propose a commercial transaction," by Plaintiff's own account, that is not all that they do. *See Dex*, 696 F.3d at 957

[6] *Accord Groden v. Random House, Inc.*, 61 F.3d 1045, 1050–51 (2d Cir. 1995); *Esch v. Universal Pictures Co.,* No. 09-cv-02258, 2010 WL 5600989, at *6 (N.D. Ala. Nov. 2, 2010).

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(citation omitted). Plaintiff alleges that these yearbook previews convey factual information: specifically a person's "name and photo." Compl. ¶¶ 6, 20. By disseminating this information to anyone who accesses the Classmates website, the yearbook previews provide a peak into the yearbooks themselves—which Plaintiff cannot dispute does "more than propose a commercial transaction." *Va. State Bd. of Pharmacy*, 425 U.S. at 762 (citation omitted).

Finally, even if Plaintiff's characterization of PeopleConnect's yearbook excerpts as "advertisements" was correct—though it is not—such advertisements still are constitutionally protected to the same extent the yearbooks they advertise are protected. *E.g. Bolger*, 463 U.S. at 66–67, 67 n.14 ("The mere fact that these pamphlets are conceded to be advertisements clearly does not compel the conclusion that they are commercial speech," and where the pamphlet advertises speech protected by the First Amendment they should be deemed non-commercial speech.). Courts have consistently held that, if a publication qualifies as constitutionally protected speech, then disseminating portions of it in advertising for the same publication is likewise protected.[7] There is ample authority that advertisements for subscriptions to constitutionally protected materials are protected to the same degree as the materials themselves. *E.g. Cher*, 692 F.2d at 637–39; *William O'Neil & Co.,* 202 F. Supp. 2d at 1119; *Page*, 960 F. Supp. 2d at 1443. Indeed, there is no principled—let alone constitutional—distinction between speech that encapsulates the entire product offered for sale and speech that provides an example of what the product contains.

2. Plaintiff's Claim Is Barred Even If The Speech Was Commercial.

If the Court concludes that PeopleConnect's speech is commercial, restrictions imposed by ORPS on that speech still "must survive intermediate scrutiny under *Central Hudson*." *See Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1176 (9th Cir. 2018). "The *Central Hudson* test first asks whether the speech is either misleading or related to illegal activity. If the speech 'is neither misleading nor related to unlawful activity,' then '[t]he State must assert a substantial interest to

[7] *Cher*, 692 F.2d at 637–39; *William O'Neil & Co.,* 202 F. Supp. 2d at 1119; *Page*, 960 F. Supp. at 1443; *Polydoros v. Twentieth Century Fox Film Corp*., 67 Cal. App. 4th 318, 325 (Cal. Ct. App. 1997); *Montana v. San Jose Mercury News, Inc*., 34 Cal. App. 4th 790, 796 (Cal. Ct. App. 1995).

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be achieved by' the regulation. The regulation must directly advance the asserted interest, and must not be 'more extensive than is necessary to serve that interest.'" *Id.* (quoting *Central Hudson*, 447 U.S. at 563–66) (internal citations omitted). "This requires that there be a reasonable fit between the restriction and the goal, and that the challenged regulation include 'a means narrowly tailored to achieve the desired objective.'" *Ballen v. City of Redmond*, 466 F.3d 736, 742 (9th Cir. 2006) (quoting *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989)) (internal citation omitted).

Plaintiff cannot satisfy this test. First, Plaintiff does not allege that PeopleConnect's speech is "misleading [or] related to unlawful activity" so there is no substantial interest in its regulation. *Central Hudson*, 447 U.S. at 564; *see Va. State Bd. of Pharmacy*, 425 U.S. at 773 (holding that state may not "suppress the dissemination of concededly truthful information about entirely lawful activity"). Second, there is no reasonable fit between ORPS's primary focus—allowing persons to protect the commercial value of their name, *Harvey*, 154 N.E.3d at 308—and barring PeopleConnect's publication of yearbook excerpts. So even under the commercial speech standard, Plaintiff's claim is barred by the First Amendment.

B. Applying ORPS To Yearbook Excerpts Violates The Dormant Commerce Clause.

State statutes that "burden, but that do not facially discriminate against, interstate commerce" violate the Constitution's Commerce Clause if they impermissibly burden interstate commerce. *Am. Beverage Ass'n v. Snyder*, 735 F.3d 362, 379 (6th Cir. 2013). Facially neutral statutes that create a disparate impact on interstate commerce are analyzed under *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Under Pike, a facially neutral state law violates the Commerce Clause if "the in-state regulatory benefits of a law outweigh the out-of-state burdens the law places on interstate commerce." *Am. Beverage Ass'n*, 735 F.3d at 379.

Here, applying ORPS to PeopleConnect's display of yearbook excerpts burdens PeopleConnect's ability to engage in interstate commerce in a way that is wholly out of proportion to the *de minimus* state interest in suppressing those results. There is no reasonable connection between the intended aim of ORPS to protect against the false endorsements of products, *ETW*

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Corp., 332 F.3d at 924, and a prohibition on PeopleConnect's display of yearbook excerpts. So the state's interest here is negligible, at best.

This negligible interest is far outweighed by the burden on interstate commerce of applying ORPS as Plaintiff proposes. Because of the "boundary-less" nature of the internet, PeopleConnect's business is inherently nationwide and interstate. *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103 (2d Cir. 2003) ("Because the internet does not recognize geographic boundaries, it is difficult . . . for a state to regulate internet activities without 'project[ing] its legislation into other States.'") (citation omitted). PeopleConnect transmits information across state lines through the internet every hour of every day, providing access to yearbooks to users located across the country. If ORPS forbids PeopleConnect's display of yearbook excerpts, as Plaintiff maintains it does, then PeopleConnect must continually ascertain the precise physical location of each user who views a search result, whether that person is using a tablet, laptop, or smartphone, and then block those search results from displaying to users if they are physically located in Ohio. PeopleConnect's only alternative would be to apply the restrictions imposed by ORPS nationwide, notwithstanding that many states do not have right of publicity laws and those that do differ in scope.[8]

Making PeopleConnect choose between excising Ohio from its nationwide transmission of search results—to the extent it is even technologically feasible—or treating ORPS as a nationwide directive would be an extraordinary interference of one state's law with interstate commerce. It would have the effect of "impermissibly regulat[ing] interstate commerce by controlling conduct beyond the State of [Ohio]." *Am. Beverage Ass'n*, 735 F.3d at 376. This is just what the Commerce Clause forbids.

[8] Courts have recognized that the Dormant Commerce Clause often is implicated by state regulation of internet-based businesses, like PeopleConnect. *E.g. Am. Booksellers Found.*, 342 F.3d at 103; *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 181 (S.D.N.Y. 1997) ("Regulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations."); *ACLU v. Johnson*, 194 F.3d 1149, 1161–62 (10th Cir. 1999) ("[T]he nature of the Internet forecloses the argument that a statute [regulating speech over the Internet] applies only to intrastate communications."); *PSINet, Inc. v. Chapman*, 362 F.3d 227, 240 (4th Cir. 2004) ("Given the broad reach of the Internet, it is difficult to see how a blanket regulation of Internet material . . . can be construed to have only a local effect.").

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CONCLUSION

For the foregoing reasons, the Complaint should be dismissed and Plaintiff compelled to adjudicate her claims in arbitration. In the alternative, the Complaint should be dismissed for the reasons set forth above.

Dated this 3rd day of May, 2021.

