Z LAW

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CONSUMER PROTECTION LAW FIRM

July 1, 2020

BY ELECTRONIC MAIL

Cathe Stewart (StewartC@adr.org)
Assistant Vice President
American Arbitration Association
1101 Laurel Oak Road
Voorhees, NJ 08043

Re: Z Law, LLC Arbitration Demands Against Chegg

Dear Ms. Stewart:

We are in receipt of a letter from Douglas Meal on behalf of Chegg, Inc. (attached hereto) and a second letter addressed to you, sent on the same date in which Chegg, Inc. asserts that my clients materially breached their Terms of Use by filing the 15,107 Demands for Arbitration with the American Arbitration Association ("AAA"). Due to this alleged "material breach" of the Terms of Use, Chegg has elected to terminate the Terms of Use and to cease performance under the Terms of Use. More specifically, Chegg asserts that "[b]y reason of these material breaches, Chegg did not ever have and does not currently have any obligation under any such agreement to arbitrate any claim any ZLaw claimant may have made in his or her ZLaw demand or to pay any AAA fees associated with such demand, even if such agreement and/or the AAA's rules would have required Chegg to pay such fees in the absence of such material breaches." In other words, Chegg tells the AAA that not only can the AAA not request that Chegg pay the initial filing fee under Chegg's Terms of Use, but that no obligation to arbitrate exists under any Terms of Use because the Terms of Use were terminated. This letter is in response to the American Arbitration Association's request for our comments.

To start, let us remember how we arrived here at the AAA. On September 11, 2019, my firm filed a class action complaint on behalf of our client Jabari Lyles in the United States District Court for the District of Maryland. The class action lawsuit sought to represent approximately 39,000,000 individuals whose personal information was stolen as a result of a massive data breach that Chegg experienced in April 2018. Notably, the data breach was not made public until September 2018. Each of the more than 39,000,000 accounts were later sold on the dark web. Rather than face the class action in court, Chegg asserted that its arbitration agreement—which every user must agree to in order to create a Chegg account—bars individuals from pursuing any action in court. We vigorously opposed that Motion to Compel Arbitration and the United States District Court for the District of Maryland sided with Chegg, and compelled the parties to arbitrate

the dispute. We have previously provided this Court Order to the AAA pursuant to the AAA's request. Subsequently, and after being told by a federal judge that we could not proceed in court, my law firm filed 15,107 individual Demands for Arbitration with the AAA each requesting twenty-five thousand dollars ($25,000.00) in damages.

Chegg started off these discussions by telling AAA that it would not under any circumstances pay the Claimants' portion of the initial filing fees. *See* Email from Douglas Meal dated June 5, 2020 ("Chegg disputes that it could ever have any obligation under the agreement on which the ZLaw demands purport to be based and/or under the AAA rules to pay to the AAA in the first instance any Consumer Filing Fee that may be payable under the AAA rules by reason of any of those demands."). Thereafter, on June 8, 2020, AAA told Chegg that it was responsible to pay the initial filing fee of seven million five hundred fifty-three thousand five hundred dollars ($7,553,500.00), which included both the Claimants and Respondents filing fees as required by Chegg's own Terms of Use. Rather than pay the initial filing fees, Chegg terminated the Terms of Use and accounts of the 15,107 Claimants in a transparent effort to avoid paying the initial filing fees. It is noteworthy to mention that Chegg has not identified a single Claimant who was not a customer of Chegg, and in fact, by terminating each Claimant's Terms of Use and account, Chegg has admitted that each of the 15,107 Claimants were indeed subject to Chegg's Terms of Use.

Chegg's basis for claiming that it has no obligation to arbitrate these Demands for Arbitration or to pay the initial filing fees is that each Demand for Arbitration is "frivolous" and that each was "filed for an improper purpose." Chegg reasons that by terminating the Terms of Use, it has also terminated its obligation to abide by the "Legal Disputes" section ("arbitration agreement") of its Terms of Use. It is unclear why Chegg feels that the "claims and/or relief sought [are] frivolous" or why Chegg feels that the Demands for Arbitration were "filed for an improper purpose," especially considering that arbitration is exactly what Chegg demanded when my law firm tried to pursue this case in court. Nonetheless, we strongly disagree with these characterizations. But rather than explain why these claims are not "frivolous" and were not "filed for an improper purpose[,]" we direct the AAA back to the Terms of Use, Douglas Meal's own words, and the United States District Court for the District of Maryland's Memorandum Opinion and Order. We are certain that the AAA will see through Chegg's truly fantastical argument and why Chegg's purported termination of the Terms of Use has no relevance to these Demands for Arbitration.

Delegation Clause

Chegg's assertion that it "did not ever have and does not currently have any obligation under any [Terms of Use] to arbitrate any claim any ZLaw claimant may have made in his or her ZLaw demand or to pay any AAA fees associated with such demand" is not a basis to terminate these arbitration proceedings. Rather, the very argument that Chegg has presented to the AAA is an arbitrability issue that must be resolved by an arbitrator under the "broad delegation clause" contained in the Terms of Use. Chegg's Terms of Use state that "You and Chegg agree that any dispute, claim or controversy arising out of or relating to these Terms of Use *or the breach, termination, enforcement, interpretation or validity thereof* (collectively, "**Disputes**") will be settled by binding arbitration[.]" *See* Terms of Use—Legal Disputes—General (last updated February 19, 2019) (last visited June 30, 2020). Chegg argued to the United States District Court that this clause in the Terms of Use was a "delegation clause" and that it required all issues other than formation to be resolved by an arbitrator. ECF 21-1 at 2 (Chegg's Memorandum in Support of Motion to Compel Arbitration) (attached hereto) ("Under applicable law, where an arbitration agreement delegates gateway questions of arbitrability to the arbitrator, such questions must be

decided via arbitration, not a court proceeding."); *id.* at 10-11 ("the parties formed an agreement to arbitrate that includes a delegation provision.").

Chegg argued that "the Arbitration Agreement specifically and plainly delegates disputes regarding arbitrability to an arbitrator, first by expressly requiring arbitration of disputes arising out of or relating to the 'enforcement, interpretation, or validity' of the 2014 Terms of Use, and second by incorporating the American Arbitration Association's Commercial Arbitration Rules." ECF 21-1 at 12 (Chegg's Memorandum in Support of Motion to Compel Arbitration); *id.* at 13 ("Courts consistently have held that this type of language constitutes clear and unmistakable evidence of the parties' intent to delegate gateway arbitration questions to the arbitrator. In *Rent-A-Center*, for example, the Supreme Court found that a nearly identical provision, which mandated arbitration of 'any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement,' clearly delegated the question of whether the arbitration provision covered plaintiff's claims to the arbitrator. *Rent-A-Ctr.*, 561 U.S. at 66."). Chegg supported its own assertion that the "delegation clause" required gateway issues related to arbitrability must be decided by an arbitrator by pointing out that the Terms of Use specifically incorporating "the American Arbitration Association ('AAA') Commercial Arbitration Rules ('AAA Rules')" and cites specifically to AAA Rule 7(a) which provides an arbitrator "the power to rule on his or her own jurisdiction, including any objection with respect to the existence, scope or validity of the arbitration agreement." ECF 21-1 at 14-15 (Chegg's Memorandum in Support of Motion to Compel Arbitration) ("the Arbitration Agreement's incorporation of the AAA Rules by itself clearly and unmistakably reflects the parties' intent to delegate the question of arbitrability to the arbitrator. And even if the Arbitration Agreement's incorporation of the AAA Rules did not by itself compel that conclusion, it would do so when considered in conjunction with Arbitration Agreement's separate express language on the subject[.]"). The United States District Court for the District of Maryland, of course, found that the Terms of Use had a "broad delegation clause" leaving for the arbitrator "gateway" issues of arbitrability and allowing the arbitrator to determine its own jurisdiction. ECF 25 at 4, 5, and 8 (Memorandum Opinion and Order) (attached hereto) ("the parties have delegated the issue of arbitrability to an arbitrator"). The Terms of Use have expressly delegated the determination of whether the parties are required to arbitrate any particular claim "relating to these Terms of Use or the *breach*, *termination*, enforcement, interpretation or *validity* thereof[.]" (Emphasis added). Since Chegg's specific basis for its assertion that it is not required to arbitrate is that Claimants breached the Terms of Use, the issues raised by Chegg are clearly issues delegated to the arbitrator to determine. For this reason, Chegg's assertion that it does not have to arbitrate the issue of whether it has to arbitrate is completely contrary to the text of the Terms of Use, its own position under the Terms of Use, and contrary to the judicial findings made in reliance thereon.

