No. 24-____

In The

Supreme Court of the United States

JUMP TRADING, LLC,

Petitioner,

v.

NICK PATTERSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND MICHAEL TOBIAS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Modern arbitration agreements often contain a so-called delegation clause providing that gateway arbitrability questions—such as whether a particular dispute falls within the scope of the arbitration agreement—are delegated to the arbitrator to decide. This Court ruled unanimously in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63 (2019) that courts possess no power to rule on arbitrability when an agreement contains a clear delegation clause.

However, in a 5-to-4 split, the circuit courts of appeals remain sharply divided on the question of whether the arbitrator or the court should decide gateway arbitrability questions involving nonsignatories to an arbitration agreement even when there is a clear delegation clause. This uncertainty creates significant practical problems for courts and litigants in the substantial number of disputes involving nonsignatories to arbitration agreements, undermining the predictability and efficiency that the Federal Arbitration Act ("FAA") was designed to promote. This petition seeks a resolution to this disagreement among the circuits by posing the following question for the Court:

Where an arbitration agreement contains a provision delegating to the arbitrator gateway questions of arbitrability, must a court leave for the arbitrator to decide the issue of whether a nonsignatory to that agreement can compel a signatory to arbitrate a dispute between them?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner and defendant-appellant below is Jump Trading, LLC. Jump Trading Holdings, LLC is Jump Trading, LLC's parent company. Jump Financial, LLC is in turn Jump Trading Holdings, LLC's parent company. No publicly held corporation owns 10% or more of Jump Trading, LLC's equity.

Kanav Kariya and William DiSomma are additional defendants in the proceedings below.

Respondents, and plaintiffs-appellees below, are Michael Tobias, individually and on behalf of all others similarly situated, and Nick Patterson, named plaintiff.

RELATED PROCEEDINGS

United States District Court for the Northern District of California

- *Patterson v. Jump Trading, LLC*, No. 5:22-cv-03600 (January 4, 2024) (order denying motion to compel arbitration)
- *Patterson v. Jump Trading, LLC*, No. 5:22-cv-03600 (April 9, 2024) (order denying renewed motion to compel arbitration)

United States Court of Appeals for the Ninth Circuit

- *Patterson v. Jump Trading, LLC*, Nos. 24-670 and 24-2489 (April 30, 2024) (order granting motion to consolidate)
- *Patterson v. Jump Trading, LLC*, Nos. 24-670 and 24-2489 (January 16, 2025) (judgment affirming denial of motion to compel)
- *Patterson v. Jump Trading, LLC*, Nos. 24-670 and 24-2489 (March 12, 2025) (order denying petition for panel rehearing and rehearing en banc)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jump Trading, LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a–4a) is reported at 2025 WL 215519. The opinion of the District Court on Petitioner's motion to compel arbitration (App. 7a–51a) is reported at 710 F. Supp. 3d 692.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2025. App. 1a–4a. A petition for rehearing was denied on March 12, 2025. App. 52a–53a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 2 of the Federal Arbitration Act, 9 U.S.C. § 2, provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or 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 * * * .

INTRODUCTION

This petition presents the Court with the opportunity to resolve an important and recurring question regarding the enforcement of arbitration agreements, over which ***nine*** different courts of appeals remain deeply and hopelessly split, 5 to 4. This entrenched circuit split has frustrated and will continue to frustrate the uniform application of federal arbitration law unless this Court intervenes. *See Boys Mkts., Inc. v. Retail Clerks Union, Loc. 770*, 398 U.S. 235, 246 (1970) (recognizing the importance of ensuring "relative uniformity in the enforcement of arbitration agreements").

The Federal Arbitration Act, 9 U.S.C. § 2, mandates that arbitration agreements be enforced "according to their terms," including any agreement to delegate to the arbitration tribunal the "gateway" question of whether a given claim should be arbitrated in the first place. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 67–68 (2019). This Court recognized in *Henry Schein* that parties "sometimes may disagree not only about the merits of the dispute but also about the threshold arbitrability question—that is, whether their arbitration agreement applies to the particular dispute." *Id.* at 65. In that scenario, as this Court has held, "if a valid [arbitration] agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." *Id.* at 69.

Whether a nonsignatory to an arbitration

agreement can enforce that agreement is one such threshold question of arbitrability. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (noting that the "gateway dispute about whether the parties are bound by a given arbitration clause raises a question of arbitrability" (citation modified)). The question of who resolves arbitrability issues involving nonsignatories in the face of a delegation clause has come up and will continue to come up regularly, as evidenced by numerous pending lawsuits in which the delegation issue raised here is being litigated and appealed in various circuit courts. *See*, *e.g.*, *Olson v. FCA US, LLC*, No. 24-6527 (9th Cir. appeal docketed Oct. 24, 2024); *Young v. Solana Labs, Inc.*, No. 24-6032 (9th Cir. appeal docketed Oct. 3, 2024); *Posada v. Cultural Care, Inc.*, No. 24-1248 (1st Cir. argued Feb. 4, 2025); *Ford v. ConocoPhillips*, No. 22-20334 (5th Cir. argued Mar. 8, 2023).[1] This is not surprising because it is a well-known tactic for signatories to sue nonsignatories in a deliberate attempt to avoid arbitration. *See, e.g.*, *Long v. Silver*, 248 F.3d 309, 319–21 (4th Cir. 2001); *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000) (finding plaintiff-signatory sought "to avoid [arbitration] agreement by bringing the action against a non-signatory charged with acting in concert with [a] non-defendant signatory").

Where, as here, there is no dispute that a valid

[1] As detailed below, Jump Trading is appealing the issue raised here to the Seventh Circuit because a district court in the Northern District of Illinois denied Jump Trading's motion to compel arbitration in a parallel proceeding that arises from the same facts and implicates the same arbitration agreement as the proceedings below. *See*, *infra* at 33–35.

arbitration agreement exists and that it contains a clear delegation clause, that clause dictates *who decides* whether a nonsignatory can enforce arbitration: the arbitrator. That is what this Court unanimously held in *Henry Schein* and unanimously reaffirmed in *Coinbase, Inc. v. Suski*, expressly stating that "where parties have agreed to [a] contract, and that contract contains an arbitration clause with a delegation provision, then, absent a successful challenge to the delegation provision, *courts must send all arbitrability disputes to arbitration*." 602 U.S. 143, 152 (2024) (emphasis added).

Yet, this simple principle has divided the courts of appeals when applied to a dispute between a signatory to the arbitration agreement and a nonsignatory. Five courts of appeals have reserved all questions of arbitrability, including whether a nonsignatory can enforce an arbitration agreement, to the arbitrator if there is a valid arbitration agreement with a delegation provision. Four other courts of appeals have held that, even where there is a clear delegation provision, courts may still decide for themselves the specific arbitrability question of whether a nonsignatory can enforce an arbitration agreement.

The issue presented in this case is clear and unambiguous. In the proceedings below, there was no dispute that Respondent and Lead Plaintiff, Michael Tobias, was a signatory to a valid arbitration agreement with a delegation clause. App. 22a–23a. Nonetheless, the District Court denied Jump Trading's motion to compel Tobias to arbitrate. It

held that whether Jump Trading, a nonsignatory to the agreement, could compel arbitration was an issue for the court to decide, and further held that, on the merits of that issue, Jump Trading was not entitled to compel arbitration. App. 20a–32a. On appeal, the Ninth Circuit affirmed the District Court's ruling. Although the Ninth Circuit agreed that the question of whether Jump Trading, as a nonsignatory, could compel Tobias to arbitrate constitutes an arbitrability issue, it nonetheless held that it was bound by its earlier decision in *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122 (9th Cir. 2013), to find that "a court retains authority to decide the arbitrability question as to Plaintiffs' claims against Jump [Trading], a third party." App. 3a.

The Ninth Circuit's decision below, as well as decisions by the Fourth, Fifth, and Eighth Circuits, have found that, unlike other arbitrability disputes, arbitrability questions involving nonsignatories fall outside the scope of broad delegation provisions, unless that delegation provision expressly references nonsignatories. Such disparate treatment of arbitrability issues conflicts with this Court's mandate that "a court may not decide the arbitrability issue" if there is a valid delegation provision. *Henry Schein*, 586 U.S. at 69. It also conflicts with the law of five other circuits, resulting in a deep circuit split over this important and recurring issue of federal arbitration law. *See Newman v. Plains All Am. Pipeline, L.P.*, 44 F.4th 251, 254 (5th Cir. 2022) (Jones, J., dissenting from denial of rehearing en banc) (noting the panel's opinion on nonsignatory enforcement "puts this court out of step with at least five (if not more) of our sister circuits").

The First, Second, Third, Sixth, and Tenth Circuits all agree that a valid delegation clause reserves all arbitrability issues to the arbitrator, including arbitrability questions involving nonsignatories. As the Third Circuit recently noted in the context of a nonsignatory moving to compel arbitration, "if the parties to [an arbitration agreement] clearly and unmistakably intended to delegate the issue of enforceability of the contract (or any other issue) to an arbitrator, the challenge to the enforceability of the arbitration agreement must be decided by the arbitrator, not by a court." *Zirpoli v. Midland Funding, LLC*, 48 F.4th 136, 145 (3d Cir. 2022); *see also Swiger v. Rosette*, 989 F.3d 501, 505 (6th Cir. 2021) (holding that enforcement of an arbitration agreement by or against nonsignatories "presents a question of arbitrability" that is delegated solely to the arbitrator if there is a delegation provision); *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 852 (6th Cir. 2020) (holding that "the arbitrator should decide for itself whether [a nonsignatory] can enforce the arbitration agreement"); *Apollo Comput., Inc. v. Berg*, 886 F.2d 469, 473–74 (1st Cir. 1989) (whether nonsignatory can enforce arbitration agreement is an issue "[t]he arbitrator should decide"); *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 211 (2d Cir. 2005) (concluding that "as a signatory to a contract containing an arbitration clause and incorporating by reference the AAA Rules, [signatory plaintiff] cannot now disown its agreed-to obligation to arbitrate *all* disputes, including the question of arbitrability"); *Casa Arena Blanca LLC v. Rainwater by Est. of Green*, No. 21-2037, 2022 WL 839800, at *5 (10th Cir. Mar. 22, 2022)

("[T]he question of whether the Agreement should be enforced against [a nonsignatory] * * * is one that should be decided by an arbitrator, not the court.").

Conversely, the Fourth, Fifth, Ninth Circuits, and a split Eighth Circuit, hold that the court, not the arbitrator, should determine whether a nonsignatory can enforce an arbitration agreement, even where that agreement contains a delegation provision. *See Newman v. Plains All Am. Pipeline, L.P.*, 23 F.4th 393, 399 (5th Cir. 2022) ("It is up to us—not an arbitrator—to decide whether [a nonsignatory] can enforce the * * * arbitration agreement"); *Rogers v. Tug Hill Operating, LLC*, 76 F.4th 279, 287 (4th Cir. 2023) (where "the party seeking to enforce an arbitration agreement is not itself a party to that agreement, *the district court* must determine * * * whether that party is entitled to enforce the arbitration agreement"), *cert. denied*, 144 S. Ct. 818 (2024); *Burnett v. Nat'l Ass'n of Realtors,* 75 F.4th 975, 983 (8th Cir. 2023) (holding that "the district court correctly concluded that the [c]ourt—not an arbitrator—must address whether [nonsignatory] HomeServices can enforce the Arbitration Agreements" (quotation omitted)), *cert. denied sub nom. HomeServices of Am., Inc. v. Burnett*, 144 S. Ct. 1347 (2024).

Whether a plaintiff who expressly agreed to have an arbitrator determine all gateway questions of arbitrability is nonetheless entitled to have a court, rather than the arbitrator, resolve arbitrability issues involving a nonsignatory should not depend upon the particular circuit in which that plaintiff chose to file the action. This Court's intervention on this

intractable circuit split is therefore warranted.

STATEMENT OF THE CASE

A. Legal Background

Congress passed the FAA to "reverse the longstanding judicial hostility to arbitration agreements," *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991), and to establish "a liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (noting the "emphatic federal policy in favor of arbitral dispute resolution").

The FAA provides that "[a] party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" may petition a district court "for an order directing that such arbitration proceed in the manner provided for in such agreement." 9 U.S.C. § 4. In such a case, the FAA mandates that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract or as otherwise provided * * *." 9 U.S.C. § 2. The "FAA thereby places arbitration agreements on an equal footing with other contracts and requires courts to enforce them according to their terms." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010) (citations omitted); *Henry Schein*, 586 U.S. at 68 ("We must interpret the [FAA] as written, and the [FAA] in turn requires that we interpret the contract as written.").

Today, arbitration agreements routinely include—either expressly or through incorporation of arbitral rules such as the AAA or JAMS rules—a delegation clause, which is "[a]n agreement to arbitrate a gateway issue." *Rent-A-Center*, 561 U.S. at 70. Delegation clauses are "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." *Ibid.* As with any other arbitration agreement, a court must determine whether an arbitration agreement with a delegation provision is valid, and once it makes that determination, must enforce that agreement according to its terms. *Henry Schein*, 586 U.S. at 69 ("[I]f a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue."). Thus, "where parties have agreed to [a] contract, and that contract contains an arbitration clause with a delegation provision, then, absent a successful challenge to the delegation provision, courts must send all arbitrability disputes to arbitration." *Suski*, 602 U.S. at 152.

B. Statement of Relevant Facts and Procedural History

Respondent Tobias is an individual who sued Jump Trading in connection with his investment in, and ownership of, two cryptocurrency tokens: TerraUSD ("UST") and LUNA. Both UST and LUNA were created by Terraform Labs PTE Ltd. ("TFL") (which entity Plaintiff initially named as a co-defendant but has since dropped from this lawsuit).

App. 8a n.1, 9a. UST was designed as an algorithmic "stablecoin," which is a type of cryptocurrency token intended to maintain a certain value. *See id.* at 9a. As such, UST was intended to maintain a $1 value. *Id.* at 10a. Holders of UST could deposit their UST into a protocol on the Terra blockchain called the Anchor Protocol, and thereby earn, as alleged by Tobias, "a guaranteed 20%" interest rate on their deposits. *Ibid.*

The Anchor Protocol was generally accessed through the Anchor Interface. *See id.* at 11a. Holders of UST (like Tobias) who wished to deposit cryptocurrency on the Anchor Protocol using the Anchor Interface were required to first agree to the Anchor Terms of Service ("Anchor TOS" or "TOS"). *See ibid.*

The Anchor TOS includes a broad arbitration provision that, in turn, includes an express, unqualified, and equally broad delegation clause:

> Any claim or controversy arising out of or relating to the Interface, this Agreement, including any question regarding this Agreement's existence, validity or termination, or any other acts or omissions for which you may contend that we are liable, *including (but not limited to) any claim or controversy as to arbitrability* ("Dispute"), shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules").