JENNER & BLOCK LLP

/s/ *Brent Caslin*
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633 West 5th Street, Suite 3600
Los Angeles, California 90071-2054
Telephone: 213 239-5100

Attorney for Defendant PeopleConnect, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the date given below, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF which sent notification of such filing to the e-mail addresses denoted on the Electronic Mail Notice List.

DATED this 3rd day of May, 2021.

/s/ *Brent Caslin*
Brent Caslin

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EXHIBIT F

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BARBARA KNAPKE, individually and on behalf of all other similarly situated, Plaintiff, v. PEOPLECONNECT, INC., a Delaware Corporation, Defendant.	Case No. 2:21-cv-00262-MJP DECLARATION OF TARA MCGUANE IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS NOTE ON MOTION CALENDAR: MAY 28, 2021

I, Tara McGuane, hereby declare:

1. I am the Associate Director of Compliance and IP at PeopleConnect, Inc. ("PeopleConnect"). I have been in that role since November 2020. In that role, I am responsible for drafting and enforcing the Terms of Service ("TOS") and am familiar with how the TOS are displayed on Classmates.com. I previously held the position of Senior IP & Marketing Compliance Manager. I have worked at PeopleConnect since 2002.

2. PeopleConnect owns and operates Classmates.com.

3. Classmates.com provides the general public access to an online database of alumni and yearbook information.

4. Classmates.com is governed by the TOS published on Classmates.com. A true and correct copy of the TOS is attached hereto as Exhibit 1.

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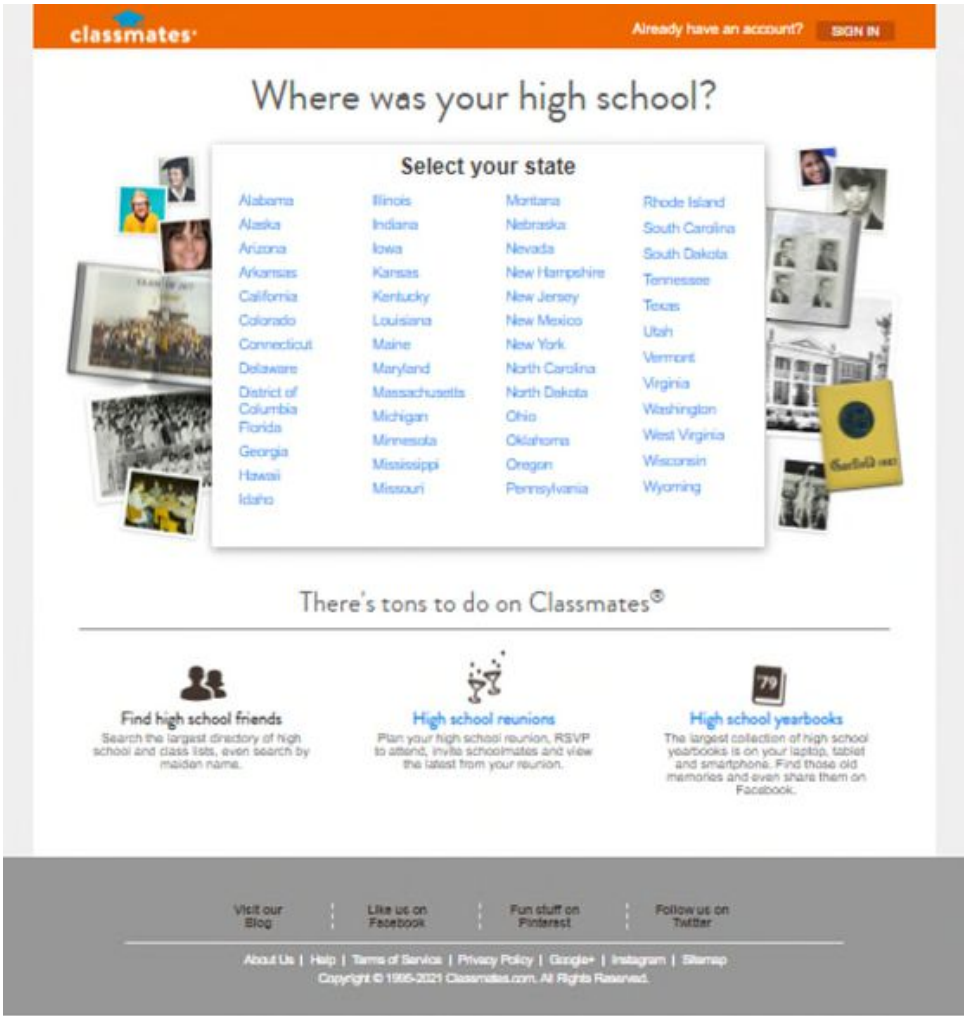
5. The TOS is accessible to each user of Classmates.com via a hyperlink in the website's persistent footer and on the non-registered user homepage as shown in the image below.



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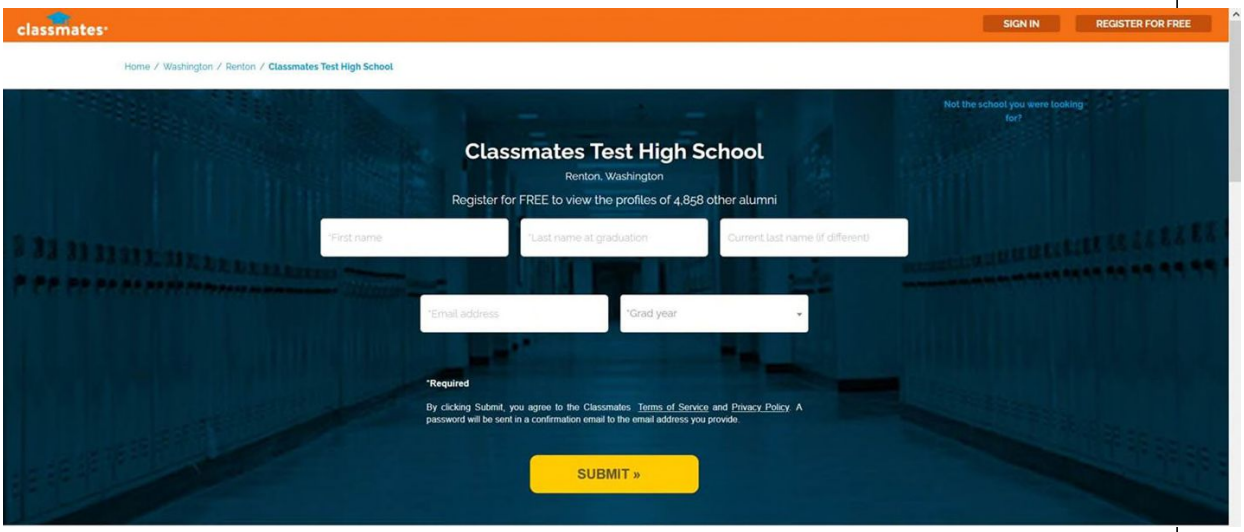
6. When a user of Classmates.com registers for an account, he or she sees the following screen, which includes the following: "By clicking Submit, you agree to the Terms of Service and Privacy Policy." The phrase "Terms of Service" is hyperlinked to a copy of the current TOS.



