

HONORABLE RICHARD A. JONES

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

BIOORIGYN, LLC, and JOANNA  
ELLINGTON CLIFTON,  
  
Plaintiffs,  
  
v.  
  
FAIRHAVEN HEALTH, LLC,  
  
Defendant.

Case No. 2:20-cv-00285-RAJ  
  
ORDER

**I. INTRODUCTION**

This matter comes before the Court on Defendant’s Motion to Dismiss or, in the Alternative, Motion for Partial Summary Judgment (Dkt. # 23) and the parties’ respective motions to seal (Dkt. ## 52, 56). Having considered the submissions of the parties, the relevant portions of the record, and the applicable law, the Court finds that oral argument is unnecessary. For the reasons below, Defendant’s dispositive motion is **GRANTED in part** (Dkt. # 23), and the parties’ motions to seal are **GRANTED** (Dkt. ## 52, 56).

**II. BACKGROUND**

Plaintiff Joanna Ellington is a scientist specializing in reproductive and genital health. Dkt. # 1 ¶ 19. In 2001, she formed a company, Plaintiff BioOrigyn LLC, that offers “fertility-friendly” and feminine care products. *Id.* Initially, Defendant Fairhaven Health LLC (“Fairhaven”) was a customer of BioOrigyn until the two companies “entered into a business collaboration on product development.” *Id.* ¶¶ 5-6. BioOrigyn

1 agreed to help Fairhaven develop Fairhaven-branded products in exchange for royalty  
2 payments. *Id.* ¶ 6. The products would come to be known as IsoFresh (a balancing  
3 vaginal gel), BabyIt (a perineal massage and postpartum comfort gel), and BabyDance (a  
4 fertility lubricant). *Id.* ¶ 28. The products were marketed under the “IsoLove” brand  
5 name, and the Court refers to the products collectively as “IsoLove products.” *Id.* ¶ 29.

6 In developing the products, the parties’ entered a series of agreements, only one of  
7 which is relevant here. *Id.* ¶¶ 22-26, 32. On May 1, 2015, Dr. Ellington and Fairhaven  
8 entered an agreement (“2015 Likeness Agreement”),<sup>1</sup> granting Fairhaven “the right to use  
9 Dr. Ellington’s Name and Likeness in relation to certain products,” subject to several  
10 conditions. *Id.* ¶ 32; Dkt. # 3. Dr. Ellington’s name and likeness<sup>2</sup> include “her full and  
11 formal names, nicknames, or aliases” and her “image, signature, voice, likeness and other  
12 representations.” Dkt. # 1 ¶ 11. Plaintiffs bring this action based on Fairhaven’s alleged  
13 “misappropriation” of Dr. Ellington’s likeness and alleged “false and deceptive  
14 commercial practices related to unauthorized and commercial use” of her likeness. *Id.*

15 Plaintiffs allege that Fairhaven misappropriated Dr. Ellington’s likeness because,  
16 despite terminating the 2015 Likeness Agreement months after entering it, Fairhaven  
17 continued to use Dr. Ellington’s likeness. *Id.* ¶¶ 34-35. Plaintiffs cite several instances.  
18 They claim that after termination Fairhaven used her likeness to promote Dr. Ellington as  
19 a “Medical Health Advisor” on Fairhaven’s website. *Id.* ¶¶ 38-40. In addition, they  
20 claim that Fairhaven used her likeness to promote the IsoLove products. *Id.* ¶¶ 41-57.  
21 Lastly, they claim that Fairhaven used her likeness to promote one product, “FertilAid  
22 For Men,” in a way that “went beyond the terms” of the 2015 Likeness Agreement. *Id.*  
23 ¶¶ 58-68.

24 Plaintiffs claim that Fairhaven engaged in false and deceptive commercial  
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26 <sup>1</sup> The complaint labels this agreement the “Likeness License.” Dkt. # 1 ¶ 8.

27 <sup>2</sup> Unless otherwise stated, the Court refers to Dr. Ellington’s name and likeness  
28 collectively as “likeness.”

