UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RENEE KESNER, Plaintiff, v. JETSMARTER, INC., JAMES TORNABENE, and JOHN DOES 1-10, Defendants.	**Civil Action No. 3:19-cv-12922** **Oral Argument Requested**

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND COMPEL ARBITRATION

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PRELIMINARY STATEMENT

Defendants James Tornabene and JetSmarter, Inc. (collectively, "JetSmarter") respectfully submit this brief in support of their motion to dismiss this action and compel arbitration.

This action stems from an agreement that Plaintiff Renee Kesner entered into with JetSmarter in which Plaintiff paid JetSmarter certain membership fees and other fees and, in exchange, JetSmarter agreed to provide Plaintiff with, among other things, access to travel-related services (the "Membership Agreement"). The Membership Agreement also contains a dispute resolution clause pursuant to which the parties agreed that any claim or dispute related to the Membership Agreement or the relationship or duties of the parties, including without limitation, the validity of the dispute resolution provision, would be resolved exclusively by binding arbitration.

Initially, when Plaintiff signed up for JetSmarter's mobile application (the "JetSmarter App"), she was given the opportunity to review JetSmarter's Terms of Use, which contained an express mandatory arbitration provision as well. In order to register for the JetSmarter App and create a profile, Plaintiff had to affirmatively acknowledge that she agreed to the Terms of Use by sliding a "button" on the JetSmarter App.

Additionally, in connection with her initial purchase of the JetSmarter membership, Plaintiff assented to arbitration once again by "clicking" a checkbox that signaled her acceptance of the terms and conditions of the then-current Membership Agreement.

Plaintiff alleges that at some point in the summer of 2018, JetSmarter substantially reduced the benefits provided in connection with the membership. As a result, and in complete contravention of the clear and enforceable mandatory arbitration provision contained in the Terms of Use and Membership Agreement, Plaintiff brought this action against JetSmarter

alleging: (1) breach of contract; (2) breach of the covenant of good faith and fair dealing; (3) consumer fraud; (4) respondeat superior; (5) fraud; (6) unjust enrichment; and (7) violation of New Jersey's Truth-In-Consumer Contract Warranty and Notice Act ("TCCWNA").

As a threshold matter, it is submitted that the Court should enforce the clear and unambiguous arbitration provision contained in the Terms of Use and Membership Agreement which requires that "[a]ny claim or dispute . . . including the validity of this clause, shall be resolved . . . by binding arbitration[.]" *See* Declaration of Mikhail Kirsanov ("Kirsanov Decl."), Ex. 2 at 20-21 and Ex. 4 at § 18. This provision plainly requires the subject dispute to be decided by a neutral decision-maker in arbitration, and not by a jury in the District of New Jersey. Plaintiff chose to entirely ignore this binding and enforceable provision requiring arbitration.

The Federal Arbitration Act and binding Supreme Court precedent mandates that written agreements to arbitrate disputes must be enforced according to their terms. Accordingly, the Court should dismiss the current action, and compel binding arbitration as the parties contemplated and agreed in accordance with the arbitration provision contained in the membership documents.

Significantly, as discussed herein, on February 20, 2019, a state court in California analyzed a substantially similar arbitration provision and held that it was enforceable. In this regard, the court stayed that lawsuit and compelled that action to binding arbitration.

On April 2, 2019, a second decision was issued in a related matter pending in the United States District Court for the Eastern District of Wisconsin entitled: *Abraham v. JetSmarter, Inc.*, Civ. No. 18-cv-1647, wherein the court granted JetSmarter's motion to dismiss in favor of arbitration. *See* 2019 U.S. Dist. LEXIS 56420 (E.D. Wis. Apr. 2, 2019). In doing so, the court

held as follows:

> The court concluded that the [plaintiffs] assented to the terms of the Membership Agreement, including the arbitration provision, when they clicked the "toggle button" next to the phrase, "I ACCEPT TERMS AND CONDITIONS OF THE MEMBERSHIP AGREEMENT."

See id. at *14.

On April 29, 2019, a third and fourth decision in connection with the enforceability of JetSmarter's arbitration provision were issued in two related matters pending in the United States District Court for the Southern District of Florida and the court granted both of JetSmarter's motions to dismiss and compel arbitration. In doing so, the court interpreted a substantially similar arbitration provision and held that based upon the express language of the arbitration provision, "the question of arbitrability is for the arbitrator." *Bachewicz v. JetSmarter, Inc.*, Civ. No. 18-cv-62570, 2019 U.S. Dist. LEXIS 71345, at *9 (S.D. Fla. Apr. 29, 2019); *Laine v. JetSmarter, Inc.*, Civ. No. 18-cv-62969, 2019 U.S. Dist. LEXIS 71346, at *10-11 (S.D. Fla. Apr. 29, 2019) ("Because the Membership Agreement states that any dispute will be resolved by an arbitrator, the issue of arbitrability must be resolved in arbitration."). In reaching this conclusion, the court relied upon the recent Supreme Court of the United States decision in *Henry Schein v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). *See Bachewicz*, 2019 U.S. Dist. LEXIS 71345, at *8. Likewise, the court found a valid and enforceable agreement to arbitrate based upon JetSmarter's clickwrap agreement. *See id.* at *7.