7. The TOS states:

> By accessing and using the Websites and Services you are agreeing to the following Terms of Service. We encourage you to review these Terms of Service, along with the
> Privacy Policy, which is incorporated herein by reference, as they form a binding agreement between us and you. If you object to anything in the Terms of Service or
> the Privacy Policy, do not use the Websites and Services.
>
> **USE OF THE WEBSITES AND/OR SERVICES REQUIRE YOU TO ARBITRATE**
> **ALL DISPUTES ON AN INDIVIDUAL BASIS, RATHER THAN JURY TRIALS OR CLASS ACTIONS, AND ALSO LIMITS THE REMEDIES AVAILABLE TO YOU IN THE EVENT OF A DISPUTE (SEE SECTION 13 BELOW).**

(Ex. 1, Acceptance of Terms.)

8. The TOS includes the following arbitration provision:

> **PLEASE READ THIS SECTION CAREFULLY - IT MAY SIGNIFICANTLY AFFECT YOUR LEGAL RIGHTS, INCLUDING YOUR**

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> **RIGHT TO FILE A LAWSUIT IN COURT. YOU AND THE PEOPLECONNECT ENTITIES EACH AGREE THAT ANY AND ALL DISPUTES THAT HAVE ARISEN OR MAY ARISE BETWEEN YOU AND THE PEOPLECONNECT ENTITIES SHALL BE RESOLVED EXCLUSIVELY THROUGH FINAL AND BINDING ARBITRATION, RATHER THAN IN COURT, EXCEPT THAT YOU MAY ASSERT CLAIMS IN SMALL CLAIMS COURT, IF YOUR CLAIMS QUALIFY.**
>
> You and PeopleConnect and/or its parent companies, subsidiaries, affiliates, and/or any and all of their respective directors, officers, employees and contractors (each a "PeopleConnect Entity" and, together, the "PeopleConnect Entities") agree to arbitrate any and all disputes and claims between them ("Dispute(s)"), except as otherwise specifically provided below. Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts. Arbitrators can award the same damages and relief that a court can award.
>
> This agreement to arbitrate is intended to be broadly interpreted. It includes, but is not limited to: (1) Disputes related in any way to the Services, billing, privacy, advertising or our communications with you; (2) Disputes arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory; (3) Disputes that arose before your agreement to these Terms of Services or any prior agreement; (4) Disputes that are currently the subject of purported class action litigation in which you are not a member of a certified class; and (5) Disputes that may arise after the termination of your use of the Services.

(*Id.* at Section 13.)

9. Any arbitrations are governed by the following rules:

> Rules. The arbitration will be governed by the Consumer Arbitration Rules of the American Arbitration Association (""AAA"), if applicable, as modified by this section. The AAA's rules and a form for initiating the proceeding are available at www.adr.org or by calling the AAA at 800.778.7879. The arbitration will be presided over by a single arbitrator selected in accordance with the AAA rules.

(*Id.* at Section 13(B)(i).)

10. The TOS also includes the following class action waiver:

> **ANY PROCEEDINGS WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS AND NOT IN A CLASS OR REPRESENTATIVE ACTION. NEITHER PARTY SHALL BE A MEMBER IN A CLASS, CONSOLIDATED, OR REPRESENTATIVE ACTION OR PROCEEDING, AND THE ARBITRATOR MAY AWARD RELIEF ONLY IN FAVOR OF THE INDIVIDUAL PARTY SEEKING RELIEF AND ONLY TO THE EXTENT NECESSARY TO PROVIDE RELIEF WARRANTED BY THAT PARTY'S INDIVIDUAL DISPUTE OR CLAIM. UNLESS THE PARTIES AGREE OTHERWISE, THE ARBITRATOR MAY NOT CONSOLIDATE**

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MORE THAN ONE PERSON'S DISPUTES, AND MAY NOT OTHERWISE PRESIDE OVER ANY FORM OF A REPRESENTATIVE OR CLASS PROCEEDING. THE PEOPLECONNECT ENTITIES DO NOT CONSENT TO CLASS ARBITRATION. THE PARTIES HEREBY WAIVE ANY RIGHT TO A JURY TRIAL.

(*Id.* at 13(c).)

11. I have reviewed and am familiar with PeopleConnect's business records related to Mr. Christopher Reilly's use of Classmates.com. PeopleConnect maintains those records in the ordinary course of its business.

12. On January 7, 2021, Mr. Reilly created a free Classmates.com account. His account was associated with the email chrisreillyfl@gmail.com. On January 29, 2021, he purchased a three-month subscription.

13. Mr. Reilly could not have created a free account without first agreeing to the Classmates.com TOS. Mr. Reilly could not have purchased a three-month subscription without again agreeing to the Classmates.com TOS.

14. I have reviewed the complaint filed by Plaintiff in this matter. The screenshots of the Classmates.com webpages reflected in Paragraphs 6 and images 1, 3, 4, and 5 included in Paragraph 8 of the complaint could only have been accessed after the user agreed to the Classmates.com TOS.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that I executed this declaration on April 30, 2021 in Seattle, Washington.

Tara McGuane

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EXHIBIT G

EXHIBIT 1

PeopleConnect

Terms of Service

Terms of Service

Update
Effective:
June 29, 2017 for new users

September 1, 2017 for existing users

Our Terms of Service have been updated, click here for a summary of changes. To view the previous version of the Terms of Service, click here.

INTRODUCTION

Welcome to PeopleConnect and thank you for using our services. Our web sites include PeopleConnect.us, Classmates.com, Intelius.com and USSearch.com, as well as other websites owned and operated by us (collectively, the "Websites"), along with various applications and tools that we operate on third-party websites and devices, such as Facebook, smartphones or tablets (such services offered through the Websites, applications or tools collectively, the "Services").

ACCEPTANCE OF TERMS

By accessing and using the Websites and Services you are agreeing to the following Terms of Service. We encourage you to review these Terms of Service, along with the Privacy Policy, which is incorporated herein by reference, as they form a binding agreement between us and you. If you object to anything in the Terms of Service or the Privacy Policy, do not use the Websites and Services.

USE OF THE WEBSITES AND/OR SERVICES REQUIRE YOU TO ARBITRATE ALL DISPUTES ON AN INDIVIDUAL BASIS, RATHER THAN JURY TRIALS OR CLASS ACTIONS, AND ALSO LIMITS THE REMEDIES AVAILABLE TO YOU IN THE EVENT OF A DISPUTE (SEE SECTION 13 BELOW).

We may change these Terms of Service, in whole or in part, at any time. Posting of the updated Terms of Service on the Websites will constitute notice to you of any such changes, although we may choose other types of notice for certain changes. Changes will become effective upon notice. Your continued use of the Websites or Services following notice shall constitute your acceptance of all changes, and each use of the Websites or Services constitutes your reaffirmation of your acceptance of these Terms of Service. If you do not agree to the changes to these Terms of Service, you sole and exclusive remedy will be to terminate your account and cease use of the Websites or Services.

INDEX OF PROVISIONS

1. BECOMING A MEMBER OF AND REGISTERING FOR THE SERVICES

A. Accessing the Services and Becoming a Member. THE SERVICES ARE INTENDED SOLELY FOR ACCESS AND USE BY INDIVIDUALS 18 YEARS OF AGE AND OLDER. BY ACCESSING AND USING THE SERVICES, YOU ARE CERTIFYING THAT YOU ARE AT LEAST 18 YEARS OLD. Our Services are primarily intended to be utilized by residents of the United States and we may limit or restrict access to the Websites and Services based on your geographic location or ISP. While there are parts of the Services where access requires the payment of a fee (”Paid Services”), there is no cost to register to become a member of the Services. The specific Services available to you will vary depending upon (1) whether you register as a member, (2) the community affiliation(s) to which you have self-identified (if you are a Classmates member), and (3) whether or not you choose to purchase Paid Services.