No Contractual Obligation Related to the Fees Paragraph in the Terms of Use

The text of the "Legal Disputes" section at issue here has been virtually identical since July 8, 2011 to the present. *See* https://web.archive.org/web/20110718093231/https://www.chegg.com/termsofuse/ (last visited June 30, 2020). The specific provision that Chegg relies on to terminate the Terms of Use due to a "material breach" is as follows:

> "**Fees.** Your responsibility to pay any AAA filing, administrative and arbitrator fees will be solely as set forth in the AAA Rules. However, if your claim for damages does not exceed $75,000, Chegg will pay all such fees ***unless the arbitrator finds*** that either

> the substance of your claim or the relief sought in your Demand for Arbitration was frivolous or was brought for an improper purpose (as measured by the standards set forth in Federal Rule of Civil Procedure 11(b))."

Terms of Use—Legal Disputes—Fees (last updated February 19, 2019) (last visited June 30, 2020) (emphasis added). As the AAA will plainly see, this paragraph of the Terms of Use does not create an obligation on either party that can be breached. Rather, this paragraph is a modification of the AAA's Consumer Arbitration Fees rules shifting the total cost of arbitration onto Chegg rather than requiring the consumer to pay its portion of initial filing fee. The Claimant cannot breach this paragraph because the paragraph places no contractual obligations on the Claimant.

Moreover, this paragraph does not provide Chegg the unilateral right to determine what is "frivolous" or "an improper purpose[.]" Rather, the Terms of Use has delegated this determination to an "arbitrator." No arbitrator has been appointed at this time because Chegg has not paid the filing fees. So, no arbitrator has had the opportunity to make these findings.

Eliminating the Right to Arbitrate is not a Form of Relief that Could be Granted for Filing a "Frivolous" or "Improper Purpose" Demand

In addition, the relief available to Chegg for the filing of a "frivolous" or "improper purpose" arbitration is not that no arbitration will take place. Rather, the relief available to Chegg under its Terms of Use is for an "arbitrator" to shift the Claimant's portion of the initial filing fees back onto the Claimant after "the arbitrator finds that either the substance of [the] claim or the relief sought in [the] Demand for Arbitration was frivolous or was brought for an improper purpose[.]" But since Chegg refuses to pay the initial filing fees, which is an obligation that it voluntarily assumed by placing that term into its Terms of Use, no arbitrator has been appointed by the AAA and so no arbitrator can decide if this paragraph would apply to require the Claimant to repay Chegg for the Claimant's portion of the initial filing fee. Thus, the payment of the initial filing fees, and subsequent appointment of an arbitrator, are conditions precedent that must be satisfied before any determination could be made as to whether or not a Claimant's Demand for Arbitration was frivolous or brought for an improper purpose.

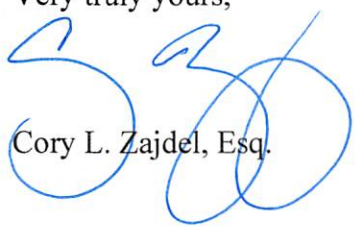
The "Legal Disputes" Section Survives Termination of the Terms of Use

Finally, Chegg chose to allow itself the right to terminate the Terms of Use for any reason and without cause at any time and without prior notice, but required that the "Legal Disputes" section of the Terms of Use survive both the termination or expiration of the Terms of Use. So even if Chegg has validly terminated the Terms of Use for all 15,107 Z Law, LLC Claimants, which Chegg has stated that it has done, these terminations of the Terms of Use have absolutely no impact on any Claimant's right to arbitrate his or her dispute with the AAA under the "Legal Disputes" section of the Terms of Use. The first paragraph of the Terms of Use state that "Chegg has the right to terminate your account for any reason at our sole discretion without notice to you." Terms of Use—Account Registration & Termination (last updated February 19, 2019) (last visited June 30, 2020). But in the "Legal Disputes" section of the Terms of Use, Chegg states "This 'Legal Disputes' section will survive any termination of these Terms of Use." Terms of Use—Legal Disputes—General (last updated February 19, 2019) (last visited June 30, 2020) (emphasis added). But just to be sure that users were aware of the fact that the "Legal Disputes" portion of the contract would survive termination, Chegg repeated this term, in even broader terms: "This 'Legal Disputes' section shall survive any expiration or termination of your relationship with Chegg."

Chegg cannot argue in good faith that it did not intend the "Legal Disputes" section to survive termination of the Terms of Use, since it expressly stated (twice) in the written Terms of Use that the "Legal Disputes" section does, in fact, survive termination of the Terms of Use. Accordingly, Chegg's decision to terminate the Terms of Use and accounts of the 15,107 Claimants has absolutely no impact on the AAA's determination that Chegg is obligated, under the very terms of the Terms of Use that it drafted, to pay the Claimants' portion of the initial filing fees, as well as Chegg's portion of the initial filing fees and to arbitrate these Demands for Arbitration.

It is important to note that Chegg has not requested any specific form of relief from the AAA in its June 26, 2020 letter. Rather, the letter simply explains that Chegg has decided not to pay the initial filing fees that were due on June 29, 2020 and that Chegg has no intention of paying the filing fees by the deadline on July 29, 2020 set by California Code of Civil Procedure 1281.97 and 1281.98. For the reasons stated herein, and because Chegg's letter sets forth no compelling reason to change course at this point in the proceedings, the Z Law, LLC Claimants request that the AAA: (1) take no action in response to Chegg's letter; (2) issue a deficiency letter to Chegg notifying that the payment of the initial filling fees are overdue and must be submitted by July 29, 2020; and (3) notify Chegg that if it wants to assert any issue with respect to arbitrability, it can do so after the appropriate filing fees are paid and an arbitrator is appointed.

Very truly yours,



Cory L. Zajdel, Esq.

CLZ

Enclosures

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BY EMAIL AND FEDERAL EXPRESS

June 26, 2020

Cory L. Zajdel
Z Law, LLC
2345 York Rd., Suite B-13
Timonium, MD 21093

Re: ZLaw Arbitration Demands Against Chegg

Dear Mr. Zajdel:

On behalf of Chegg, Inc. ("Chegg"), I write in regard to the 15,107 individuals (the "ZLaw claimants") that your firm purports to represent in connection with the 15,107 separate demands for arbitration your firm purports to have filed with the AAA on behalf of the ZLaw claimants (the "ZLaw demands").

As you are aware, last month your office delivered six boxes to Chegg and represented to the AAA that they contain the ZLaw demands. The last five of those boxes were received by Chegg on May 21. Thereafter, Chegg began reviewing their contents, however that process was made more time consuming and more costly than otherwise would have been the case as a result of your firm's unjustifiable refusal to share with Chegg the electronic versions of the claims and the spreadsheet regarding the claimants that your firm shared with the AAA (the "Withheld Materials"). Chegg therefore has not yet been able to complete its review of what exactly is in the six boxes.

Based on its review to date of the contents of the six boxes, however, Chegg has determined the following:

1. The six boxes contain 15,079 demands for AAA arbitration – not 15,107 – one of which is missing the first page of the demand, making it impossible to determine the claimant.

2. Contrary to your statement as reported in the press in the past, the demands for AAA arbitration contained in the six boxes are in all respects identical to one another apart from the claimant contact information (in sections 2 and 6) and the reference codes (in the bottom right corner).

3. A number of the 15,079 claimants identified in the AAA arbitration demands contained in the six boxes never agreed to the Terms of Use that your April 30, 2020 letter to the AAA asserts to be the basis for AAA jurisdiction (the "Alleged Agreement").

Further, Chegg has determined that to the extent any of the ZLaw claimants in fact filed with the AAA one of the AAA arbitration demands contained in the six boxes (or a demand substantially identical to the

ones in the boxes), and entered into an agreement[1] with Chegg that might have imposed an obligation on Chegg in connection with a ZLaw demand, the ZLaw claimants have materially breached the agreement. The material breach occurred because (1) the substance of the claim and/or relief sought in the ZLaw demand is frivolous and/or (2) the ZLaw demand was filed for an improper purpose. Accordingly, Chegg hereby notifies each such ZLaw claimant, through you as his or her purported counsel, of the material breach. Under applicable law, the material breach on the part of each such ZLaw claimant gave, and gives, Chegg as the non-breaching party the right to cease all performance that otherwise might have been due under the breached agreement from and after the date of the breach and, further, to terminate the breached agreement. Chegg hereby notifies each such ZLaw claimant, through you as his or her purported counsel, that because of the ZLaw claimant's material breach, Chegg is electing to cease all future performance under the agreement from and after the filing of the ZLaw claimant's ZLaw demand and to terminate the agreement, effective immediately.