On May 1, 2019, another Judge in the Southern District of Florida issued a decision in *Pieczynski v. JetSmarter, Inc.*, Civ. No. 19-60588 granting JetSmarter's motion to dismiss and compel arbitration. While this motion was unopposed, the court still chose to enforce JetSmarter's subject arbitration provision.

Finally, on May 28, 2019, the United States District Court for the Northern District of Illinois issued a decision granting JetSmarter's motion to dismiss and compel arbitration. *See Liceaga v. JetSmarter*, Civ. No. 1:19-cv-00107 (N.D. Ill. May 28, 2019). In doing so, it enforced JetSmarter's arbitration provision and explained that the issue of whether the membership agreement is illusory is for the arbitrator to decide – not the court. *See id.* at 4.

Further, given that there are multiple proceedings commenced by other members alleging the same or similar claims as Plaintiff that are currently pending in other arbitrations, this action should be compelled to arbitration so it may be coordinated with the other arbitrations to achieve judicial economy, avoidance of inconsistent results, and conservation of the parties' resources.

Accordingly, based upon the foregoing, it is respectfully requested that the Court grant this motion and compel arbitration.

STATEMENT OF FACTS

I. Plaintiff's Allegations

Plaintiff alleges that in or about December 2017, she researched JetSmarter's offerings and purchased one of JetSmarter's memberships. *See* Declaration of Ronald A. Giller ("Giller Decl."), Ex. 1 (Complaint), ¶ 6. Plaintiff claims that "[u]ntil the summer of 2018, the program which the Kesners purchased largely worked in keeping with the parties' agreement." *Id.* at ¶ 9. Shortly after this period, Plaintiff claims that JetSmarter substantially changed the services provided. *Id.* at ¶ 10. Based upon the purported change in services, Plaintiff initiated this action on April 24, 2019. *See id.*

II. The Agreement to Arbitrate

When Plaintiff originally downloaded and registered the JetSmarter App on December 12, 2017, she affirmatively assented to JetSmarter's Terms of Use which required mandatory binding arbitration of all disputes. *See* Kirsanov Decl. at ¶ 5-8. The process for creating an

account via the JetSmarter App (which Plaintiff completed) is explained at length in the accompanying Kirsanov Decl. Indeed, during this process, Plaintiff had several opportunities to review JetSmarter's "Terms of Use" which included the mandatory arbitration provision. *See id.*

When Plaintiff originally registered the JetSmarter App, the operative Terms of Use contained the following arbitration provision:

> Any claim or dispute arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof or the use of the Service or Application (collectively, "Disputes") between the Parties and/or against any agent, employee, successor, or assign of the other, whether related to this agreement or the relationship or duties contemplated herein, including the validity of this clause, shall be resolved by binding arbitration by the American Arbitration Association, under the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes then in effect, by a sole arbitrator . . . You acknowledge and agree that you and JetSmarter are each waiving the right to a trial by jury[.].[1]

See id., Ex. 2 at 20-21.

Additionally, at the same time, Plaintiff purchased a Smart Membership with JetSmarter which contained a membership term from December 13, 2017 through December 13, 2018. *Id.* at ¶ 9. At this time, she entered into a Membership Agreement with JetSmarter and acknowledged and accepted the terms and conditions of the agreement. *Id.*

In this regard, the Membership Invoice included the following language directly above the itemized membership fee:

[1] It should also be noted that the subject dispute resolution provision does contain a few carve outs permitting a party to seek relief in a court of competent jurisdiction in very limited circumstances; however, none of them are applicable to the instant lawsuit.

THE ABOVE PERSON OR ENTITY IS HEREBY REFERRED TO AS "THE MEMBER".

BY REMITTING THE AMOUNT DUE UNDER THIS INVOICE AND ACCEPTING THE TERMS AND CONDITIONS OF THE MEMBERSHIP AGREEMENT, MEMBER WILL GAIN ACCESS TO JETSMARTER'S SERVICE

Id. at Ex. 3 (emphasis added).

Below the itemized charges, the Membership Invoice contained a large checkbox to the left of the phrase, "I ACCEPT TERMS AND CONDITIONS OF THE MEMBERSHIP AGREEMENT":

I ACCEPT TERMS AND CONDITIONS OF THE MEMBERSHIP AGREEMENT

The Membership Agreement may be amended or modified from time to time and available for review at http://jetsmarter.com/legal/membership. It is the Member's sole responsibility to review and abide by all of the terms and conditions of the Membership Agreement and all applicable service terms and conditions, as amended from time to time. The Membership Fee is an access fee for use of the Service, is not a payment for air transportation, and is non-refundable, except as specifically provided herein, even if Member fails to utilize the Program or the Services. The Membership Fee is not amortized over time and not based on Member's ability to purchase or use the Service.

