

**FOR PUBLICATION**

**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

OPINION

Appeal from the United States District Court  
for the Western District of Washington  
Marsha J. Pechman, District Judge, Presiding

Argued and Submitted May 18, 2022  
Seattle, Washington

Filed June 29, 2022

Before: Kim McLane Wardlaw, Ronald M. Gould, and  
Mark J. Bennett, Circuit Judges.

Opinion by Judge Bennett

**SUMMARY\***

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**Choice of Law / Arbitration**

The panel vacated the district court's denial of a motion to compel arbitration in an action involving a right of publicity claim against PeopleConnect, LLC under Ohio law.

Plaintiff Barbara Knapke claimed that PeopleConnect used her name and likeness in its Classmates.com school yearbook database without her consent. Knapke retained an attorney, Christopher Reilly, who created a Classmates.com account and searched for Knapke on the site. In creating the account, Reilly agreed to the Terms of Service, which contained an arbitration provision. Applying Ohio law, the district court denied PeopleConnect's motion to compel arbitration, holding that there was no evidence that Knapke gave her counsel authority to bind her to the Terms of Service containing the arbitration provision.

The panel held that the district court erred in applying Ohio law because Washington law governed the threshold question of arbitrability. Here, because no conflict was shown to exist between the law of Washington (the forum state) and Ohio law, Washington law applied.

The panel held that on the record before the district court, questions of fact precluded ruling on the motion to compel arbitration. These questions of fact included: whether Knapke and Reilly had an agency relationship when Reilly

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\* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

agreed to the Terms of Service; if they did have an agency relationship, whether and how Knapke limited Reilly's authority as her agent; and whether Knapke ratified Reilly's agreement to arbitrate even if Reilly initially lacked authority to bind her to the agreement. The panel rejected Knapke's contention that Fed. R. Civ. P. 11 obligations affected Reilly's use of the Classmates.com account. The panel held further that PeopleConnect had a right to conduct discovery on these and related arbitrability issues before the district court decides the motion to compel arbitration. The panel remanded for further proceedings.

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### COUNSEL

Ian Heath Gershengorn (argued) and Illyana A. Green, Jenner & Block LLP, Washington, D.C.; Clifford W. Berlow, Debbie L. Berman, and Wade A. Thomson, Jenner & Block LLP, Chicago, Illinois; Brent Caslin, Jenner & Block LLP, Los Angeles, California; for Defendant-Appellant.

Roger Perlstadt (argued), Ryan D. Andrews, and Ben Thomassen, Edelson PC, Chicago, Illinois; Philip L. Fraietta, Bursor & Fisher P.A., New York, New York; for Plaintiff-Appellee.

**OPINION**

BENNETT, Circuit Judge:

Barbara Knapke claims that PeopleConnect, Inc. uses her name and likeness in its Classmates.com school yearbook database without her consent. Knapke, an Ohio resident, wanted to pursue an individual and class action right of publicity claim against PeopleConnect under Ohio law. Knapke retained an attorney, Christopher Reilly, but the record does not reflect when she retained him. Reilly created a Classmates.com account and searched for Knapke on the site. By creating the account, Reilly agreed to the site's Terms of Service, which contained an arbitration provision. Knapke eventually filed suit in the U.S. District Court for the Western District of Washington, represented by Reilly and his law firm. PeopleConnect sought to compel arbitration through a motion to dismiss<sup>1</sup> and alternatively asked for the right to conduct arbitration-related discovery. Applying Ohio law, the district court denied the motion, holding that there was no evidence that Knapke gave her counsel authority to bind her to the Terms of Service containing the arbitration provision. The district court also denied discovery.

The district court erred. First, Washington law, not Ohio law, governs the threshold question of arbitrability. And second, on the record before the district court, questions of fact precluded ruling on the motion to compel arbitration. These questions of fact include whether Knapke and Reilly had an agency relationship when Reilly agreed to the Terms of Service; if they did have an agency relationship, whether

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<sup>1</sup> We follow the parties' lead in referring to the motion to dismiss as a motion to compel arbitration.

and how Knapke limited Reilly's authority as her agent; and whether Knapke ratified Reilly's agreement to arbitrate even if Reilly initially lacked authority to bind her to the agreement. PeopleConnect has a right to conduct discovery on these and related arbitrability issues before the district court decides the motion to compel arbitration. We have jurisdiction under 9 U.S.C. § 16(a)(1), and we vacate the district court's denial of the motion to compel arbitration and remand for further proceedings.

### I. BACKGROUND

PeopleConnect, Inc., a Delaware corporation with its principal place of business in Seattle, Washington, owns and operates Classmates.com, an online library of more than 450,000 yearbooks. Although any Classmates.com user may access some of that library, a user must register for either a free or paid account to access most of it. To register, a user must agree, by clicking "Submit", to hyperlinked Terms of Service and a privacy policy. The Terms of Service contain an arbitration provision. The arbitration provision covers, with almost no exceptions, "any and all disputes that have arisen or may arise" between the user and an array of PeopleConnect entities. The Terms of Service also allow a user to "opt-out and not be bound by [the] arbitration provision by sending written notice of [the] decision to opt-out" within thirty days.

Knapke lives in Sidney, Ohio. Her class action complaint is based on Classmates.com's use of her and other Ohioans' names and likenesses to advertise its products without their consent in violation of Ohio's right to publicity statute. The complaint included screenshots from parts of Classmates.com accessible only to a user who had first agreed to the Terms of Service. Some screenshots show that a user named "Christopher" was logged into a

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