B. Your Information. We will collect, store, compile and utilize information about you, your computer, smartphone or other device, and your use of the Services, including information that you provide in response to questionnaires, surveys and registration forms. Please review our Privacy Policy for more information about our privacy policies and practices. For your part, you agree that all information that you provide to us or

post on the Services is complete, accurate and up to date. If any of your information changes, you agree to immediately update it. If you fail to update your information or if all or part of your information is (or appears to be) untrue, inaccurate, or incomplete, we may suspend or terminate your account and refuse any and all current or future use of the Services, without refund to you of any fees paid.

Without limiting any of the foregoing, you are responsible for ensuring that the email address you provide to us is valid and that the services, software or systems you use to access your email ("Email Systems") do not block or filter Communications (as defined below). We ask that you use your personal email address when registering. If you provide us with a non-personal email address or use an Email System that interferes with the delivery of Communications, we may not be able to provide you with certain Services. Your failure to provide us with an email address to which we can consistently deliver email may result in the termination of your account.

C. Your Password. During the registration process we may provide you with a unique registration number. We will also either ask you to create a password or assign you a random password, which you can change at any time by logging onto the "Account" portion of the Services. Alternatively, you may have the option of using your Facebook login credentials or similar login processes or co-registration forms from or on other third party websites to create an account and authenticate your access to the website. Because any activities that occur under your account are your responsibility, it is important for you to keep your password secure. Notify us immediately if you believe that someone has used your account without your authorization.

D. Communications. From time to time we will send you communications, in keeping with our Privacy Policy and as otherwise permitted in these Terms of Service ("Communications"). Please note that any number of issues may interfere with your receipt of such Communications, including some types of Email Systems that may use filtering or blocking techniques that are intended to block email. We are not responsible for the actual delivery or your actual receipt of these Communications.

2. PAID SERVICES

Access to some of the Services requires the purchase of Paid Services. If you elect to purchase Paid Services, you agree to our storage of your payment information and understand that your Paid Services are personal to you, such that you may not transfer or make available your account name and password to others. Any distribution or sharing by you of your account name and password may result in cancellation of your Paid Services without refund and/or additional charges based on unauthorized use. We reserve the right, from time to time, to change the Paid Services, with or without prior notice to you.

A. Payment. Prices for all Paid Services are in U.S. dollars and exclude any and all applicable taxes, unless expressly stated otherwise. To the extent permissible under law, you are responsible for any applicable taxes, whether or not they are listed on your receipt or statement. All applicable taxes are calculated based on the billing

information you provide us at the time of purchase. If you purchase Paid Services, you agree to pay, using a valid credit or debit card or other form of payment that we may accept from time to time ("Payment Method"), the applicable fees and taxes (if any) set forth in the offer that you accepted. We reserve the right, upon prior notice to you, to change the amount of any fees and to institute new fees, effective at the end of your current subscription period. All authorized charges will be billed to your designated Payment Method on the terms described in the specific offer. If payment cannot be charged to your Payment Method or your payment is returned to us for any reason, we reserve the right to either suspend or terminate your access to the unpaid-for Paid Services. It is your responsibility to ensure that sufficient funds are available to cover the charges for the Paid Services, and we have no liability for any overdraft or other fees that you may incur as a result of our processing of your payment.

B. Automatic Renewal Program. Upon your acceptance of an offer for the purchase of any subscription-based Paid Services, you will be enrolled in our automatic renewal program to help ensure that there is no interruption in your access to such Paid Services. Under this program, you authorize us to automatically renew your subscription at the end of the term of the subscription you purchased, and each subsequent term, for the same term length of the subscription you initially purchased (unless otherwise stated in the offer you accepted). Unless you change your renewal status as described below, at the time of each such renewal you authorize us to charge your designated Payment Method at the then-current, non-promotional price (unless otherwise stated in the offer you accepted) for the renewal of your subscription. If you no longer want to be enrolled in our automatic renewal program, you can change your renewal status at any time by completing the following steps:

- Classmates.com - logging onto the Account portion of the Classmates.com Website, clicking on "Account & Billing" and changing your renewal option from "automatic" to "manual."
- Intelius.com – logging onto the My Account portion of the Intelius.com Website and click on "cancel my membership."
- USSearch.com - logging onto the Your Account portion of the USSearch.com Website and click on "cancel service."

Please note that completing these steps will only stop future automatic renewals of your current subscription and will not impact any automatic renewals that occurred prior to the date that you completed these steps.

C. Current Information. You must provide us with current, complete and accurate information for your Payment Method. You must promptly update all information to keep your Payment Method current, complete and accurate (such as a change in billing address, card number or expiration date), and you must promptly notify us if your Payment Method is cancelled (including if you lose your card or it is stolen), or if you become aware of a potential breach of security (such as an unauthorized disclosure or use of your name or password). Changes to such information can be made by accessing the Account portion of the applicable Website or by contacting the applicable Customer Support. If you fail to provide us with any of the foregoing

information, you agree that you are responsible for fees accrued under your Payment Method. In addition, you authorize us to obtain updated or replacement expiration dates and card numbers for your credit or debit card as allowed or provided by your credit or debit card issuer.

D. No Refund Policy. All fees relating to Paid Services, including the initial fees and any subsequent automatic renewal fees (as described above), are non-refundable. If you initiate a chargeback or otherwise reverse a payment made with your Payment Method, we may in our discretion cancel your Paid Services immediately. If we successfully dispute the reversal, and the reversed funds are returned to us, you are not entitled to a refund or to have your Paid Services reinstated.

3. SPECIAL TERMS THAT APPLY TO CLASSMATES USERS

A. Classmates Member Conduct - Community Guidelines. The Classmates Services contain areas that enable members to communicate and share information, including without limitation sending email through the Services, providing information on your profile pages, and posting information on message boards, forums and other areas where you may interact with other members (collectively, the "Communication Tools"). When you use the Communication Tools, you may have the opportunity to disclose, post, upload, or otherwise publicly display, or to share directly with other members, information and other content, including without limitation biographical information, photographs, stories and comments (collectively, "Content"). While we may provide you with these Communications Tools, we also wish to remind you that you should choose carefully what information you post via the Services and share with other members.

You are required to use the Communication Tools responsibly, just as you would act responsibly when communicating or interacting with others in your offline communities. As a result, we expect and require that you take full responsibility for the Content that you post on or send through the Classmates Services. We have established some "Community Standards" that outline your responsibilities when using the Communication Tools.

