UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EARL BOULE,

Plaintiff,

-v-

CREDIT ONE BANK,

Defendant.

No. 15-cv-8562 (RJS)
ORDER

RICHARD J. SULLIVAN, District Judge:

Plaintiff Earl Boule ("Plaintiff") brings this suit against Defendant Credit One Bank ("Defendant" or "Credit One") for claims under the Telephone Consumer Protection Act ("TCPA") based on Defendant's alleged unauthorized telephone calls to Plaintiff regarding Plaintiff's Credit One credit card account. Now before the Court is Defendant's motion to compel arbitration and to dismiss this action. (Doc. No. 9.) For the reasons set forth below, Defendant's motion is granted.

I. BACKGROUND

Plaintiff commenced this action on October 30, 2015 (Doc. No. 1 ("Compl.")), and on December 16, 2015, Defendant filed a motion to compel arbitration and to dismiss this action, arguing that Plaintiff's TCPA claim is subject to arbitration pursuant to the arbitration clause in the cardholder agreement governing Plaintiff's credit card account with Defendant. (Doc. No. 9; *see also* Doc. Nos. 10 at 2; 10-4 (or the "Cardholder Agreement" or "Agreement"); and 11–13.) Specifically, the seven-page Cardholder Agreement contains a section entitled "**COMMUNICATIONS**," which informs a customer that, by signing the Agreement, he is:

> providing express written permission authorizing Credit One Bank . . . to contact [the customer] at any phone number (including mobile, cellular/wireless, or similar

> devices) . . . [the customer] provide[s] at anytime, for any lawful purpose. The ways in which we may contact you include live operator, automatic telephone dialing systems (auto-dialer), prerecorded message, text message or email. Phone numbers and email addresses you provide include those you give to us, those from which you contact us or which we obtain through other means.

(Agreement at 4.) In addition, the Agreement contains a broad arbitration provision, which states:

> [The customer ("you") and Credit One ("we")] agree that either you or we may, without the other's consent, require that any controversy or dispute between you and us (all of which are called "Claims"), be submitted to mandatory, binding arbitration. This arbitration provision is made pursuant to a transaction involving interstate commerce, and shall be governed by, and enforceable under, the Federal Arbitration Act . . . , 9 U.S.C. §1 et seq., and (to the extent State law is applicable), the State law governing this Agreement.

(*Id.* at 6.) This arbitration provision also sets forth a non-exhaustive list of "Claims Covered" thereunder, including:

- [D]isputes relating to the establishment, terms, treatment, operation, handling, limitations on or termination of your account; any disclosures or other documents or communications relating to your account; any transactions or attempted transactions involving your account, whether authorized or not; billing, billing errors, credit reporting, the posting of transactions, payment or credits, or collections matters relating to your account; services or benefits programs relating to your account, whether or not they are offered, introduced, sold or provided by us; advertisements, promotions, or oral or written statements related to (or preceding the opening of) your account, goods or services financed under your account, or the terms of financing; the application, enforceability or interpretation of this Agreement, including this arbitration provision; and any other matters relating to your account, a prior related account or the resulting relationships between you and us[;] . . . [and]

- Claims based on any theory of law, any contract, statute, regulation, ordinance, tort (including fraud or any intentional tort), common law, constitutional provision, respondeat superior, agency or other doctrine concerning liability for other persons, custom or course of dealing or any other legal or equitable ground (including any claim for injunctive or declaratory relief). Claims subject to arbitration include Claims based on any allegations of fact, including an alleged act, inaction, omission, suppression, representation, statement, obligation, duty, right, condition, status or relationship.

(*Id.*) As written, the arbitration provision in the Cardholder Agreement encompasses any "dispute[]" relating to the handling of the applicable credit card account, including with respect to

any "communications relating to [the] account." (*Id.*) Moreover, the provision expressly states that "[a]ny questions about what Claims are subject to arbitration shall be resolved by interpreting this arbitration provision in the broadest way the law will allow it to be enforced." (*Id.*)