Nothing in this letter or in any other communication by or on behalf of Chegg to ZLaw in regard to any, some, or all of the ZLaw demands and/or the ZLaw claimants constitutes (1) a waiver of any of Chegg's rights regarding any of those demands and/or any of those claimants, or regarding the conduct of ZLaw and/or the ZLaw claimants in connection with any of those demands or any of the matters alleged in any of them, all of which rights are expressly reserved, or (2) an admission of any kind regarding any of said demands and/or any of said matters.

Very truly yours,

Douglas H. Meal

[1] The term "agreement" for purposes of this letter includes without limitation (1) any agreement substantially in the form of the Alleged Agreement and, to the extent severable from any such agreement, (2) any agreement substantially in the form of the first sentence of the paragraph entitled "General" of the Alleged Agreement's section entitled "Legal Disputes."

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
Baltimore Division

JABARI LYLES, on his own behalf and on behalf of all others similarly situated, Plaintiff, v. CHEGG, INC., Defendant.	)	Case No. 1:19-cv-3235 Hon. Richard D. Bennett

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO COMPEL ARBITRATION AND DISMISS OR, ALTERNATIVELY, STAY

Defendant Chegg, Inc. ("Chegg"), pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, hereby submits this Memorandum in Support of Defendant's Motion to Compel Arbitration and Dismiss or, Alternatively, Stay (the "Motion").

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I. INTRODUCTION

The Court should compel arbitration and dismiss or, alternatively, stay the present lawsuit that Plaintiff has filed against Chegg (the "Action"), because (1) the parties dispute whether Plaintiff's claims are subject to mandatory arbitration under the arbitration agreement formed by the parties on September 30, 2014 (the "Arbitration Agreement"); (2) the Arbitration Agreement requires an arbitrator, not a court, to decide this dispute; and (3) even if this dispute were for the Court to decide, the Arbitration Agreement covers all Plaintiff's claims.

All of the claims in Plaintiff's Class Action Complaint ("Complaint") are based on an event that Chegg announced on September 25, 2018 in which an unauthorized party gained access to a database containing Chegg user data that had been provided to Chegg via its online platforms (the "Services"). In particular, each cause of action is premised on Plaintiff's allegations that Chegg failed to implement adequate data security to protect the user data that Plaintiff provided Chegg when he signed up for and/or otherwise used the Services. Plaintiff's filing of the Complaint, accordingly, violated the Arbitration Agreement, which broadly covers all disputes that relate to or arise out of (1) the terms of use that governed Plaintiff's use of the Services; (2) the Services; or (3) Plaintiff's use of the Services.

When Chegg informed Plaintiff that his filing of the Complaint violated the parties' Arbitration Agreement, Plaintiff did not agree to dismiss his Complaint. Nor did he provide any basis for his apparent position that the Arbitration Agreement does not require him to do so. Chegg, accordingly, was forced to file this Motion.

While Chegg is left to speculate as to what grounds Plaintiff may believe exist to challenge the Arbitration Agreement's application here, no matter what that challenge may be,

the Court must grant Chegg's Motion. Under applicable law, where an arbitration agreement delegates gateway questions of arbitrability to the arbitrator, such questions must be decided via arbitration, not a court proceeding. Here, then, the only thing the Court needs to find to grant Chegg's Motion is that the parties formed an agreement to arbitrate that delegates gateway questions of arbitrability to an arbitrator. As explained below, courts that have considered language similar to that used in the Arbitration Agreement routinely have found that such language clearly and unmistakably accomplishes such a delegation. As a result, regardless of whether Plaintiff claims the Arbitration Agreement is not broad enough to cover his claims or attempts to challenge the validity of the Arbitration Agreement more broadly (Chegg is not aware of any basis for him to do so) these would be challenges that must be presented to an arbitrator, not this Court.

Even if the Arbitration Agreement had not included a delegation provision, in which case the issue of the Arbitration Agreement's scope would be before the Court, the end result would be the same. Plaintiff's claims all are based on the relationship between Plaintiff and Chegg that is governed by the applicable terms of use and are centered on user data that Plaintiff provided to Chegg through the Services. The Arbitration Agreement's scope is more than broad enough to cover claims of that sort.

II. STATEMENT OF FACTS

A. Parties

Chegg is a leading direct-to-student online learning platform. Declaration of Dana Jewell ISO Motion to Compel ("Jewell Decl.") ¶ 2. Chegg provides students with educational materials, including study aids and textbooks for rent or sale, as well as learning services,

including 24/7 live tutoring for study skills, writing, and math. *Id.* ¶ 3. Chegg's services also include connecting students with opportunities for scholarships and internships. *Id.* ¶ 4. Chegg's headquarters is in Santa Clara, California. *Id.* ¶ 5.

Plaintiff Jabari Lyles is a Maryland resident who created a Chegg.com account on September 30, 2014. Verified Complaint, ECF 1-2 ("Complaint" or "Compl."), ¶ 4; Declaration of Wentao Xu ISO Motion to Compel ("Xu Decl.") ¶¶ 2, 3. At the time Plaintiff created his account, the information he provided reported that he was attending college in Maryland. *Id.* ¶ 2. Additionally, Plaintiff has alleged that the Action "arises out of a transaction that took place within Maryland." Compl. ¶ 7.

B. Chegg and Plaintiff Agreed to Chegg's 2014 Terms of Use, Which Require the Parties to Arbitrate Certain Disputes.

Chegg's records establish that, in connection with creating his Chegg.com account on September 30, 2014, Plaintiff agreed to Chegg's Terms of Use in effect at that time (the "2014 Terms of Use"). Xu Decl. ¶ 4. Plaintiff has not disputed that he agreed to be bound by the 2014 Terms of Use when he created his Chegg.com account. Declaration of Michelle L. Visser ISO Motion to Compel ("Visser Decl.") ¶ 5.

The introduction to the 2014 Terms of Use contains a bold "**ARBITRATION NOTICE**," which notifies users that, unless an exception applies, the 2014 Terms of Use require individual arbitration of disputes between the parties:

> **ARBITRATION NOTICE: Except for certain types of disputes described in the ARBITRATION section below, you agree that disputes between you and CHEGG will be resolved by binding, individual ARBITRATION and you waive your right to participate in a class action lawsuit or class-wide arbitration.**

Jewell Decl., Ex. 1, 1 (emphasis in original). The "Legal Disputes" section of the 2014 Terms of Use contains the arbitration provisions specified in the above notice (the "Arbitration Agreement"):

> **Legal Disputes**
>
> If a dispute arises between you and Chegg, our goal is to provide you with a neutral and cost effective means of resolving the dispute quickly. Accordingly, you agree that we will resolve any claim or controversy at law or equity that relates to or arises out of the Terms of Use or the Services or your use of the Services (a "**Claim**") in accordance with the subsections below.
>
> General. You and Chegg agree that any dispute, claim or controversy arising out of or relating to these Terms of Use or the breach, termination, enforcement, interpretation or validity thereof (collectively, "**Disputes**") will be settled by binding arbitration; except that either party retains the right to bring an individual action in small claims court. **You acknowledge and agree that you and Chegg are each waiving the right to a trial by jury or to participate as a plaintiff or class member in any purported class action or representative proceeding**. Further, unless both you and Chegg otherwise agree, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of any class or representative proceeding.

Jewell Decl., Ex. 1, 10 (emphasis in original). The Arbitration Agreement also contains an "Arbitration Rules, Governing Law, Jurisdiction, and Venue" section, which incorporates the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "**AAA Rules**") and provides users information about how to access them:

> Arbitration Rules, Governing Law, Jurisdiction and Venue. The arbitration will be administered by the American Arbitration Association ("**AAA**") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "**AAA Rules**") then in effect, except as modified by this Section of these Terms of Use. (The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778¬7879.) The Federal Arbitration Act will govern the interpretation and enforcement of this Section. These Terms and any action related thereto will be governed by the laws of the State of California without regard to its conflict of laws provisions.

Id. The Arbitration Agreement also contains sections describing how to file an arbitration claim, how the proceedings are conducted, and how payment of fees is handled. *See id.* at Ex. 1, 10-11.