1 practices, on the other hand, because it made misstatements in its product advertisements.  
2 *Id.* ¶¶ 69-85. For example, Plaintiffs allege that Fairhaven advertised one IsoLove  
3 product as having “no irritation potential,” despite “user feedback” to the contrary. *Id.*  
4 ¶ 70. Another example, Plaintiffs allege that Fairhaven promoted FertilAid For Men, a  
5 fertility pill, as being “clinically proven” to “improve sperm count, motility and  
6 morphology,” even though the clinical study referred to in fact found no such  
7 improvement. *Id.* ¶¶ 76-85 (emphasis omitted). The clinical study was conducted by Dr.  
8 Ellington. *Id.*

9 On February 24, 2020, Plaintiffs sued Fairhaven. Dkt. # 1. They assert five  
10 claims: breach of the 2015 Likeness Agreement, false association and false advertising in  
11 violation of the Lanham Act, infringement of personality rights, and unfair business  
12 practices in violation of Washington’s Consumer Protection Act. *Id.*

13 Fairhaven now moves to dismiss, or in the alternative, for partial summary  
14 judgment. Dkt. # 23. The motion is ripe for review.

### 15 III. LEGAL STANDARD

16 Federal courts are tribunals of limited jurisdiction and may only hear cases  
17 authorized by the Constitution or a statutory grant. *Kokkonen v. Guardian Life Ins. Co.*  
18 *of America*, 511 U.S. 375, 377 (1994). The burden of establishing subject-matter  
19 jurisdiction rests upon the party seeking to invoke federal jurisdiction. *Id.* Once it is  
20 determined that a federal court lacks subject-matter jurisdiction, the court has no choice  
21 but to dismiss the suit. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); Fed. R. Civ.  
22 P. 12(h)(3) (“If the court determines at any time that it lacks subject-matter jurisdiction,  
23 the court must dismiss the action.”).

24 A party may bring a factual challenge to subject-matter jurisdiction, and in such  
25 cases the court may consider materials beyond the complaint. *PW Arms, Inc. v. United*  
26 *States*, 186 F. Supp. 3d 1137, 1142 (W.D. Wash. 2016) (citing *Savage v. Glendale Union*  
27 *High Sch.*, 343 F.3d 1036, 1039 n.2 (9th Cir. 2003)); *see also McCarthy v. United States*,

1 850 F.2d 558, 560 (9th Cir. 1988) (“Moreover, when considering a motion to dismiss  
2 pursuant to Rule 12(b)(1) the district court is not restricted to the face of the pleadings,  
3 but may review any evidence, such as affidavits and testimony, to resolve factual disputes  
4 concerning the existence of jurisdiction.”).

#### 5 **IV. DISCUSSION**

6 Fairhaven advances three arguments: Plaintiffs’ claims are subject to binding  
7 arbitration, Plaintiffs’ claims fail because Ms. Ellington consented or acquiesced to  
8 Fairhaven’s use of her likeness, and Plaintiffs’ claims fail because they are untimely.  
9 Dkt. # 23 at 2-3. The Court need only address the first. The Court agrees with Fairhaven  
10 that this case must be dismissed and submitted to arbitration, and the Court ends its  
11 analysis there.

##### 12 **A. Motions to Seal (Dkt. ## 52, 56)**

13 In a previous order, the Court denied without prejudice the parties’ unopposed  
14 motions to seal. Dkt. # 51. Though the Court agreed that the documents requested to be  
15 sealed were confidential and proprietary, it denied the motions because as presented they  
16 did not meet the “compelling reasons” sealing standard. *Kamakana v. City & Cnty. of*  
17 *Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). The parties failed to explain what injury  
18 would result if the documents are not sealed or why a less restrictive alternative would be  
19 insufficient. Dkt. # 51.

20 Since then, the parties have refiled their motions to seal. Dkt. ## 52, 56. They  
21 have revised their motions and pared their requests for redactions. *Id.* They have also  
22 publicly refiled many documents or portions of documents that were previously filed  
23 under seal. Dkt. ## 53-54, 57-62. The Court has reviewed the parties’ submissions and  
24 determines that the parties have remedied the deficiencies of their previous sealing  
25 motions. The Court finds compelling reasons for the currently sealed documents to  
26 remain so. Dkt. # 55, 63-64.

