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

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