

**NELSON MULLINS RILEY &
SCARBOROUGH LLP**
Jahmy S. Graham (SBN 300880)
jahmy.graham@nelsonmullins.com
Michael E. Seager (SBN 354564)
michael.seager@nelsonmullins.com
19191 South Vermont Avenue, Suite 900
Torrance, CA 90502
Telephone: 424.221.7400
Facsimile: 424.221.7499

Benjamin J. Sitter (SBN 273394)
ben.sitter@nelsonmullins.com
Six PPG Place, Suite 700
Pittsburgh, PA 15222
Telephone: (412) 730-4050
Facsimile: (412) 567-9241

Attorneys for Defendant
NFHS NETWORK, LLC

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO

STEVEN KASPER, on behalf of himself and all
others similarly situated,

Plaintiff,

vs.

NFHS NETWORK, LLC, a Delaware Limited
Liability Company,

Defendant.

Case No.: 3:24-cv-04682-JD

District Judge: Hon. James Donato

**DEFENDANT NFHS NETWORK, LLC'S
NOTICE OF MOTION AND MOTION TO
COMPEL ARBITRATION;
MEMORANDUM OF POINTS AND
AUTHORITIES**

Date: October 3, 2024

Time: 10:00 a.m.

Courtroom: 11

Complaint Filed: June 20, 2024

FAC Filed: July 1, 2024

Removal Filed: August 1, 2024

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page(s)

I. INTRODUCTION1

II. FACTUAL BACKGROUND.....2

 A. Kasper’s Claims in This Action 2

 B. NFHS Network’s Terms of Use..... 2

 C. Kasper’s Use of NFHS Network’s Services and Acceptance of the Terms of Use..... 6

III. LEGAL STANDARD9

IV. ARGUMENT.....10

 A. Kasper Agreed to Arbitrate His Claims Against NFHS Network 10

 1. The FAA Governs the Arbitration Agreement 10

 2. Kasper Assented to the Terms of Use..... 11

 B. The Court Should Enforce the Parties’ Agreement to Delegate Questions of Arbitrability to the Arbitrator..... 14

 C. Even if the Court Addresses Arbitrability, the Arbitration Agreement Clearly Encompasses Kasper’s Claims 14

V. CONCLUSION.....15

TABLE OF AUTHORITIES

Page(s)

Cases

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265 (1995)..... 10

AT&T Techs., Inc. v. Commc’ns Workers of Am.,
475 U.S. 643 (1986)..... 15

Burris v. Discover Bank,
No. 8:19-cv-1092, 2019 WL 9516076 (C.D. Cal. Sept. 20, 2019)..... 15

Chiron Corp. v. Ortho Diagnostic Sys., Inc.,
207 F.3d 1126 (9th Cir. 2000) 9

Citizens Bank v. Alafabco, Inc.,
539 U.S. 52 (2003)..... 10

Cook v. Wells Fargo Bank, N.A.,
No 4:23-cv-240, 2024 WL 1736371 (S.D. Ga. Apr. 23, 2024) 11

Dean Witter Reynolds, Inc. v. Byrd,
470 U.S. 213 (1985)..... 9

Dickey v. Ticketmaster LLC,
No. 18-cv-9052-GW, 2019 WL 9096443 (C.D. Cal. Mar. 12, 2019)..... 10

Duval v. Costco Wholesale Corp.,
No. 22-cv-2338, 2023 WL 3852694 (N.D. Cal. June 5, 2023)..... 10

First Options of Chi., Inc. v. Kaplan,
514 U.S. 938 (1995)..... 11

Henry Schein, Inc. v. Archer & White Sales, Inc.,
586 U.S. 63 (2019)..... 14

In re Facebook Biometric Info. Priv. Litig.,
185 F. Supp. 3d 1155 (N.D. Cal. 2016) 12

Knutson v. Sirius XM Radio Inc.,
771 F.3d 559, 565–66 (9th Cir. 2014) 11

KPMG LLP v. Cocchi,
565 U.S. 18 (2011)..... 9

Lifescan, Inc. v. Premier Diabetic Servs., Inc.,
363 F.3d 1010 (9th Cir. 2004) 10

1 *Mortenson v. Bresnan Commc’ns, LLC*,
 2 722 F.3d 1151 (9th Cir. 2013) 9

3 *Oracle Am., Inc. v. Myriad Grp., A.G.*,
 4 724 F.3d 1069 (9th Cir. 2013) 14

5 *Peter v. Doordash, Inc.*,
 6 445 F. Supp. 3d 580 (N.D. Cal. 2020) 9, 11

7 *Peterson v. Lyft, Inc.*,
 8 No. 16-CV-07343-LB, 2018 WL 6047085 (N.D. Cal. Nov. 19, 2018)..... 12

9 *Rent-A-Cntr, W., Inc. v. Jackson*,
 10 561 U.S. 63 (2010)..... 14

11 *Saperstein v. Thomas P. Gohagan & Co.*,
 12 476 F. Supp. 3d 965 (N.D. Cal. 2020) 9

13 *Simula, Inc. v. Autoliv, Inc.*,
 14 175 F.3d 716 (9th Cir. 1999) 9

15 *Tompkins v. 23andMe, Inc.*,
 16 No. 5:13-CV-05682-LHK, 2014 WL 2903752 (N.D. Cal. June 25, 2014), *aff’d*, 840 F.3d 1016
 17 (9th Cir. 2016)..... 12