1           **B.     Subject Matter Jurisdiction<sup>3</sup>**

2           Because the Federal Arbitration Act (“FAA”) requires courts to “direct the parties  
3 to proceed to arbitration on issues as to which an arbitration agreement has been signed,  
4 the FAA limits court involvement to determining (1) whether a valid agreement to  
5 arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at  
6 issue.” *Cox v. Ocean View Hotel Corp.*, 533 F.3d 1114, 1119 (9th Cir. 2008) (internal  
7 quotations omitted). The party opposing arbitration bears the burden of showing that the  
8 agreement is not enforceable. *See Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 91-  
9 92 (2000); *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 483  
10 (1989).

11           “The FAA limits the district court’s role to determining whether a valid arbitration  
12 agreement exists, and whether the agreement encompasses the disputes at issue.” *Nguyen*  
13 *v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014) (internal citation omitted).  
14 To determine “whether a valid arbitration agreement exists, federal courts ‘apply ordinary  
15 state-law principles that govern the formation of contracts.’” *Id.* (quoting *First Options*  
16 *of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995)). In determining whether an arbitration  
17 agreement encompasses the dispute at issue, district courts must be mindful that  
18 “arbitration is a matter of contract and a party cannot be required to submit to arbitration  
19 any dispute which he has not agreed so to submit.” *AT & T Technologies, Inc. v.*  
20 *Comm’n Workers of Am.*, 475 U.S. 643, 648 (1986). Any doubts as to the scope of an  
21 arbitration agreement should be resolved in favor of arbitrability. *Simula v. Autoliv*, 175  
22 F.3d 716, 721 (9th Cir. 1999).

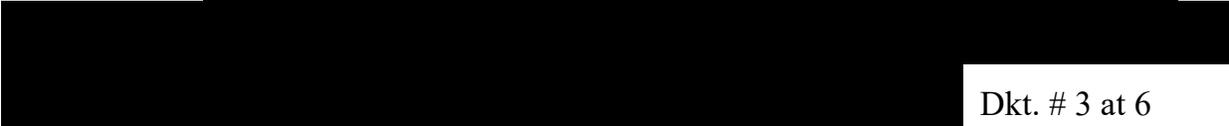
23           Part one of the Court’s inquiry, whether an arbitration agreement exists, is not  
24 seriously in dispute. The parties’ 2015 Likeness Agreement indeed contains an  
25 arbitration clause. Dkt. # 3 at 6-7. Plaintiffs’ argument is not that no such clause exists,

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27 <sup>3</sup> Fairhaven moves to dismiss this action under Rule 12(b)(1) for lack of subject matter  
jurisdiction. Dkt. # 23 at 4-5.

1 only that the existing clause fails to reach their asserted claims. Dkt. # 53 at 7-12. The  
2 clause's reach, however, must be analyzed under part two of the inquiry. Under part one,  
3 the Court finds that Fairhaven has met its initial burden: a valid arbitration agreement  
4 exists.

5 Part two is whether the arbitration agreement encompasses the dispute at issue.  
6 On this front, the Court is guided by *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720 (9th  
7 Cir. 1999). In that case, the Ninth Circuit determined that an arbitration agreement  
8 containing the phrase "arising in connection [with this Agreement]" must be construed  
9 liberally. *Id.* at 720-21. Such language reaches every dispute between the parties that  
10 (1) have a "significant relationship to the contract" and (2) have their "origin or genesis  
11 in the contract." *Id.* at 721. A plaintiff's "factual allegations need only 'touch matters'  
12 covered by the contract containing the arbitration clause and all doubts are to be resolved  
13 in favor of arbitrability." *Id.* The Court "must examine the factual allegations raised to  
14 determine which of [Plaintiffs'] causes of action are arbitrable." *Id.*

15 Like the arbitration agreement in *Simula*, the arbitration clause in the 2015  
16 Likeness Agreement is broad and must be liberally construed. The arbitration clause  
17 maintains that 

18   
19  Dkt. # 3 at 6  
20 (emphasis added).<sup>4</sup> Given the broad arbitration clause, the Court must identify every  
21 dispute that has a "significant relationship to the contract" or has its "origins or genesis in  
22 the contract." *Simula*, 175 F.3d at 721.