See id. Plaintiff signaled her acceptance of the Membership Agreement by clicking on the checkbox. *Id.* at ¶ 10-12. The checkbox had to be clicked because the checkmark appeared in the box and Plaintiff ultimately paid and received a Smart Membership from JetSmarter. *Id.*

Before clicking the checkbox, Plaintiff could have easily accessed the full Membership Agreement by clicking the hyperlink next to the checkbox or the second hyperlink below the checkbox. The language below the checkbox clearly warned Plaintiff that it was her "sole responsibility to review and abide by all of the terms and conditions of the Membership Agreement[.]" *Id.* at Ex. 3.

If Plaintiff clicked the hyperlinks, she would have been directed to a webpage displaying the Membership Agreement. *Id.* at ¶ 13. The Membership Agreement's opening paragraph

plainly stated that members were agreeing "to the following terms and conditions . . . relating to the services provided in relation to Member's subscription to JetSmarter's membership program" and contained a dispute resolution section requiring all disputes to be resolved by binding arbitration before the American Arbitration Association. *Id.* at Ex. 4.

In addition to the Terms of Use which required mandatory binding arbitration, the Membership Agreement in place at the time Plaintiff purchased her Smart Membership also required all disputes to be resolved by way of binding arbitration before the American Arbitration:

> Any claim or dispute between the parties and/or against any agent, employee, successor, or assign of the other, whether related to this Agreement, any of the Terms and Conditions or the relationship or rights or obligations contemplated herein, including the validity of this clause, shall be resolved exclusively by binding arbitration by the American Arbitration Association, under the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes then in effect, by a sole arbitrator.

Id., Exhibit 4 at ¶ 18.

The above-referenced unambiguous arbitration provision is broad and encompasses any claim or dispute between the parties related to their relationship, obligations, or the agreement. *See id.* Upon accepting the terms of the Membership Agreement, Plaintiff continued to use JetSmarter's services. *Id.* at ¶ 14.

As a result, Plaintiff's claims relating to the purported misrepresentations and inaccuracy of the services provided and her causes of action for breach of contract, violation of good faith and fair dealing, respondeat superior, consumer fraud, common law fraud, unjust enrichment, and violation of the TCCWNA all fall within the ambit of the mandatory arbitration provision. Moreover, there are multiple proceedings commenced by other members alleging the same or similar claims as Plaintiff that are currently pending in other arbitrations. *See* Gushue Decl. at ¶

2. As such, this case should be dismissed and ordered to arbitration so that it can be coordinated with the other arbitration proceedings.

LEGAL ARGUMENT

I. Standard of Review

As a threshold matter, this motion should be decided under a Rule 12(b)(6) standard given the undisputed fact that Plaintiff entered into enforceable clickwrap agreements containing equally enforceable arbitration provisions. *See Contorno v. Wiline Networks, Inc.*, Civ. No. 7-5865 (JAP), 2008 U.S. Dist. LEXIS 36050, at *5-6 (D.N.J. May 1, 2008) (granting defendant's motion to compel arbitration and ultimately concluding that the arbitration agreement was valid and enforceable under a 12(b)(6) standard); *see also Sicily by Car S.p.A. v. Hertz Global Holdings, Inc.*, Civ. No. 14-6113 (SRC), 2015 U.S. Dist. LEXIS 65751, at *7-8 (D.N.J. May 20, 2015) (applying Rule 12(b)(6) standard and granting defendant's motion to compel arbitration). Put simply, an enforceable agreement to arbitrate exists and, as a result, this motion should be granted and arbitration compelled.

II. The Terms of Use and Membership Agreement Both Compel Arbitration of This Dispute

The binding arbitration provisions set forth above are unambiguous and enforceable. As such, this action should be dismissed and binding arbitration compelled.[2]

The Federal Arbitration Act ("FAA"), 9 U.S.C.A. §§ 1-16, expresses a national policy favoring arbitration and requires courts to "place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms[.]" *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 346 (2011) (internal citations omitted). Indeed, the FAA

[2] While the FAA requires a stay of any action subject to a valid arbitration agreement, this Court has the discretion to dismiss this action if all the issues raised are arbitrable. *See Hoffman v. Fid. & Deposit Co.*, 734 F. Supp. 192, 195 (D.N.J. 1990).

mandates that written agreements to arbitrate disputes "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C.A. § 2.

Moreover, due to the strong public policy in favor of arbitration, the United States Supreme Court has emphasized that questions of arbitrability "must be addressed with a healthy regard for the federal policy favoring arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Thus, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 24-25; *AT&T Mobility LLC*, 563 U.S. at 341 (explaining that the FAA pre-empts any contrary state law regarding the arbitrability of a dispute).