18 *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*,
 19 363 U.S. 574 (1960)..... 11

20 *West v. Uber Techs.*,
 21 No. 18-CV-3001-PSG-GJS, 2018 WL 5848903 (C.D. Cal. Sept. 5, 2018)..... 12, 13

22 Statutes

23 9 U.S.C. § 3..... 2

24 9 U.S.C. § 4..... 9

25 18 U.S.C. § 2710..... 1, 2

26 Bus. & Prof. Code § 17200..... 1, 2

27 Cal. Civ. Code § 1550..... 11

28 Cal. Civ. Code § 1799.3..... 2

Ga. Code Ann. § 13-3-1 11

MEMORANDUM OF POINTS AND AUTHORITIES**I. INTRODUCTION**

Despite having agreed to arbitrate all claims related to his use of Defendant NFHS Network, LLC’s (“NFHS Network”) website—and despite having additionally waived his right to a jury trial and class action lawsuit—Plaintiff Steven Kasper (“Kasper”) brought this putative class action, in court, against NFHS Network. Worse, this is not his first time doing so. Just a few short months ago, Kasper brought a substantially similar class action in the United States District Court for the Central District of California (the “Original Kasper Action”). There, as he continues to do here, Kasper claimed that NFHS Network unlawfully disclosed Kasper’s and others’ private information about their “personal video-viewing habits and activities” without consent and asserted claims under the Video Privacy Protection Act (“VPPA”), 18 U.S.C. § 2710, et seq. and California’s Unfair Competition Law (“UCL”), Bus. & Prof. Code § 17200, et seq. (*See* FAC ¶ 1; Declaration of Jahmy S. Graham (“Graham Decl.”), Exh. 2 (“Original Kasper FAC”), ¶¶ 4–6.)

As NFHS Network asserted in response to the Original Kasper Action, at all times during his various subscriptions to the services offered by NFHS Network, Kasper’s repeated subscription initiations and continued use of NFHS Network’s services confirmed his agreement to NFHS Network’s use of technologies on the website, NFHS Network’s Privacy Policy, and NFHS Network’s Terms of Use (collectively, the “Terms of Use”), all of which include a binding arbitration clause and a jury and class action lawsuit waiver. (*See* Declaration of Andrew Huddle (“Huddle Decl.”), ¶¶ 10–13, Exhs. 1–5.) Having repeatedly agreed to arbitrate his claims on an individual basis, Kasper could not adjudicate his claims in court, nor represent a putative class.

Nevertheless, after NFHS Network moved to compel arbitration of Kasper’s claims in the Original Kasper Action, but before he had to respond to that motion and before it was actually adjudicated, Kasper voluntarily dismissed his entire action with no notice to NFHS Network. (*See* Graham Decl. ¶ 4, Exh. 5.) The next day, Kasper filed substantially the same complaint in the Alameda County Superior Court, which NFHS Network removed. (*See* Dkt. 1-2.)

Despite his forum shopping, Kasper’s claims continue to be subject to a binding agreement to arbitrate his claims on an individual basis. NFHS Network’s arbitration agreement and its class

1 action waiver are fully enforceable under the Federal Arbitration Act (“FAA”), 9 U.S.C. § 3, et seq.,
2 and this dispute plainly falls within the scope of claims to be arbitrated under that agreement.
3 Accordingly, Kasper’s claims must be adjudicated in binding arbitration on an individual basis, not
4 in this Court on a class wide basis. NFHS Network respectfully requests that the Court grant its
5 motion to compel arbitration.

6 **II. FACTUAL BACKGROUND**

7 **A. Kasper’s Claims in This Action**

8 Kasper’s allegations relate to his and other putative class members’ use of the NFHS
9 Network website, mobile applications, and other services and products (collectively, the “Services”),
10 the disclosures on the website, and NFHS Network’s offered streaming services. (*See generally*
11 FAC.) Kasper alleges that NFHS Network, a joint venture created to provide sports fans with the
12 ability to stream live and on demand high school sports, unlawfully disclosed his and others’
13 “private information about their personal video-viewing habits and activities” on its website. (*Id.* ¶
14 1.) He alleges that NFHS Network “sells subscriptions” through which consumers “may view
15 prerecorded videos”, and that NFHS Network “chose to affirmatively disclose” his viewing habits
16 and activities on its website to third parties, including Meta Platforms Inc. (“Meta”), through “pieces
17 of tracking software, including Metal Pixels,” without his or others’ consent. (*Id.* ¶¶ 4–6.)

18 Kasper brings a claim under the Video Privacy Protection Act, 18 U.S.C. § 2710 et seq.,
19 California’s UCL, Cal. Bus. & Prof. Code § 17200 *et seq.*, and Cal. Civ. Code § 1799.3. (FAC ¶¶
20 85–113.) For each, he seeks to represent a class of California consumers “who subscribed to NFHS
21 Network and, while having a Facebook account, viewed prerecorded video content on
22 www.nfhsnetwork.com during the time the Meta Pixel was active” on the website. (*Id.* ¶ 76.) As
23 further outlined below, however, all of Kasper’s claims are subject to binding mandatory arbitration
24 under NFHS Network’s Terms of Use.