23 **i. Breach of the 2015 Likeness Agreement (Count I)**

24 Plaintiffs' first claim for breach of the 2015 Likeness Agreement is encompassed  
25 by the arbitration clause. In their complaint, Plaintiffs allege that the agreement was

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27 <sup>4</sup> Pursuant to the Court's previous order, Dkt. # 22, the 2015 Likeness Agreement is filed  
28 under seal. The Court quotes the agreement here and redacts the quotation accordingly.

1 valid, that Fairhaven terminated the agreement, that the termination required Fairhaven to  
2 “discontinue all use of and reference to Dr. Ellington’s Name and Likeness,” that the  
3 obligation “survive[d] termination of the agreement,” and that Fairhaven breached the  
4 agreement by continuing to use Dr. Ellington’s name and likeness after termination. Dkt.  
5 # 1 ¶¶ 86-92. This claim has its very genesis and origin in the 2015 Likeness Agreement.  
6 To resolve the dispute, one must assess the rights granted under the agreement, the  
7 cessation of those rights, and the breach of the contract by continued use of those rights.  
8 Under the likeness agreement’s arbitration provision, that task has been assigned to an  
9 arbitrator. Hence, Plaintiffs’ first claim for breach of contract is subject to arbitration.

10 Plaintiffs do not dispute this. Indeed, they do not address the arbitrability of their  
11 first claim at all. *See* Dkt. # 53 at 7-12. Instead, they recast the scope of the 2015  
12 Likeness Agreement and claim and seek to “drop” the claim altogether. *Id.* According to  
13 Plaintiffs, the 2015 Likeness Agreement is narrow: it “governs only the use of the  
14 Likeness with respect to the Blog entries for the Approved Products,” such as FertilAid  
15 For Men. *Id.* at 13. They say that their breach of contract claim is similarly limited. *See*  
16 *id.* at 7-9. In any event, “[t]o simply the issues,” Plaintiffs agree to “drop their claims  
17 related to the [FertilAid For Men] product . . . including Count I in its entirety . . . and  
18 portions of Counts II and IV . . . that are related to [FertilAid For Men].” *Id.* at 11 n.7.

19 In response, Fairhaven argues that Plaintiffs are seeking to “rewrite” the  
20 complaint. Dkt. # 46 at 3. Plaintiffs are dropping their breach claim, Fairhaven says,  
21 simply to “avoid” and “circumvent” the arbitration clause. *Id.*

22 Plaintiffs do not dispute that their first claim must be sent to arbitration. Their  
23 argument is not that their breach claim is not arbitrable; their argument is that the Court  
24 should ignore the claim altogether because they would now like to “drop” it. Despite this  
25 maneuver, the Court must analyze the claims and factual allegations pleaded in the  
26 complaint—not Plaintiffs’ representations on summary judgment—to determine whether  
27 they are encompassed by the 2015 Likeness Agreement’s arbitration provision.

1 As pleaded, Plaintiffs’ breach of contract claim is not as limited as Plaintiffs now  
2 say. It is not merely limited to blogs and FertilAid For Men. According to the complaint,  
3 “Defendant breached the [2015 Likeness Agreement] by, *among other things*, using Dr.  
4 Ellington’s Name and Likeness to endorse or approve its products *including* FertilAid For  
5 Men.” Dkt. # 1 ¶ 90. The claim makes no mention of blogs, nor does it purport to limit  
6 the claim to FertilAid For Men. In fact, other allegations suggest that Fairhaven intended  
7 for its breach claim to cover much more. For example, Fairhaven alleges that the 2015  
8 Likeness Agreement required Fairhaven to “discontinue all use of and reference to Dr.  
9 Ellington’s Name and Likeness,” a requirement that “survives termination of the  
10 agreement.” *Id.* ¶ 89. Fairhaven allegedly breached the agreement by “continuing to use  
11 her Name and Likeness after [it] terminated the agreement.” *Id.* ¶ 90. These allegations  
12 suggest that Fairhaven, at least as initially pleaded, intended for the claim to cover any  
13 later use of Dr. Ellington’s likeness that was not covered by the 2015 Likeness  
14 Agreement.