C. **The 2014 Terms of Use Also Cover Plaintiff's Provision of User Data to Chegg, Address Data Security, and Limit Chegg's Liability to Plaintiff.**

In addition to containing the Arbitration Agreement, the 2014 Terms of Use govern Plaintiff's "use of the Services," which are defined to include Chegg.com and all other web sites, mobile apps, applications and other interactive features or services that posted a link to the 2014 Terms of Use. Jewell Decl., Ex. 1, 1. All user data that Plaintiff provided to Chegg, including the email address that he provided and the account password he created when he set up his Chegg.com account, were provided via the Services. Xu Decl. ¶ 2.

With respect to data security, the 2014 Terms of Use disclaim any warranties, whether express or implied, (1) with respect to "SECURITY ASSOCIATED WITH THE TRANSMISSION OF INFORMATION TO chegg OR VIA THE SERVICES," or (2) "THAT THE SERVICES OR THE SERVER, NETWORK OR OTHER SOFTWARE AND EQUIPMENT THAT MAKES THEM AVAILABLE ARE FREE OF VIRUSES OR OTHER HARMFUL COMPONENTS." Jewell Decl., Ex. 1, 8 (capitals in original).

The 2014 Terms of Use also provide that, to the extent permitted by law, "IN NO EVENT SHALL THE CHEGG PARTIES BE LIABLE FOR LOSS OR DAMAGES OF ANY KIND" related to (1) "THE SERVICES," or (2) user's "USE OF . . . THE SITE." *Id.* at 8-9 (capitals in original).

D. **Plaintiff Filed Suit in Maryland Circuit Court Notwithstanding the Parties' Arbitration Agreement.**

On September 25, 2018, Chegg announced that an unauthorized party had gained access to a company database that hosted user data for Chegg.com and certain of the company's family of brands (the "Event"). Jewell Decl., Ex. 3. The information that may have been obtained during the Event could include a Chegg user's name, email address, shipping address, Chegg username, and hashed Chegg password. *Id.* The unauthorized party did not gain access to any Social Security numbers or financial information, such as credit card or bank data.[1] *Id.* Chegg reset all users' passwords and notified users and certain regulatory authorities. *Id.*

On September 11, 2019, Plaintiff, individually and on behalf of similarly situated individuals, filed the Complaint in the Circuit Court of Baltimore City, Maryland. Complaint, *Lyles v. Chegg, Inc.*, No. 24C19004708 (Md. Cir. Ct. Baltimore City, Sept. 11, 2019). On November 8, 2019, Chegg filed a Notice of Removal and removed the Action to this Court. ECF 1. The Complaint asserts eight causes of action: Breach of Implied Contract, Negligence, Breach of Covenant of Good Faith and Fair Dealing, Violation of California Civil Code § 1798.80, *et seq.*, three Violations of California Business and Professions Code § 17200, *et seq.*, and Violation of Article 1, Section 1 of the California Constitution. Each of the eight causes of action is premised on the Event and is based in whole or in part on Plaintiff's assertion that Chegg did not have adequate data security controls in place to protect the user data that Plaintiff and other Chegg users provided to Chegg via the Services. Plaintiff's only alleged injury is that

[1] Chegg's records establish that Plaintiff never provided any of these types of information to Chegg. Xu Decl. ¶ 2.

that he "received scam calls which mention his PII." Compl. ¶ 18. The relief the Complaint seeks nonetheless includes compensatory damages, equitable relief, punitive damages, and attorneys' fees. Compl., p. 26 (Prayer for Relief).

For the reasons set forth in detail *infra* in Part III, given the allegations in the Complaint and the relief sought, Plaintiff's claims are covered by the parties' Arbitration Agreement and, accordingly, subject to mandatory arbitration.[2] On November 7, 2019, counsel for Chegg shared this information with Plaintiff's counsel. Visser Decl. ¶ 2. Per Plaintiff's counsel's request, Chegg's counsel also provided Plaintiff's counsel with a copy of the 2014 Terms of Use. *Id.* ¶ 3. On November 20, 2019, Plaintiff's counsel confirmed that Plaintiff would not voluntarily dismiss the Action in light of the Arbitration Agreement, but instead would require to Chegg to move forward with filing this Motion. *Id.* ¶ 4. To date, Plaintiff has not provided Chegg with any theory as to why the Arbitration Agreement does not subject his claims, or at a minimum any dispute as to the arbitrability of his claims, to mandatory arbitration. *Id.* ¶ 5.

III. ARGUMENT

A. The FAA Applies and Requires Rigorous Enforcement of Agreements Mandating Arbitration.

The Federal Arbitration Act ("FAA"), which "govern[s] the interpretation and enforcement" of the Arbitration Agreement, Jewell Decl., Ex. 1, 10, requires that "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract,

[2] While, as described above, the Arbitration Agreement does include an exception for individual claims filed in small claims court, that exception does not apply here as the Action was commenced in the Baltimore City Circuit Court, not in small claims court, and was brought as a class action, not individually.

transaction, or refusal, 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. § 2. Sections 3 and 4 of the FAA provide for enforcement of Section 2's substantive rule by requiring that courts stay court proceedings and compel arbitration where an action brought in court is referable to arbitration. 9 U.S.C. §§ 3-4; *see also generally Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68 (2010) (explaining framework). Additionally, "dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable." *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc*., 252 F.3d 707, 709–10 (4th Cir. 2001).

The Supreme Court has consistently instructed that "the FAA was designed to promote arbitration[, and] . . . embod[ies] . . . a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345–46 (2011) (internal citation and quotations omitted). The FAA manifests "at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*., 473 U.S. 614, 625 (1985). Because arbitration is a highly favored means of settling disputes, the Supreme Court has held that arbitration agreements "must be rigorously enforced."[3] *Perry v. Thomas*, 482 U.S. 483, 490 (1987) (internal quotation omitted).

[3] The rigorous enforcement of arbitration agreements also applies to "terms that specify *with whom* the parties chose to arbitrate their disputes and *the rules* under which that arbitration will be conducted," including provisions that mandate individual arbitration and waive rights to class arbitration. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (emphasis in original) (internal quotation omitted) (enforcing class action waiver).

B. **The Court Should Compel Arbitration Because the Parties Formed an Agreement to Arbitrate that Delegates Questions of Arbitrability to the Arbitrator.**

To compel arbitration under the FAA, the moving party typically must establish "(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of [a party] to arbitrate the dispute." *Whiteside v. Teltech Corp.*, 940 F.2d 99, 102 (4th Cir. 1991); *see also Galloway v. Santander Consumer USA, Inc.*, 819 F.3d 79, 84-85 (4th Cir. 2016). The party opposing arbitration bears the burden of showing that the arbitration agreement is invalid. *See Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

As is frequently the case when a party moves to compel arbitration,[4] there can be no dispute here that the first, third, and fourth elements above are satisfied. Plaintiff's filing of the Action establishes the requisite dispute between the parties for FAA purposes, and Plaintiff's refusal to dismiss the Action and pursue arbitration establishes the requisite "failure, neglect or refusal" to arbitrate. *See Bobys & Assocs. Inc. v. Paetec Commc'ns Inc.*, No. 8:13-CV-01811-AW, 2013 WL 4543511, at *3 (D. Md. Aug. 26, 2013) (filing suit in state court in alleged violation of arbitration provision satisfies requirements of dispute and failure to arbitrate). The

[4] *See, e.g.*, *Novic v. Credit One Bank, Nat'l Ass'n*, 757 F. App'x 263 (4th Cir. 2019) (considering only whether the arbitration agreement contained a delegation provision where it was only disputed issue); *Galloway*, 819 F.3d at 84 (noting that only second element is at issue and analyzing only that element).

2014 Terms of Use and the Arbitration Agreement contained therein also relate to interstate commerce because they are agreements between residents of different states for commercial services. *See id.*; *see also* Compl. ¶ 4; Xu Decl. ¶¶ 2-3; Jewell Decl. ¶ 5.

Where the parties have not agreed otherwise, the only potential remaining question—whether there is a written agreement that includes an arbitration provision which purports to cover the dispute—is decided judicially. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943–47 (1995). However, parties can agree instead that "gateway questions of arbitrability, such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy," must be decided by the arbitrator. *Rent-A-Ctr.*, 561 U.S. at 68–69 (internal quotation omitted); *Novic*, 757 F. App'x at 265 ("parties may consent to arbitrate the 'gateway' issue of arbitrability, essentially allowing the arbitrator to determine his or her own jurisdiction."). This kind of antecedent arbitration agreement is generally referred to as a "delegation provision," and it must "specifically and plainly reflect[] the parties' intent to delegate disputes regarding arbitrability to an arbitrator." *Novic*, 757 F. App'x at 266. A delegation provision "is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other." *Rent-A-Center*, 561 U.S. at 70.