25 **B. NFHS Network’s Terms of Use**

26 Every visitor or user of NFHS Network’s Services is subject to a set of contractual terms and
27 conditions called the “NFHS Network Terms of Use.” For all relevant periods, the most current
28 version of the Terms of Use has always been publicly displayed on the NFHS Network website’s

1 Terms of Use page (the “Terms of Use page”).¹ (Huddle Decl. ¶ 8.) Further, a hyperlink to that
 2 Terms of Use page is pushed to customers at different stages of a visitor’s use of the website or app,
 3 as described in more detail below. (*See id.* ¶¶ 8, 15-19, 21, 23.)

4 The current version of the Terms of Use—which superseded² all prior versions—went live
 5 on February 14, 2024 (the “2024 Terms of Use”). (Huddle Decl. ¶ 13.) As can be seen in the current
 6 Terms of Use page, the 2024 Terms of Use contain, in “ALL CAPS” at the top of the page, express
 7 notice of the terms’ arbitration provision and class action waiver, stating that “This Agreement
 8 Contains a Binding Arbitration Agreement and Class Action and Jury Trial Waiver Clauses in the
 9 Below Section ‘Dispute Resolution’ That is Applicable to You and Us.” (*Id.*, Exh. 5.) The referenced
 10 “DISPUTE RESOLUTION” section of the Terms of Use also appears in “ALL CAPS.” (*Id.*)
 11 Immediately below this section heading, visitors will see the following: “PLEASE READ THIS
 12 ARBITRATION AGREEMENT . . . CAREFULLY. IT REQUIRES YOU TO ARBITRATE
 13 DISPUTES WITH US AND LIMITS THE MANNER IN WHICH YOU CAN SEEK RELIEF
 14 FROM US AND INCLUDES A WAIVER OF CLASS ACTION AND JURY TRIAL.” (*Id.*)

15 The arbitration provision states that the visitor “agree[s] that any dispute, controversy, or
 16 claim relating in any way to your access or use of the Service or to any aspect of your relationship
 17 with us, will be resolved by binding arbitration, rather than in court, including threshold questions of
 18 the arbitrability of such dispute, controversy, or claim” subject to certain, inapplicable exceptions.
 19 (*Id.*) The 2024 Terms of Use also provide—as they have since 2022—that users “may opt out of this
 20 dispute resolution.” (*Id.*)

21 In addition to the detailed terms and conditions surrounding arbitration, the Dispute
 22 Resolution section contains a class action waiver subsection that reads,

23 **ARBITRATION AGREEMENT: CLASS ACTION WAIVER**

24 _____
 25 ¹ In 2019, NFHS Network launched mobile applications for customers to access its products and
 26 services. The Terms of Use are similarly accessible in the NFHS Network mobile applications, for
 27 both iOS and Android. (Huddle Decl. ¶ 8.)

28 ² All versions of the Terms of Use have stated that NFHS Network may, from time to time, with or
 without advance notice, change the Terms of Use in its sole and absolute discretion. (*See* Huddle
 Decl., Exhs. 2–5.) All versions of the Terms of Use have similarly stated that the current version
 supersedes all prior versions. (*Id.*)

1 WE EACH AGREE THAT ANY PROCEEDINGS, WHETHER IN ARBITRATION
2 OR COURT, WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS AND
3 NOT IN A CLASS OR REPRESENTATIVE ACTION OR AS A MEMBER IN A
4 CLASS, CONSOLIDATED OR REPRESENTATIVE ACTION.

5 (*See* Huddle Decl., Exh. 5.)

6 NFHS Network disseminated the revised 2024 Terms of Use to visitors and users, both new
7 and existing, in several ways. First, visitors entering the NFHS Network website are presented with a
8 “cookie banner” notice of NFHS Network’s Privacy Policy along with a notice that makes clear that
9 either “further use” of the NFHS Network website or affirmatively clicking “agree” both indicate an
10 acceptance and agreement to both the NFHS Network website’s use of technologies and the Privacy
11 Policy and Terms of Use. (*See id.* ¶ 19, Exh. 10.) The Terms of Use and Privacy Policy are also
12 visibly hyperlinked in a contrasting color. Second, NFHS Network sent emails to all existing users
13 with registered accounts, including Kasper, notifying users of the change in Terms of Use. The
14 subject of these emails was “Updates to our Privacy Policy and Terms of Use Agreement.” (*See id.* ¶
15 20, Exh. 11.) The body of the email included multiple hyperlinks to the complete Terms of Use—
16 also in contrasting colors—and the short email flagged that “key changes” included updates to the
17 arbitration provision language. (*Id.*)



18
19
20 We understand your inbox is busy, but this is important, and we take the
21 protection of your personal information very seriously.
22 We are updating our [Privacy Policy](#) and [Terms of Use](#), effective **February 14, 2024**, to better align with recent changes in privacy laws and our data practices.
23 We are making it easier for you to understand the information we collect, use and
24 share, as well as providing you with more options for how we handle your data.
25 Below is a quick summary for each policy:
26 We updated our Privacy Policy and made the following key changes:
27

- Information regarding your consent to our use of certain tracking technologies and third-party cookies;
- Provided additional information about privacy rights available to users who are residents of certain states.

28 We updated our Terms of Use and made the following key changes:
• Updated our binding arbitration language.
We encourage you to review the revised [Privacy Policy](#) and [Terms of Use](#). By continuing to use our services on or after the last modified date on the policy in question, you agree to our revised Privacy Policy and Terms of Use. Please reach out to [Customer Service](#) if you have any questions.
NOTE: This is a legal notice, which is why you are receiving this even if you have previously opted out of our marketing and promotional emails.