Id. at 11a–12a (emphasis added).

In the proceedings below, Tobias never disputed that he subscribed to and was bound by the Anchor TOS, including its arbitration and delegation provisions. Tobias nonetheless sued TFL, the other signatory to the Anchor TOS, and nonsignatory Jump Trading in federal court for allegedly colluding to defraud him and other UST holders and users of the Anchor Protocol, in violation of the Securities Exchange Act of 1934 and the Securities Act of 1933. Tobias' allegations under those federal laws served as the basis for invoking the District Court's federal jurisdiction under 28 U.S.C. § 1331.

Tobias claimed, *inter alia*, that the interest rate he was promised for the UST deposits he made through the Anchor Protocol was central to a fraud allegedly committed by Jump Trading acting in concert with TFL, a signatory to the arbitration agreement. *See* App. 8a, 10a–11a. After being selected as lead plaintiff pursuant to the Private Securities Litigation Reform Act on December 13, 2022, Tobias filed the Second Amended Complaint ("SAC") on February 23, 2023. The SAC named Jump Trading, TFL, and Mr. Do Kwon, one of TFL's co-founders (TFL, together with Do Kwon, the "TFL Defendants"), as well as a number of other defendants that Tobias has since voluntarily dismissed from the case. App. 8a n.1. Jump Trading and the TFL Defendants each moved to compel arbitration and to dismiss the SAC. *Id.* at 18a; R.314.[2] After the motions were fully briefed, Tobias voluntarily dismissed his claims against the TFL Defendants just five days before oral argument

[2] "R.__" refers to the record in the appellate proceeding below before the Ninth Circuit, Dkt. No. 14.3.

on the motions. R.316–17.

On January 4, 2024, the District Court denied Jump Trading's motion to compel arbitration and granted without prejudice Jump Trading's Motion to Dismiss for Failure to State a Claim. App. 5a. On January 25, 2024, Tobias filed the Third Amended Complaint ("TAC") against Jump Trading, alleging the same basic theories advanced in the earlier complaint. *Ibid.* And, even after dismissing TFL, Tobias continued to assert that Jump Trading "controlled" TFL. R.37 (TAC ¶ 2).

Tobias's allegations in the TAC still place the Anchor Protocol, and the arbitration agreement contained therein, at the center of the alleged fraud. For example, in the TAC, Tobias claims that the "20% yield [on Anchor Protocol] was a marketing ploy to increase investment in the Terra ecosystem." R.78 (TAC ¶ 183) (claiming that others "called L[UNA] a Ponzi because of the 20% yield on Anchor").

On February 2, 2024, Jump Trading renewed its motion to compel arbitration as to the now operative TAC. *Id.* at 317. The District Court denied the motion "[f]or the same reasons identified in the order denying Jump's motion to compel arbitration of the claims in the second amended complaint." App. 6a. In its prior decision, the District Court found that Tobias had "agreed to assign at least some questions of arbitrability to the arbitrator." *Id.* at 23a. However, the District Court concluded that, under the Ninth Circuit's controlling holding in *Kramer*, Jump Trading needed to show "clear and unmistakable evidence" that the delegation provision governed the specific "question of whether a third party nonsignatory to the

agreement like Jump [Trading] is entitled to enforce the agreement." *Id.* at 23a–24a. The District Court then interpreted for itself the scope of the Anchor TOS's arbitration provision, finding that it "contains no express reference to disputes with third parties like Jump [Trading], let alone to issues of arbitrability that might arise in connection with such disputes." *Id.* at 24a.

On appeal, the Ninth Circuit upheld the District Court's denial of Jump Trading's motion to compel. The Ninth Circuit determined that it was "bound by *Kramer*" to assess for itself whether there was "clear and unmistakable evidence that Plaintiffs agreed to arbitrate arbitrability with nonsignatories." *Id.* at 2a–3a (quoting *Kramer*, 705 F.3d at 1127). The Ninth Circuit then interpreted the scope of the arbitration clause, noting that "[t]here is no mention of any third party or nonsignatory to the arbitration agreement." *Id.* at 3a. On that basis, the Ninth Circuit agreed with the District Court that the court "retain[ed] authority to decide the arbitrability question" of whether the arbitration agreement was enforceable by nonsignatories. *Ibid.*

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Is Part of a Deep Circuit Split Over Whether a Delegation Provision in an Arbitration Agreement Covers Arbitrability Questions Involving Nonsignatories

This Court's review is needed to resolve a deep circuit split over an issue that threatens the certainty,

predictability, and efficient resolution of disputes normally afforded by arbitration agreements: Whether a delegation clause in a valid arbitration agreement mandates that the arbitrator, and not a court, determine the threshold question of whether a nonsignatory may enforce an arbitration agreement.

Parties agree to have arbitrators, rather than courts, resolve threshold arbitrability disputes for the same reasons they agree to arbitration in the first place: for greater efficiency, predictability, speed, and reduced cost. *See Mitsubishi*, 473 U.S. at 628; *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009). The lingering circuit split, in which roughly half the circuits hold that a party who has agreed to mandatory arbitration is nonetheless entitled to have a court, rather than the arbitrator, resolve nonsignatory arbitrability disputes, undermines these values, and creates threshold disputes in court, notwithstanding the agreement delegating all such issues to the arbitrator.

This persistent, unresolved circuit split has also generated significant judicial and academic commentary, underscoring the pressing need for this Court's intervention. *See, e.g.*, Tamar Meshel, *"A Doughnut Hole in the Doughnut's Hole": The* Henry Schein *Saga and Who Decides Arbitrability*, 73 Rutgers L. Rev. 83, 114 n.178 (2020) (noting that courts have been inconsistent on this issue and that "[p]articularly unclear is whether claims by/against non-signatories relate to the *scope* of the arbitration agreement or to its *existence*"); John F. Coyle & Robin J. Effron, *F. Selection Clauses, Non-Signatories, & Pers. Jurisdiction*, 97 Notre Dame L. Rev. 187, 241

(2021).

A. The First, Second, Third, Sixth, and Tenth Circuits Hold That the Arbitrator Must Decide the Arbitrability of Claims Involving Nonsignatories Where There is a Clear Delegation Clause

Of the nine circuits that have addressed the issue, five agree with Jump Trading's position that courts cannot resolve arbitrability disputes involving nonsignatories where there is a delegation clause.

In *Swiger v. Rosette*, the plaintiff opposed a motion to compel arbitration on the basis that the nonsignatory defendant "did not sign [the] agreement" and thus "lacked ability to invoke [it]." 989 F.3d 501, 506 (6th Cir. 2021). Quoting *Henry Schein*, the Sixth Circuit rejected the plaintiff's argument, instead holding that "[a] valid delegation clause precludes courts from resolving any threshold arbitrability disputes, even those that appear 'wholly groundless.'" *Id.* at 505 (quoting *Henry Schein*, 586 U.S. at 68). Thus, whether a nonsignatory can enforce the arbitration agreement "presents a question of arbitrability that [the] arbitration agreement delegated to an arbitrator" if there is a delegation provision. *Id.* at 507.

Likewise, in *Blanton v. Domino's Pizza Franchising LLC*, the Sixth Circuit held that "the arbitrator should decide for itself whether [a nonsignatory] can enforce the arbitration agreement." 962 F.3d 842, 852 (6th Cir. 2020). In that case, certain employees filed a putative antitrust class action against Domino's Pizza Franchising LLC alleging that the terms of Domino's franchise agreements with

its franchisees violated federal antitrust law. Domino's moved to compel arbitration under an arbitration agreement between the plaintiffs-employees and the franchises that employed them.

On appeal from the district court's order compelling arbitration, the Sixth Circuit identified the material issue as "whether there's clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Id.* at 846 (citation modified). The Sixth Circuit correctly noted that some courts have "conflate[d] the questions of contract formation and interpretation (which generally involve state law) with the question whether a particular agreement satisfies the 'clear and unmistakable' standard (which seems to be one of federal law)." *Ibid.* The Sixth Circuit observed that, to resolve an arbitrability dispute regarding nonsignatories, the court need only determine whether the agreement delegated arbitrability to the arbitrator under the clear and unmistakable evidence standard, not whether a separate contract was formed with the nonsignatory. *Ibid.*; *see also Becker v. Delek US Energy, Inc.*, 39 F.4th 351, 356 (6th Cir. 2022) (reaffirming that "[w]hether a non-signatory can enforce a delegation clause is * * * a question of enforceability, not existence" of the contract). And because the arbitration agreement at issue in that case incorporated the AAA rules, which delegate "arbitrability" issues to the arbitrator, the Sixth Circuit found "'clear and unmistakable' evidence" that the parties had agreed to arbitrate all questions of arbitrability, including enforcement by a

nonsignatory. *Blanton*, 962 F.3d at 846.

The Third Circuit has adopted the same approach. In *Zirpoli v. Midland Funding, LLC*, the Third Circuit considered whether a nonsignatory assignee could enforce an arbitration agreement with a delegation clause that specified that the arbitrator would decide issues concerning "enforceability," "arbitrability," and the "scope of this Agreement." 48 F.4th 136, 139 (3rd Cir. 2022). The nonmovant contested the validity of an assignment—and thus whether the nonsignatory could enforce the arbitration agreement. *Id.* at 141. The Third Circuit majority concluded that this was a question of "arbitrability" that had been delegated to the arbitrator, not the court, to decide. *Id.* at 145.

The Third Circuit found that, because there was no dispute that a contract existed between the original signatories, any dispute over *who* could enforce that agreement was a "merits" question that the delegation clause committed to the arbitrator. *Id.* at 142–43. According to the Third Circuit, if a court were to decide that question itself, after the plaintiff-signatory already had agreed to delegate it, the court's actions would render the delegation clause "meaningless." *Id.* at 143.

Similarly, the Tenth Circuit has held, in a dispute regarding enforcement of an arbitration agreement against a nonsignatory, that where the arbitration agreement contained "an enforceable delegation clause," the court "should have sent the case to arbitration" instead of resolving the arbitrability dispute. *Casa Arena Blanca v. Rainwater by Est. of Green*, No. 21-2037, 2022 WL 839800, at *5 (10th Cir. Mar. 22, 2022) ("[T]he question of whether the

Agreement should be enforced against [a nonsignatory] as a third-party beneficiary of that contract is one that should be decided by an arbitrator, not the court," because "there is no issue of contract formation, only contract enforcement.").

Earlier decisions from the First and Second Circuits agree. The First Circuit has long held that courts cannot resolve disputes over whether a nonsignatory can compel arbitration where a delegation clause requires arbitration of "issues of arbitrability." *Apollo Comput., Inc. v. Berg*, 886 F.2d 469, 472 (1st Cir. 1989). In *Apollo*, a plaintiff resisting arbitration "claim[ed] that there was no agreement to arbitrate between it and the [nonsignatory] defendants." *Id.* at 470. The First Circuit rejected that argument and did "not reach any of the[ ] arguments" about whether the nonsignatory defendants could compel arbitration because the arbitration agreement "submit[ted] issues of arbitrability to the arbitrator." *Id.* at 472. The First Circuit concluded that whether the nonsignatory defendants could enforce the arbitration agreement is an issue "[t]he arbitrator should decide." *Id.* at 473.

The Second Circuit has similarly held that when a signatory argues that it cannot "be compelled to participate in arbitration [by] * * * a non-signatory," the issue must be decided by an arbitrator if the contract has a delegation clause. *Contec Corp. v. Remote Sol., Co.*, 398 F.3d 205, 207 (2d Cir. 2005).

B. The Fourth, Fifth, Eighth, and Ninth Circuits Hold That the Court Should Decide the Arbitrability of Claims Involving Nonsignatories Even Where the Arbitration Agreement Has a Delegation Clause

By contrast, the Fourth, Fifth, and Ninth Circuits hold that a court is empowered to decide whether a nonsignatory can enforce an arbitration provision, even if there is a delegation provision. There is simultaneously an apparent internal circuit split on this issue in the Eighth Circuit, further illustrating the confusion among the circuit courts.

The Fourth Circuit has concluded that the court, and not the arbitrator, decides the enforceability of an arbitration agreement by nonsignatories even where there is a delegation provision. In *Rogers v. Tug Hill Operating, LLC*, a plaintiff who worked for defendant Tug Hill sued under the Fair Labor Standards Act claiming overtime pay. 76 F.4th 279, 282 (4th Cir. 2023), *cert. denied*, 144 S. Ct. 818 (2024). Tug Hill sought to compel arbitration under an arbitration agreement that the plaintiff had entered into with a non-party that had helped the plaintiff secure his employment with Tug Hill. *Ibid.* The arbitration agreement included a delegation provision which stated that "[t]he arbitrator has exclusive authority to resolve any dispute relating to the interpretation, applicability, or enforceability of this binding arbitration agreement." *Id*. at 283.

The Fourth Circuit reversed the district court's decision granting the motion to compel arbitration. In doing so, the Fourth Circuit held that when "the party

seeking to enforce an arbitration agreement is not itself a party to that agreement, *the district court* must determine * * * whether that party is entitled to enforce the arbitration agreement under state contract law." *Id.* at 287. The Fourth Circuit then interpreted the arbitration agreement for itself and determined that the plaintiff had only "agreed to arbitrate issues — including threshold issues — arising *between him and RigUp*." *Id.* at 288. The Fourth Circuit concluded the delegation provision does not address "whether a third party like Tug Hill has rights under the arbitration agreement." *Ibid.*

The Fifth Circuit agrees. In *Newman v. Plains All American Pipeline, L.P.*, the plaintiff-employee (Newman) signed an employment agreement with his employer (a non-party) that incorporated the AAA rules. 23 F.4th 393, 397 (5th Cir. 2022). Newman subsequently sued a nonsignatory (Plains) for which he performed work. *Ibid.* Plains moved to compel arbitration on the basis that the arbitration agreement between Newman and his non-party employer incorporated the AAA rules' delegation provision. *Ibid.*

The Fifth Circuit upheld the district court's denial of Plains' motion to compel. Adopting the same analysis that the Sixth Circuit rejected in *Blanton* and *Becker*, the Fifth Circuit held that there is no difference between contract "enforceability" and "existence" (or formation) where a nonsignatory seeks to compel arbitration. *Id.* at 398 ("To that end, deciding enforceability between the parties and an arbitration agreement's existence are two sides of the same coin."). Based on this determination, the Fifth

Circuit concluded that "[w]hen a court decides whether an arbitration agreement exists, it *necessarily decides* its enforceability between parties." *Ibid.* (emphasis added). Therefore, the court, not an arbitrator, must decide "under state contract law" whether an arbitration agreement "is made enforceable against (or for the benefit of) a third party." *Id.* at 401. And because the court believed it was required to decide "the first-step, formation question" (in other words, the "existence" of the contract under state law), it concluded that "deciding an arbitration agreement's enforceability between parties remains a question for courts." *Id.* at 398–99.