When an arbitration agreement includes a delegation provision, the court's role is more limited: if the court agrees that the parties formed an agreement to arbitrate that includes a delegation clause, the court "must enforce [the delegation provision] under §§ 3 and 4 [of the FAA]," leaving to the arbitrator any challenges to the scope of the arbitration agreement or the validity of other clauses in the agreement. *Novic*, 757 F. App'x at 266–67; *see also Rent-A-*

Center, 561 U.S. at 72 (explaining that where a delegation provision exists, the court may not consider whether the broader arbitration provision and/or contract containing the arbitration provision is valid or whether the dispute at issue falls within the arbitration agreement's scope); *Berkeley Cty. Sch. Dist. v. HUB Int'l Ltd.*, 363 F. Supp. 3d 632, 644 (D.S.C. 2019) (explaining scope of permissible challenges to arbitration where a party argues that a delegation provision applies).

Here, as set forth below, the parties formed an agreement to arbitrate that includes a delegation provision. Accordingly, the Court should compel arbitration of the parties' dispute as to the arbitrability of Plaintiff's claims and dismiss or, alternatively, stay the Action pending the outcome of that arbitration.

1. <u>The Parties Formed an Agreement to Arbitrate that Includes a Delegation Clause.</u>

The parties formed an agreement to arbitrate under Maryland law.[5] Under Maryland law, formation of a contract requires manifestation of mutual assent and sufficient consideration.

[5] "State contract formation law determines the validity of arbitration agreements." *Caire v. Conifer Value Based Care,* LLC, 982 F. Supp. 2d. 582, 591 (D. Md 2013) (Bennett, J.). The applicable state law for purposes of determining whether the parties formed an agreement is Maryland because, pursuant to Maryland choice-of-law rules, the applicable law is that of the state where the last act necessary to form the contract occurred, and Plaintiff appears to have accepted the 2014 Terms of Use in Maryland. *See* Compl. ¶ 9 (alleging that Plaintiff resides in Maryland); *id.* ¶ 7 (alleging "the case arises out of a transaction that took place within Maryland"); Xu Decl. ¶ 2 (when registering for an account on Chegg.com, Plaintiff stated he attended college in Maryland); *see also Varon v. Uber Tech., Inc.*, No. MJG-15-3650, 2016 U.S. Dist. LEXIS 58421, at *6 (D. Md. May 3, 2016) (applying Maryland law where user accepted mobile application terms in Maryland). This is true even where a contract specifies a different state in a choice-of-law provision. *See id.*

Galloway, 819 F.3d at 85; *Hill v. Peoplesoft USA, Inc.*, 412 F.3d 540, 543 (4th Cir. 2005). Both are present here.

Here, Chegg's records show that Plaintiff accepted and agreed to the 2014 Terms of Use when he registered for a Chegg.com account on September 30, 2014. Xu Decl. ¶ 4; Jewell Decl. ¶ 6-7; *id.* Ex. 1. Plaintiff has provided no evidence to dispute those records. The 2014 Terms of Use, in turn, included the Arbitration Agreement. Jewell Decl., Ex. 1, 10-11. Chegg, accordingly, has met its burden of showing that the parties formed an agreement to arbitrate.

The Arbitration Agreement within the 2014 Terms of Use is also supported by sufficient consideration. "[M]utual promises to arbitrate act as an independently enforceable contract ... [*i.e.*,] each party has promised to arbitrate disputes arising from an underlying contract, and each promise provides consideration for the other." *Caire*, 982 F. Supp. 2d at 592 (Bennett, J.) (internal quotation omitted); *see also Hill*, 412 F.3d at 543 ("[B]ecause the Arbitration Agreement, on its face, unambiguously require[d] both parties to arbitrate," the agreement was supported by sufficient consideration). Here, the Arbitration Agreement unambiguously contains a mutual exchange of promises: "*You and Chegg* agree that any dispute, claim or controversy arising out of or relating to these Terms of Use or the breach, termination, enforcement, interpretation or validity thereof (collectively, "Disputes") will be settled by binding arbitration." Jewell Decl., Ex. 1, 10 (emphasis added); *see also id.* ("*[W]e* will resolve any claim or controversy . . . in accordance with the subsections below.") (emphasis added).

Moreover, as shown below, the Arbitration Agreement specifically and plainly delegates disputes regarding arbitrability to an arbitrator, first by expressly requiring arbitration of disputes arising out of or relating to the "enforcement, interpretation, or validity" of the 2014 Terms of

Use, and second by incorporating the American Arbitration Association's Commercial Arbitration Rules.[6] Jewell Decl., Ex. 1, 10.

As to the first point, the Arbitration Agreement expressly provides that the parties agreed to arbitrate disputes relating to the "enforcement, interpretation or validity" of the 2014 Terms of Use. By definition, since the Arbitration Agreement is within the 2014 Terms of Use, this means that the parties agreed to arbitrate disputes relating to the "enforcement, interpretation or validity" of the Arbitration Agreement itself. Courts consistently have held that this type of language constitutes clear and unmistakable evidence of the parties' intent to delegate gateway arbitration questions to the arbitrator. In *Rent-A-Center*, for example, the Supreme Court found that a nearly identical provision, which mandated arbitration of "any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement," clearly delegated the question of whether the arbitration provision covered plaintiff's claims to the arbitrator. *Rent-A-Ctr.*, 561 U.S. at 66. This result logically flowed from the fact that determination of whether a

[6] Interpretation of the Arbitration Agreement is governed by the FAA and California law. The meaning of arbitration provisions, including potential delegation provisions, are interpreted like any other contractual term and, accordingly, are governed by the state law applicable to the contract, against the backdrop of the FAA where applicable. *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468 (2015) (arbitration agreements interpreted in accordance with state law governing agreement); *Rent-A-Center*, 561 U.S. at 70 (FAA applies to delegation provisions as it does any other arbitration agreement). Here, the Arbitration Agreement contains a choice-of-law clause specifying that the FAA and California law will govern the parties' agreement, Jewell Decl., Ex. 1, 10 ("The Federal Arbitration Act will govern the interpretation and enforcement of this Section. These Terms and any action related thereto will be governed by the laws of the State of California without regard to its conflict of laws provisions."), and Maryland choice-of-law rules require enforcement of this provision. *Jackson v. Pasadena Receivables, Inc.*, 398 Md. 611, 617 (2007) (The Maryland Court of Appeals "has long recognized the ability of contracting parties to specify in their contract that the laws of a particular State will apply"). In any event, the result is the same under either California or Maryland law.

plaintiff's claims are arbitrable requires an evaluation of whether the arbitration provision is enforceable and whether it may be interpreted to cover the claim at issue. *See id.*; *see also Novic*, 757 F. App'x at 266 (provision requiring arbitration of disputes related to "*application, enforceability, or interpretation*" of agreement delegated arbitrability because provision was "similar in crucial respects" to provision in *Rent-A-Center*) (emphasis in original); *Gutierrez v. FriendFinder Networks Inc.*, No. 18-CV-05918-BLF, 2019 WL 1974900, at *9 (N.D. Cal. May 3, 2019) (collecting cases and explaining that "the inclusion of language stating that the validity of [terms of use] is to be arbitrated, when incorporated in the arbitration provision, indicates that the parties intended to arbitrate questions of arbitrability"). Because the Arbitration Agreement here uses language that courts have consistently recognized as delegating gateway questions of arbitrability to the arbitrator, the Court should for this reason alone find that the Arbitration Agreement delegates to the arbitrator the question of whether Plaintiff's claims are subject to arbitration.

Moreover, turning to the second point, the Arbitration Agreement reinforces its delegation of arbitrability to the arbitrator through express incorporation of the American Arbitration Association ("AAA") Commercial Arbitration Rules ("AAA Rules"). The Arbitration Agreement states that "[t]he arbitration will be administered by the [AAA] in accordance with the [AAA Rules] then in effect" and provides a link to the AAA Rules and the AAA's phone number via a subsequent parenthetical. Jewell Decl., Ex. 1, 10. Rule 7(a) of the AAA Rules, in turn, states that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the

arbitration agreement." AAA Rules, R-7(a) (2013), American Arbitration Association, available at https://adr.org/sites/default/files/CommercialRules_Web_FINAL_1.pdf.