The following Classmates Community Standards apply to and govern your use of the Communication Tools:

- Do not create a false identity, impersonate any person or entity, or otherwise misrepresent yourself, your age or your affiliation with any person or entity
- Do not register more than one personal membership or register on behalf of another person
- Do not post telephone numbers, street addresses or email addresses in Content that is publicly accessible on the Services, with the exception of the location of a reunion or other appropriate event
- Do not engage in behavior meant to threaten, harass, intimidate or bully others or which constitutes predatory or stalking conduct

- Do not use the Services as a venue to air personal disputes with other individuals
- Do not provide any Content that is illegal, obscene, pornographic or sexually explicit, depicts graphic or gratuitous violence or illegal drug paraphernalia, or is derogatory, demeaning, malicious, defamatory, abusive, hateful, racially or ethnically offensive, or otherwise determined to be objectionable
- Do not provide any Content that encourages a criminal offense or infringes, misappropriates, or otherwise violates the intellectual property rights or other rights of any third party
- Do not post web addresses that link to pornographic or inappropriate content, websites that promote your or someone else's commercial gain, websites that provide services similar to those offered by us, or any other content that violates these Community Standards
- Do not provide or post private communications from us or any other party without such party's permission
- Do not copy or re-post content provided by others or otherwise use information or content you obtained on the Services in any manner not authorized by us or the contributor
- Do not participate in any unauthorized or unsolicited promotions, advertising, junk mail, spam, or any other form of solicitation, or otherwise use the Services for any commercial purpose
- Do not violate any applicable local, state, national and international law or regulation
- Do not interfere with, interrupt, destroy or limit the functionality of the Services or any computer software or hardware or telecommunications equipment
- Do not try to gain unauthorized access to the Services, other members' accounts, or computers connected to the Services
- Do not collect users' content or information, or otherwise access the Services, using automated means, such as scripts, bots, robots, spiders or scrapers
- Do not do anything that could damage, disable, overburden or impair the proper working or appearance of the Services, such as a denial of service attack or interference with page rendering or other functionality

B. . Classmates Member Conduct - Monitoring and Enforcement. We do not actively monitor the Communication Tools or the Content that is provided through such Communication Tools, nor are we obligated to do so. Accordingly, we do not guarantee the accuracy, integrity or quality of the Content. Because individuals sometimes choose not to comply with our policies and practices, you may be exposed to Content that you find offensive or otherwise objectionable. We encourage you to use the tools available on the Classmates Services to report any Content that you think may violate the Community Standards. We may investigate the complaints that come to our attention, but are not obligated to do so. If we choose to investigate, we will take any action that we believe is appropriate in our sole discretion, such as issuing warnings, removing the Content, or suspending or terminating accounts. However, because situations and interpretations vary, we also reserve the right not to take any action. In such cases, we may not remove Content that you believe is

objectionable. Please remember that you can always choose to refrain from using any part of the Services that exposes you to something that you are uncomfortable with. Under no circumstances will we be liable in any way for any Content, including any errors or omissions in any Content or any loss or damage of any kind incurred as a result of the use of, access to or denial of access to any Content. In addition, we are not responsible for the conduct, whether online or offline, of any user of the Website or member of these Services.

C. Submitting or Posting Content on Classmates. We do not claim ownership of any of the Content you submit or post through the Classmates Services or allow us to obtain from third parties to include in the Services. Instead, you hereby grant us a royalty-free, worldwide, transferable, sub-licensable, non-exclusive license to use, reproduce, publish, store, distribute, display, communicate, perform, transmit, create derivative works based upon, and promote such Content (in whole or in part) in any medium now known or hereafter devised. Please remember that you are ultimately responsible for all of your Content, and you therefore warrant and represent that you are entitled to grant the foregoing license and that the Content does not violate any third party rights. No compensation will be paid for the use of your Content.

4. SPECIAL TERMS THAT APPLY TO INTELIUS & US SEARCH USERS

A. Intelius and US Search Member Conduct.

The following member conduct guidelines apply to and govern your use of the Intelius or US Search Services:

- Do not create a false identity, impersonate any person or entity, or otherwise misrepresent yourself, your age or your affiliation with any person or entity
- Do not register more than one personal account/membership or register on behalf of another person
- Do not engage in behavior meant to threaten, harass, intimidate or bully others or which constitutes predatory or stalking conduct
- Do not use the Services to seek information about or harm minors in any way
- Do not provide or post private communications from us without permission
- Do not violate any applicable local, state, national and international law or regulation
- Do not interfere with, interrupt, destroy or limit the functionality of the Services or any computer software or hardware or telecommunications equipment
- Do not try to gain unauthorized access to the Services, other members' accounts, or computers connected to the Services
- Do not resell any of the products or services that you purchase from us
- Do not collect users' content or information, or otherwise access the Services, using automated means, such as scripts, bots, robots, spiders or scrapers
- Do not do anything that could damage, disable, overburden or impair the proper working or appearance of the Services, such as a denial of service attack or interference with page rendering or other functionality

B. FCRA Restrictions. We do not provide consumer reports and are not a consumer reporting agency as defined by the Fair Credit Reporting Act (15 U.S.C. § 1681b) (the "FCRA"). The Services cannot be used to determine an individual's eligibility for credit, insurance, employment, housing or any other purpose prohibited under the FCRA Federal Trade Commission or court interpretations of the FCRA, or similar statutes or determinations.

C. Additional Restrictions. When using the Intelius or US Search Services, you should not assume that the data available through these Services include a complete or accurate representation of a person's criminal or civil judgment background or other information. Certain records, such as criminal, marriage, divorce, etc. may not be available in all states and counties. The data contained in the databases used by the Services have been compiled from publicly available information (such as from court records, phone directories, social networks, business websites, and other public sources) and other proprietary sources for the specific purposes of locating individuals and/or providing general background information about individuals. Our technology can also analyze public data to reveal possible relationships, even when official records aren't available. WE HAVE NOT VERIFIED THE DATA OR INFORMATION AVAILABLE THROUGH THE SERVICES AND DO NOT WARRANT ITS ACCURACY, LEGITIMACY, TIMELINESS, LEGALITY OR COMPLETENESS. ANY DATA OR INFORMATION PURCHASED FROM US VIA THE SERVICES IS PROVIDED "AS IS," WITHOUT WARRANTY OF ANY KIND, EXPRESS OR IMPLIED, INCLUDING, BUT NOT LIMITED TO, FITNESS FOR A PARTICULAR PURPOSE, TITLE, OR IMPLIED WARRANTIES OF MERCHANTABILITY OR NON-INFRINGEMENT.

D. Search Products. All reports purchased via the Intelius and US Search Services are made available in the Account section of the applicable Website for a limited time, as follows:

- Intelius reports are made available for 45 days from date of purchase.
- US Search reports are made available for 1 year from date of purchase.
- Reports obtained via a subscription service are made available for as long as the subscription remains active.

To extend their availability, search reports may be printed or saved digitally using common web browser features.

5. OUR PROPERTY RIGHTS

The Services, and all of the content, information and other material that they contain, other than the Content posted by our users, are owned by us, or our third party licensors, and are protected by intellectual property and other rights and laws throughout the world. Subject to your compliance with these Terms of Service, we grant you a limited, revocable, non-exclusive, non-assignable, non-sublicenseable license for the period of your membership to access the Services and view any materials available on the Services for the sole purpose of using the Services. Aside from this limited license, nothing found on the Services maybe copied, reproduced,

republished, distributed, sold, licensed, transferred or modified without our express written permission. In addition, the trademarks, domain names, logos and service marks displayed on the Services are our property or the property of our licensors. This Agreement does not grant you any right or license with respect to any such trademarks, domain names, logos or service marks. If you are aware of Materials on the Services that infringes the copyright or other right of a third party, please contact us through the Copyright Infringement Policy process, which is described in Section 9 below.

6. AVAILABILITY OF SERVICES

We do not provide you with access to the Internet or the equipment necessary to access the Internet or the Services. You are responsible for the fees charged by others to obtain access to the Services and for obtaining the equipment necessary to access the Services. From time to time we may modify, suspend or discontinue any of the Services with or without notice to you. We shall not be liable to you for any such modification, suspension or discontinuance. We may establish certain policies and practices concerning use of the Services, such as the maximum number of email messages, search reports, message board postings or other Content that can be sent through the Services and the number of days that these items will be retained on our systems. We have no responsibility or liability for the deletion or failure to store any messages and other communications or other Content, or search reports maintained or transmitted by or through the Services. We reserve the right to change our practices and policies at any time, in our sole discretion, with or without notice to you.