1 (*Id.*) Finally, all visitors to either the website or mobile app who—like Kasper—create an account
2 are required to affirmatively acknowledge their agreement to the Terms of Use. (*Id.*, Exh. 12)

3 The NFHS Network Terms of Use has seen four iterations during the time period relevant to
4 this action: the terms effective August 2014 (the “2014 Terms of Use”), the terms effective April
5 2018 (the “2018 Terms of Use”), the terms effective July 2022 (the “2022 Terms of Use”), and the
6 present 2024 Terms of Use. In every iteration, NFHS Network’s Terms of Use has included a
7 mandatory arbitration and class action waiver (the “arbitration provision”) with important
8 consistencies.

9 Binding Arbitration and Class Waiver: The Terms of Use have always included a binding
10 arbitration provision and a class action waiver clause. The 2024 Terms of Use changed the syntax of
11 the arbitration provision and added descriptive headings and arbitration-related signposts for users.
12 (*Compare* Huddle Decl., Exh. 5 *with, e.g., id.*, Exh. 4.) Nevertheless, at all relevant periods, NFHS
13 Network’s Terms of Use included a binding arbitration provision. (*Compare id.*, Exh. 5 *with, e.g.,*
14 *id.*, Exh. 4.) Moreover, the arbitration provision has always included a class action waiver. (*id.*, Exh.
15 4 (“Claims seeking relief on a class-wide or consolidated basis rather than on an individual basis
16 may be brought exclusively on an individual basis in arbitration and the parties specifically waive
17 any right to bring any claims between themselves in court on a consolidated or class-action basis.”);
18 *cf.* Huddle Decl., Exh. 5 (quoted *supra*.)

19 The Arbitration Provision Covers a Broad Range of Claims: The scope of the arbitration
20 provision also has not changed materially. Prior to 2024, the scope of the NFHS Network arbitration
21 provision was substantially the same for the entire period of Kasper’s use, encompassing “any
22 controversy or claim arising out of or relating to this agreement, the Service, or any alleged breach
23 of this agreement, or any other controversy or claim between the parties.” (Huddle Decl. ¶¶ 10-12,
24 Exhs. 1-4; *cf. id.*, Exh. 5 [2024] (“You agree that any dispute, controversy, or claim relating in any
25 way to your access or use of the Service or to any aspect of your relationship with us, will be
26 resolved by binding arbitration, rather than in court”) Under this provision, the parties agreed
27 arbitration would be the “sole[] and “exclusive[]” dispute resolution process. (Huddle Decl., Exh. 4.)

28 Delegation to Arbitrator: The agreement—either explicitly or through incorporation of the

1 AAA Commercial Arbitration Rules—has always delegated the threshold issue of arbitrability to the
 2 arbitrator. (*See, e.g.*, Huddle Decl., Exh. 5 [2024] (“You agree that any dispute . . . will be resolved
 3 by binding arbitration, rather than in court, including threshold questions of the arbitrability of such
 4 dispute”); *Id.*, Exh. 4 (“The parties specifically agree to submit any controversy or claim . . .
 5 solely and exclusively to arbitration administered by the American Arbitration Association (‘AAA’)
 6 in accordance with its Commercial Arbitration Rules.”).)

7 Opt-out: Since 2022, the agreement has included an arbitration “opt-out” provision,
 8 providing a user 30 days to opt out. (Huddle Decl., Exhs. 4-5.)

9 **C. Kasper’s Use of NFHS Network’s Services and Acceptance of the Terms of Use**

10 As Kasper’s FAC alleges, Kasper is a user of NFHS Network’s services. Kasper created an
 11 account with NFHS Network in 2016 using the email address [REDACTED] (the “confirmed
 12 account”).³ (Graham Decl. ¶ 9; Huddle Decl. ¶ 28.)

13 To create the confirmed account in 2016, Kasper acknowledged and agreed to the Terms of
 14 Use. Specifically, in 2016, when Kasper created his confirmed account, he was required to
 15 affirmatively click that he agreed to the Website’s terms and conditions before he could complete the
 16 registration process. (Huddle Decl. ¶ 28; Exh. 6.) As can be seen in the image below, the box next to
 17 the notice of the Terms of Use was, by default, unchecked, requiring the user to manually check the
 18 box indicating their assent. Indeed, the account creation could not proceed until Kasper did so as can
 19 be seen by the red error message that appeared when a user attempted to continue to the “Next Step”
 20 without checking the box to accept:

21
 22
 23
 24 ³ As set forth in the Graham Declaration, Kasper confirmed that the account associated with the
 25 email address [REDACTED] is his account. (Graham Decl. ¶ 9.) Kasper’s original Complaint in
 26 the Original Kasper Action also included allegations regarding a Gmail account. However, the
 27 subsequent FAC removed all reference to specific accounts, including the Gmail account, and
 28 Kasper has not identified a Gmail account to NFHS Network. (*Compare* Graham Decl., Exh. 1, ¶ 7
with, e.g., Original Kasper FAC ¶¶ 3–6.) To the extent Kasper had a Gmail or any other email
 account, NFHS Network reserves all arguments as to whether the activity associated with those
 account(s) indicates Kasper’s further assent to the Terms of Service and arbitration provision therein.