The Ninth Circuit has reached the same conclusion, but under starkly different reasoning than that employed by the Fourth and Fifth Circuits. In *Kramer v. Toyota Motor Corp.*, the Ninth Circuit addressed a dispute between buyers of Toyota vehicles and Toyota regarding alleged vehicle defects. 705 F.3d 1122 (9th Cir. 2013). The buyers had entered into arbitration agreements with various Toyota dealerships, but not with Toyota directly. Those agreements expressly delegated questions concerning "the interpretation and scope" of the arbitration clause to the arbitrator. *Id.* at 1125. When the buyers sued Toyota, Toyota sought to compel arbitration under the arbitration agreements between the buyers and the dealerships. Toyota argued that, even though it was a nonsignatory to those arbitration agreements, the agreements' delegation provisions meant that the arbitrator must decide the "issue of whether a nonsignatory may compel Plaintiffs to arbitrate." *Id.* at 1127.

The Ninth Circuit disagreed. It reasoned that, even though the plaintiff had "agreed to arbitrate arbitrability" through the delegation provision, the "arbitration agreements do not contain clear and unmistakable evidence" that the delegation provision governed disputes specifically with nonsignatories. *Ibid.* Instead of making the same mistake the Fourth and Fifth Circuits made by treating nonsignatory enforcement as a contract formation issue to be decided under state law, the Ninth Circuit applied the "clear and unmistakable evidence" standard under federal law. However, the Ninth Circuit incorrectly added an additional requirement that there must be "clear and unmistakable evidence that Plaintiffs agreed to arbitrate arbitrability *with nonsignatories*." *Ibid.* (emphasis added). Thus, the rule in the Ninth Circuit is that, even where there is a binding delegation clause in an arbitration provision, courts retain the authority to interpret the *scope* of that delegation clause to determine whether the signatories intended to delegate the specific arbitrability dispute at issue.

Finally, there is an apparent intra-circuit split within the Eighth Circuit. In *Eckert/Wordell Architects, Inc. v. FJM Properties of Willmar, LLC*, the plaintiff sought to avoid arbitration on the basis that the defendant "was not a signatory" to the arbitration agreement, even though the arbitration agreement incorporated the AAA Rules which, in turn, delegate arbitrability questions to the arbitrator. 756 F.3d 1098, 1099 (8th Cir. 2014). The Eighth Circuit rejected the plaintiff's argument, finding that the "incorporation of the AAA Rules" provides a "clear and unmistakable indication that

the parties intended for the arbitrator to decide threshold questions of arbitrability." *Id.* at 1100. Further, it held that "[w]hether a particular arbitration provision may be used to compel arbitration between a signatory and a nonsignatory is a threshold question of arbitrability" that must be decided by the arbitrator. *Ibid.*

However, more recently in *Burnett v. National Association of Realtors*, the Eighth Circuit went the other way. 75 F.4th 975 (8th Cir. 2023), *cert. denied sub nom. HomeServices of Am., Inc. v. Burnett*, 144 S. Ct. 1347 (2024). The *Burnett* plaintiffs filed a putative class action against several brokerages, including HomeServices of America, Inc. and certain affiliates of HomeServices ("HomeServices"). Certain putative class members had entered into agreements with non-party affiliates of HomeServices. *Id.* at 978. Those agreements contained arbitration provisions which incorporated the AAA rules, delegating arbitrability disputes to the arbitrator. *Ibid.*

HomeServices moved to compel arbitration under the agreements between the plaintiffs and the non-party HomeServices affiliates. In denying that motion, the district court reasoned that the "[c]ourt—not an arbitrator—must address whether HomeServices can enforce the Arbitration Agreements." *Burnett v. Nat'l Ass'n of Realtors*, 615 F. Supp. 3d 948, 959 (W.D. Mo. 2022). It then interpreted the scope of the arbitration agreements and determined that HomeServices, as a nonsignatory, could not enforce them because they were limited to disputes "between the parties" to the contract. *Id.* at 958–59.

The Eighth Circuit affirmed. *Burnett*, 75 F.4th at 983–84. Illustrating the current confusion over the issue raised by this petition, the Eighth Circuit cited its prior decision in *Eckert* for the proposition that incorporating the AAA Rules was a "clear and unmistakable indication that the *parties* intended for the arbitrator to decide the threshold questions of arbitrability." *Id.* at 982 (citing *Eckert*, 756 F.3d at 1100). It further relied on *Eckert* to correctly find that "[w]hether a particular arbitration provision may be used to compel arbitration between a signatory and a *nonsignatory* is a threshold question of arbitrability." *Ibid.* (citing *Eckert*, 756 F.3d at 1100). But instead of leaving the "threshold question of arbitrability" to the arbitrator as in *Eckert*, the Eighth Circuit itself interpreted the scope of the arbitration agreement (notwithstanding the clear and unmistakable delegation clause) and distinguished *Eckert* on the basis that the arbitration agreement at issue there purportedly did not contain the same language as in *Burnett* that limited the application of the arbitration agreement to disputes "between the parties." *Id.* at 984 n.5. Based on that interpretation of the scope of the arbitration agreement, the Eighth Circuit in *Burnett* held that HomeServices could not enforce the arbitration agreement because it is not a "party" or "third-party beneficiary" of the agreement. *Id.* at 984.

Thus, in *Burnett*, the Eighth Circuit appeared to join the Fourth, Fifth, and Ninth Circuits in improperly usurping the arbitrator's ability to decide threshold questions of arbitrability even where there is a clear delegation provision.

Together, the Fourth, Fifth, Eighth, and Ninth

Circuits comprise nearly 50 percent of the population of the United States, whereas the contrasting views of the First, Second, Third, Sixth, and Tenth Circuits hold sway over 40 percent of that population. As a result of this longstanding circuit split, parties can, and presumably do, engage in systematic forum shopping to defeat the goal of arbitral resolution. *Cf. Outokumpu Stainless USA, LLC v. Coverteam SAS*, No. 17-10944, 2022 WL 2643936, at *6 (11th Cir. July 8, 2022) (Tjoflat, J., concurring) (recognizing that allowing each U.S. jurisdiction "to impose its own test for threshold questions of arbitrability would create an unmanageable tangle of arbitration law in the United States, lead to forum shopping, and frustrate the uniform standards the New York Convention and Chapter 2 of the FAA were enacted to create"). Specifically, plaintiffs who seek to avoid arbitration may obtain personal jurisdiction over nonsignatories and file a lawsuit in those circuits in which threshold arbitrability questions are resolved by courts rather than arbitrators. A lingering circuit split that encourages such strategic and inequitable results cries out for intervention by this Court.

II. The Decision Below Violates This Court's Mandate in *Henry Schein*

On the merits, the Ninth Circuit's decision below contradicts this Court's requirement that "a court may not decide the arbitrability issue" where there is a delegation provision. *Henry Schein*, 586 U. S. at 69. The Ninth Circuit attempted to reconcile its decision with *Henry Schein* by noting that "*Henry Schein* did not involve nonsignatories, and did nothing to mandate delegation when the contract does not

require it by clear and unmistakable evidence." App. 2a (citation modified). That rationale is erroneous.

As this Court recently confirmed in *Coinbase, Inc. v. Suski*, "parties can form multiple levels of agreement concerning arbitration." 602 U.S. 143, 148 (2024). The parties "can agree to send the merits of a dispute to an arbitrator." *Ibid.* They can also agree to have the arbitrator "resolve threshold arbitrability questions as well as underlying merits disputes." *Ibid.* (quoting *Henry Schein*, 586 U. S. at 65). A disagreement over the "merits of the dispute" is a "first-order" dispute. *Ibid.* (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)). A disagreement over "whether [the parties] agreed to arbitrate the merits" is a "second-order" dispute. *Ibid.* (citing *First Options*, 514 U.S. at 942). Finally, a disagreement over "who should have primary power" to settle the second-order dispute is a "third-order" dispute. *Id.* at 149 (citing *First Options*, 514 U.S. at 942).

This Court has repeatedly affirmed that *all* three orders of dispute are governed by regular contract principles. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) ("An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce."); *First Options*, 514 U.S. at 943 ("Just as the arbitrability of the merits of a dispute depends upon whether the parties agreed to arbitrate that dispute, so the question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about *that* matter." (citations omitted)); *Henry Schein*, 586 U.S. at 68 ("When the

parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract.").

Although circuit courts of appeals disagree on this issue, *Henry Schein*'s reasoning should be dispositive on the merits. There, a distributor of dental equipment brought an antitrust action seeking an injunction against its supplier. Plaintiff and a predecessor-in-interest to the defendant had previously agreed to arbitrate "any dispute arising under or related to the agreement," except for "actions seeking injunctive relief." *Henry Schein*, 586 U.S. at 63. The arbitration agreement also incorporated the AAA rules, which in turn delegate any disputes regarding arbitrability to the arbitrator. *Id*. at 66.

The supplier moved to compel arbitration, arguing that the delegation provision in the AAA rules required that an arbitrator, rather than the court, decide the threshold arbitrability question (a third-order dispute). The distributor opposed, arguing that, because the supplier's position regarding arbitrability was baseless in light of the clear carveout from the arbitration clause for claims seeking injunctive relief, the court should resolve the threshold arbitrability question. The district court and Fifth Circuit agreed with the distributor and denied the motion to compel arbitration. They found that, because the argument for arbitration of a dispute seeking injunctive relief was "wholly groundless" in light of the carveout in the agreement, they did not need to send the threshold arbitrability question to arbitration but rather could decide it for themselves. *Id.* at 67.

Having granted certiorari with respect to that

delegation clause issue, this Court eliminated the "wholly groundless" exception altogether. In doing so, this Court reaffirmed that "[j]ust as a court may not decide a merits question that the parties have delegated to an arbitrator, a court may not decide an arbitrability question that the parties have delegated to an arbitrator." *Id.* at 69. Each level of dispute is "a question of contract" subject to its own analysis based on the plain terms. *Id.* at 65. Thus, "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Ibid.*

In the decision below and in *Kramer*, the Ninth Circuit conflated the second-order dispute over whether a nonsignatory can enforce the arbitration agreement and the third-order dispute over *who decides* the second-order question. Under the Ninth Circuit's inverted approach, a court must first interpret the *scope* of the arbitration agreement (the second-order question) to determine whether there is "clear and unmistakable evidence" that the parties intended to delegate the specific arbitrability question at issue to the arbitrator (the third-order question). In doing so, the Ninth Circuit effectively applied the wholly groundless exception under a different guise, contrary to this Court's ruling in *Henry Schein*.

The Ninth Circuit's approach upends the appropriate framework for determining a court's role in resolving arbitrability issues when faced with a delegation clause. Under *Henry Schein*, the proper role of the court is to first determine whether "there is clear and unmistakable evidence" that "the parties agreed to arbitrate *arbitrability*." 586 U.S. at 72

(emphasis added) (citing *First Options*, 514 U.S. at 944). That is, a court must decide the third-order question (i.e., who decides arbitrability) before it decides whether it even can address the second-order question (i.e., the merits on arbitrability). This is a binary analysis: The court determines whether the delegation provision clearly and unmistakably delegated "arbitrability" to the arbitrator. If the court answers that question in the affirmative, then it should not address the second-order question—that is, it should not (indeed, under *Henry Schein*, *cannot*) address whether the agreement delegated to the arbitrator the specific arbitrability question involving nonsignatories because that is now a question for the arbitrator to decide.

By contrast, the Ninth Circuit's circular approach eliminates the third-order inquiry altogether. Resolving whether the delegation provision applies to a specific dispute (such as enforcement by a nonsignatory) necessarily requires the court to interpret the *scope* of the arbitration agreement itself, as the Ninth Circuit acknowledged. *See Kramer*, 705 F.3d at 1128 (recognizing whether arbitrability dispute with nonsignatory was delegated to arbitrator amounted to analyzing the "scope of the arbitration agreement"). And the Ninth Circuit's decision below further illustrates this circularity.

The Ninth Circuit held that it could not determine whether the arbitrability dispute was delegated to the arbitrator without first determining whether the arbitration agreement extended to nonsignatories. Under this approach, the Ninth Circuit interpreted

the *scope* of the arbitration agreement for the very purpose of determining *who* had the authority to decide the arbitration agreement's scope. In doing so, the Ninth Circuit decided both the second-order and third-order questions in one stroke, rendering the delegation provision meaningless. And the same circularity would exist if the Ninth Circuit had gone the other way and determined that the delegation provision *did apply* to enforcement by a nonsignatory. The Ninth Circuit would have then sent "the arbitrability question of whether [a nonsignatory may enforce the agreement] to an arbitrator to decide—even though [it had] *already* decided" that issue. *Zirpoli*, 48 F.4th at 143.

The circular approach adopted by the Ninth Circuit, and followed by the Fourth, Fifth, and Eighth Circuits, conflicts with the core holding from *Henry Schein* that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue." 586 U.S. at 68.

III. This Petition Raises a Recurring Issue

The narrow legal issue of *who* decides whether a nonsignatory can enforce an arbitration agreement when there is a clear delegation provision is a recurring one. *See supra* at 3. Indeed, contemporary arbitration provisions in a variety of types of contracts frequently contain delegation provisions like the one at issue here. *See, e.g.*, John F. Coyle & Christopher R. Drahozal, *An Empirical Study of Disp. Resol. Clauses in Int'l Supply Conts.*, 52 Vand. J. Transnat'l L. 323, 354–55 (2019) (noting that express delegation

clauses are common in consumer financial contracts and that international supply contracts are often governed by arbitration rules with "language that operates as a delegation clause"). Such delegation provisions also form part of the rules of many arbitral institutions, like the AAA and JAMS, which are routinely incorporated in arbitration agreements today. *See, e.g.*, *Henry Schein*, 586 U.S. at 66 ("The rules of the American Arbitration Association provide that arbitrators have the power to resolve arbitrability questions."); *Acheron Portfolio Tr. v. Mukamal*, No. 21-12111, 2022 WL 16707942, at *3 (11th Cir. Nov. 4, 2022) ("Under the JAMS Rules, the arbitrator decides the gateway issue of arbitrability.").