In light of Rule 7(a), most courts to have addressed the issue have concluded that an arbitration agreement's incorporation of the AAA Rules by itself suffices to establish that the parties have agreed to delegate the question of whether a claim is arbitrable to the arbitrator. *See, e.g., Best Effort First Time, LLC v. Southside Oil,* LLC, No. CV GLR-17-825, 2018 WL 1583465, at *5 (D. Md. Mar. 30, 2018) ("of the circuits that have considered this issue, every court has held that incorporation of AAA rules constitutes clear and unmistakable evidence of the parties' intent to arbitrate arbitrability where parties agreed to arbitrate all claims and disputes arising out of or relating to the underlying agreement.") (underline in original); *Rodriguez v. Am. Techs., Inc.*, 39 Cal. Rptr. 3d 437, 446 (2006) (holding that incorporation of AAA construction rules was sufficient to delegate arbitrability); *cf. Simply Wireless, Inc v. T-Mobile US, Inc*, 877 F.3d 522, 528 (4th Cir. 2017) (holding that substantively identical provision from JAMS rules reflects clear intent to delegate arbitrability) *cert. denied sub nom. Simply Wireless, Inc. v. T-Mobile U.S., Inc.*, 139 S. Ct. 915 (2019), and *abrogated on other grounds by Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524 (2019). Here, the Court should similarly conclude that the Arbitration Agreement's incorporation of the AAA Rules by itself clearly and unmistakably reflects the parties' intent to delegate the question of arbitrability to the arbitrator. And even if the Arbitration Agreement's incorporation of the AAA Rules did not by itself compel that conclusion, it would do so when considered in conjunction with Arbitration Agreement's separate express language on the subject, as discussed above.

2. The Court Should Compel Arbitration and Dismiss the Litigation or, Alternatively, Stay All Proceedings Pending Resolution of the Arbitration.

Because the parties entered into an arbitration agreement that delegates gateway questions—including whether Plaintiff's claims are within the scope of the Arbitration Agreement—to the arbitrator, the Court should compel arbitration and dismiss the Action. *See* 9 U.S.C. § 4. Dismissal is the proper remedy here because, "[w]ith the issue of arbitrability referred to the arbitrator, nothing in the plaintiff['s] claims remains for the Court to consider." *Gillam v. Branch Banking & Tr. Co. of Va.*, No. 3:17-CV-722, 2018 WL 3744019, at *5 (E.D. Va. Aug. 7, 2018) (enforcing delegation provision and dismissing case without prejudice) (citing *Choice Hotels*, 252 F.3d at 709-10); *see also House v. Rent-A-Ctr. Franchising Int'l, Inc.*, No. CV 3:16-06654, 2016 WL 7394552, at *6–7 (S.D.W. Va. Dec. 21, 2016) (enforcing delegation provision and dismissing action, explaining "dismissal pending arbitration is appropriate when all issues are subjected to arbitration"); *Innospec Ltd. v. Ethyl Corp.*, No. 3:14-CV-158-JAG, 2014 WL 5460413, at *4 (E.D. Va. Oct. 27, 2014) ("[D]ismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable. With the issue of arbitrability referred to the arbitrator, nothing in [Plaintiff's] claim remains for the Court to consider. Accordingly, the Court dismisses the claim without prejudice.") (internal quotation omitted). Alternatively, the Court should stay all proceedings pending resolution of the arbitration. *See* 9 U.S.C. § 3.

C. **Even if the Arbitration Agreement Had Not Delegated Gateway Arbitrability Issues to the Arbitrator, the Court Should Still Compel Arbitration Because All of Plaintiff's Claims Are Within the Arbitration Agreement's Scope.**

As explained above, the Court should not consider whether Plaintiff's claims are within the scope of the Arbitration Agreement because the parties have delegated that question to the

arbitrator. Even if the Court were to determine that it was required to undertake that analysis, however, the end result would be the same because Plaintiff's claims are all within the Arbitration Agreement's broad scope, meaning that the Action must be dismissed or stayed pending arbitration.[7]

Under the FAA, there is a "heavy presumption of arbitrability" requiring that "when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Long v. Silver*, 248 F.3d 309, 315 (4th Cir. 2001) (internal quotation omitted). Thus, under the FAA, arbitration "should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Kop-Flex Emerson Power Transmission Corp. v. Int'l Ass'n of Machinists & Aerospace Workers Local Lodge No. 1784, Dist. Lodge No. 4*, 840 F. Supp. 2d 885, 889 (D. Md. 2012) (Bennett, J.) (internal quotation omitted). The same is true under California law. *See Bos Material Handling, Inc. v. Crown Controls Corp*., 186 Cal. Rptr. 740, 742–43 (Ct. App. 1982) ("the general rule is that arbitration should be upheld unless it can be said with assurance that an arbitration clause is not susceptible to an interpretation covering the asserted dispute").

The Arbitration Agreement covers any dispute "that *relates to or arises out of* the Terms of Use or the Services or your use of the Services" or that "*aris[es] out of or relat[es] to* these Terms of Use or the breach, termination, enforcement, interpretation or validity thereof." Jewell Decl., Ex. 1, 10 (emphasis added). This sort of scope provision is the "paradigm of a broad clause." *ValueSelling Assocs., LLC v. Temple*, No. 09 CV 1493 JM, 2009 WL 3736264, at *2

[7] As described above in Part III.B.1, interpretation of the Arbitration Agreement is governed by the FAA and California law.

(S.D. Cal. Nov. 5, 2009) (referring to provision requiring arbitration of claims "arising out of or relating to the agreement"). Thus, under California law, where a contract such as the 2014 Terms of Use provides for arbitration of any disputes "arising out of or relating to" a contract, this language is read to apply not just to claims for breach of the applicable contract but also to all non-contract claims that "have their roots *in the relationship between the parties* which was created by the contract." *Bos Material Handling, Inc.*, 186 Cal. Rptr. at 742 (internal quotation omitted) (emphasis added) (holding that tort claims were within scope of arbitration provision); *see also Berman v. Dean Witter & Co.*, 119 Cal. Rptr. 130, 133 (Ct. App. 1975) ("The phrase any controversy . . . arising out of or relating to this contract . . . is certainly broad enough to embrace tort as well as contractual liabilities so long as they have their roots in the relationship between the parties which was created by the contract.") (internal quotations omitted). Here then, by agreeing to arbitrate any claims that "arise out of or relate to these Terms of Use," the parties broadly agreed to arbitrate any claim rooted in the relationship between them that is the subject of the 2014 Terms of Use.

Focusing now on the facts pled, because each of Plaintiff's causes of action hinges on his assertions that, as a result of the parties' relationship, (1) Plaintiff provided user data to Chegg, (2) Chegg was obligated to provide a certain level of data security to protect that user data, and (3) Chegg failed to do so, Plaintiffs' claims have their roots in the relationship created by the 2014 Terms of Use. These allegations include:

> **Count 1 (Breach of Implied Contract)**: Compl. ¶ 67 ("When Affected Individuals created accounts and used Chegg's online services, they provided their PII [to Chegg]"), ¶ 72 (Chegg breached implied contract by "failing to safeguard and protect the PII");

> **Count 2 (Negligence)**: ¶ 77 ("When Affected Individuals gave their PII to Chegg to create an account and/or facilitate and close sales transactions, they did so with the mutual understanding that Chegg had reasonable security measures in place"), ¶ 78 ("Upon accepting Affected Individuals' PII in their system, Chegg undertook and owed a duty to Affected Individuals to exercise reasonable care to secure and safeguard that information from being compromised, lost, stolen, misused, and or/disclosed to unauthorized parties, and to utilize commercially reasonable methods to do so"); *see also* ¶¶ 79-89;
>
> **Count 3 (Breach of the Implied Covenant of Good Faith and Fair Dealing)**: ¶ 94 ("Affected Individuals contracted with Chegg by accepting Chegg's offers and paying for Chegg's online services"); ¶ 98 (Chegg breached implied covenant by "failing to use and provide reasonable and industry-leading security practices");
>
> **Counts 4 (Violation of Cal. Civ. Code §§ 1798.80 *et. seq*)**: ¶ 102 ("Chegg was required to, but failed, to [*sic*] take all reasonable steps to dispose, or arrange for the disposal, of records within its custody or control containing PII"); *see also* ¶ 107;
>
> **Counts 5-7 (Violations of Cal. Bus. Prof. Code § 17200 (UCL)**): ¶ 114 (alleging purportedly unlawful practices of "sub-standard security practices and procedures described herein" and "gathering Affected Individuals' PII in an unsecure electronic environment"); ¶ 126 (alleging purportedly unfair practice of "failing to enact adequate privacy and security measures and protect Affected Individuals' PII"); ¶ 131 (alleging purportedly deceptive practice of "omitting, suppressing, and concealing the material fact of the inadequacy of the privacy and security protections for Affected Individuals' PII"); and
>
> **Count 8 (Constitutional Invasion of Privacy)**: ¶ 141 ("Affected Individuals had a legally protected privacy interest in the PII provided to Chegg"); ¶ 143 ("Chegg's actions and inactions amounted to a serious invasion of the Affected Individuals' privacy interests."); *see also* ¶ 139 (incorporating all prior allegations).