1 **Create your NFHS Network Account** (all fields are required) Already a member? [SIGN IN](#)

2

3

4 First Name Email Address

5 Password (must be at least 6 characters) Confirm Password

6

7 Please send me updates from the NFHS Network.


8 I accept the [Terms and Conditions](#), am over the age of 13 and if under 18, have the permission of my parent/guardian. **You must accept the terms and conditions to complete the form**

9

10 [Next Step >](#)

11

12 Have a question or need help? Contact [Customer Service](#).

13  Secure Server

14 (Huddle Decl. ¶ 28; Exh. 7.) Thus, to create an account, any user (Kasper included) had to
 15 affirmatively click the box confirming their acceptance of the Terms and Conditions. And as can be
 16 seen in this image, the interface provided a prominent hyperlink to a new webpage containing the
 17 Terms of Use. (*Id.*) Importantly, Kasper’s user data confirms he consented to NFHS Network’s
 18 Terms of Use prior to creating the confirmed account. (Huddle Decl. ¶ 28.)

19 Since then, Kasper has continued to use NFHS Network’s services through multiple periods
 20 of lapsed and active paid subscriptions only recently discontinued on May 9, 2024:

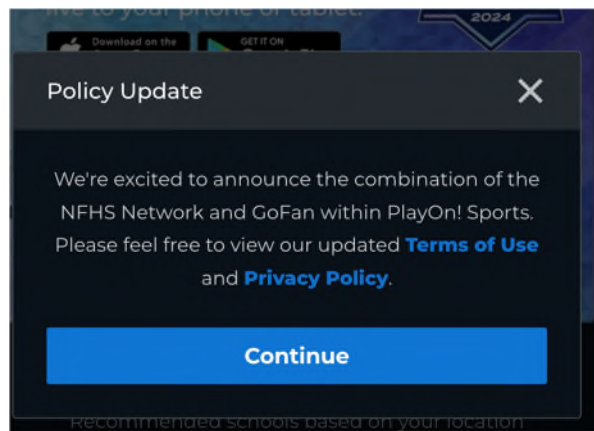
Subscription Period	Initiation Method
9/2016 - 4/2017	Web/web mobile subscription
8/2017 - 1/2018	Web/web mobile subscription
11/2018 - 12/2018	Web/web mobile subscription
3/2021 - 10/2021	Web/web mobile subscription
2/25/2023 – 5/9/2024	Apple subscription

27 (Huddle Decl. ¶ 29.)

28

1 Most recently, Kasper reinitiated a monthly subscription, this time through the iOS app's
 2 native interface, which allowed users to subscribe in-app until May 2023.⁴ At that time, a user who
 3 wished to reactivate a subscription was presented with a page that provided subscription options and
 4 disclosures. (Huddle Decl. ¶ 23, Exh. 13-3.) In a standalone paragraph at the end of the disclosures,
 5 the last sentence read, "For more information, see our Terms of Use [hyperlink to the Terms of Use]
 6 and Privacy Policy [hyperlink to Privacy Policy]." (*Id.*) Hyperlinks to both referenced policies
 7 appeared in bright blue, bold font against a black backdrop. (*Id.*). At the time Kasper initiated his
 8 2023 monthly subscription, the "Terms of Use" hyperlink described above would have linked to the
 9 2022 Terms of Use (*id.*, Exh. 4.), which had gone into effect during the subscription lapse that
 10 preceded Kasper's 2023 subscription reactivation.

11 Moreover, around this time, Kasper was also separately notified that the terms had been
 12 updated. In 2022, when NFHS Network launched the 2022 Terms of Use, the Website was updated
 13 to push a cookie banner to users titled "Policy Update":



21 (Huddle Decl. ¶ 17; Exh. 9.) The Terms of Use were flagged as "updated" and a color-contrasting
 22 hyperlink to the Terms of Use was provided. (*See id.*) All users—new or returning—would see this
 23 banner upon first returning to the website following the launch of the 2022 Terms. (*See id.*) Thus,
 24 upon returning to the site after the launch of the 2022 Terms, Kasper was notified that that Terms of

25

26 ⁴ Between 2019 (when the NFHS Network mobile apps launched) and May 2023, users could initiate
 27 subscriptions in the mobile app directly. (Huddle Decl. ¶¶ 22-23.) To do so, the user would be
 28 directed through the app's native iOS subscription flow, rather than being redirected to the Website.
 After May 2023, mobile app users who wished to initiate a subscription were redirected to the NFHS
 Network webpage to complete the subscription.

1 Use had been updated. (Huddle Decl. ¶ 31.) Indeed, Kasper’s user history confirms he saw this
2 banner. (*Id.*)

3 Kasper’s last subscription to NFHS Network’s paid service—initiated in 2023—remained
4 active until May 9, 2024, at which time his subscription lapsed. Thus, *when the 2024 Terms were*
5 *launched, NFHS Network sent Kasper, along with all other account holders, the email notice of*
6 *the revised Terms of Use described above.*

7 **III. LEGAL STANDARD**

8 It is well established that “[t]he FAA provides that any arbitration agreement within its scope
9 shall be valid, irrevocable, and enforceable, and permits a party aggrieved by the alleged . . . refusal
10 of another to arbitrate to petition any federal district court for an order compelling arbitration in the
11 manner provided for in the agreement.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126,
12 1130 (9th Cir. 2000) (quoting 9 U.S.C. § 4). The United States Supreme Court has explained that
13 the FAA “reflects an emphatic federal policy in favor of arbitral dispute resolution.” *KPMG LLP v.*
14 *Cocchi*, 565 U.S. 18, 21 (2011).