Absent timely review by this Court, the longstanding and deepening circuit split will continue to plague courts and litigants. *See infra* at 33–35; *see also Zirpoli*, 48 F.4th at 140 ("We are once again confronted with the 'mind-bending issue' of arbitration about arbitration." (citation omitted)). Indeed, it is common for nonsignatories to an arbitration agreement to be dragged into litigation that is deeply intertwined with issues that the plaintiff agreed to arbitrate. Often, that happens where, as here, a plaintiff who signed an arbitration agreement "is seeking to avoid that agreement by bringing the action against a non-signatory charged with acting in concert with [a] non-defendant signatory." *Grigson v. Creative Artists Agency L.L.C.*, 210 F.3d 524, 528 (5th Cir. 2000). And, given that arbitration agreements are routinely enforced on the *merits* in this context, it is crucial to have consistent judicial enforcement of *threshold* arbitrability

questions. *See, e.g.*, *id.* at 527–28 (allowing nonsignatory to enforce arbitration where the complaint alleged "substantially interdependent and concerted misconduct" between nonsignatory and signatory).

The Ninth Circuit's holding below substantially undercuts the value of delegation provisions in arbitration contracts. Rather than have the arbitrator resolve the entire dispute efficiently in one forum, the Ninth Circuit's holding requires a separate initial and costly round of litigation in federal court over the disputed meaning and "scope" of the arbitration agreement's delegation provision. Yet, that is precisely what this Court and modern arbitrability jurisprudence seek to avoid. *See, e.g.*, *Henry Schein*, 586 U.S. at 68; *Rent–A–Center*, 561 U.S. at 70.

IV. Inconsistent Treatment of Delegation Clauses Across Circuit Courts Incentivizes Forum Shopping

Resolving the circuit split is also needed to disincentivize signatories to arbitration agreements from shopping for a forum in which they are more likely to evade arbitration. As of today, litigants seeking to evade arbitration by suing nonsignatories have every incentive to file suits in the Fourth, Fifth, Eighth, or Ninth Circuits where they are more likely to have a court decide threshold arbitrability issues involving nonsignatories.

This case plainly illustrates that problem. Had Jump Trading been sued and thereafter moved to compel arbitration in the First, Second, Third, Sixth, or Tenth Circuits, its motion would have been granted

and the arbitrator would have decided the threshold arbitrability question of whether Jump Trading, as a nonsignatory, could enforce the arbitration agreement here. However, as of now, whether Jump Trading can enforce the arbitration agreement is being left for the court to decide, and not the arbitrators, simply because Tobias sued Jump Trading in the Ninth Circuit.

V. If Left Unresolved, the Circuit Split Exposes Petitioner and Others Similarly Situated to Inconsistent Application of Federal Arbitration Law in Cases Arising Out of the Same Facts

The inequity of the circuit split is particularly evident in the present case. Jump Trading is currently subject to multiple lawsuits that implicate the exact same arbitration agreement in the Anchor TOS. In addition to having been sued by Tobias in the Ninth Circuit, Jump Trading is also a defendant in a separate case in the Seventh Circuit, styled *Kim v. Jump Trading, LLC*, No. 1:23-cv-02921 (N.D. Ill.) ("*Kim*"). In that case, another group of putative class plaintiffs sued Jump Trading in the U.S. District Court for the Northern District of Illinois based on the same operative facts that give rise to Tobias's claims in the proceedings below, implicating the same Anchor TOS and its arbitration agreement.

On September 26, 2024, Jump Trading moved to compel arbitration in *Kim* based on the Anchor TOS, arguing that the delegation clause requires that the arbitrator, and not the court, determine whether Jump Trading, as a nonsignatory, can enforce the arbitration agreement. Mot. to Compel Arb., *Kim*,

Dkt. No. 82. Notably, the Seventh Circuit remains one of the two circuit courts that has yet to address directly whether, in the face of a delegation provision, questions about a nonsignatory's enforcement of an arbitration provision are reserved for the arbitrator.

On May 9, 2025, the district court in *Kim* denied Jump Trading's motion to compel arbitration. 2025 WL 1359136. It acknowledged the current split of authority over the delegation clause issue raised here. *Id.* at *4 (noting the "inconsistency in the federal case law concerning who * * * decides a challenge to a non-signatory's standing to demand arbitration" (citation omitted)). It further recognized that the Seventh Circuit has not "explicitly addressed" that question. *Id.* at *5. Nonetheless, the district court concluded that it was entitled to decide whether Jump Trading can compel arbitration, even where there is a delegation provision. *Id.* at *8.

Jump Trading has appealed the denial of its motion to compel arbitration in *Kim* to the Seventh Circuit. *Kim v. Jump Trading, LLC*, No. 25-1964 (7th Cir. appeal docketed June 4, 2025). If the Seventh Circuit affirms the district court's decision, it will join four other circuits, creating a deeper 5-to-5 circuit split. But if the Seventh Circuit reverses the district court's denial of Jump Trading's motion to compel arbitration, that will result in diametrically inconsistent circuit decisions over who decides arbitrability *arising from the same set of facts and the exact same arbitration agreement*. Absent this Court's resolution of the existing circuit split, Jump Trading, and other parties who may be subject to parallel proceedings in circuits that disagree over the question

presented here, will continue to face the risk of competing judicial decisions regarding the same arbitration agreement.

VI. This Case Is an Appropriate Vehicle To Resolve the Circuit Split Over Who Decides Arbitrability

This petition is the perfect vehicle to resolve the question presented above. There was no dispute in the proceedings below that a valid arbitration agreement exists in this case, that it contains a clear and unmistakable delegation clause, and that Tobias subscribed to that arbitration agreement. Moreover, the Ninth Circuit's conclusion below was outcome-determinative, holding that Jump Trading could not compel arbitration.

This petition also does not implicate the issues that arguably complicated this Court's review of the two prior petitions that recently came before the Court on this issue. *Compare* Petition for Writ of Certiorari, *HomeServices of Am. Inc. v. Burnett* (No. 23-840) ("*HomeServices* Pet."); Petition for Writ of Certiorari, *Tug Hill Operating, LLC v. Rogers* (No. 23-661).

In the cases from which those earlier petitions arose, the Fourth and Eighth Circuits performed a state-law analysis—rather than, as here, an analysis under federal law—to determine whether a contract had been formed between plaintiffs-signatories and the nonsignatory. *HomeServices* Pet. at 11; *Tug Hill*, 76 F.4th at 287–88. In *Tug Hill*, the Fourth Circuit found that "the district court erred in ruling that it could use its statutory powers under the FAA to grant [the nonsignatory's] motion to compel arbitration

without first resolving whether, *as a matter of state contract law*, [the nonsignatory] was authorized to enforce the arbitration agreement." 76 F.4th at 288 (emphasis added). And in *HomeServices,* the Eighth Circuit concluded that plaintiffs and HomeServices had not entered into such a "valid and enforceable agreement" under Missouri law. *HomeServices* Pet. at 24. HomeServices' petition thus presented a question of preemption of Missouri law under the FAA. *Id*. at 28 (arguing that "[a]ny state law that purported to control that distinct inquiry would be 'preempted' by the FAA and this Court's decisions").

This petition presents no such preemption question. The District Court and the Ninth Circuit correctly determined that arbitrability was a question of federal law. They erred in their application of federal law by interpreting the *scope* of the arbitration agreement—a task that the arbitration agreement reserved solely for the arbitrator—to determine whether the delegation clause applied.

Additionally, the district court in *HomeServices* denied the motion to compel arbitration for the independent reason that HomeServices had waived its rights to enforce arbitration. *HomeServices* Pet. at 34 n.7. The Eighth Circuit was presented with, but did not address, that independent basis when it affirmed the district court, and it was not raised as a question in HomeServices' petition for writ of certiorari to this Court. *Ibid.* Therefore, even if this Court had granted certiorari in *HomeServices* to address the delegation question, the district court's alternative basis for denying the motion to compel would have been left untouched. That concern is not

present here. If this Court determines that the District Court erred in deciding the threshold issue of arbitrability, there is no further bar to granting Jump Trading's motion to compel arbitration.

Moreover, in *HomeServices*, the Eighth Circuit had declined to stay the mandate during the pendency of the petition for writ of certiorari, and the case had proceeded to a jury trial. *Id.* at 11. HomeServices nonetheless argued that granting review would "avoid a further waste of judicial and party resources on post-trial proceedings," but the substantial resources associated with a full jury trial had already been expended. *Id.* at 35. By contrast, here, the Ninth Circuit granted Jump Trading's motion to stay the mandate, and the case has been stayed during the pendency of the appeals. App. 6a. Therefore, granting review now will conserve considerable party and judicial resources, thereby preserving the "asserted benefits of arbitration." *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 743 (2023).

This petition accordingly presents a perfect vehicle to conclusively resolve the deep five-to-four circuit split over whether a delegation clause in an arbitration provision requires that threshold questions of arbitrability regarding enforcement by a nonsignatory be resolved by the arbitrator rather than the court.

CONCLUSION

For the reasons set forth above, this petition for writ of certiorari should be granted.

Respectfully submitted,

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June 10, 2025

APPENDIX

TABLE OF APPENDICES

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 16, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-670
D.C. No. 5:22-cv-03600-PCP

NICK PATTERSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; MICHAEL TOBIAS,

Plaintiffs-Appellees,

v.

JUMP TRADING, LLC,

Defendant-Appellant.

No. 24-2489
D.C. No. 5:22-cv-03600-PCP

MICHAEL TOBIAS,

Plaintiff-Appellee,

v.

JUMP TRADING, LLC,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of California
P. Casey Pitts, District Judge, Presiding

Appendix A

Submitted January 14, 2025*
San Francisco, California

Before: H.A. THOMAS, MENDOZA, and JOHNSTONE, Circuit Judges.

MEMORANDUM**

Appellant Jump Trading, LLC appeals the district court's denial of its motion to compel arbitration in this putative securities class action. We review the denial of a motion to compel arbitration de novo. *Setty v. Shrinivas Sugandhalaya LLP*, 3 F.4th 1166, 1167 (9th Cir. 2021). We have jurisdiction under 28 U.S.C. § 1291, and affirm.

1. Absent "clear and unmistakable evidence that Plaintiffs agreed to arbitrate arbitrability with nonsignatories," the court must decide the issue of arbitrability. *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1127 (9th Cir. 2013). Jump argues that *Henry Schein, Inc. v. Archer and White Sales, Inc.*, abrogated *Kramer* because it held: "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." 586 U.S. 63, 71, 139 S. Ct. 524, 202 L. Ed. 2d 480 (2019). But *Henry Schein* did not involve nonsignatories, and did nothing to mandate delegation when the contract does not require it by "'clear and unmistakable' evidence." *Id.* at

* The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

69 (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)). So we remain bound by *Kramer*.

The agreement at issue here does not clearly and unmistakably delegate the arbitrability question to an arbitrator. Instead, the arbitration agreement delegates to an arbitrator the resolution of "[a]ny claim or controversy arising out of the Interface, this Agreement . . . or any other acts or omissions for which you may contend that we are liable, including (but not limited to) any claim or controversy as to arbitrability." The arbitration agreement defines "you" as the "user of the interface" and "we" as "Terraform Labs PTE, Ltd." There is no mention of any third party or nonsignatory in the arbitration agreement. *See Kramer*, 705 F.3d at 1124-25 (analyzing a similar arbitration agreement). So a court retains authority to decide the arbitrability question as to Plaintiffs' claims against Jump, a third party. The district court did not err by deciding the question.

2. Jump argues that Plaintiffs should be equitably estopped from avoiding arbitration. Equitable estoppel does not apply to this contract. For equitable estoppel to apply in cases involving "a nonsignatory seeking to compel a signatory to arbitrate its claims against [a] nonsignatory . . . the subject matter of the dispute [must be] intertwined with the contract providing for arbitration." *Setty*, 3 F.4th at 1169 (citations omitted). The claims are not intertwined with the contract unless they "arise out of or relate" to that contract. *Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844, 847-48 (9th Cir. 2013) (citation omitted).

Here, Plaintiffs-Appellees allege various statutory securities fraud claims arising from Jump's alleged attempt to prop up the value of the assets traded on an interface run by Terraform Labs PTE, Ltd., the other signatory to the arbitration agreement. The contract providing for arbitration requires arbitration of claims arising out of the use of Terraform's product and more broadly governs the use of that product. The subject matter of the claims—securities fraud—is thus not intertwined with the activity covered by the arbitration agreement contract and equitable estoppel does not apply.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED APRIL 9, 2024

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 22-cv-03600-PCP
Re: Dkt. No. 158

NICK PATTERSON,

Plaintiff,

v.

JUMP TRADING LLC, *et al.*,

Defendants.

ORDER DENYING MOTION TO COMPEL ARBITRATION & GRANTING MOTION TO STAY

On January 4, 2024, the Court denied Jump's motion to compel arbitration and granted its motion to dismiss the second amended complaint with leave to amend. Dkt. No. 155. On January 25, 2024, the plaintiffs filed a third amended complaint. Dkt. No. 156. Thereafter, Jump timely appealed the Court's order denying its motion to compel arbitration. *See* Dkt. No. 157.

Now before the Court is Jump's motion to compel arbitration of all claims in the third amended complaint

and Jump's unopposed motion to stay the proceedings pending appeal. Dkt. No. 158. For the same reasons identified in the order denying Jump's motion to compel arbitration of the claims in the second amended complaint, *see* Dkt. No. 155, Jump's motion to compel arbitration of the claims in the third amended complaint is denied. Jump's motion to stay proceedings pending resolution of its appeal is granted. *See Coinbase, Inc. v. Bielski*, 599 U.S. 736, 744 (2023) (holding that "the *Griggs* rule requires that a district court stay its proceedings while the interlocutory appeal on the question of arbitrability is ongoing"). Accordingly, these proceedings are stayed pending appeal. The parties shall notify the Court within 10 days of receipt of a decision from the United States Court of Appeals for the Ninth Circuit.

IT IS SO ORDERED.

Dated: April 9, 2024

/s/ P. Casey Pitts
P. Casey Pitts
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, FILED JANUARY 4, 2024

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Case No. 22-cv-03600-PCP

NICK PATTERSON,

Plaintiff,

v.