15 The Court will not ignore the express language of the complaint simply because  
16 Plaintiffs request to drop the claim here. Whether Plaintiffs continue to pursue this claim  
17 or not, the claim is subject to the 2015 Likeness Agreement’s arbitration provision and  
18 must be sent to arbitration.

19 **ii. False Association in Violation of the Lanham Act (Count II) &**  
20 **Infringement of Personality Rights (Count IV)**

21 Plaintiffs’ second and fourth claims are also encompassed by the arbitration  
22 provision. Though the claims are brought under different statutes, they share a core  
23 allegation. Plaintiffs allege that Fairhaven exploited Dr. Ellington’s likeness without  
24 authorization. Dkt. # 1 ¶¶ 96-97, 125-26. For both claims, Plaintiffs allege that Fairhaven  
25 was authorized to use her likeness under the 2015 Likeness Agreement, yet Fairhaven  
26 exceeded the authorization when it continued to use her likeness after the agreement was  
27 terminated. *Id.* ¶¶ 97, 126. For example, in support of their false association claim,  
28 Plaintiffs allege that Fairhaven used Dr. Ellington’s likeness without authorization

1 because the 2015 Likeness Agreement “allowed [Fairhaven] to use Dr. Ellington’s Name  
2 and Likeness only on certain Approved Products, for specified purposes . . . and within a  
3 limited duration of time” but “[f]ollowing termination of the [2015 Likeness  
4 Agreement] . . . [Fairhaven] did not stop using Dr. Ellington’s Name and Likeness.” *Id.*  
5 ¶ 97. Similarly, in support of their infringement of personality rights claim, Plaintiffs  
6 allege that Fairhaven “exploited” Dr. Ellington’s likeness without authorization as “[a]ny  
7 limited authorization granted to Fairhaven by virtue of the [2015 Likeness  
8 Agreement] . . . has expired in its entirety.” *Id.* ¶¶ 125-26.

9         The Court finds that both claims have a significant relationship to the 2015  
10 Likeness Agreement. Both claims are thus governed by the agreement’s arbitration  
11 provision. The significant relationship is that—as pleaded by Plaintiffs themselves—the  
12 2015 Likeness Agreement demarcates where Fairhaven’s permission to use Dr.  
13 Ellington’s likeness started and stopped. Where the permission stopped and where  
14 Fairhaven continued to use Dr. Ellington’s likeness is precisely where Counts II and IV  
15 begin. To decide these claims, one must determine what Fairhaven’s rights were under  
16 the 2015 Likeness Agreement, when those rights ended, and what Fairhaven did  
17 afterwards. Under *Simula*, these disputes are encompassed by the agreement’s arbitration  
18 provision and are left for the arbitrator.

19         Plaintiffs’ principal argument is that the IsoLove products cannot be encompassed  
20 by the 2015 Likeness Agreement because they were developed years later. Dkt. # 53 at  
21 7-9. According to Plaintiffs, “the parties did not intend to make the IsoLove products  
22 subject to the [2015 Likeness Agreement], and never agreed to arbitrate disputes relating  
23 to those products.” *Id.* at 8.

24         This argument is unconvincing for three reasons. First, it fails to address the  
25 FertilAid For Men products. Plaintiffs do not dispute that those products are clearly  
26 within the ambit of the arbitration provision. They merely wish to drop the portions of  
27 Counts II and IV that relate to the FertilAid For Men products. *Id.* at 11 n.7. To the

1 extent the claims include FertilAid For Men products, they are undisputedly subject to  
2 arbitration.