All of the actions described in these allegations – e.g., Plaintiff's creation of an account, the provision of data by Plaintiff to Chegg, and Chegg's alleged failure to protect that data – occurred within the context of the parties' relationship that is the subject of the 2014 Terms of Use. And regardless of the labels attached to the causes of action, they are all fundamentally

based on Chegg's alleged conduct in the course of the parties' relationship that is the subject of the 2014 Terms of Use. This is sufficient to bring them within the Arbitration Agreement's language extending its scope to all claims arising out of or relating to the 2014 Terms of Use. *See Berman*, 119 Cal. Rptr. at 134 ("arising out of or relating to" agreement language in arbitration agreement between investor and broker applied to non-contract claims because "[i]t seems clear to us that the parties intended that clause to apply to disputes arising out of transactions based upon the client-broker relationship") (citation omitted); *Izzi v. Mesquite Country Club*, 231 Cal. Rptr. 315, 317–18 (Ct. App. 1986) (claims by condo buyers that seller failed to disclose potential for future assessments covered by "arising out of or relating to" language in arbitration agreement because claim "would have its roots in the purchaser-vendor relationship created by the purchase and sale contract containing the arbitration clause") (citation omitted) (abrogated on unrelated issue).[8]

Accordingly, while the Court should not consider whether Plaintiff's claims are within the scope of the Arbitration Agreement as the parties have delegated this question to the arbitrator, if the Court were to undertake this analysis, the Court should find that all of Plaintiff's

[8] While not necessary for Plaintiff's claims to "have [their] roots in the relationship" created by the 2014 Terms of Use and, therefore, be covered by the Arbitration Agreement, the fact that the Terms of Use themselves will be directly at issue if this case proceeds past the early stages of litigation underscores that the dispute unquestionably is one that "arises out or relates to" the 2014 Terms of Use. For example, the fact that the 2014 Terms of Use expressly address data security undermines Plaintiff's implied contract claim. Jewell Decl., Ex. 1, 8. As another example, the 2014 Terms of Use's warranty disclaimers undermine Plaintiff's claims in Count 7 that Chegg engaged in fraudulent or deceptive business practices. As a final example, in the unlikely event that Plaintiff were to establish that Chegg is liable under any of Plaintiff's theories, the 2014 Terms of Use's limitation of liability clause would limit the damages Plaintiff could seek.

claims are within the scope of the Arbitration Agreement, compel arbitration, and either dismiss the Action or alternatively stay it pending the arbitration.[9] *See* 9 U.S.C. § 4; *Choice Hotels*, 252 F.3d at 709-10 ("dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable.") (citation omitted).

IV. CONCLUSION

For the foregoing reasons, Chegg respectfully requests that the Court grant its Motion to Compel Arbitration and Dismiss or, Alternatively, Stay.

[9] If the question of scope were properly before the Court, that question would properly be resolved against Plaintiff not only because Plaintiff's claims all arise out of or relate to the 2014 Terms of Use, as discussed in text, but also because those claims also all arise out of or relate to the Services or Plaintiff's use of the Services, in that the user data at issue in all of Plaintiff's claims was provided to Chegg through Plaintiff's use of the Services. *See Varela v. Lamps Plus, Inc*., No. CV 16-577-DMG (KSX), 2016 WL 9110161, at *4 (C.D. Cal. July 7, 2016) (holding that common law and statutory claims alleging unreasonable security were covered by a provision requiring arbitration of claims "in connection with his employment" because data was collected and stored in connection with employment), *aff'd*, 701 F. App'x 670 (9th Cir. 2017), *rev'd and remanded on other grounds*, 139 S. Ct. 1407 (2019), *vacated on other grounds*, 771 F. App'x 418 (9th Cir. 2019).

Dated: December 4, 2019

Respectfully submitted,

/s/ *Jonathan A. Direnfeld*

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JABARI LYLES,	*	
Plaintiff,	*	
v.	*	Civil Action No. RDB-19-3235
CHEGG, INC.,	*	
Defendant.	*	

* * * * * * * * * * * * *

MEMORANDUM ORDER

On April 29, 2018, Defendant Chegg, Inc. ("Defendant" or "Chegg") experienced a data breach resulting in the exposure of its customer's personally identifiable information. Plaintiff Jabari Lyles ("Plaintiff" or "Lyles") has filed a putative class action lawsuit against Chegg which seeks redress for the data breach. Plaintiff's Complaint brings eight Counts, all arising from the April 2018 incident.

Now pending is Defendant's Motion to Compel Arbitration and Dismiss, or, Alternatively, Stay. (ECF No. 21.) The parties' submissions have been reviewed and no hearing is necessary. *See* Local Rule 105.6 (D. Md. 2018). For the reasons stated herein, Defendant's Motion to Compel Arbitration and Dismiss (ECF No. 21) is GRANTED. This case is DISMISSED WITHOUT PREJUDICE.

BACKGROUND

Chegg provides education materials and services to high school and college students. (Compl. ¶ 1, ECF No. 2-1.) Lyles is a Maryland resident and former Chegg customer who contracted with Chegg while he was a student at the University of Maryland, Baltimore

County. (*Id.* ¶ 9; Decl. of Wentao Xu ¶ 2, ECF No. 21-6.) On September 30, 2014, Lyles created a Chegg account through its online registration process. (ECF No. 21-6 ¶ 2.) By clicking the "sign up" button on the Chegg.com website, Lyles agreed to the company's Terms of Use. (ECF No. 21-6 ¶ 4; ECF No. 24-4.) The Terms of Use in effect at that time (the "2014 Terms of Use") contains an arbitration notice, as follows:

> **ARBITRATION NOTICE: Except for certain types of disputes described in the ARBITRATION section below, you agree that disputes between you and CHEGG will be resolved by binding, individual ARBITRATION and you waive your right to participate in a class action lawsuit or classwide arbitration.**

(2014 Terms of Use, ECF No. 21-3.) Beneath the heading "Legal Disputes," the Terms of Use specified that "You and Chegg agree that any dispute, claim or controversy arising out of or relating to these Terms of Use or the breach, termination, enforcement, interpretation or validity thereof . . . will be settled by binding arbitration" (*Id.* at 11.) The Terms of Use further specify that the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") govern the arbitration. (*Id.*)

On April 29, 2018, an unauthorized party gained access to the data of approximately 40 million Chegg customers, including user names, email addresses, shipping addresses, and hashed Chegg passwords. (Compl. ¶¶ 3, 11; Form 8-K, ECF No. 21-5.) Plaintiff generally alleges that Defendant did not take proper security measures to prevent the exposure of its customers' personally identifiable information and did not notify its customers of the data breach. (Compl. ¶¶ 17, 27.) Plaintiff claims that he has received spam calls mentioning his personally identifiable information since the breach. (*Id.* ¶ 18.)

On September 11, 2019, Lyles filed this putative class action lawsuit in the Circuit Court of Baltimore City, Maryland. Complaint, *Lyles v. Chegg, Inc.*, No. 24C19004708 (Md. Cir. Ct. Baltimore City, Sept. 11, 2019). The Complaint contains eight Counts, all arising from the April 2018 data breach. On November 8, 2019, Chegg filed a Notice of Removal and removed the Action to this Court pursuant to 28 U.S.C. §§ 1332(a), 1332(d), 1441, and 1446. (ECF No. 1.) On December 4, 2019, Chegg filed the presently pending Motion to Compel Arbitration and Dismiss, or, Alternatively, Stay. (ECF No. 21.)

STANDARD OF REVIEW

As this Court has previously noted, "motions to compel arbitration exist in the netherworld between a motion to dismiss and a motion for summary judgment." *Caire v. Conifer Value Based Care, LLC*, 982 F. Supp. 2d 582, 589 (D. Md. 2013) (citing *Shaffer v. ACS Gov't Servs., Inc.*, 321 F. Supp. 2d 682, 683 (D. Md. 2004)). Where, as here, the formation or validity of the arbitration agreement is in dispute, a motion to compel arbitration is treated as one for summary judgment. *Berkeley Cty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225, 234 (4th Cir. 2019); *see also Caire*, 982 F. Supp. 2d at 589 (citing *Shaffer*, 321 F. Supp. 2d at 684 n.1); *Rose v. New Day Fin., LLC*, 816 F. Supp. 2d 245, 251 (D. Md. 2011). Rule 56 of the Federal Rules of Civil Procedure provides that a court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505 (1986). A genuine issue over a material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* In considering a motion for summary

judgment, a judge's function is limited to determining whether sufficient evidence exists on a claimed factual dispute to warrant submission of the matter to a jury for resolution at trial. *Id.* at 249.