JUMP TRADING LLC,

Defendant.

January 4, 2024, Decided;
January 4, 2024, Filed

ORDER DENYING MOTION TO COMPEL ARBITRATION AND GRANTING MOTION TO DISMISS

In this putative securities class action, lead plaintiff Michael Tobias and additional plaintiff Nick Patterson assert various securities fraud claims against defendant Jump Trading LLC for Jump's involvement in the promotion and sale of cryptocurrency tokens that dramatically dropped in price within a matter of days in May 2022.

Jump moves to compel arbitration and to dismiss plaintiffs' second amended complaint for failure to state a claim. For the reasons that follow, the Court denies Jump's motion to compel arbitration and grants Jump's motion to dismiss with leave to amend.

BACKGROUND

This case at one time involved multiple defendants. It now involves just one: Jump Trading LLC.[1] Jump Trading LLC, in conjunction with its business division Jump Crypto (together "Jump"), is a Delaware limited liability company that "engages in algorithmic trading of a variety of asset classes, including digital and traditional assets." Second Amended Complaint, Dkt. No. 102 ("SAC") ¶¶ 18, 57. The plaintiffs allege that Jump colluded with and was a principal participant in a fraudulent scheme with former defendants including Terraform Labs Pte. Ltd. (TFL) and its Chief Executive Officer Do Kwon.[2]

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1. The plaintiffs initially brought the seconded amended complaint against TerraForm Labs Ptd Ltd., Jump Trading LLC, Tribe Capital, DeFinance Capital/Definance Technologies Oy, Three Arrows Capital Ptd Ltd., and individual defendants Nicholas Platias and Do Kwon. Second Amended Complaint, Dkt. No. 102 ("SAC") ¶ 1. The plaintiffs have since moved to voluntarily dismiss, without prejudice, defendants Nicholas Platias, Definance Capital/Definance Capital OY ("Definance"), Tribe Capital, and Three Arrows Capital Pte. Ltd., Dkt. No. 144, at 2, as well as defendants Terraform Labs, Pte. Ltd., and Do Kwon, Dkt. No. 146, at 2.

2. For the purposes of Jump's motion to dismiss, the Court assumes the truth of all facts alleged in plaintiffs' second amended complaint. *See Usher v. City of Los Angeles*, 828 F.2d 556, 561 n.1 (9th Cir. 1987).

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In 2018, Mr. Kwon founded TFL, a company headquartered in Singapore that focuses on "developing, marketing, and selling a suite of digital assets and financial products." SAC ¶¶ 3,17, 41. Cryptocurrency tokens—one form of digital asset—are a kind of "financial product that is contractually based (via a 'smart' contract) and is created and uploaded permanently to a given blockchain." *Id.* ¶ 3 n.3. A "blockchain protocol" is computer code "that operates as a set of regulations and guidelines that govern the functioning of various parts of a blockchain company's technology." *Id.* ¶ 3 n.2. "Cryptocurrency markets are notoriously volatile." *Id.* ¶ 62. "Stablecoins" are a form of cryptocurrency that purport to solve the problem of "wild fluctuations ... by attempting to tie or 'peg' their market value to an external collateral with less volatility, such as another currency (*e.g.*, U.S. dollars), commodity (*e.g.*, gold), or financial instrument (*e.g.*, stocks, cryptocurrencies, etc.)." *Id.* "The price of a stablecoin ... is supposed to always remain at $1" (or the value of whatever other external collateral the coin is pegged to). *Id.* Stablecoin developers "have devised two primary ways to maintain price stability: overcollateralization with fiat reserves and algorithmic stablecoins." *Id.* ¶ 62.

TFL operates the "Terra" blockchain and protocol. SAC ¶ 3. "Terra Tokens" refer to the range of TFL's digital assets, including the UST and LUNA coins, which are TFL's "largest Terra ecosystem digital assets by market cap." *Id.* ¶ 5. The UST is "an algorithmic stablecoin that operates through a pair of tokens (the stablecoin itself and another digital asset that backs the stablecoin) and a smart contract that regulates the relationship between

the two (*i.e.*, the algorithm)." *Id.* ¶ 62. The UST is pegged to $1 and backed by the LUNA, its companion coin. *Id.* ¶¶ 61-62. While an overcollateralized coin would allow swapping the coin for $1 in dollar reserves, the algorithmic UST stablecoin instead allows coin holders to "exchange one UST stablecoin for $1 worth of TFL's LUNA" coin. *Id.* ¶¶ 61-62. To "maintain UST's 1:1 parity with the U.S. dollar, TFL's algorithm mints and burns UST and LUNA to control the supply and keep the value of UST steady at $1, while at the same time incentivizing arbitrageurs to trade the UST back to its peg of $1 if it deviates." *Id.* ¶ 62.

TFL never registered any offering of securities nor registered the Terra Tokens as a class of securities pursuant to federal securities law. SAC ¶ 77. TFL and Mr. Kwon, however, "touted the expertise and success of the Terraform team" and "aggressively marketed TFL's crypto asset securities to U.S. investors." *Id.* ¶¶ 80, 82. Investors like Mr. Tobias and Mr. Patterson allegedly invested fiat and digital currencies to purchase Terra Tokens with the expectation of profit. *Id.* ¶ 86.

TFL also developed protocols to support the sale and promotion of Terra Tokens. SAC ¶ 3. These protocols operate like company charters with "a set of regulations and guidelines that govern the functioning of various" technologies. *Id.* ¶ 3 & n.2. TFL launched its most popular protocol, the Anchor Protocol, in August 2020. *Id.* ¶¶ 69-70. The Anchor Protocol allegedly functions like "a type of high-yield savings account whereby investors can 'stake' or deposit UST with TFL in exchange for a guaranteed 20%" rate of return. *Id.* ¶ 6.

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Users, including the lead plaintiff, accessed the Anchor Protocol through a web application called the Anchor Protocol Interface ("Interface"). In order to connect to the Interface, users first had to accept the Anchor Terms of Service (TOS) that "explain[] the terms and conditions by which" users "may access and use the Interface." Amani Decl., Dkt. No. 122-1, at 5. The first paragraph of the agreement states:

> Welcome to https://anchorprotocol.com/, a website ("Site") that provides access to https://app.anchorprotocol.com/, a website-hosted user interface (the "App") (collectively referred to as the "Interface") provided by Terraform Labs PTE, Ltd. ("Terra", "we", "our", or "us"). The Interface provides access to a decentralized protocol on the Terra blockchain that allows suppliers and borrowers of certain digital assets to participate in autonomous interest rate markets (the "Protocol").

Id. Throughout the agreement, the TOS refers to users of the Interface as "you." *Id.* ("This Agreement applies to you ('You') as a user of the Interface, including all the products, services, tools, and information made available on app.anchorprotocol.com or on anchorprotocol.com."). The TOS includes the following provisions regarding dispute resolution:

> Any claim or controversy arising out of or relating to the Interface, this Agreement, including any question regarding this

> Agreement's existence, validity or termination, or any other acts or omissions for which you may contend that we are liable, including (but not limited to) any claim or controversy as to arbitrability ("Dispute"), shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules")
>
> You understand that you are required to resolve all Disputes by binding arbitration. The arbitration shall be held on a confidential basis before one or three arbitrators, who shall be selected pursuant to SIAC Rules. The seat of the arbitration shall be determined by the arbitrator(s); the arbitral proceedings shall be conducted in English. The applicable law shall be Singapore law.

Id. at 11.

Jump has been involved with TFL since at least 2019, when Jump's President Kanav Kariya met with Mr. Kwon to discuss UST. SAC ¶ 56. In November 2019, TFL loaned Jump 30 million LUNA to "improve liquidity" because of LUNA's "lackluster ... performance." *Id.* ¶¶ 30-31. Jump began to sell LUNA into the market in July 2020, thereby "allowing investors to purchase LUNA through transactions in secondary markets." *Id.* ¶ 31. In September of that year, TFL loaned Jump an additional 65 million LUNA. *Id.* ¶ 32. "To receive the LUNA, Jump had to meet certain thresholds related to trading in UST. Jump met

the first threshold and began receiving LUNA pursuant to the loan from TFL in January 2021." *Id.* ¶ 32. The loan and Jump's sales of LUNA "allowed public investors, including U.S. investors, to acquire LUNA through transactions in the secondary market, and generated speculative interest in LUNA." *Id.* ¶ 32.

In late May 2021, the "UST began to de-peg from the U.S. dollar ... dropping to nearly $0.90" by May 23, 2021. SAC ¶ 191. "That morning and throughout the day, Kwon communicated repeatedly with Jump" and "expressed concern over UST's value." *Id.* ¶ 191. After Mr. Kwon "discussed with Jump how to restore UST's peg to the dollar," Jump purchased "large quantities of UST throughout the day on May 23 and continuing through May 27." *Id.* ¶¶ 191-92. Following those purchases, "UST's market price began to rise" and "eventually was restored to near $1." *Id.* ¶ 192. This conduct was allegedly central in efforts to mislead investors about the stability of the algorithm. *Id.* ¶ 202.

Subsequently, Mr. Kwon "agreed to remove the loan agreement conditions requiring Jump to achieve the requisite benchmarks to receive the loaned LUNA tokens" and agreed to deliver "the remaining 61,458,334 LUNA tokens to Jump." SAC ¶ 193. Those modifications were reduced to writing in a July 21, 2021 agreement, whose terms promised Jump LUNA tokens at $0.40 per token during a time when "LUNA was trading at more than $90 in the secondary market." *Id.* ¶ 194. In total, the plaintiffs allege that Jump generated profits of $1.28 billion as a result of its agreements with TFL. *Id.* ¶ 195.

The cause of the re-peg, TFL's loans to Jump, and Jump's role in increasing the price of Terra Tokens were not publicly disclosed to investors. Rather, the plaintiffs allege that Jump joined TFL and others in "mislead[ing] investors who were actively buying and trading UST to believe that the algorithm had 'self-heal[ed]' to restore the peg without any human involvement." SAC ¶ 202.

In January 2022, as part of its efforts to promote the stability of the algorithm, "TFL formed the Luna Foundation Guard—a group of six venture capital groups that promised to support and fund the Terra ecosystem and to 'defend the peg' in the event that high volatility caused the UST/LUNA pair to become untethered from one another." SAC ¶¶ 6, 48. Mr. Kariya served as a founding member of the Luna Foundation Guard's Governing Council. *Id.* ¶ 53. The plaintiffs allege that the Luna Foundation Guard and its members made a series of statements "attributing UST's recovery from the May 2021 depegging to the resiliency of algorithmic stablecoins—rather than an infusion of capital" without disclosing the nature of the intervention that restored the UST's peg. *Id.* ¶ 49 & n.19; *see id.* ¶ 250. In addition to those statements, the plaintiffs allege that Jump, without disclosing its role in stabilizing the peg, made a series of misleading statements and misrepresentations that are actionable under the securities laws.

First, on October 11, 2021, Jump published a "now-deleted" blog post on their website titled "Stablecoins: The Impending Rise of a Multi-Trillion Dollar Market" and stating:

> We believe there will be several winners in the stablecoin space, as there is a spectrum of users who put more or less value on the elements of decentralization, stability, capital efficiency, and integration with regulatory regimes. We are particularly excited about Terra and their dollar stablecoin UST, which we believe is the most elegant solution for creating a highly scalable and more decentralized stablecoin.

SAC ¶ 129.

Second, on January 28, 2022, Mr. Kariya posted the following statements about Terra Tokens on Twitter:

> It's difficult to imagine a sustained mass exodus to UST given the circumstances. In the event it occurs, there is potential for UST to be sold/burned and provide some downward pressure on Luna price. Worth noting that the UST supply is >$11B and UST in Abracadabra is ~$900M.
>
> ...
>
> A $450M contraction of the economy (assuming a highly conservative 50% don't find the UST useful anymore) should be manageable over a couple days and not impactful to prospects of the project. Crazily enough, on this 'bearish' day, there has been a net burn of LUNA.

SAC ¶ 131.

Third, in a Luna Foundation Guard press release issued on February 22, 2022, Mr. Kariya stated:

> UST Forex Reserve further strengthens confidence in the peg of the market's leading decentralized stablecoin UST.... It can be used to help protect the peg of the UST stablecoin in stressful conditions. This is similar to how many central banks hold reserves of foreign currencies to back monetary liabilities and protect against dynamic market conditions.

SAC ¶¶ 136, 138, 250.

Fourth, on March 1, 2022, the plaintiffs allege that "Kwon appeared with Jump's Kariya on the Ship Show and promoted the stability and security of the UST and LUNA peg as Terra's two most 'attractive' features." SAC ¶ 142.

Fifth, on March 10, 2022, Jump promoted an article titled "Yield Farming for Serious People" on its website. The article "purports to 'illuminate' the concept of 'yield farming' (i.e. earning compounding returns on crypto assets) for investors" and specifically "provides the following solicitation for Terra securities":

> There are many examples, but consider two prominent ones that are more retail-facing. First, traders on Coinbase have the option to stake their Ether on the platform, i.e., delegate their Ether to Coinbase as it participates in upgrading the Ethereum network to Ethereum

> 2.0, in exchange for interest of around 5% (at the time of writing). Second, Terra traders can use the Terra Station app to stake their Luna, i.e., delegate their Luna tokens to one of several different validators who process the Terra network, in exchange for rewards.

SAC ¶ 145. The promotion of this article was purportedly accompanied by a link to another article titled "Here's How to Stake$LUNA and Earn Rewards in the Terra Ecosystem," encouraging investors "to stake LUNA directly through the Terra Station wallet." *Id.* ¶ 145. "Around the same time, two of TFL's early investors, Polychain Capital and Area, proposed a cut to the yield rate in the Anchor Protocol," something Mr. Kariya rejected. *Id.* ¶ 146.

Plaintiffs allege that by May 2022, "structural vulnerabilities within the Terra ecosystem precipitated a massive selloff of both UST and LUNA." SAC ¶ 158. Between May 7 and May 12, 2022, "[t]he price of UST and LUNA Tokens dropped by 91% and 99.7% ... after it was revealed that TFL's largest digital assets were unstable and unsustainable." *Id.* ¶ 159.

After purchasing 454,991 Terra Tokens on April 6, 2022 for $1 per token, Mr. Tobias lost $441,062.82 as a result of the selloff. SAC ¶ 15; Dkt. No. 19-4, at 2. Mr. Patterson purchased Terra Tokens in the first few months of 2022 as well, resulting in significant investment losses because of the same selloff. SAC ¶ 16; Dkt. No. 25-3, at 2-7.