15 The threshold to “demonstrat[e] arbitrability is not high,” *Simula, Inc. v. Autoliv, Inc.*, 175
16 F.3d 716, 719 (9th Cir. 1999), and “any doubts concerning the scope of arbitrable issues should be
17 resolved in favor of arbitration, whether the problem at hand is the construction of the contract
18 language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Saperstein v.*
19 *Thomas P. Gohagan & Co.*, 476 F. Supp. 3d 965, 972 (N.D. Cal. 2020). The FAA “leaves no place
20 for the exercise of discretion by a district court, but instead mandates that district courts shall direct
21 the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.”
22 *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985); 9 U.S.C § 4.

23 Thus, a party seeking arbitration need only prove the existence of an agreement to arbitrate
24 by a preponderance of the evidence. *E.g., Peter v. Doordash, Inc.*, 445 F. Supp. 3d 580, 586 (N.D.
25 Cal. 2020). Meanwhile, as “arbitration is favored, those parties challenging the enforceability of an
26 arbitration agreement bear the burden of proving that the provision is unenforceable.” *Mortenson v.*
27 *Bresnan Commc’ns, LLC*, 722 F.3d 1151, 1157 (9th Cir. 2013). When deciding a motion to compel
28 arbitration, a court “may consider the pleadings, documents of uncontested validity, and affidavits

submitted by either party.” *Dickey v. Ticketmaster LLC*, No. 18-cv-9052-GW, 2019 WL 9096443, at *3 (C.D. Cal. Mar. 12, 2019) (citations omitted).

IV. ARGUMENT

In assessing whether to grant a motion to compel arbitration, the Court must generally evaluate two key issues: (1) whether a valid arbitration agreement exists; and (2) whether the agreement encompasses the dispute at issue. *Lifescan, Inc. v. Premier Diabetic Servs., Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004). Once a court determines that the parties entered into an agreement to arbitrate, however, the court will enforce any further agreement to arbitrate these two arbitrability inquiries. Here, Kasper agreed to arbitrate his claims because he assented to NFHS Network’s Terms of Use. He also agreed to delegate threshold issues of arbitrability to the arbitrator. Respectfully, the Court should enforce the arbitration agreement and grant NFHS Network’s Motion to Compel Arbitration.

A. Kasper Agreed to Arbitrate His Claims Against NFHS Network.

1. The FAA Governs the Arbitration Agreement.

The FAA governs NFHS Network’s arbitration agreement because the underlying contract involves a transaction affecting interstate commerce. *See Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 273-74, 281 (1995). To establish that the FAA applies to a contract, a party need not “show[] any specific effect upon interstate commerce,” as long as “in the aggregate the economic activity in question would represent a general practice subject to federal control.” *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57 (2003). The Terms of Use—and Kasper’s assent thereto—relate to his subscription to services on NFHS Network’s website that permits access to NFHS Network’s live events and library of prerecorded videos available on NFHS Network’s website and mobile applications. (*E.g.*, FAC ¶¶ 14–15; Huddle Decl., Exh. 5 (“The following Terms of Use . . . set forth the terms and conditions that apply to use of the NFHS Network website . . . mobile application(s) . . . and other applicable services or products”) Courts regularly find that the FAA applies where, as here, an agreement involves transactions and communications on the internet. *E.g.*, *Duval v. Costco Wholesale Corp.*, No. 22-cv-2338, 2023 WL 3852694, at *2 (N.D. Cal. June 5, 2023) (collecting cases).

1 **2. Kasper Assented to the Terms of Use.**

2 While the FAA governs the arbitration agreement, whether the parties formed an agreement
3 to arbitrate is “a matter of contract.” *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363
4 U.S. 574, 582 (1960). The moving party’s burden is light in this regard. NFHS Network need only
5 show, by a preponderance of the evidence, that an agreement to arbitrate exists. *Peter*, 445 F. Supp.
6 3d at 586. To make this determination, courts “apply ordinary state-law principles that govern the
7 formation of contracts.” *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

8 As for which state’s laws apply, Kasper is a California resident who invokes California law
9 in his operative complaint (*e.g.*, FAC ¶¶ 12, 95–113), while NFHS Network’s principal place of
10 business is in Georgia and the Terms of Use contain a Georgia choice-of-law provision. (*E.g.*,
11 Huddle Decl. ¶ 5, Exhs. 1–5.) The Court need not necessarily resolve at this stage which state’s
12 substantive law applies to this dispute because California and Georgia law do not conflict on
13 contract formation. *Compare* Cal. Civ. Code § 1550 *with* Ga. Code Ann. § 13-3-1. Under both
14 states’ applicable law, the crucial inquiry is whether there was a manifestation of mutual assent to
15 the Terms of Use. (*E.g.*, *Peter*, 445 F. Supp. 3d at 585; *see also* *Cook v. Wells Fargo Bank, N.A.*, No
16 4:23-cv-240, 2024 WL 1736371, at *4 (S.D. Ga. Apr. 23, 2024).) Assent requires notice of the terms
17 and some outward or objective indication of assent. *Cook*, 2024 WL 1736371, at *4; *Knutson v.*
18 *Sirius XM Radio Inc.*, 771 F.3d 559, 565–66 (9th Cir. 2014) (applying California law).

19 Kasper’s own allegations confirm that he voluntarily entered into a subscription agreement
20 with NFHS Network by “agreeing to pay monthly in exchange for access to NFHS Network’s live
21 events and its library of prerecorded videos.” (FAC ¶ 11.) Acceptance of the Terms of Use is a
22 requirement for using and subscribing to the NFHS Network’s services. Kasper’s account and
23 subscription history confirm this.