Under the FAA, there are two elements for courts to consider in ruling on a motion to compel arbitration of a given dispute: "(1) whether a valid arbitration clause exists; and (2) whether the particular dispute falls within the scope of the arbitration agreement." *Tecnimont S.p.A. v. Holtec Int'l*, Civ. No. 1:17-cv-5167 (JBS) (KMW), 2018 U.S. Dist. LEXIS 136794, at *9-10 (D.N.J. Aug. 13, 2018). Here, both prongs are clearly met.

A. Plaintiff Accepted Written Agreements to Arbitrate This Dispute

First, there most certainly exists valid written agreements to arbitrate – the Terms of Use and Membership Agreement both contain substantially similar arbitration provisions – which Plaintiff acknowledged and accepted. *See* Kirsanov Decl. at ¶¶ 3-14. Significantly, Plaintiff affirmatively expressed her agreement to arbitrate when she registered the JetSmarter App and affirmatively "swiped" the white "button" on the "REGISTRATION" screen thereby indicating her agreement to JetSmarter's "Terms of Use." *Id.* Indeed, a user cannot complete their JetSmarter registration and cannot become a JetSmarter member without affirmatively "swiping" the white "button". *Id.* Plaintiff expressed her agreement to arbitrate a second time when she

clicked the checkbox located on the Membership Invoice and accepted the terms of JetSmarter's Membership Agreement.

These are known as "clickwrap" agreements, which require users to click a box or toggle a button to affirmatively accept written terms and conditions. *See, e.g., Manopla v. Raymours Furniture Co.*, Civ. No. 3:17-cv-7649 (BRM) (LHG), 2018 U.S. Dist. LEXIS 109024, at *11-12 (D.N.J. June 29, 2018). A certain agreement is considered "a clickwrap agreement because it requires a computer user to affirmatively manifest their assent to terms of the contract." *Id.* at *11 (citation omitted). "If the user does not affirmatively manifest her assent to the terms by taking the required action, she will not be able to proceed and obtain the offered good or service[.]" *ADP, LLC v. Lynch*, Civ. No. 2:16-01053 (WJM), 2016 U.S. Dist. LEXIS 85636, at *12 (D.N.J. June 30, 2016) (citing *Liberty Syndicates at Lloyd's v. Walnut Advisory Corp.*, Civ. No. 09-1343, 2011 U.S. Dist. LEXIS 132172, at *4 (D.N.J. Nov. 16, 2011)).

Indeed, "[n]umerous courts, including courts in the Third Circuit, have enforced clickwrap agreements." *See id.*; *see also Davis v. Dell*, Civ. No. 07-630 (RBK) (AMD), 2007 U.S. Dist. LEXIS 94767, at *14 (D.N.J. Dec. 28, 2007) ("Under [] New Jersey . . . law, when a party uses his computer to click on a button signifying his acceptance of terms and conditions in connection with an online transaction, he thereby manifests his assent to an electronic agreement."); *Bekele v. Lyft, Inc.*, 199 F. Supp. 3d 284, 295 (D. Mass. 2016) (enforcing arbitration agreement against drivers of Lyft service, who clicked on "I agree" box near terms of service); *Meyer v. Uber Technologies*, 868 F.3d 66, 80 (2d Cir. 2017) (enforcing arbitration agreement located within the terms of service for Uber ride-sharing software); *Wickberg v. Lyft, Inc.*, Civ. No. 18-12094 (RGS), 2018 U.S. Dist. LEXIS 213281 (D. Mass. Dec. 19, 2018) (enforcing arbitration provision which was contained in a clickwrap agreement against a putative

class of Lyft drivers).

In this case, the enforceability of the clickwrap agreement is governed by state law and clickwrap agreements are generally enforceable under New Jersey law. *See Beture v. Samsung Elecs. Am., Inc.*, Civ. No. 17-5757 (SRC), 2018 U.S. Dist. LEXIS 121801, at *20 (D.N.J. July 18, 2018). The JetSmarter Membership Agreement also contains a Florida choice-of-law provision. *See* Kirsanov Decl. Exhibit 4, ¶ 17. However, as set forth below, both Florida and New Jersey law favor the enforcement of clickwrap agreements; thus, there is no conflict that would typically necessitate a choice-of-law analysis. *See Kearney v. Bayerische Motoren Werke Aktiengesellschaft*, Civ. No. 17-13544 (WHW) (CLW), 2018 U.S. Dist. LEXIS 147746, at *13 (D.N.J. Aug. 29, 2018) (explaining that no conflict of law analysis is necessary when there is no actual conflict between the laws of the respective states).