On these allegations, lead plaintiff Mr. Tobias and co-plaintiff Mr. Patterson bring this putative class action alleging several violations of federal securities law. The plaintiffs also bring claims in the alternative under the Racketeer Influenced and Corrupt Organizations Act (RICO) and for aiding and abetting, conspiracy, and unjust enrichment under California state law.

Jump now moves to compel arbitration pursuant to the arbitration agreement between Mr. Tobias and TFL and to dismiss the second amended complaint pursuant to Federal Rule of Civil Procedure 12(b)(6).

LEGAL STANDARDS

A. Motion To Compel Arbitration

With limited exceptions, the Federal Arbitration Act (FAA) governs the enforceability of arbitration agreements in contracts involving interstate commerce. 9 U.S.C. § 1 *et. seq.* Under the FAA, arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity for the reconvocation of any contract." 9 U.S.C. § 2. The FAA reflects "both a liberal federal policy favoring arbitration, and the fundamental principle that arbitration is a matter of contract." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (cleaned up). When a party moves to compel arbitration pursuant to the FAA, the Court's role is "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute

at issue." *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000). The Court must enforce the agreement according to its terms if "the response is affirmative on both counts." *Id.* Unless parties have "clearly and unmistakably provide[d] otherwise," the "arbitrability of a particular dispute is a threshold issue to be decided by the courts." *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1268 (9th Cir. 2006) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002)).

B. Motion To Dismiss

In order to comply with pleading requirements of Federal Rule of Civil Procedure 8(a)(2) and survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Alt. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). A claim is plausible on its face "when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (citing *Twombly*, 550 U.S. at 556). In evaluating a motion to dismiss, the Court accepts the plaintiff's allegations as true and draws all reasonable inferences in the plaintiff's favor. *Usher v. City of Los Angeles*, 828 F.2d 556, 561 n.1 (9th Cir. 1987). The Court need not, however, "accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *In re Gilead Sciences Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008).

In any action alleging fraud, additional requirements apply. Under Federal Rule of Civil Procedure 9(b), the plaintiff must state the circumstances constituting the alleged fraud with particularity. *See Or. Pub. Emps. Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 604 (9th Cir. 2014). Furthermore, in any securities class action challenging a defendant's alleged misrepresentations or misleading omissions, the Private Securities Litigation Reform Act of 1995 (PSLRA) requires that the complaint "specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, ... all facts on which that belief is formed." 15 U.S.C. § 78u-4(b)(1). For each alleged misstatement or omission, the complaint must also "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." *Id.* § 78u-4(b)(2)(A). "A litany of alleged false statements, unaccompanied by the pleading of specific facts indicating why those statement were false, does not meet" PSLRA's standard. *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1070 (9th Cir. 2008).

ANALYSIS

I. Jump Cannot Compel Arbitration Under the Agreement between Tobias and TFL.

When registering to use TFL's Anchor Protocol Interface, lead plaintiff Michael Tobias and TFL agreed that they would arbitrate certain disputes that might arise between them. It is undisputed that Jump was not a party

to that agreement and has never entered into any other arbitration agreement with Mr. Tobias. Jump nonetheless contends that it may invoke Mr. Tobias's agreement with TFL to compel arbitration of Mr. Tobias's claims against Jump in this lawsuit. Jump's motion presents two distinct issues: (1) whether Mr. Tobias has agreed that the arbitrator, rather than this Court, must determine whether his claims against Jump are subject to the TFL arbitration agreement, and, if not, (2) whether Mr. Tobias must arbitrate his claims against Jump. For the reasons explained below, the Court answers both questions in the negative.

A. The Court Will Decide the Threshold Issue of Arbitrability.

The threshold issue presented here is whether this Court has the power to decide whether Mr. Tobias agreed to arbitrate his claims against Jump, or whether that determination must be made by the arbitrator in the first instance.

Because arbitration is a matter of contract, "courts must enforce arbitration contracts according to their terms." *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 139 S. Ct. 524, 529, 202 L. Ed. 2d 480 (2019) (citing *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67, 130 S. Ct. 2772, 177 L. Ed. 2d 403 (2010)). An "agreement to arbitrate a gateway issue" like arbitrability "is simply an additional, antecedent agreement the party seeking arbitration asks the federal courts to enforce, and the FAA operates on this additional arbitration agreement

just as it does on any other." *Id.* (quoting *Rent-A-Center*, 561 U.S. at 68-70). "To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists." *Id.* at 530 (citing 9 U.S.C. § 2). "But if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue." *Id.*

While the FAA requires courts to enforce an agreement to assign questions of arbitrability to the arbitrator, the Supreme Court has emphasized that courts "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Henry Schein*, 139 S. Ct. at 531. The law therefore "treats silence or ambiguity about the question *who* (primarily) should decide arbitrability differently from the way it treats silence or ambiguity about the question *whether* a particular merits-related dispute is arbitrable because it is within the scope of a valid arbitration agreement—for in respect to this latter question the law reserves the presumption" favoring arbitration of the dispute. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995) (cleaned up).

Jump argues that the arbitrator, rather than the Court, must decide whether Jump can enforce the arbitration agreement between Mr. Tobias and TFL because Mr. Tobias agreed to "a clear and unmistakable delegation clause ... that specifies that the arbiter, rather than a court, should resolve any questions concerning arbitrability." Dkt. No. 114, at 14. The provision in the arbitration agreement is not in dispute. It states:

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> We will use our best efforts to resolve any potential disputes through informal, good faith negotiations. If a potential dispute arises, you must contact us by sending an email to legal@anchorprotocol.com so that we can attempt to resolve it without resorting to formal dispute resolution. If we aren't able to reach an informal resolution within sixty days of your email, then you and we both agree to resolve the potential dispute according to the process set forth below.
>
> Any claim or controversy arising out of or relating to the Interface, this Agreement, including any question regarding this Agreement's existence, validity or termination, or any other acts or omissions for which you may contend that we are liable, including (but not limited to) any claim or controversy as to arbitrability ("Dispute"), shall be referred to and finally resolved by arbitration in Singapore in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ("SIAC Rules").

Amani Decl., Dkt. No. 122-1, Ex. A ¶ 18; Dkt. No. 122, at 34.

Given the language of this agreement, there can be no dispute that Mr. Tobias and TFL agreed to assign at least some questions of arbitrability to the arbitrator. But Jump's position can prevail only if there is clear and unmistakable evidence that Mr. Tobias's agreement

includes an agreement to arbitrate the question of whether a third party nonsignatory to the agreement like Jump is entitled to enforce the agreement.

Jump identifies no such evidence here. The arbitration clause contains no express reference to disputes with third parties like Jump, let alone to issues of arbitrability that might arise in connection with such disputes. To the contrary, the clause provides that "*you and we* both agree to resolve [any] potential dispute according to the [arbitration] process set forth" therein, defining you as Mr. Tobias and "we" as TFL alone. Further, the clause's provision requiring arbitration of "any claim or controversy as to arbitrability" at least arguably modifies "any acts or omissions for which you may contend that *we* are liable," with "we" once again defined to include only TFL. *See* Amani Decl., Dkt. No. 122-1, at 5 (clarifying that the Anchor TOS refers to "Terraform Labs PTE, Ltd. ('Terra', 'we', 'our', or 'us')").

Under binding Ninth Circuit precedent, this language is insufficient to demonstrate the parties' intent to assign the question of whether a third party may enforce the parties' arbitration agreement to the arbitrator. In *Kramer v. Toyota Motor Corp.*, the Ninth Circuit considered an arbitration clause that assigned questions of arbitrability to the arbitrator but also stated, before doing so, that "[e]ither you or we may choose to have any dispute between you and us decided by arbitration." 705 F.3d 1122, 1127 (2013). That language, the Ninth Circuit held, evidenced the parties' "intent to arbitrate arbitrability" with the other party to the arbitration agreement "and

no one else." *Id.* That reasoning applies here, given that the agreement between TFL and Mr. Tobias contains "you and we" language (in the paragraph immediately preceding the language on which Jump relies) that is legally indistinguishable from the language the Ninth Circuit found dispositive in *Kramer*.

Jump contends that this Court is not bound by *Kramer* because it is inconsistent with the Supreme Court's more recent decision in *Henry Schein*. *See Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012), *aff'd sub nom. Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 133 S. Ct. 2247, 186 L. Ed. 2d 239 (2013) ("[A] published decision of this court constitutes binding authority which 'must be followed unless and until overruled by a body competent to do so.'") (quoting *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001)). But *Henry Schein* did not consider the circumstances presented in *Kramer*. Instead, the question addressed by the Court in *Henry Schein* was whether courts can decline to enforce delegation clauses and "decide the arbitrability question themselves if the argument that the arbitration agreement applies to the particular dispute is 'wholly groundless.'" *Henry Schein*, 139 S. Ct. at 528. The Court considered whether this "wholly groundless" exception was consistent with the Federal Arbitration Act and held that it was not, reiterating that "[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract." *Id. Henry Schein* did not change the requirement that courts must determine whether a valid arbitration agreement exists and whether that agreement in fact

contains "clear and unmistakable evidence" that the parties agreed to arbitrate arbitrability before compelling arbitration. *Id.* at 530-31. To the contrary, the Supreme Court remanded the case back to the lower courts to allow them to address "in the first instance" whether there was in fact "clear and unmistakable evidence" that "the parties agreed to arbitrate arbitrability," reiterating that "courts 'should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.'" *Id.* at 531.

Unlike *Henry Schein*, in which the Court "express[ed] no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator," 139 S. Ct. at 531, *Kramer* addressed that preliminary inquiry about the agreement to delegate arbitrability issues in the specific context presented here—namely, whether there was clear and unmistakable evidence that the parties to that agreement had agreed to arbitrate the arbitrability of disputes with third parties. Because *Kramer* addressed the issue now before the Court and was not overruled by *Henry Schein*, it remains binding precedent that this Court must follow. *Hart*, 266 F.3d at 1170 ("A district judge may not respectfully (or disrespectfully) disagree with his learned colleagues on his own court of appeals who have ruled on a controlling legal issue, or with Supreme Court Justices writing for a majority of the Court. Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point is the law. ... Binding authority must be followed unless and until overruled by a body competent to do so.").

It also bears noting that Jump's interpretation of *Henry Schein* would lead to consequences that would almost certainly fall well outside the understandings or expectations of the parties who agree to such provisions, producing an outcome contrary to basic principles of contract law. *Cf. United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960) ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); *In re Holl*, 925 F.3d 1076, 1083 (9th Cir. 2019); *Liberty Surplus Ins. Corp. v. Samuels*, 562 F. Supp. 3d 431, 438 (N.D. Cal. 2021) ("Under California law, [t]he fundamental rules of contract interpretation are based on the premise that the interpretation of a contract must give effect to the 'mutual intention' of the parties.").

Under Jump's proposed rule, once an individual entered into an arbitration agreement assigning questions of arbitrability to the arbitrator, anyone anywhere in the world could insist upon arbitrating a dispute with that individual and the courts would be required to grant a motion to compel no matter how disconnected that dispute might be from the arbitration agreement. If TFL and its landlord had a dispute over his TFL's rent payments, for example, TFL's landlord could invoke the arbitration agreement between TFL and Mr. Tobias and insist that the arbitrability of the rent dispute had to be determined by the arbitrator. This would be so even though TFL certainly could not possibly have intended, in drafting the terms of service for users of the Anchor Protocol, to send any dispute with its landlord to an arbitrator. To the

contrary, "[g]enerally, the contractual right to compel arbitration 'may not be invoked by one who is not a party to the agreement and does not otherwise possess the right to compel arbitration.'" *Kramer*, 705 F.3d at 1126 (quoting *Britton v. Co-op Banking Grp.*, 4 F.3d 742, 744 (9th Cir. 1993)).

It is the parties to the agreement and their intentions in entering that agreement that matter and, in the absence of clear and unmistakable evidence, the Court is reluctant to conclude that the parties intended to arbitrate all questions of arbitrability arising in any dispute they might have with any third party anywhere else in the world, as Jump suggests. Under *Kramer*, the agreement between TFL and Mr. Tobias lacks clear and unmistakable evidence of the parties' intent to assign questions regarding the arbitrability of disputes with third parties to the arbitrator. That question must therefore instead be answered by the Court.

B. Jump May Not Compel Arbitration Because the Plaintiffs' Claims Against Jump Do Not Fall Within the Arbitration Agreement's Scope and Equitable Estoppel Does Not Require Arbitration Here.

In moving to compel arbitration, Jump argues that the arbitration agreement itself encompasses this dispute and that it can enforce the agreement under the doctrine of equitable estoppel, which "allows a nonsignatory to a written agreement containing an arbitration clause to compel arbitration" under certain limited circumstances.

GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC, 140 S. Ct. 1637, 1644, 207 L. Ed. 2d 1 (2020). Jump's argument is without merit.

1. Federal Common Law Applies.

At the outset, the Parties dispute whether federal common law or California state law should guide the court's analysis. Citing the Ninth Circuit's decision in *Setty v. Shrinivas Sugandhalaya LLP*, Jump argues that federal common law applies in determining the arbitrability of claims by a nonsignatory. 3 F.4th 1166, 1168 (9th Cir. 2021). By contrast, the plaintiffs argue that California law and the so-called "*Goldman* factors" should be applied in determining the arbitrability of claims by a nonsignatory.[3] Jump is correct.

The plaintiffs do not dispute that the arbitration clause in the Anchor TOS involves an international agreement governed by the New York Convention, "a multilateral treaty that addresses international arbitration" and that

3. Under California law, a nonsignatory may compel arbitration under only two circumstances sometimes called the *Goldman* factors: "(1) when a signatory must rely on the terms of the written agreement in asserting its claims against the nonsignatory or the claims are intimately founded in and intertwined with the underlying contract, and (2) when the signatory alleges substantially interdependent and concerted misconduct by the nonsignatory and another signatory and the allegations of interdependent misconduct are founded in or intimately connected with the obligations of the underlying agreement." *Ngo v. BMW of N. Am., LLC*, 23 F.4th 942, 948-49 (9th Cir. 2022); *see Goldman v. KPMG, LLP*, 173 Cal. App. 4th 209, 218, 92 Cal. Rptr. 3d 534 (2009) (articulating two circumstances).

is implemented in Chapter 2 of the FAA. *Outokumpu Stainless*, 140 S. Ct. at 1644. That is because TFL, a signatory to the agreement, is a foreign entity seeking to enforce arbitration in Singapore according to the Arbitration Rules of the Singapore International Arbitration Center. *See* 9 U.S.C. § 202 (explaining that "[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention" unless, with limited exception, the "agreement or award arising out of such a relationship ... is entirely between citizens of the United States").