7. LINKING TO OR FROM THE SERVICES

You cannot link to the Services without our prior written consent. While the Services may have links to the websites of third parties, we have no control over those websites. We are not responsible or liable for any content, advertising, products, services, information or other materials on or available from those websites. We are also not responsible or liable, directly or indirectly, for any damage or loss caused or alleged to be caused by or in connection with use of or reliance on any content, advertising, products, services, information or other materials on those websites.

8. TERMINATION

You may terminate your account, for any or no reason, at any time by contacting Customer Support through the applicable Website (see Section 2 above for more information about termination of Paid Services). We may terminate your account, for any or no reason, at any time, with or without notice. If we determine, in our sole discretion, that you are not in compliance with the Terms of Service or Privacy Policy, we reserve the right to restrict, suspend or terminate your account. Upon any termination of your account, we may immediately deactivate or delete your account and all related information and/or bar any further access to your account, Content or information. If you have purchased Paid Services from us, any termination by you, or by us with cause, is subject to the no-refund policy described in Section 2(D) above.

9. COPYRIGHT INFRINGEMENT POLICY

In compliance with the Digital Millennium Copyright Act ("DMCA"), we have established the procedure outlined below to address alleged copyright infringement on the Services. If you believe that your work has been copied and has been posted on the Services in a way that constitutes copyright infringement, you may provide us with notice of your complaint by providing our Designated Copyright Agent with the following information in writing:

1. The electronic or physical signature of the owner of the copyright or a person authorized to act on the owner's behalf;
2. Identification of the copyrighted work that you claim has been infringed;
3. Identification of the material that is claimed to be infringing, with information about its location reasonably specific to permit us to locate the material;
4. Your name, address, telephone number, and email address;
5. A statement by you that you have a good faith belief that the disputed use is not authorized by the copyright owner, its agent, or the law; and
6. A statement, made under penalty of perjury, that the above information in your notification is accurate and that you are the copyright owner or are authorized to act on the copyright owner's behalf.

To be effective, your notification must be in writing and include the above information. Our Designated Copyright Agent to receive your notification is:

Name of Agent: Intellectual Property Manager
Address: 1501 Fourth Avenue, Suite 400, Seattle, WA 98101
Telephone Number of Designated Agent: (206) 301-5800
Facsimile Number of Designated Agent: (206) 301-5795
Email Address Designated Agent: copyrightnotice@peopleconnect.us
We, in our sole discretion, reserve the right to refuse additional Content from members who have posted allegedly infringing material, to delete the material, and/or to terminate such members' accounts.

After receiving a notification, we will process and investigate the notification and will take appropriate actions under the DMCA and other applicable intellectual property laws. Upon receipt of a notification that complies or substantially complies with the DMCA (as set forth above), we will act expeditiously to remove or disable access to any material claimed to be infringing or claimed to be the subject of infringing activity, and will act expeditiously to remove or disable access to any reference or link to material or activity that is claimed to be infringing. We will promptly take reasonable steps to notify the member that is the subject of the notification that it has removed or disabled access to such material.

If you are subject to a notification, you may provide us with a counter notification by providing our Designated Copyright Agent the following information in writing:

1. Your physical or electronic signature;
2. Identification of the material that has been removed or to which access has been

disabled and the location at which the material appeared before it was removed or access to it was disabled;

3. A statement under penalty of perjury that you have a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled; and
4. Your name, address, and telephone number, and a statement that you consent to the jurisdiction of Federal District Court for the judicial district in which your address is located, or if your address is outside of the United States, for any judicial district in which we may be found and that you will accept service of process from the person who provided the initial notification of alleged infringement.

Upon receipt of a proper counter notification under the DMCA (as set forth above), we will promptly provide the person who provided the initial notification with a copy of the counter notification and inform that person that we will reinstate the removed material or cease disabling access to it in ten (10) business days. Additionally, we will replace the removed material and cease disabling access to it not less than ten (10), nor more than fourteen (14) business days following receipt of the counter notice, unless our Designated Copyright Agent first receives notice from the person who submitted the initial notification that such person has filed an action seeking a court order to restrain you from engaging in infringing activity relating to the material on the Services.

10. DISCLAIMER OF WARRANTIES

YOU UNDERSTAND AND AGREE THAT:

THE SERVICES ARE PROVIDED ON AN "AS IS" AND "AS AVAILABLE" BASIS. WE DISCLAIM TO THE FULLEST EXTENT PERMISSIBLE BY LAW, AND YOU WAIVE, ALL WARRANTIES OF ANY KIND, WHETHER EXPRESS, IMPLIED, OR STATUTORY, INCLUDING WITHOUT LIMITATION THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE AND NON-INFRINGEMENT. THE FUNCTIONS, MATERIALS AND CONTENT OF THE SERVICES ARE NOT WARRANTED TO BE UNINTERRUPTED, TIMELY, SECURE OR ERROR-FREE, AND WE MAKE NO WARRANTY THAT THE INFORMATION ON THE SERVICES WILL BE ACCURATE, CURRENT OR RELIABLE OR THAT THE QUALITY ANY PRODUCTS, INFORMATION OR OTHER MATERIAL PURCHASED OR OBTAINED BY YOU THROUGH THE SERVICES WILL MEET YOUR EXPECTATIONS. WE DISCLAIM ANY RESPONSIBILITY FOR THE DELETION, FAILURE TO STORE, MISDELIVERY, OR UNTIMELY DELIVERY OF ANY INFORMATION OR MATERIAL. YOU ASSUME THE ENTIRE RISK OF LOSS AND DAMAGE DUE TO YOUR USE OF THE SERVICES, INCLUDING BUT NOT LIMITED TO THE COST OF REPAIRS OR CORRECTIONS TO YOUR HARDWARE OR SOFTWARE. SOME JURISDICTIONS DO NOT ALLOW THE EXCLUSION OF CERTAIN WARRANTIES, AND AS A CONSEQUENCE SOME OF THE ABOVE DISCLAIMERS MAY NOT APPLY TO YOU.

11. LIMITATIONS OF LIABILITY

YOUR USE OF THE SERVICES IS ENTIRELY AT YOUR SOLE RISK. WE, OUR PARENTS, SUBSIDIARIES AND OTHER AFFILIATES, AND THEIR RESPECTIVE OWNERS, DIRECTORS, OFFICERS, EMPLOYEES, LICENSORS, AGENTS AND CONTRACTORS SHALL NOT BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, EXEMPLARY OR PUNITIVE DAMAGES OR LOSSES (INCLUDING WITHOUT LIMITATION LOSS OF PROFITS, GOODWILL, USE, DATA OR OTHER INTANGIBLE LOSSES), WHICH YOU MAY INCUR IN CONNECTION WITH THE USE OF, OR INABILITY TO USE, THE SERVICES. IN ADDITION, OUR AGGREGATE LIABILITY WILL NOT EXCEED THE GREATER OF ONE HUNDRED DOLLARS ($100) OR THE AMOUNT YOU HAVE PAID US IN THE TWELVE MONTHS PRIOR TO THE DATE ON WHICH YOUR CLAIM AROSE. THE FOREGOING LIMITATIONS OF LIABILITY ARE PART OF THE BASIS OF THE BARGAIN BETWEEN YOU AND US AND SHALL APPLY TO ALL CLAIMS OF LIABILITY (INCLUDING WITHOUT LIMITATION WARRANTY, TORT, NEGLIGENCE, CONTRACT OR STRICT LIABILITY), EVEN IF WE HAVE BEEN TOLD OF THE POSSIBILITY OF ANY SUCH DAMAGE AND EVEN IF THE AVAILABLE REMEDIES FAIL THEIR ESSENTIAL PURPOSE. SOME JURISDICTIONS DO NOT ALLOW THE LIMITATION OF LIABILITY FOR INCIDENTAL OR CONSEQUENTIAL DAMAGES, AND AS A CONSEQUENCE SOME OF THE ABOVE LIMITATIONS MAY NOT APPLY TO YOU. IN ANY SUCH CASE, OUR LIABILITY WILL BE LIMITED TO THE FULLEST EXTENT PERMITTED BY APPLICABLE LAW.