In undertaking this inquiry, this Court must consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Scott v. Harris*, 550 U.S. 372, 378, 127 S. Ct. 1769 (2007). However, this Court must also abide by its affirmative obligation to prevent factually unsupported claims and defenses from going to trial. *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993). If the evidence presented by the nonmoving party is merely colorable, or is not significantly probative, summary judgment must be granted. *Anderson*, 477 U.S. at 249–50. A party opposing summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348 (1986); *see also In re Apex Express Corp.*, 190 F.3d 624, 633 (4th Cir. 1999). This Court has previously explained that a "party cannot create a genuine dispute of material fact through mere speculation or compilation of inferences." *Shin v. Shalala*, 166 F. Supp. 2d 373, 375 (D.Md.2001) (citations omitted).

ANALYSIS

The parties agree that the 2014 Terms of Use contains an arbitration agreement and a "broad delegation clause," leaving to the arbitrator any questions concerning the scope of the agreement. (ECF No. 23 at 3 n.1; ECF No. 24 at 1 n.2.) Quite simply, the only issue before this Court is whether the parties formed an arbitration agreement. While Plaintiff argues that the Defendant has produced insufficient evidence to show that they formed an agreement,

there is no triable issue of fact concerning the formation of an arbitration agreement. Accordingly, the Defendant's Motion to Compel Arbitration and Dismiss (ECF No. 21) is GRANTED. This case is DISMISSED WITHOUT PREJUDICE.

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* governs the parties' arbitration agreement. The FAA requires that "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at § 2. The FAA explicitly reserves issues of contract formation for trial, "provided that a question of fact as to that issue is properly generated." *Focus Music Entm't, LLC v. Streamify, LLC*, ELH-18-1241, 2018 WL 6423906, at *6 (D. Md. Dec. 5, 2018). To proceed to trial, "an unequivocal denial that the agreement to arbitrate had been made is needed, and some evidence should be produced to substantiate the denial." *Drews Distrib., Inc. v. Silicon Gaming, Inc.*, 245 F.3d 347, 352 n.3 (4th Cir. 2001) (citation and internal quotation marks omitted).

Employing a so-called "delegation provision," the parties may agree to arbitrate the "gateway" issue of arbitrability, "essentially allowing the arbitrator to determine his or her own jurisdiction." *Novic v. Credit One Bank, N.A.*, 757 F. App'x 263, 265 (4th Cir. 2019). In such cases, the court may not pass upon the scope or validity of the arbitration agreement. *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 72, 130 S. Ct. 2772 (2010). Even when questions of arbitrability have been delegated to the arbitrator, however, the court must decide issues concerning contract formation. *Granite Rock Co. v. Int'l Bd. of Teamsters*, 561 U.S. 287, 296 (2010) ("[W]here the dispute at issue concerns contract formation, the dispute is generally for

the courts to decide."); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 n.1, 126 S. Ct. 1204 (2006) (distinguishing between arbitral questions of contract validity and nonarbitral questions of whether a contract was "ever concluded"); *Berkeley Cty. Sch. Dist. v. Hub Int'l Ltd.*, 944 F.3d 225 (4th Cir. 2019) ("[T]he district court – rather than the arbitrator – [must] decide whether the parties have formed an agreement to arbitrate.").

Plaintiff has failed to generate a triable issue concerning the formation of an arbitration agreement. According to the Declaration of Wentao Xu, who holds the position of Director of Engineering at Chegg, Lyles created a Chegg.com account on September 30, 2014. (ECF No. 21-6 ¶ 2.) By clicking on the "sign up" button on the Chegg.com website, Lyles agreed to the 2014 Terms of Use on September 30, 2014. (ECF No. 21-6 ¶ 4; ECF No. 24-4.) The 2014 Terms of Use contains an arbitration agreement and a delegation provision. (ECF No. 21-3 at 11.) Lyles does not deny any of this. He neither disputes that he accepted the 2014 Terms of Use nor submits any evidence refuting the formation of a contract.

Lyles nevertheless argues that arbitration may not be compelled because Chegg has failed to produce evidence concerning the manner in which the 2014 Terms of Use and its arbitration provision were communicated to him on the Chegg.com website. Without this evidence, Lyles argues, Chegg has not established that the parties formed an arbitration agreement. Although it takes the position that this evidence is not required, Chegg replied to Plaintiff's arguments by furnishing additional evidence concerning the manner in which the Chegg.com website provided notice of the 2014 Terms of Use to its users.

To resolve questions of contract formation, this Court must apply state contract law. *First Options of Chi, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). In Maryland, "the law of the jurisdiction where the contract was made [*"lex loci contractus"*] controls its validity and construction." *Kramer v. Bally's Park Place, Inc.,* 311 Md. 387, 535 A.2d 466, 467 (1988). As this case involves the issue of the formation of the arbitration agreement and because the contract was entered into by the parties in Maryland, Maryland law governs.

Courts applying Maryland law have upheld clickwrap agreements—that is, "agreements that require a customer to affirmatively click a box on the website acknowledging receipt of an assent to the contract terms before he or she is allowed to proceed using the website." *CoStar Realty Info., Inc. v. Field*, 612 F. Supp. 2d 660, 669 (D. Md. 2009); *see also Fusha v. Delta Airlines, Inc.*, RDB-10-2571, 2011 WL 3849657, at *2-4 (D. Md. 2011). Such agreements must "give the user reasonable notice that a click will manifest an assent to an agreement." *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 75 (2d Cir. 2017) (quoting *Sgouros v. TransUnion Corp.*, 817 F.3d 1029, 1033-34 (7th Cir. 2016)). Federal district courts have generally upheld clickwrap so long as it "reasonably communicate[s]" the existence of the contract terms. *Meyer*, 868 F.3d at 76 (collecting cases).

Applying these principles, the evidence supports Chegg's contention that the parties formed an arbitration agreement. Chegg has produced a copy of the Chegg.com sign-up page appearing on September 30, 2014, which presented a large button inviting users to "Sign up" by providing an email address and creating a password. (ECF No. 24-2.) Below the "Sign up" button, the webpage indicated that "By clicking 'sign up' you agree to the Terms and Privacy Policy." (*Id.*) By hovering over the word "Terms" with their cursors, Chegg customers

were able to review the 2014 Terms of Use. (ECF No. 24-1 ¶ 4; ECF No. 24-4.) The Terms of Use contain a clearly visible arbitration agreement. (ECF No. 21-3 at 2.) This layout reasonably communicated the terms of the 2014 Terms of Use and clearly indicated that, by signing up for a Chegg account, a user agreed to those terms. Plaintiff has not presented any evidence supporting a contrary position. Accordingly, there is no triable issue to be presented concerning the formation of an arbitration agreement, and this case must proceed to arbitration.

The FAA requires the district court to stay judicial proceedings covered by an arbitration agreement. 9 U.S.C. § 3. Notwithstanding this provision, the United States Court of Appeals for the Fourth Circuit permits dismissal "when all the issues presented in a lawsuit are arbitrable." *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-10 (4th Cir. 2001). By deciding that there is no triable issue concerning the formation of an arbitration agreement, this Court has now decided the only issue presented in the parties' submissions. As the parties have delegated the issue of arbitrability to an arbitrator, there is nothing further for this Court to decide. *See Gillam v. Branch Banking & Tr. Co. of Virginia*, 3:17-CV-722, 2018 WL 3744019, at *5 (E.D. Va. Aug. 7, 2018). Accordingly, this case is DISMISSED WITHOUT PREJUDICE.

For the foregoing reasons, is HEREBY ORDERED this 27th day of April, 2020, that:

1. Defendant's Motion to Compel Arbitration and Dismiss (ECF No. 21) is GRANTED;
2. The parties will proceed to arbitration;
3. This case is DISMISSED WITHOUT PREJUDICE;

4. The Clerk of this Court shall transmit copies of this Order and accompanying Memorandum Opinion to counsel;

5. The Clerk of this Court shall CLOSE this case.

____/s/_____

Richard D. Bennett
United States District Judge