"In cases involving the New York Convention, in determining the arbitrability of federal claims by or against non-signatories to an arbitration agreement, [courts] apply 'federal substantive law,' for which [they] look to 'ordinary contract and agency principles.'" *Setty*, 3 F.4th at 1168. The Court will therefore apply federal substantive law to determine whether Jump can require Mr. Tobias to arbitrate the claims at issue here.

2 Jump Cannot Enforce Mr. Tobias's Agreement with TFL.

Although Jump is correct that the arbitrability of Mr. Tobias's claims is governed by federal rather than state law, that conclusion does not help Jump because federal law permits third parties to enforce arbitration agreements only where the claims at issue are intertwined with the contract in which the arbitration agreement appears, a requirement that is not satisfied here.

Jump argues that equitable estoppel applies under federal law "because Lead Plaintiff alleges collusive conduct between Jump Trading and TFL." Dkt. No. 114, at 22. Relying upon a single-judge concurrence in an Eleventh Circuit opinion, Jump contends that the federal equitable estoppel test "permits nonsignatories to compel arbitration if *either* (1) 'the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against the nonsignatory' *or* (2) 'the signatory raises allegations of collusive misconduct between the nonsignatory and other signatories to the contract.'" Dkt. No. 137, at 15 (citing *Outokumpu Stainless USA, LLC v. Coverteam SAS*, 2022 U.S. App. LEXIS 18846, 2022 WL 2643936, at *7 (11th Cir. July 8, 2022) (Tjoflat, J., concurring)); *see* Dkt. No. 114, at 20-21. This is not the law of the Ninth Circuit, however. To the contrary, *Setty* held that "[f]or equitable estoppel to apply, it is essential ... that the subject matter of the dispute be intertwined with the contract providing for arbitration." 3 F.4th at 1169 (citing *Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844 (9th Cir. 2013)). Where the plaintiff's claims "d[o] not arise out of or relate to the contract that contained the arbitration agreement," the nonsignatory defendant may not compel the plaintiff to arbitrate claims on the basis of equitable estoppel. *Rajagopalan*, 718 F.3d at 848. In *Rajagopalan*, for example, the plaintiff's claims against the non-signatory defendant were not related to the terms of any contract containing an arbitration agreement, but instead involved "statutory claims that [were] separate from the ... contract itself." *Id.* at 847-48. The Ninth Circuit therefore found no basis to compel arbitration of

the plaintiff's claims against the non-signatory defendant. *Id.* at 848.

Jump's argument fails for the same reason. Mr. Tobias is not relying on the terms of his written agreement with TFL to assert his claims against Jump or pursuing claims against Jump that are intertwined with the terms of his contractual agreement with TFL. Indeed, the subject of Mr. Tobias's overall agreement with TFL is rather limited and addresses only Mr. Tobias's use of TFL's Interface for accessing the Anchor Protocol.[4] Instead, Mr. Tobias alleges a series of statutory securities fraud claims arising from Jump's alleged conduct and statements surrounding the May 2021 repeg of UST. While the arbitration clause arguably encompasses a broader range of disputes that might arise *between Mr. Tobias and TFL*, that is of no assistance to Jump.[5]

Because Jump is not a party to Mr. Tobias's agreement with TFL and because Mr. Tobias's claims against Jump are not intertwined with that agreement, Jump's motion to compel arbitration of those claims is denied.

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4. Jump argues that the arbitration clause encompasses the claims here because it "covers all disputes 'arising out of or relating to the Interface, this Agreement ... or any other acts or omissions for which you may contend that we are liable." Dkt. No. 114, at 25. But Mr. Tobias's claims do not involve the Interface or the terms of his Agreement to use the Interface, and the clause's third provision governing "other acts or omissions" applies only to claims against TFL.

5. The Court need not consider whether a different analysis would apply if the arbitration agreement required arbitration of *all* disputes with *any* party involving LUNA or UST.

II. The Second Amended Complaint Fails to State a Claim for Relief.

Having denied Jump's motion to compel arbitration, the Court must address Jump's motion to dismiss the second amended complaint for failure to state a claim. In so moving, Jump argues that the plaintiffs have failed to allege that Jump committed securities fraud under Section 10(b) of the Exchange Act and Rule 10b-5(b), failed to allege that Jump committed securities fraud under Section 10(b) of the Exchange Act and Rules 10(a) and 10(c), and failed to plead control person liability for TFL and the Luna Foundation Guard's actions. Additionally, Jump argues that the plaintiffs have failed to state alternative claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) and for aiding and abetting, conspiracy, and unjust enrichment under California state law.

A. The Plaintiffs Have Adequately Pleaded that Terra Tokens Are Securities.

As an initial matter, the Court must consider whether the plaintiffs have sufficiently pleaded that the Terra Tokens are securities, because the plaintiffs' federal securities claims are all premised on that disputed contention.

Under Section 2(a)(1) of the Securities Act, "investment contracts" are securities. An investment contract is "an investment of money in a common enterprise with profits to come solely from the efforts of others." *SEC v. W.J.*

Howey Co., 328 U.S. 293, 301, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946). The Ninth Circuit has distilled that test into three parts: "(1) an investment of money (2) in a common enterprise (3) with an expectation of profits produced by the efforts of others." *Warfield v. Alaniz*, 569 F.3d 1015, 1020 (9th Cir. 2009).

The plaintiffs have adequately pleaded that investors invested money in Terra Tokens. The first prong requires only "that the investor commit his assets to the enterprise in such a manner as to subject himself to financial loss." *Id.* at 1021. The plaintiffs plead that they and putative class members "invested fiat, including U.S. dollars, and digital currencies such as Bitcoin and Ethereum, to purchase the Terra Tokens," SAC ¶ 86, and that the "Terra Tokens were listed on U.S. based currency exchanges like Binance US and Kraken, which allowed retail investors to purchase the Terra Tokens with traditional and other currencies," *id.* ¶ 87. These alleged facts are sufficient to satisfy the first prong.

The plaintiffs have also adequately pleaded that Terra Token investors were part of a common enterprise. This second prong "has been construed by [the Ninth] Circuit as demanding either an enterprise common to the investor and the seller, promoter or some third party (vertical commonality) or an enterprise common to a group of investors (horizontal commonality)." *Hocking v. Dubois*, 885 F.2d 1449, 1455 (9th Cir. 1989). The plaintiffs allege that "investors were passive participants in the Terra Tokens' launch and potential profits of Plaintiffs and the Class were intertwined with those of Defendants and

of other investors." SAC ¶ 90. Specifically, the plaintiffs plead that TFL and Mr. Kwon "pooled funds received from investors to develop the Terraform ecosystem and increase the value of LUNA" and that "the fortunes of LUNA purchasers were tied to one another, and each depended on the success of the Defendants' efforts and strategy and the Terraform ecosystem as a whole." *Id.* ¶ 92. TFL and Mr. Kwon allegedly invested proceeds to grow and expand the Terra ecosystem and "held significant amount of LUNA, tying their fortunes with LUNA investors' fortunes." *Id.* ¶¶ 93-94. These alleged facts are sufficient to satisfy the second prong.

Third, the plaintiffs have adequately pleaded that investors purchased Terra Tokens with a reasonable expectation of profit from the efforts of TFL and others. The third prong requires that "the investor be 'led to expect profits solely from the efforts of the promotor or a third party.'" *S.E.C. v. Rubera*, 350 F.3d 1084, 1091 (9th Cir. 2003). The Ninth Circuit has specifically "rejected a strict interpretation of this prong in favor of a more flexible focus on whether the efforts made by those other than the investor are the undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise." *Id.* at 1092 (cleaned up). The third prong "involves two distinct concepts: whether a transaction involves any expectation of profit and whether expected profits are the product of the efforts of a person other than the investor." *Id.*

The plaintiffs plead that "Terra Tokens were sold to investors prior to the Terra ecosystem being fully

developed and able to handle the scale and scope of TFL's operations" with "the primary purpose ... to make a profit or accumulate additional Terra Tokens from various rewards programs, rather than to utilize the Terra Tokens themselves for a task." SAC ¶ 95. Investors did so, they allege, with the expectation of profit to be derived from the managerial and entrepreneurial efforts of TFL and the Luna Foundation Guard. *Id.* ¶ 96. The plaintiffs further allege that TFL and Mr. Kwon, through social media, blog posts, and marketing materials, for example, promoted LUNA as an investment that would "increase in value with the increased usage of the Terraform blockchain that could result from their continued development and maintenance," and touted the "functionality and promotion of TFL's algorithmic stablecoin UST and LUNA." *Id.* ¶¶ 100-109. These facts are sufficient at this stage to satisfy the third prong.

Accordingly, the plaintiffs have adequately pleaded that their purchases of Terra Tokens were investment contracts constituting securities under federal law. *See also SEC v. Terraform Labs*, No. 23-cv-1346 (JSR), 2023 U.S. Dist. LEXIS 230518, 2023 WL 8944860, at *13-14 (S.D.N.Y. Dec. 28, 2023) (holding that there is no genuine dispute that UST, LUNA, and other tokens are securities because they are investment contracts under the *Howey* test); *SEC v. Terraform Labs*, No. 23-cv-1346 (JSR), 684 F. Supp. 3d 170, 2023 U.S. Dist. LEXIS 132046, 2023 WL 4858299, at *10 (S.D.N.Y. July 31, 2023) (holding that the SEC asserted a plausible claim that Terra Tokens qualify as securities under the *Howey* test).

B. The Second Amended Complaint Fails To Adequately Plead that Jump Made Material Misrepresentations.

Section 10(b) of the Exchange Act makes it unlawful "for any person . . . [t]o use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe[.]" 15 U.S.C. § 78j(b). Rule 10b-5, promulgated by the SEC under the authority of Section 10(b), in turn makes it unlawful for any person:

> (a) To employ any device, scheme or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5. To state a claim under Rule 10b-5(b), a plaintiff must plead: "(1) a material misrepresentation or omission by the defendant; (2) scienter; (3) a connection between the misrepresentation or omission and the

purchase or sale of a security; (4) reliance upon the misrepresentation or omission; (5) economic loss; and (6) loss causation." *City of Dearborn Heights Act 345 Police & Fire Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 613 (9th Cir. 2017) (quoting *Apollo Grp. Inc.*, 774 F.3d at 603).

The plaintiffs challenge several statements as materially false or misleading, relying primarily on an omissions theory of liability and arguing that Jump failed to disclose that it "knew that the algorithm supporting the Terra ecosystem was insufficient, without human intervention to support the peg." Dkt. No. 130, at 18. The Court addresses each challenged statement in turn.

1. October 11, 2021 "Stablecoins" Blog Post

The plaintiffs allege that on October 11, 2021, Jump published a blog post "on the Insights portion of Jump's website titled "Stablecoins: The Impending Rise of a Multi-Trillion Dollar Market." It stated:

> We believe there will be several winners in the stablecoin space, as there is a spectrum of users who put more or less value on the elements of decentralization, stability, capital efficiency, and integration with regulatory regimes. We are particularly excited about Terra and their dollar stablecoin UST, which we believe is the most elegant solution for creating a highly scalable and more decentralized stablecoin.

SAC ¶ 129.

The plaintiffs do not meet their burden with respect to this purported misstatement or omission. "Under the PSLRA, to properly allege falsity, a securities fraud complaint must now 'specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, ... state with particularity all facts on which that belief is formed.'" *In re Rigel Pharms., Inc. Sec. Litig.*, 697 F.3d 869, 877 (9th Cir. 2012) (quoting 15 U.S.C. § 78u-4(b)(1)). In order for an omission to be actionable, "an omission must be misleading; in other words it must affirmatively create an impression of a state of affairs that differs in a material way from the one that actually exists." *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002).

As Jump points out, plaintiffs have not "specifically alleged that *Jump Trading* made an omission" with respect to this statement. Dkt. No. 115, at 19 n.7 (emphasis in original). Rather the second amended complaint merely pleads that the originally named defendants *as a group* "never disclosed that it was the conduct of TFL, Kwon and Jump, and not the algorithm, that restored UST's peg." *Id.* (quoting SAC ¶ 202). Even if this group allegation sufficiently identifies what information Jump purportedly omitted, that is insufficient on its own to satisfy the heightened pleading standards under the PSLRA, which requires that the plaintiffs actually "specify the reason or reasons why" *this statement* was "misleading or untrue." *Brody*, 280 F.3d at 1006 (holding that the plaintiffs' allegations failed to satisfy the heightened

pleading standards of the PSLRA where they "specif[ied] what information" the defendant omitted but did "not indicate why the statement" the defendant "made was misleading"). Plaintiffs' complaint fails to provide any specific allegations as to why this first statement was misleading in the absence of the information plaintiffs contend was improperly omitted. *See Broam v. Bogan*, 320 F.3d 1023, 1026 n.2 (9th Cir. 2003); *Schneider v. California Dep't of Corr.*, 151 F.3d 1194, 1197 n.1 (9th Cir. 1998) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court *may not* look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss.") (emphasis in original).

Even if the plaintiffs had satisfied their pleading burden, the first statement appears to "concern[] expressions of opinion, as opposed to knowingly false statements of fact." *Apollo Grp.*, 774 F.3d at 606. Jump's statements that they "believe there will be several winners," that they "are particularly excited about Terra and their dollar stablecoin UST," and that they "believe" that the UST "is the most elegant solution" are not "capable of objective verification." *Id.* As a general rule, "optimistic" statements involving inherently "subjective assessments" are not actionable as securities violations. *Id.*

2. January 28, 2022 Kariya Twitter Comment

The plaintiffs allege that on January 28, 2022, Mr. Kariya, Jump's President, posted the following statements on Twitter:

> It's difficult to imagine a sustained mass exodus to UST given the circumstances. In the event it occurs, there is potential for UST to be sold/burned and provide some downward pressure on Luna price. Worth noting that the UST supply is >$11B and UST in Abracadabra is ~$900M.
>
> ...
>
> A $450M contraction of the economy (assuming a highly conservative 50% don't find the UST useful anymore) should be manageable over a couple days and not impactful to prospects of the project. Crazily enough, on this 'bearish' day, there has been a net burn of LUNA.