12. INDEMNIFICATION

You shall indemnify and hold harmless, and at our request, defend us, our parents, subsidiaries, and other affiliates, as well as their respective owners, directors, officers, shareholders, employees, licensors, agents and contractors (each, an "Indemnified Party") from and against any and all claims, proceedings, damages, injuries, liabilities, losses, costs and expenses (including reasonable attorneys' fees, an allocation for in-house counsel, and other legal costs) arising out of your acts or omissions, including claims resulting from your use of the Services, your submission, posting or transmission of information or Content, or any breach of your obligations set forth in the Terms of Service or Privacy Policy. You shall reimburse each Indemnified Party on demand for any costs, expenses and liabilities incurred by such Indemnified Party to which this indemnity relates.

13. MANDATORY ARBITRATION, DISPUTE RESOLUTION AND CLASS ACTION WAIVER

PLEASE READ THIS SECTION CAREFULLY – IT MAY SIGNIFICANTLY AFFECT YOUR LEGAL RIGHTS, INCLUDING YOUR RIGHT TO FILE A LAWSUIT IN COURT. YOU AND THE PEOPLECONNECT ENTITIES EACH AGREE THAT ANY AND ALL DISPUTES THAT HAVE ARISEN OR MAY ARISE BETWEEN YOU AND THE PEOPLECONNECT ENTITIES SHALL BE RESOLVED EXCLUSIVELY THROUGH FINAL AND BINDING ARBITRATION, RATHER THAN IN COURT, EXCEPT THAT YOU MAY ASSERT CLAIMS IN SMALL CLAIMS COURT, IF YOUR

CLAIMS QUALIFY.

You and PeopleConnect and/or its parent companies, subsidiaries, affiliates, and/or any and all of their respective directors, officers, employees and contractors (each a "PeopleConnect Entity" and, together, the "PeopleConnect Entities") agree to arbitrate any and all disputes and claims between them ("Dispute(s)"), except as otherwise specifically provided below. Arbitration is more informal than a lawsuit in court. Arbitration uses a neutral arbitrator instead of a judge or jury, allows for more limited discovery than in court, and is subject to very limited review by courts. Arbitrators can award the same damages and relief that a court can award.

This agreement to arbitrate is intended to be broadly interpreted. It includes, but is not limited to: (1) Disputes related in any way to the Services, billing, privacy, advertising or our communications with you; (2) Disputes arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory; (3) Disputes that arose before your agreement to these Terms of Services or any prior agreement; (4) Disputes that are currently the subject of purported class action litigation in which you are not a member of a certified class; and (5) Disputes that may arise after the termination of your use of the Services.

A. CONTACT US FIRST. If you intend to pursue or participate in any Dispute in arbitration or small claims court (solely to the extent specifically provided below), you must first notify us of the dispute in writing at least thirty (30) days in advance of initiating arbitration or the small claims court action (if applicable) and attempt to informally negotiate a resolution to the Dispute in good faith. Notice to us should be sent via certified mail to: PeopleConnect, Inc., 1501 4th Avenue, Suite 400, Seattle, WA 98101, Attention: Legal Department. The notice of Dispute must: (a) include your name, address, phone number, and email address(es) used to register with or use the Services; (b) describe the nature and basis of the Dispute; (c) enclose and/or identify all relevant documents and/or information; and (d) set forth the specific relief sought. If the applicable PeopleConnect Entity and you do not reach an agreement to resolve the Dispute within thirty (30) days after the notice is received, you may commence with a formal arbitration proceeding or small claims court action (if applicable).

B. MANDATORY AND BINDING ARBITRATION PROCEDURES

YOU UNDERSTAND THAT BY THIS PROVISION, YOU AND THE PEOPLECONNECT ENTITIES ARE FOREGOING THE RIGHT TO SUE IN COURT AND HAVE A JURY TRIAL. THE FEDERAL ARBITRATION ACT GOVERNS THE INTERPRETATION AND ENFORCEMENT OF THIS AGREEMENT TO ARBITRATE.

i. **Rules.** The arbitration will be governed by the Consumer Arbitration Rules of the American Arbitration Association ("AAA"), if applicable, as modified by this section. The AAA's rules and a form for initiating the proceeding are available at www.adr.org or by calling the AAA at 800.778.7879. The arbitration will be presided over by a single arbitrator selected in accordance with the AAA rules.

ii. **Location.** Unless otherwise required by the AAA rules, the arbitration shall be held in Seattle, Washington. You and PeopleConnect may elect to have the arbitration conducted based solely on written submissions, subject to the arbitrator's discretion to require an in-person hearing. In cases where an in-person hearing is held, you or the applicable PeopleConnect Entity may attend by telephone, unless the arbitrator requires otherwise.

iii. **Cost Sharing.** Payment of all filing, administration and arbitrator fees will be governed by the AAA's rules, unless otherwise stated in this agreement. The applicable PeopleConnect Entity will pay as much of the filing, administration and arbitrator fees as the arbitrator deems necessary to prevent the arbitration from being cost-prohibitive, unless the arbitrator determines that a Dispute was filed for purposes of harassment or is patently frivolous. Reasonable documented attorneys' fees of both parties will be borne by the party that ultimately loses.

iv. **Arbitrator's Decision.** The arbitrator will decide the substance of the Dispute in accordance with the laws of the state of Washington, regardless of choice of law principles, and will honor all claims of privilege recognized by law. The arbitrator will have the power to award a party any relief or remedy that the party could have received in court in accordance with the law(s) that apply to the Dispute. The arbitrator's award shall be final and binding and judgment on the award rendered by the arbitrator may be entered in any court of competent jurisdiction.

C. CLASS ACTION WAIVER.

ANY PROCEEDINGS WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS AND NOT IN A CLASS OR REPRESENTATIVE ACTION. NEITHER PARTY SHALL BE A MEMBER IN A CLASS, CONSOLIDATED, OR REPRESENTATIVE ACTION OR PROCEEDING, AND THE ARBITRATOR MAY AWARD RELIEF ONLY IN FAVOR OF THE INDIVIDUAL PARTY SEEKING RELIEF AND ONLY TO THE EXTENT NECESSARY TO PROVIDE RELIEF WARRANTED BY THAT PARTY'S INDIVIDUAL DISPUTE OR CLAIM. UNLESS THE PARTIES AGREE OTHERWISE, THE ARBITRATOR MAY NOT CONSOLIDATE MORE THAN ONE PERSON'S DISPUTES, AND MAY NOT OTHERWISE PRESIDE OVER ANY FORM OF A REPRESENTATIVE OR CLASS PROCEEDING. THE PEOPLECONNECT ENTITIES DO NOT CONSENT TO CLASS ARBITRATION. THE PARTIES HEREBY WAIVE ANY RIGHT TO A JURY TRIAL.