24 When Kasper created his account, he confirmed his acceptance of the Terms of Use.
25 Specifically, he was required to ***affirmatively*** click a box next to a statement indicating that he
26 ***agreed to the website’s Terms of Use*** to complete the registration process. (Huddle Decl. ¶ 28, Exh.
27 6.) The interface included a prominent hyperlink which took the user to those Terms of Use. (*Id.* ¶
28 15.) And a user attempting to proceed past this page without the Terms would receive an error

1 message in bright red font that read, “You must accept the terms and conditions to complete the
2 form[.]” (*Id.* ¶ 15, Exh. 7.) Kasper’s own user data further confirms he consented to NFHS
3 Network’s Terms of Use prior to creating the confirmed account. (*Id.* ¶ 28.)

4 In sum, Kasper manifested assent to the Terms of Use both by affirmatively clicking a box to
5 confirm his assent and, separately, by continuing to use NFHS Network’s services. Courts routinely
6 enforce agreements formed under such circumstances, given the clear, conspicuous notice to the user
7 of both the existence of the terms and the fact that clicking “agree” and/or continuing to use the
8 service would unambiguously manifest assent. *E.g.*, *Peterson v. Lyft, Inc.*, No. 16-CV-07343-LB,
9 2018 WL 6047085, at *2 (N.D. Cal. Nov. 19, 2018) (finding that the arbitration agreement is
10 enforceable where a plaintiff’s “clicking of the ‘I accept’ button rendered Lyft’s Terms of Service a
11 binding contract”); *Tompkins v. 23andMe, Inc.*, No. 5:13-CV-05682-LHK, 2014 WL 2903752, at *8
12 (N.D. Cal. June 25, 2014), *aff’d*, 840 F.3d 1016 (9th Cir. 2016) (holding a contract has been formed
13 when plaintiff “clicked a box or button that appeared near a hyperlink to the [contract] to indicate
14 acceptance of the [contract]”); *West v. Uber Techs.*, No. 18-CV-3001-PSG-GJS, 2018 WL 5848903,
15 at *5 (C.D. Cal. Sept. 5, 2018) (“A reasonably prudent smartphone user would understand that the
16 Terms were connected to the creation of a user account when notice of the Terms of Service is
17 provided simultaneously to enrollment”).

18 Moreover, courts will enforce updates to terms of use when notice of the updates is provided
19 to the user and the user thereafter continues to use the service. *E.g.*, *In re Facebook Biometric Info.*
20 *Priv. Litig.*, 185 F. Supp. 3d 1155, 1167 (N.D. Cal. 2016) (“[I]ndividualized notice in combination
21 with a user’s continued use is enough for notice and assent.”). Here, Kasper has manifested assent to
22 subsequent versions of the Terms of Use through continuing use of NFHS Network’s services and
23 further acknowledgment of updates to the Terms of Use. Since creating his account in 2016, Kasper
24 has continued to use NFHS Network’s services through multiple periods of lapsed and active paid
25 subscriptions continuing to as recently as May 9, 2024. (Huddle Decl. ¶ 29.) Most recently, in
26 February 2023, Kasper reactivated his monthly subscription, this time through the iOS native
27 interface that was available prior to May 2023. (*Id.* ¶¶ 29, 32.) The process for doing so involved
28 navigating to a page where the user was presented with a page that allowed them to pick between a

1 monthly pass and an annual pass. (*Id.* ¶ 23, Exh. 13-3.). With these options, the interface provided
2 subscription disclosures, and in a standalone paragraph at the end of the disclosures, the last sentence
3 read, “For more information, see our Terms of Use [hyperlink to the Terms of Use] and Privacy
4 Policy [hyperlink to Privacy Policy.” (*Id.*) The two referenced policies were hyperlinks that
5 appeared in bright blue, bold font against a black backdrop. (*Id.*) Once the user selected a plan—
6 here, Kasper selected a monthly plan—they would be navigated to the purchase interface. At the
7 time Kasper initiated his 2023 monthly subscription, the “Terms of Use” hyperlink described above
8 would have linked to the 2022 Terms of Use, which had gone into effect during the subscription
9 lapse that preceded Kasper’s 2023 subscription reactivation. (*Id.* ¶ 29; *id.*, Exh. 4.)

10 Moreover, around this time, Kasper was also separately notified that the Terms of Use had
11 been updated. In 2022, when NFHS Network launched the 2022 Terms of Use, the Website was
12 updated to push a cookie banner to users titled “Policy Update.” (Huddle Decl. ¶ 17; Exh. 9.) The
13 Terms of Use were flagged as “updated” and a color-contrasting hyperlink to the Terms of Use was
14 provided. (*Id.* ¶ 17; Exh. 9.) All users—new or returning like Kasper—would see this banner upon
15 first returning to the website following the launch of the 2022 Terms. (*Id.* ¶ 17.) Thus Kasper, upon
16 returning to the site after the launch of the 2022 Terms, was notified that that Terms of Use had been
17 updated. (*Id.* ¶ 31.) Importantly, Kasper’s user history confirms he saw this banner. (*Id.*) Kasper also
18 kept his subscription and account active thereafter. (*Id.* ¶ 29.)