SAC ¶ 131. Jump concedes that "the portion of Mr. Kariya's January 28, 2022 tweet stating that '[c]razily enough, on this 'bearish' day, there has been a net burn of LUNA,'" may contain an alleged statement of fact. Dkt. No. 115, at 16. Jump argues, however, that the plaintiffs never allege that this statement was "actually false nor explain how" it could be false, "falling far short of Rule 9(b)'s and the PSLRA's specificity requirements." *Id.* Jump is correct.

The PSLRA requires that the plaintiffs actually "specify the reason or reasons why" *this statement* was "misleading or untrue." *Brody*, 280 F.3d at 1006. In their Response, the plaintiffs allege that this statement was misleading because of its failure to disclose "that the algorithmic nature of the UST stablecoin had already

failed once and required a secret bailout from Jump to maintain its dollar peg." Dkt. 130, at 12. Additionally, they assert that the thread "omitted any description of the loans Jump received from TFL such that it was highly incentivized to promote investment in Terra Tokens." *Id.*

But again, the Complaint must specify the reason why this particular statement was misleading, and it does not. Plaintiffs merely plead generally that Defendants as a group "never disclosed that it was the conduct of TFL, Kwon and Jump, and not the algorithm, that restored UST's peg." SAC ¶ 202. The plaintiffs cannot remedy their failure to specify why *this statement* attributed to Jump was misleading by trying to address it in the first instance in their opposition brief. "By requiring specificity, § 78u—4(b)(1) prevents a plaintiff from skirting dismissal by filing a complaint laden with vague allegations of deception unaccompanied by a particularized explanation stating why the defendant's alleged statements or omissions are deceitful." *Metzler Inv. GMBH v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008).

3. February 22, 2022 Kariya Statement in Luna Foundation Guard Press Release and Jump Tweet

The plaintiffs allege that on February 22, 2022 Jump President Kariya made the following statement in a Luna Foundation Guard press release:

> UST Forex Reserve further strengthens confidence in the peg of the market's leading

> decentralized stablecoin UST .... It can be used to help protect the peg of the UST stablecoin in stressful conditions. This is similar to how many central banks hold reserves of foreign currencies to back monetary liabilities and protect against dynamic market conditions.

SAC ¶¶ 136, 138, 250. The plaintiffs also allege that on the same day Jump endorsed Mr. Kariya's statement by retweeting the following:

> As @KariyaKanav has mentioned, the UST Forex Reserve will strengthen confidence in the peg [g]iving users confidence by following central banks that hold a variety of foreign currencies to protect against severe market risks.

SAC ¶ 139.

With respect to Mr. Kariya's statement, the second amended complaint alleges that "the *Luna Foundation Guard* was required to, but did not, disclose that UST was not 'stable' as promoted, that the peg of UST/LUNA would be unable to be maintained during periods of high volatility in the market[,] and that Anchor's staking rewards program was unsustainable and causing the 'stressful conditions' that would (and did) precipitate the de-pegging of UST and LUNA." SAC ¶ 250(f) (emphasis added). But the Luna Foundation Guard is not a defendant here, and the second amended complaint is silent as to why these statements were misleading coming from Mr.

Kariya, what duty if any Mr. Kariya and Jump had to disclose, and, if so, what Mr. Kariya and Jump specifically were required to disclose. The plaintiffs have thus failed to adequately plead the specific reason why this particular statement by Jump was misleading.

Further, even if the plaintiffs had satisfied their pleading burden, these statements also appear to "concern[] expressions of opinion, as opposed to knowingly false statements of fact." *Apollo Grp.*, 774 F.3d at 606.

4. March 1, 2022, Kariya Appearance on Ship Show

The plaintiffs allege that Jump's Mr. Kariya appeared on the Ship Show with Mr. Kwon and "promoted stability and security of the UST and LUNA peg as Terra's two most 'attractive' features." SAC ¶ 142. The plaintiffs allege that "the reference to the purported stability of the UST/LUNA peg was false and misleading because, again, it failed to disclose the fact that Jump had secretly bailed out the UST peg in May 2021." Dkt. No. 130, at 14. But they do not identify any *specific* statement made by Mr. Kariya, nor facts indicating what statements or omissions can be attributed to him specifically. The plaintiffs therefore fail to plead any actionable statement by Mr. Kariya here. *See In re Rigel Pharms., Inc. Sec. Litig.*, 697 F.3d at 877 ("[A] securities fraud complaint must now 'specify each statement alleged to have been misleading.'").

5. March 10, 2022 "Yield Farming for Serious People" Article

The plaintiffs allege that on March 10, 2022, Jump published an article titled "Yield Farming for Serious People" on its Website. According to the second amended complaint:

> Jump instructs investors on the "first major form of yield farming"—delegating tokens to transaction validators in exchange for a share of the proceeds. Importantly, Jump provides the following solicitation for Terra securities: "There are many examples, but consider two prominent ones that are more retail-facing. First, traders on Coinbase have the option to stake their Ether on the platform, i.e., delegate their Ether to Coinbase as it participates in upgrading the Ethereum network to Ethereum 2.0, in exchange for interest of around 5% (at the time of writing). Second, Terra traders can use the Terra Station app to stake their Luna, i.e., delegate their Luna tokens to one of several different validators who process the Terra network, in exchange for rewards."

SAC ¶ 145. "This promotion," the plaintiffs allege, "provides a link to an article 'Here's How to Stake$LUNA and Earn Rewards in the Terra Ecosystem,' which encourages investors to stake LUNA directly through the Terra Station wallet." *Id.*

While Jump concedes that this statement "arguably" contains an alleged statement of fact, it argues that the plaintiffs neither plead that this statement is false "nor explain how they could be false." Dkt. No. 115, at 16. Accordingly, Jump argues that it "fall[s] far short of Rule 9(b)'s and the PSLRA's specificity requirements." *Id.*

In their Response, the plaintiffs allege that this statement omits that Jump "had entered into secret loan transactions with TFL and that Jump had secretly bailed out the UST peg in May 2021, resulting in Jump obtaining LUNA tokens for just $0.40 per token." Dkt. No. 130, at 14. Additionally, the plaintiffs point to SAC ¶ 146, where they alleged that "Luna Foundation Guard Governing Council member[] Kanav Kariya of Jump ... rejected the proposal" to "cut to the yield rate in the Anchor Protocol." Dkt. No. 130, at 14.

Here too, the complaint fails to specify the reason why this particular statement was misleading. Plaintiffs merely plead that the originally named defendants as a group "never disclosed that it was the conduct of TFL, Kwon and Jump, and not the algorithm, that restored UST's peg." SAC ¶ 202. The second amended complaint does not provide a "particularized explanation stating *why* the defendant's alleged statements or omissions are deceitful." *Metzler Inv.*, 540 F.3d at 1061 (emphasis in original). The plaintiffs cannot remedy their failure to specify why *this statement* attributed to Jump was misleading by trying to address it in the first instance in their opposition brief.

6. Luna Foundation Guard False and Misleading Statements

Finally, the plaintiffs seek to impute a series of purportedly false and misleading statements made by the Luna Foundation Guard to Jump. SAC ¶¶ 49-51, 136, 137, 139-53. The plaintiffs do not state with particularity how or why these statements can be imputed to Jump in the first instance. Without more, the plaintiffs fail to meet the pleading requirements of Rule 9(b) and the PSLRA.

In sum, the plaintiffs have failed to sufficiently plead a single actionable misrepresentation or omission under Section 10(b) and Rule 10b-5(b). The Court therefore grants Jump's motion to dismiss this claim with leave to amend.

C. The Second Amended Complaint Fails To Adequately Plead that Jump Committed a Manipulative or Deceptive Act.

The plaintiffs also allege that Jump committed a manipulative or deceptive act in violation of Rule 10b-5(a) and Rule 10b-5(c). Specifically, they assert that "Defendants TFL and Kwon on the one hand and either or both of Jump Crypto and Jump Trading on the other secretly colluded to restore the peg by-passing the algorithm. Jump Crypto and Jump Trading purchased 'massive amounts' of the stablecoin, executing these purchases for the purpose of restoring the peg when the purported algorithm had failed." SAC ¶¶ 192, 269.

"[M]anipulative conduct typically constitutes 'a scheme . . . to defraud' in violation of Rule 10b—5(a) or a

'course of business which operates ... as a fraud or deceit upon any person' in violation of Rule 10b—5(c)." *Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 938 (9th Cir. 2009). "Manipulation ... is virtually a term of art when used in connection with securities markets. The term refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity." *Id.* at 939 (quoting *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 476, 97 S. Ct. 1292, 51 L. Ed. 2d 480 (1977)). Deception through omission, by contrast, "generally refers to the failure to disclose material information about a company, as opposed to affirmative manipulation." *Id.* (citation omitted). "The person who omitted the material information must have had a duty to disclose it to the person supposedly harmed by the omission." *Id.* (citing *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1157 (9th Cir. 1996)). That duty "may arise 'from a relationship of trust and confidence between parties to a transaction.'" *Id.* (quoting *Chiarella v. United States*, 445 U.S. 222, 230, 100 S. Ct. 1108, 63 L. Ed. 2d 348 (1980)).

Plaintiffs' second amended complaint fails to plead with sufficient particularity that Jump specifically, as opposed to the originally named defendants generally, engaged in manipulative conduct, or that Jump itself had any duty to disclose its role in the re-peg. While the plaintiffs plead that Jump did in fact purchase large quantities of UST during the May 2021 re-peg, Jump correctly notes that the plaintiffs fail to allege that Jump "had a deceptive purpose at that time." Dkt. No. 115, at 19 n.5. Even accepting the facts as true, the plaintiffs merely plead that Mr. Kwon communicated with Jump on May

23, 2021, when the UST's price declined, and that Jump "purchas[ed] large quantities of UST throughout the day on May 23 and continuing through May 27." SAC ¶¶ 191-92. Additionally, the plaintiffs plead that TFL's Mr. Kwon agreed to remove loan conditions at some later dater and signed an agreement in writing in July 2021 that modified that previous loan agreement, providing LUNA to Jump at $0.40 a token. SAC ¶¶ 193-194.

This is not enough to state a claim for manipulative or deceptive conduct. First, to be liable for a scheme to defraud, "the defendant must have engaged in conduct that had the principal purpose and effect of creating a false appearance of fact in furtherance of the scheme. It is not enough that a *transaction* in which a defendant was involved had a deceptive purpose and effect; the defendant's *own conduct* contributing to the transaction or overall scheme must have had a deceptive purpose and effect." *Simpson v. AOL Time Warner Inc.*, 452 F.3d 1040, 1048 (9th Cir. 2006), *vacated on other grounds*, 519 F.3d 1041 (9th Cir. 2008) (emphasis in original). The second amended complaint fails to allege that Jump's action—purchasing "massive amounts" of UST to help stabilize the UST in May 2021—was done in furtherance of the scheme or had any deceptive purpose and effect at that time. As Jump emphasizes, "According to the SAC and the SEC complaint on which it is based, the bulk of Jump Trading's purchase of UST in 'large quantities' were made on May 23, 2021, demonstrably before and not 'in the face of' TFL and Kwon's alleged misstatements ..., and in March 2022." Dkt. No. 115, at 19. That conduct could reflect a benign business decision as opposed to manipulative or deceptive conduct if Jump truthfully believed it was purchasing the tokens below

their real value, and plaintiffs fail to allege facts sufficient to attribute a deceptive purpose to those purchases.

The second amended complaint also fails to allege that Jump had any duty to disclose. "Rule 10b—5 is violated by nondisclosure only when there is a duty to disclose." *Paracor Fin., Inc. v. Gen. Elec. Cap. Corp.*, 96 F.3d 1151, 1157 (9th Cir. 1996). In determining whether a party had a duty to disclose, courts consider several factors: "(1) the relationship of the parties, (2) their relative access to information, (3) the benefit that the defendant derives from the relationship, (4) the defendant's awareness that the plaintiff was relying upon the relationship in making his investment decision, and (5) the defendant's activity in initiating the transaction." *Id.* The second amended complaint, however, is devoid of any specific allegations that Jump had such a duty. In addition, as Jump notes, the second amended complaint impermissibly relies on group pleading with respect to this claim.

For both of these reasons, the Court grants Jump's motion to dismiss this claim with leave to amend.[6]

III. The Court dismisses the plaintiffs' alternative RICO and state law claims without prejudice.

The plaintiffs also allege claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) and for

6. With respect to claims one and two, Jump has also presented substantial arguments about the insufficiency of plaintiffs' pleading of scienter, control person liability, reliance, and loss causation. Because the Court grants the motion to dismiss on other grounds, it need not address those arguments at this time.

aiding and abetting, conspiracy, and unjust enrichment under California state law. Those claims are pleaded in the alternative and dependent on the Court finding that that Terra Tokens are not securities. Because the Court concludes that the plaintiffs have sufficiently pleaded that the Terra Tokens are securities, the Court grants Jump's motion to dismiss those claims without prejudice to their reassertion in the future should the Court's conclusion that Terra Tokens are securities be revisited and changed.

CONCLUSION

For the foregoing reasons, Jump's Motion to Compel Arbitration is DENIED and Jump's Motion to Dismiss is GRANTED WITH LEAVE TO AMEND. Any amended complaint shall be filed within 21 days of the entry of this order and shall include a chart listing numerically each alleged false or misleading statement, the speaker, the date, and the arguments supporting plaintiffs' claim of falsity and scienter. The chart shall also cite the paragraphs in the amended complaint where the allegations are made.

IT IS SO ORDERED.

Dated: January 4, 2024

/s/ P. Casey Pitts
P. Casey Pitts
United States District Judge

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED MARCH 12, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 24-670
D.C. No. 5:22-cv-03600-PCP
Northern District of California,
San Jose

NICK PATTERSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED AND MICHAEL TOBIAS,

Plaintiffs-Appellees,

v.

JUMP TRADING, LLC,

Defendant-Appellant,

FCA US, LLC,

Amicus Curiae-Pending.

Appendix D

No. 24-2489
D.C. No. 5:22-cv-03600-PCP
Northern District of California,
San Jose

MICHAEL TOBIAS,

Plaintiff-Appellee,

v.

JUMP TRADING, LLC,

Defendant-Appellant,

FCA US, LLC,

Amicus Curiae-Pending.

Before: H.A. THOMAS, MENDOZA, and JOHNSTONE, Circuit Judges.

The panel has unanimously voted to deny the petition for panel rehearing and for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 40.

The petition for rehearing and for rehearing en banc, Dkt. 37, is denied.