"In the internet era, when agreements are often maintained, delivered and signed in electronic form, a separate document may be incorporated through a hyperlink[.]" *Singh v. Uber Technologies Inc.*, 235 F. Supp. 3d 656, 665 (D.N.J. 2017) (internal quotations and citation omitted). Under New Jersey law, before binding a party to the terms and conditions of a hyperlinked agreement, courts must first look "to whether users were provided with a reasonably conspicuous notice of the existence of contract terms and whether the user registered an unambiguous manifestation of assent to these terms." *Id.* (internal quotations and citations omitted). "Courts must determine whether an online agreement that incorporates a hyperlinked-agreement by reference generally provide[s] reasonable notice such that the terms and conditions of that agreement apply." *Id.* (internal quotations and citations omitted). "If this condition is met, a party will be bound by the hyperlinked-agreement, even if that party did not review the terms and conditions of the hyperlinked agreement before assenting to them." *Id.*

In *Singh*, the court concluded that the plaintiff was provided with reasonable notice as to the existence of the terms and conditions of the hyperlinked agreement even though he admittedly did not review the agreement. *Singh*, 235 F. Supp. 3d at 666. Once Singh signed on to the Uber App, the plaintiff was presented with a message indicating that "By clicking below, you represent that you have reviewed all the documents above and that you agree to the contract above." *Id.* Under this message, there was a "YES, I AGREE" icon. *Id.* This process was repeated a second time. *Id.* In *Singh*, the court held that the plaintiff was bound by the terms and conditions of the hyperlink agreement including its arbitration provision. *Id.*

Similarly, here, on the Membership Invoice, the Plaintiff affirmatively clicked on the checkbox adjacent to the hyperlinked-phrase: "I ACCEPT TERMS AND CONDITIONS OF THE MEMBERSHIP AGREEMENT". By clicking on this hyperlink, she would have been able to access the terms of the then-current membership agreement. The Membership Invoice made a second reference to the Membership Agreement by containing language indicating the following:

Membership Invoice

> BY REMITTING THE AMOUNT DUE UNDER THIS INVOICE AND **ACCEPTING THE TERMS AND CONDITIONS OF THE MEMBERSHIP AGREEMENT**, MEMBER WILL GAIN ACCESS TO JETSMARTER'S SERVICE[.]

See Kirsanov Decl. at Exhibit 3 (emphasis added).

Additionally, below the checkbox, there is a third reference to the Membership Agreement in the Membership Invoice and language explaining that it was available for review at: http://jetsmarter.com/legal/membership. *See id.* Likewise, if Plaintiff had clicked on any of these hyperlinks, she would have been able to access the membership agreement as well.

In addition to the enforceable Membership Agreement containing an arbitration provision, when Plaintiff registered the JetSmarter App, she "swiped" the white "button"

acknowledging her acceptance of JetSmarter's "Terms of Use". As discussed at length in the Kirsanov Decl., during the registration process, Plaintiff had several opportunities to review the Terms of Use. Indeed, on the first screen containing the "CREATE ACCOUNT" button, JetSmarter displayed the following text: "By using JetSmarter service, you agree to our Terms & Conditions and Privacy Policy." *See* Kirsanov Decl. at Ex. 1. If Plaintiff had clicked on the hyperlinked-phrase "Terms & Conditions" formatted in distinct red text, she would have been directed to a screen that displayed JetSmarter's "Terms of Use" including its Dispute Resolution provision. *Id.* at ¶ 3-8. Again, at the end of the registration process, displayed on the "REGISTRATION" screen, Plaintiff was once again presented with another opportunity to review the Terms of Use. In this regard, the "REGISTRATION" screen contained the following language: "I agree to Terms of Use and Privacy Policy." *Id.* at Ex. 1. By clicking (or "tapping") on the Terms of Use link, Plaintiff would have been directed to a screen that displayed JetSmarter's Terms of Use. *Id.* In order to proceed and complete the registration, Plaintiff "swiped" a white "button" on the "REGISTRATION" screen next to the phrase "I agree to Terms of Use and Privacy Policy". *See id.*

Based upon the foregoing, Plaintiff was certainly provided with adequate notice and, as such, the Membership Agreement and Terms of Use should be deemed valid and the arbitration provisions enforced.

Similarly, Florida federal courts agree that Florida would enforce clickwrap agreements. *See Segal v. Amazon.com, Inc.*, 763 F. Supp. 2d 1367, 1369-70 (S.D. Fla. 2011) (enforcing forum selection clause in clickwrap agreement in agreement to sell products on Amazon.com); *Siedle v. Nat'l Assoc. of Sec. Dealers, Inc.*, 248 F. Supp. 2d 1140, 1143 (M.D. Fla. 2002) (agreeing with multiple decisions from other courts enforcing clickwrap agreements).