19 Indeed, this last subscription to NFHS Network’s paid service—initiated in 2023—continued
20 to renew monthly until May 9, 2024. Thus, when the 2024 Terms were launched, NFHS Network
21 sent an email providing notice of the revised Terms of Use individually to Kasper along with all
22 other account holders. (*Id.* ¶ 33.) That email notified Kasper and other users of the 2024 updates,
23 expressly flagging the revised arbitration terms. *Cf., e.g., West*, 2018 WL 5848903, at *5. Despite
24 this, Kasper’s subscription continued to remain active thereafter on a month-to-month basis, and
25 even after having filed the instant suit on February 23, 2024—less than 10 days after he was
26 provided notice of updated Terms of Use with an updated arbitration provision. (*See* Huddle Decl. ¶
27 32.) Moreover, and in conjunction with the individual email sent to Kasper and all users, all new and
28 returning Website visitors are further notified of the update when they land on the Website through a

1 new cookie banner that makes clear that either “further use” of the NFHS Network website or
 2 affirmatively clicking “agree” both indicate an acceptance and agreement to both the NFHS Network
 3 website’s use of technologies and the privacy policy and Terms of Use. (*See Id.* ¶ 19.) Here, too, the
 4 Terms of Use and Privacy Policy are also visibly hyperlinked in a contrasting color.

5 **B. The Court Should Enforce the Parties’ Agreement to Delegate Questions of**
 6 **Arbitrability to the Arbitrator.**

7 The parties agreed that arbitrability determinations should be left to the arbitrator and the
 8 Court should enforce that agreement. Parties to an arbitration agreement “can agree to arbitrate
 9 ‘gateway’ questions of arbitrability.” *Rent-A-Cntr, W., Inc. v. Jackson*, 561 U.S. 63, 68-69 (2010).
 10 “An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party
 11 seeking arbitration” can enforce. (*Id.* at 70.) Once the court finds that the parties delegated
 12 arbitrability determinations to the arbitrator, it has “no power” to override that agreement, even if the
 13 party opposing arbitration claims the movant’s arbitration rights are “wholly groundless.” *Henry*
 14 *Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 68–69 (2019).

15 Here, the 2024 Terms of Use clearly and unmistakably provide that “any dispute,
 16 controversy, or claim relating in any way to your access or use of the Service or to any aspect of
 17 your relationship with us, will be resolved by binding arbitration, rather than in court, including
 18 threshold questions of the arbitrability of such dispute, controversy or claim” (Huddle Decl.,
 19 Exh. 5.) Moreover, all prior versions of the Terms of Use also delegated issues of arbitrability to the
 20 arbitrator by stating that disputes would be conducted “in accordance with” the AAA rules. (*Id.*,
 21 Exhs. 1-4.) The Ninth Circuit, like “[v]irtually every circuit to have considered the issue has
 22 determined that incorporation of the [AAA] arbitration rules constitutes clear and unmistakable
 23 evidence that the parties agreed to arbitrate arbitrability.” *Oracle Am., Inc. v. Myriad Grp., A.G.*, 724
 24 F.3d 1069, 1074 (9th Cir. 2013).

25 **C. Even if the Court Addresses Arbitrability, the Arbitration Agreement Clearly**
 26 **Encompasses Kasper’s Claims.**

27 Once a court finds that an agreement to arbitrate exists, the “presumption of arbitrability”
 28 effected by the FAA mandates that “any doubts concerning the scope of arbitrable issues should be

1 resolved in favor of arbitration.” *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 650
 2 (1986). Here, the arbitration provision in the Terms of Use is valid, especially broadly written, and
 3 directly applies to Kasper’s claims. The 2024 Terms of Use state that the agreement to arbitrate
 4 extends to “any dispute, controversy, or claim relating in any way to your access or use of the
 5 Service or to any aspect of your relationship with” NFHS Network, and every prior version of the
 6 agreement similarly covered “any controversy or claim arising out of or relating to this agreement,
 7 the Service, or any alleged breach of this agreement, or any other controversy or claim between the
 8 parties.” (Huddle Decl., Exhs. 1–5.) Kasper’s claims are all premised on purported unlawful
 9 disclosure of his and others’ viewing activity on NFHS Network’s website. Plainly, these claims
 10 “relat[e]” to Kasper’s use of NFHS Network’s services and Kasper’s “relationship” with NFHS
 11 Network, and they therefore fall within the arbitration provision’s ambit. *Cf., e.g., Burris v. Discover*
 12 *Bank*, No. 8:19-cv-1092, 2019 WL 9516076, at *3 (C.D. Cal. Sept. 20, 2019) (finding “especially
 13 broad” language in an arbitration provision addressed to disputes “arising out of or relating to” an
 14 account “or any other dispute between” the parties to be enforceable).

15 V. CONCLUSION

16 For the foregoing reasons, NFHS Network respectfully requests that the Court grant its
 17 Motion to Compel Arbitration and exercise its discretion to refer these proceedings to arbitration.

18 DATED: August 23, 2024

NELSON MULLINS RILEY & SCARBOROUGH LLP

19 By: /s/ Jahmy S. Graham

20 Jahmy S. Graham
 21 Benjamin J. Sitter
 22 Michael E. Seager

23 Attorneys for Defendant
 24 NFHS NETWORK, LLC
 25
 26
 27
 28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system and I served a copy of the foregoing pleading on all counsel for all parties, via the CM/ECF system and/or mailing same by United States Mail, properly addressed, and first class postage prepaid, to all counsel of record in this matter.

/s/ Jahmy S. Graham
Jahmy S. Graham