3         Second, the argument fails to undermine the significant relationship between the  
4 2015 Likeness Agreement and Counts II and IV. As explained above, in their complaint,  
5 Plaintiffs use the 2015 Likeness Agreement as a measuring stick to identify where  
6 Fairhaven’s permission to use Dr. Ellington’s likeness began and where it ended.  
7 Plaintiffs argument—that Fairhaven used Dr. Ellington’s likeness long after the 2015  
8 Likeness Agreement was terminated to promote different products—does not undermine  
9 that relationship. The IsoLove products may have very well been invented and promoted  
10 long after the agreement was terminated. As pleaded, Counts II and IV would  
11 nevertheless have a significant relationship to the likeness agreement. As they relate to  
12 the IsoLove products, the claims would still be premised on the allegations that the 2015  
13 Likeness Agreement defined the scope of Fairhaven’s rights to use Dr. Ellington’s  
14 likeness, that Fairhaven exceeded that scope, and that Plaintiffs are bringing false  
15 association and personality infringement rights claims accordingly. *See, e.g.,* Dkt. # 1  
16 ¶ 52 (“[T]he [2015 Likeness Agreement] allowed Fairhaven to use Dr. Ellington’s Name  
17 and Likeness for limited purposes in connection with specific products, which did not  
18 include any of the IsoLove products. . . . Fairhaven nevertheless capitalized on her Name  
19 and Likeness for the sales of the IsoLove products . . .”).

20         Finally, given the preference for arbitration, the Court resolves all doubts in favor  
21 of arbitrability. *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 721 (9th Cir. 1999). Counts II  
22 and IV are subject to arbitration.

23                 **iii. False Advertising (Count III)**

24         Though a closer call than the previous two claims, Plaintiffs’ third claim is also  
25 encompassed by the arbitration clause. According to the complaint, Fairhaven  
26 “misrepresent[ed] the nature, characteristics and qualities of its products and services.”  
27 Dkt. # 1 ¶ 111. For example, as to FertilAid For Men, Plaintiffs allege that Fairhaven’s

1 marketing materials misrepresented the results of a clinical study conducted by Dr.  
2 Ellington. *Id.* ¶¶ 77-85, 111. As to BabyIt, an IsoLove product, Fairhaven allegedly  
3 marketed the product as having no irritation potential despite “user feedback” that the  
4 product may in fact have a “likelihood of irritation.” *Id.* ¶ 70. Plaintiffs claim that those  
5 false statements, among others, amount to a violation of the Lanham Act. *Id.* ¶¶ 107-23.

6 Plaintiffs argue that Count III does not bear a significant relationship to the 2015  
7 Likeness Agreement. Dkt. # 53 at 9-12. They say that the “gravamen” of their  
8 allegations do not concern “whether [Fairhaven] used Dr. Ellington’s Likeness,” but  
9 rather whether Fairhaven employed “deceptive practices” and “false and misleading  
10 statements” to promote its products. *Id.* at 10.

11 The question is not, however, whether the 2015 Likeness Agreement is the  
12 “gravamen” of Plaintiffs’ false advertising claim; it is whether the agreement bears a  
13 “significant relationship” to it. *Simula*, 175 F.3d at 721. The Court acknowledges that  
14 Dr. Ellington’s likeness is not as squarely implicated in Count III (false advertisement) as  
15 it is in Counts II and IV (false association and infringement of personality rights).  
16 Misrepresentations about a clinical study or the properties of a product may be distinct  
17 from Fairhaven’s use of Dr. Ellington’s likeness. Yet her likeness, and thus the 2015  
18 Likeness Agreement, still bear a significant relationship to Plaintiff’s false advertisement  
19 claim.