Moreover, six cases have already been decided – five in federal district court – which have all enforced the terms of JetSmarter's clickwrap agreement and compelled arbitration. *See Abraham v. JetSmarter, Inc.*, Civ. No. 18-cv-1647, 2019 U.S. Dist. LEXIS 56420 (E.D. Wis. Apr. 2, 2019); *Bachewicz v. JetSmarter, Inc.*, Civ. No. 18-cv-62570, 2019 U.S. Dist. LEXIS 71345 (S.D. Fla. Apr. 29, 2019); *Laine v. JetSmarter, Inc.*, Civ. No. 18-cv-62969, 2019 U.S. Dist. LEXIS 71346 (S.D. Fla. Apr. 29, 2019); *Pieczynski v. JetSmarter, Inc.*, Civ. No. 19-cv-60588 (S.D. Fla. May 1, 2019) (unopposed); *Liceaga v. JetSmarter*, Civ. No. 1:19-cv-00107 (N.D. Ill. May 28, 2019); *Derek Milosavljevic v. JetSmarter, Inc.,* Case No. BC716486 (Superior Court- Los Angeles County, California).

In sum, Florida courts have specifically and recently enforced clickwrap agreements requiring parties to litigate their dispute in a particular forum including three recent Southern District of Florida decisions enforcing JetSmarter's clickwrap agreements. Likewise, New Jersey law recognizes that a party may assent to contract terms by deeds as well as words, which should include the volitional act of clicking on a button next to the words, "I ACCEPT TERMS AND CONDITIONS OF THE MEMBERSHIP AGREEMENT," especially when the full terms of that agreement are only one click away. Because JetSmarter's clickwrap agreement is enforceable under both states' laws, JetSmarter satisfies the first prong and this Court should hold the Plaintiff to her agreement and require her to arbitrate her dispute with the American Arbitration Association.

B. An Arbitrable Issue Exists

The second prong is also satisfied. Whether an arbitrable issue exists is clearly a question for the arbitrator. In this regard, courts "have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy." *Rent-A-Center, W., Inc. v. Jackson*,

561 U.S. 63, 68-69 (2010).

Most notably, as set forth by the Supreme Court of the United States as recently as January 2019, when there is a delegation provision, arbitrability must be decided by the arbitrator. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 529 (2019) ("When the parties' contract delegates the arbitrability question to an arbitrator . . . a court possesses no power to decide the arbitrability issue."). In *Henry Schein*, the Supreme Court reaffirmed that "[j]ust as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Id.* at 530. Accordingly, the express language contained in the arbitration provision provides complete autonomy to the arbitrator and unquestionably requires the issue of arbitrability to be decided by the arbitrator. As set forth above, in granting JetSmarter's motions to dismiss and compel arbitration in other matters, the Southern District of Florida relied upon the *Henry Schein* decision in concluding that the subject delegation provision requires arbitrability to be decided by the arbitrator.

In *Caruso v. J&M Windows, Inc.*, the court relied upon the Supreme Court's decision in *Rent-A-Center* and compelled arbitration. Civ. No. 18-770, 2018 U.S. Dist. LEXIS 163286, *7-8 (E.D. Pa. 2018). In doing so, the court explained that the relevant agreement "plainly commit[ted] authority over gateway issues such as arbitrability to the arbitrator." *Id.* at *7.

Further, in *Beture*, the District Court held that the relevant agreement delegated the issue of determining the arbitrability of the plaintiffs' claims to the arbitrator. *Beture*, 2018 U.S. Dist. LEXIS 121801, at *10. In issuing this decision, the District Court noted that the relevant agreement incorporated "the AAA Arbitration Rules, and further state[d] that the 'arbitrator shall decide all issues of interpretation and application of this arbitration provision and the

[agreement].'" *Id.* at *7.

This matter is closely akin to *Caruso* and *Beture* because the instant agreements require issues of the validity of the arbitration clause and arbitrability to be decided by the arbitrator and unequivocally incorporate the AAA Arbitration Rules:

> Any claim or dispute . . . including the validity of this clause, shall be resolved . . . **by binding arbitration by the American Arbitration Association, under the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes then in effect, by a sole arbitrator.**

See Kirsanov Decl. at Ex. 2 at 20-21 and Ex. 4 at § 18 (emphasis added); *see also Malkin v. Funding Trust II*, Civ. No. 15-CIV-62092 (BLOOM) (Valle), 2016 U.S. Dist. LEXIS 191154, at *23 (S.D. Fla. Feb. 1, 2016) (quoting *U.S. Nutraceuticals, LLC v. Cyanotech Corp.*, 769 F.3d 1308, 1311 (11th Cir. 2014)) ("The Eleventh Circuit has stated that 'when parties incorporate the rules of the [American Arbitration] Association into their contract, they clearly and unmistakably agree[] that the arbitrator should decide whether the arbitration clause [applies].'") (internal quotations omitted).