D. ARBITRATION OPT-OUT. You have the right to opt-out and not be bound by this arbitration provision by sending written notice of your decision to opt-out to: PeopleConnect Arbitration Opt-Out, 1501 Fourth Avenue, Suite 400, Seattle, WA 98101. This notice must be sent within thirty (30) days of your first use of the Services or, if you are already a user of the Services upon initial release of this arbitration provision, within thirty (30) days of our email notice to you of that initial release.

The opt-out notice must state that you do not agree to this agreement to arbitrate and must include your name, address, phone number and email address(es) used to register with or use the Services. You must sign the opt-out notice for it be effective. Any opt-out not received within the applicable thirty (30) day period set forth above will

not be valid.

If you opt-out of the agreement to arbitrate, you and the PeopleConnect Entities agree that any Disputes will be resolved by a state or federal court located in King County, Washington, and you consent to the jurisdiction and venue of such court.

E. SMALL CLAIMS. You may choose to pursue your Dispute in small claims court (rather than arbitration) where jurisdiction and venue over the applicable PeopleConnect Entity and you are proper, and where your claim does not include a request for any type of equitable relief, and so long as the matter advances on an individual (non-class) basis.

F. INJUNCTIVE RELIEF. Notwithstanding anything to the contrary in the foregoing, either party may bring suit in court seeking a temporary or preliminary injunctive relief, which shall then be subject to review by the arbitrator should such party further seek permanent injunctive relief in arbitration.

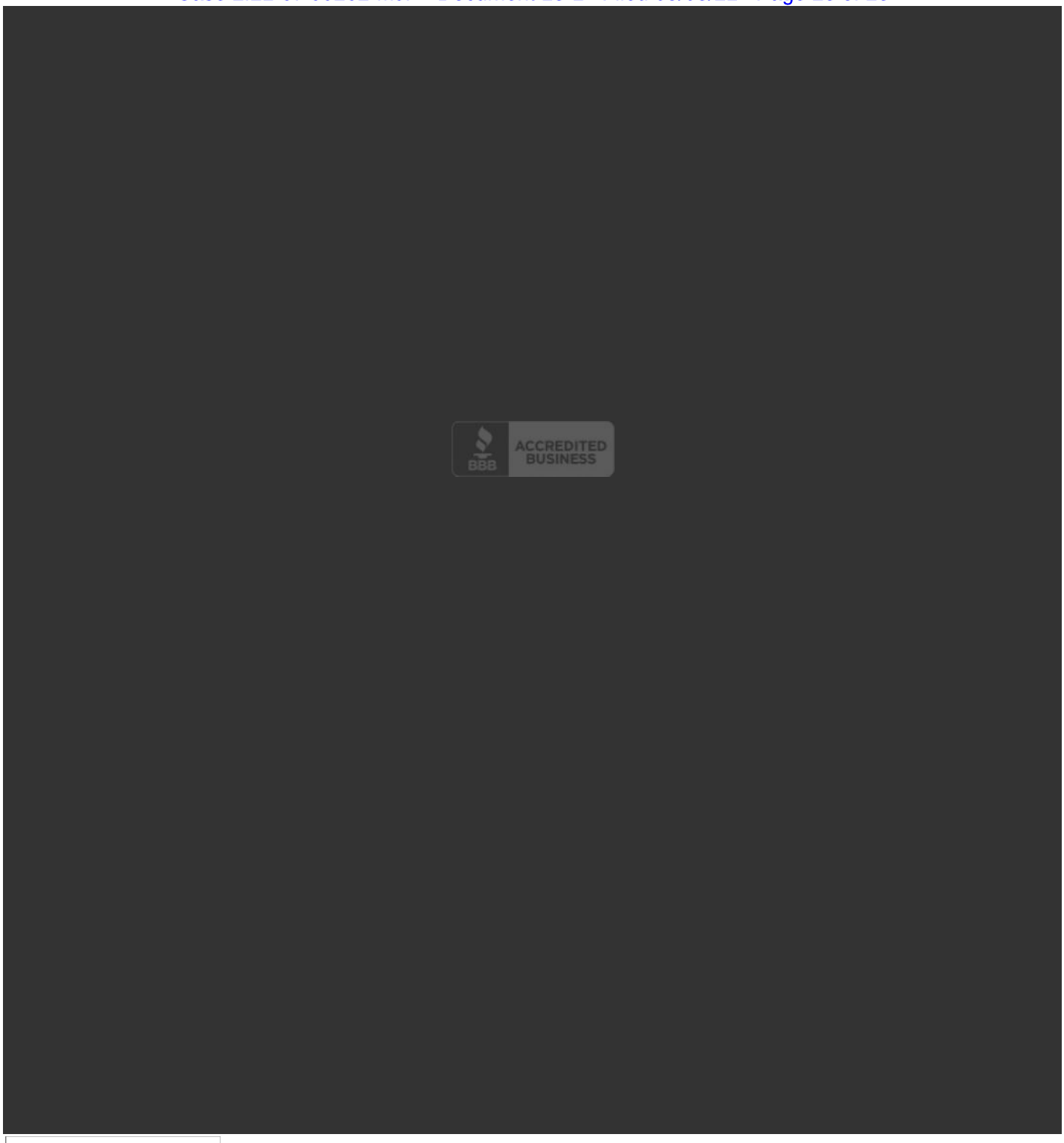
G. TIME LIMIT TO PURSUE DISPUTE. You agree that regardless of any statue or law to the contrary, any claim or cause of action arising out of or related to use of the Services or the Terms of Service or Privacy Policy must be filed within one (1) year after such claim or cause of action arose or be forever barred.

H. CHANGES TO ARBITRATION CLAUSE. We may make changes to this arbitration provision during the term of our Services to you. You may reject any material changes by sending us written objection within thirty (30) days of the change to PeopleConnect, Inc., 1501 Fourth Avenue, Suite 400, Seattle, WA 98101, Attention: Legal Department. By rejecting any future material change, you are agreeing to arbitrate in accordance with the unmodified language of the previous version.

14. MISCELLANEOUS TERMS

Our relationship is not one of agency or partnership and neither you nor we shall be deemed to be a partner, employee, fiduciary, agent or representative of the other by your use of the Services. You may not assign or transfer your rights to any third party. The terms and conditions in these Terms of Service are severable. In the event that any provision is determined to be unenforceable or invalid, such provision shall still be enforced to the fullest extent permitted by applicable law, and such determination shall not affect the validity and enforceability of any other provisions. If we fail to enforce any provision of these Terms of Service it shall not constitute a waiver of such provision. We may assign our rights and obligations under these Terms of Service. These Terms of Service will inure to the benefit of our successors, assigns and licensees. The failure of either party to insist upon or enforce the strict performance of the other party with respect to any provision of these Terms of Service, or to exercise any right thereunder, will not be construed as a waiver or relinquishment to any extent of such party's right to assert or rely upon any such provision or right in that or any other instance; rather, the same will be and will remain in full force and effect. The Terms of Service, the Privacy Policy, and any additional terms incorporated by reference herein will be governed by the laws of the state of Washington and constitute the entire

understanding between us regarding your access to, license and use of the Services and supersede any prior agreements, statements or representations with respect to the same.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