20 Plaintiffs’ factual allegations amply support this conclusion. To start, Plaintiffs  
21 allege that Fairhaven “appreciates the value associated with Dr. Ellington’s Name and  
22 Likeness, which is well recognized among the relevant purchasing public, and takes  
23 advantage thereof.” Dkt. # 1 ¶ 109. They also allege that the false advertising statements  
24 were made while “[c]apitalizing on the use” of Dr. Ellington’s likeness. *Id.* ¶ 110. In  
25 pleading the interstate commerce element of the claim, Plaintiffs allege that Fairhaven’s  
26 “widespread unauthorized use” of Dr. Ellington’s likeness was done “across various  
27 online channels and throughout the country and overseas.” *Id.* ¶ 120. Most significantly,

1 Plaintiffs’ own allegations claim that Fairhaven has “inextricably linked” Dr. Ellington’s  
2 likeness to these false and misleading statements. *Id.* ¶ 70 (“Defendant’s false and/or  
3 misleading advertising of BabyIt harms BioOrigyn and Dr. Ellington, because  
4 Defendant’s unauthorized use of her Name and Likeness has *inextricably linked*  
5 BioOrigyn and Dr. Ellington to this product.”) (emphasis added); *Id.* ¶ 85 (“Defendant’s  
6 false and/or misleading advertising of FertilAid for Men harms Dr. Ellington as well as  
7 BioOrigyn because Defendant’s unauthorized use of Dr. Ellington’s Name and Likeness  
8 has *inextricably linked* BioOrigyn and Dr. Ellington to this product.”) (emphasis added).

9 To decide this claim, one must assess the false and misleading nature of  
10 Fairhaven’s advertisements. To do that would require an inquiry of the extent Fairhaven  
11 was permitted to use Dr. Ellington’s likeness in those advertisements. Weighing all  
12 doubts in favor of arbitration, the Court finds that the “inextricable link” between Dr.  
13 Ellington’s likeness, the 2015 Likeness Agreement, and Plaintiffs’ false advertising claim  
14 is a sufficient “significant relationship” under *Simula*. Thus, Count III is subject to  
15 arbitration.

#### 16 **iv. Unfair Business Practices (Count V)**

17 Plaintiffs’ final claim for violation of the Washington Consumer Protection Act is  
18 also encompassed by the 2015 Likeness Agreement. The factual allegations underlying  
19 this claim are substantially the same as the previous. Plaintiffs allege that Fairhaven’s  
20 advertisements and trade practices, such as the statements it made in promoting FertilAid  
21 For Men and BabyIt products, “have the capacity to deceive a substantial portion of the  
22 public.” Dkt. # ¶¶ 132-34.

23 Like the previous claim, Plaintiffs’ factual allegations bear a significant  
24 relationship with the 2015 Likeness Agreement. Plaintiffs allege that Fairhaven  
25 “appreciates the value associated with Dr. Ellington’s Name and Likeness, which is well  
26 recognized among the relevant purchasing public, and takes advantage thereof.” *Id.*  
27 ¶ 131. And in pleading the public interest element of the claim, Plaintiffs allege that

1 Fairhaven “misused Dr. Ellington’s Name and Likeness in a manner that both violates the  
2 Lanham Act and infringes the personality rights protected under Washington law, which  
3 evidences public deception and confusion caused by Defendant’s conducts.” *Id.* ¶ 138.  
4 Plaintiffs further allege that the misuse “serve[s] a common goal . . . to promote products  
5 and services of Defendant to the public.” *Id.*

6 Again, to decide this claim, one must assess the deceptive nature of Fairhaven’s  
7 advertisements and the extent the public interest was affected. That would require an  
8 inquiry of the extent Fairhaven was permitted to use Dr. Ellington’s likeness in those  
9 advertisements. Weighing all doubts in favor of arbitration, the Court finds a significant  
10 relationship between Dr. Ellington’s likeness, the 2015 Likeness Agreement, and  
11 Plaintiffs’ unfair business practices claim. As with the previous four claims, Count V is  
12 subject to arbitration.

#### 13 V. CONCLUSION

14 For the reasons stated above, the Court **GRANTS** the parties’ motions to seal  
15 (Dkt. ## 52, 56) and **GRANTS in part** Fairhaven’s Motion to Dismiss or, in the  
16 Alternative, Motion for Partial Summary Judgment (Dkt. # 23). This action is  
17 **DISMISSED** in favor of arbitration.

18 DATED this 3rd day of June, 2021.

19   
20 The Honorable Richard A. Jones  
21 United States District Judge  
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