Based upon the foregoing, the FAA controls and requires that the Court dismiss this action and compel arbitration as arbitrability must be decided by the arbitrator.[3] Because there are multiple proceedings commenced by other members alleging the same or similar claims as Plaintiff that are currently pending in other arbitrations, it is respectfully requested that the Court grant this motion and compel arbitration so that this action can be coordinated with the other arbitration proceedings to achieve judicial economy, avoidance of inconsistent results, and

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[3] As set forth above, the Membership Agreement also contains a choice-of-law provision requiring the application of Florida law. *See* Kirsanov Decl. at Ex. 4, § 17. To the extent the FAA somehow does not preempt the Florida Arbitration Code ("FAC"), application of the FAC would cause the same result. *See Fla. Power Corp. v. City of Casselberry*, 793 So. 2d 1174, 1178-79 (Fla. 5th DCA 2001) (applying same factors under the FAC).

conservation of the parties' resources.[4]

III. Arbitration Has Already Been Compelled in Six Related Lawsuits

A. United States District Court for the Eastern District of Wisconsin

On April 2, 2019, in a related matter pending in the United States District Court for the

[4] It should also be noted that there are several other pending lawsuits around the country that advance related claims against JetSmarter. Significantly, JetSmarter has or will be filing motions to dismiss and compel arbitration in those actions as well. Notably, as explained herein, JetSmarter's arbitration provision has been enforced in six separate cases. Additionally, a list of the other related actions filed against JetSmarter are as follows:

- *Bachewicz v. JetSmarter, Inc.*, Civ. No. 2:18-cv-62570 (S.D. Fla.) (motion to dismiss and compel arbitration granted);
- *Laine v. JetSmarter, Inc.*, Civ. No. 0:18-cv-62969 (S.D. Fla.) (motion to dismiss and compel arbitration granted);
- *Pieczynski v. JetSmarter, Inc.*, Civ. No. 0:19-cv-60588 (S.D. Fla.) (motion to dismiss and compel arbitration granted as unopposed);
- *Abraham v. JetSmarter, Inc.*, Civ. No. 2:18-cv-01647 (E.D. Wi.) (motion to dismiss in favor of arbitration granted);
- *Liceaga v. JetSmarter, Inc.*, Civ. No. 1:19-cv-00107 (N.D. Ill.) (motion to dismiss and compel arbitration granted);
- *Derek Milosavljevic v. JetSmarter, Inc.*, Case No. BC716486 (Superior Court- Los Angeles County, California) (motion to dismiss and compel arbitration granted);
- *Mauricio Betancur v. JetSmarter, Inc.*, Case No. 19STCV10855 (Superior Court- Los Angeles, County, California);
- *Porcelli v. JetSmarter, Inc.*, Civ. No. 1:19-cv-02537 (S.D.N.Y.);
- *Firshein v. JetSmarter, Inc.*, Civ. No. 1:19-cv-03419 (S.D.N.Y.);
- *Galvez v. JetSmarter, Inc.*, Civ. No. 2:18-cv-10311 (S.D.N.Y.);
- *Worthington v. JetSmarter, Inc.*, Civ. No. 1:18-cv-12113 (S.D.N.Y.);
- *Davimos v. JetSmarter, Inc.*, Civ. No. 3:18-cv-15144 (D.N.J.);
- *Koons v. JetSmarter, Inc.*, Civ. No. 3:18-cv-16723 (D.N.J.);
- *Scaba v. JetSmarter, Inc.*, Civ. No. 2:18-cv-17262 (D.N.J.);
- *Gonzalez v. JetSmarter, Inc.*, Case No. 2019-001062-CC-26 (County Court, Miami-Dade County, Fla.);
- *Sporn v. JetSmarter, Inc.*, Case No. 191100078621 (In the Justice Court for Harris County, Texas);
- *Sporn v. JetSmarter, Inc.*, Case No. 191100078585 (In the Justice Court for Harris County, Texas); and
- *Zabokritsky v. JetSmarter, Inc.*, Civ. No. 1:19-cv-00273 (E.D. Pa.).

Eastern District of Wisconsin entitled: *Abraham v. JetSmarter, Inc.*, Civ. No. 18-cv-1647, 2019 U.S. Dist. LEXIS 56420 (E.D. Wis. Apr. 2, 2019), the court issued a decision and granted JetSmarter's motion to dismiss in favor of arbitration. In doing so, the court:

> (1) concluded that the plaintiffs assented to the terms of the membership agreement including the arbitration provision when they clicked on the toggle button located on the membership invoice; and
>
> (2) held that the arbitration provision is neither procedurally or substantively unconscionable.

Id.

B. United States District Court for the Southern District of Florida

Even more recently, on April 29, 2019 and May 1, 2019, the Southern District of Florida issued decisions in three cases granting JetSmarter's motions to dismiss and compel arbitration based upon substantially similar arbitration agreements and transactions.

In *Laine v. JetSmarter, Inc.*, JetSmarter members filed suit claiming that, among other things, JetSmarter breached their contract and engaged in fraud. In response, JetSmarter filed a motion to dismiss and compel arbitration. In granting the motion, the court explained that:

> (1) "click-wrap agreements are valid and enforceable contracts";
>
> (2) the arbitration agreement is not illusory; and
>
> (3) "[b]ecause the Membership Agreement states that any dispute will be resolved by an arbitrator, the issue of arbitrability must be resolved in arbitration."

2019 U.S. Dist. LEXIS 71346, at *4-11.

In *Bachewicz v. JetSmarter, Inc.*, another JetSmarter member again filed suit claiming that, among other things, JetSmarter breached their contract and engaged in common law fraud as well as violated the Illinois Consumer Fraud Act. 2019 U.S. Dist. LEXIS 71345, at *10.

JetSmarter responded to this lawsuit by filing a motion to dismiss and compel arbitration. In granting this motion, the court explained that:

> (1) "click-wrap agreements are valid and enforceable contracts";
>
> (2) "the question of arbitrability is for the arbitrator";
>
> (3) claims for breach of contract, violation of good faith and fair dealing, violation of the Illinois Consumer Fraud Act, common law fraud, and respondeat superior are all "covered by the arbitration clause and must proceed through arbitration";
>
> (4) the membership agreement is not an unenforceable illusory contract; and
>
> (5) general challenges to the membership agreement as a whole as being unconscionable and not specific to the delegation provision must be decided by the arbitrator.

Id. at *4-13.

A third decision has been issued by another Judge in the Southern District of Florida in the matter entitled: *Pieczynski v. JetSmarter, Inc.*, granting JetSmarter's motion to dismiss and compel arbitration. Although this motion was unopposed, the court still chose to enforce the subject arbitration provision. *See* Gushue Decl. at ¶ 12.

C. United States District Court for the Northern District of Illinois

Most recently, on May 28, 2019, the Northern District of Illinois issued a decision granting JetSmarter's motion to dismiss and compel arbitration based upon a substantially similar agreement to arbitrate.

In *Liceaga v. JetSmarter*, JetSmarter members filed suit claiming that, among other things, JetSmarter violated the Illinois Consumer Fraud and Deceptive Practices Act and engaged in common law fraud. In response, JetSmarter filed a motion to dismiss and compel arbitration. In granting the motion, the court enforced a similar arbitration provision and

explained that any arguments concerning whether or not the membership agreements were invalid due to their purported illusory nature should be decided by the arbitrator – not the court. *See* Gushue Decl. at Ex. 9.

D. Superior Court of Los Angeles County, California

In addition to the five federal court decisions granting JetSmarter's motions to dismiss and compel arbitration discussed above, a state court located in California also granted a similar motion. *See id.* at ¶ 3-6. While it is recognized that a decision issued by a state court judge does not have a binding effect on this Court, it should be noted that a motion to compel arbitration was granted in a related lawsuit involving JetSmarter and an arbitration provision that was substantially similar to the one in this case. *Id.* In this regard, plaintiff Derek Milosavljevic, a former JetSmarter member, previously filed a lawsuit against JetSmarter entitled: *Milosavljevic v. JetSmarter, Inc.*, bearing Case No. BC716486, pending in the Superior Court for Los Angeles County, California. *Id.*

In response to this suit, JetSmarter promptly moved to compel arbitration based upon an arbitration provision that was substantially similar to the one in this case. *Id.* In this regard, the arbitration provision at issue provided as follows:

> Any claim or dispute between the Parties . . . including the validity of this clause, shall be resolved by binding arbitration by the American Arbitration Association, under the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes then in effect, by a sole arbitrator.

Id.

On January 24, 2019, the court held the first hearing for the refiled motion to compel arbitration. *Id.* During that hearing, the court indicated that it was inclined to grant the motion to compel arbitration, but would permit further briefing in light of the recent Supreme Court decision – *Henry Schein, Inc. v. Archer & White Sales, Inc. Id.* at Ex. 2 (Transcript of January

24, 2019 Hearing).

After receiving supplemental briefing on the applicability of the *Henry Schein* decision, on February 20, 2019, the court granted JetSmarter's motion and entered an Order compelling arbitration. *See id.* at Ex. 4 (Minute Order); Ex. 3 (Transcript of February 20, 2019 Hearing).

Notably, six decisions have already been issued enforcing JetSmarter's arbitration provision and compelling arbitration.

CONCLUSION

JetSmarter unquestionably satisfies the two elements requiring this Court to grant this motion and compel arbitration. The parties unequivocally entered into enforceable clickwrap agreements containing substantially similar arbitration provisions. Several other district courts have reviewed arbitration provisions which are substantially similar to the provisions at issue in this case and held them to be enforceable.

Additionally, with respect to the issue of arbitrability, given that there is a clear delegation provision at issue here and the AAA rules are incorporated into the arbitration provisions, it is submitted that this Court should follow the Supreme Court's guidance in *Henry Schein* as well as the other district courts who, in compelling arbitration, also enforced the delegation provision and required the issue of arbitrability to be decided by the arbitrator.

In short, the clear and unambiguous arbitration provisions contained in the Terms of Use and Membership Agreement should be enforced and this Court should dismiss the pending

action and compel arbitration of the dispute between the parties so that this action can be coordinated with the other proceedings currently pending in arbitration.

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