II. DISCUSSION

Under the Federal Arbitration Act, "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.'" *Guyden v. Aetna, Inc.*, 544 F.3d 376, 382 (2d Cir. 2008) (quoting 9 U.S.C. § 2). "A district court has no discretion regarding the arbitrability of a dispute when the parties have agreed in writing to arbitration." *Leadertex, Inc. v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995) (citations omitted). "There is a strong federal policy favoring arbitration as an alternative means of dispute resolution." *ACE Capital Re Overseas Ltd. v. Cent. United Life Ins. Co.*, 307 F.3d 24, 29 (2d Cir. 2002) (citation omitted). Indeed, the Second Circuit has stated that "it is difficult to overstate the strong federal policy in favor of arbitration, and it is a policy we 'have often and emphatically applied.'" *Arciniaga v. Gen. Motors Corp.*, 460 F.3d 231, 234 (2d Cir. 2006) (quoting *Leadertex*, 67 F.3d at 25). Accordingly, "where . . . the existence of an arbitration agreement is undisputed, doubts as to whether a claim falls within the scope of that agreement should be resolved in favor of arbitrability." *ACE Capital Re Overseas Ltd.*, 307 F.3d at 29; *see also Collins & Aikman Prods. Co. v. Bldg. Sys., Inc.*, 58 F.3d 16, 19 (2d Cir. 1995) ("Federal policy requires us to construe arbitration clauses as broadly as possible. . . . We will compel arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." (citations omitted)). At a minimum, if an issue is "referable to arbitration," proceedings before the district court must be stayed until "such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3. Where an entire dispute is arbitrable, district courts may "dismiss[] the complaint"

entirely "in favor of arbitration." *E.g.*, *Guyden*, 544 F.3d at 387 (affirming district court's decision dismissing the complaint and compelling arbitration).

To determine whether a dispute is arbitrable, a court must decide two questions: "(1) whether there exists a valid agreement to arbitrate at all under the contract in question . . . and if so, (2) whether the particular dispute sought to be arbitrated falls within the scope of the arbitration agreement." *Hartford Acc. & Indem. Co. v. Swiss Reinsurance Am. Corp.*, 246 F.3d 219, 226 (2d Cir. 2001) (citation omitted). In addition, where, as here, federal statutory claims are asserted, a court must also consider a third issue – that is, "whether Congress intended those claims to be nonarbitrable." *Kowalewski v. Samandarov*, 590 F. Supp. 2d 477, 486 (S.D.N.Y. 2008) (citation omitted). The Court will address each inquiry in turn.[1]

As to the validity of the Agreement, Plaintiff does not deny the existence of the Cardholder Agreement; rather, he claims that Defendant has failed to establish that Plaintiff consented to and therefore is bound by the terms of the Agreement. Specifically, Plaintiff argues that Defendant's evidence of consent – an "exemplar" version of the Agreement that Defendant allegedly mailed to Plaintiff and a sworn affidavit of a Credit One corporate officer (Doc. Nos. 10-1 and 10-4) – is insufficient because the exemplar does not contain "Plaintiff's name, address, solicitation number or signature," and the affidavit is "inadmissible hearsay" that the Court "cannot . . . consider[]"

[1] Both parties rely on New York law in their briefs (*see* Doc. Nos. 11–12), even though the Cardholder Agreement provides that it is to be "governed by and interpreted in accordance with . . . the laws of the State of Nevada" (Cardholder Agreement at 4). The Court will address the parties' arguments under New York law, since that is the standard they apply. *See Clarex Ltd. v. Natixis Sec. Am. LLC*, No. 12-cv-7908 (PAE), 2013 WL 2631043, at *2 n.3 (S.D.N.Y. June 11, 2013) ("[T]he Court applies New York law for both plaintiffs, because all parties apply New York law in their submissions: Where '[t]he parties' briefs assume that New York law controls . . . such implied consent . . . is sufficient to establish choice of law." (quoting *Wolfson v. Bruno*, 844 F. Supp. 2d 348, 354 (S.D.N.Y. 2011))); *cf. Celle v. Filipino Reporter Enterp. Inc.*, 209 F.3d 163, 175 (2d Cir. 2000) ("Since no party has challenged the choice of New York libel law, all are deemed to have consented to its application."). Moreover, given the relatively straightforward contract interpretation issues presented, the Court notes that, even under Nevada law, it would find that Plaintiff's claim is subject to arbitration under the terms of the Agreement.

because the affiant did not personally "work[] on the Plaintiff's credit card account" and therefore his testimony is based only on his review of Credit One's records (Doc. No. 11-1 at 8–9).

In fact, the affidavit does not contain improper testimony, *see Searles v. First Fortis Life Ins. Co.*, 98 F. Supp. 2d 456, 461 (S.D.N.Y. 2000) ("an affiant may testify as to the contents of records []he reviewed in h[is] official capacity"), and the Court finds that Defendant has presented credible and sufficient circumstantial evidence demonstrating that Plaintiff received and subsequently consented to the terms of the Cardholder Agreement. First, the affidavit establishes that it is Defendant's policy to send a customer opening a Credit One credit card account two copies of the Cardholder Agreement that will govern the terms of the account: one copy is sent when Defendant mails a customer a written solicitation for a pre-approved credit card and, if the customer decides to open an account, a second copy is mailed to the customer in the same envelope as his credit card for activation. (*See* Doc. No. 10-1.) The affidavit also reflects that Defendant abided by its customary policy in its dealings with Plaintiff, which Plaintiff does not dispute. *See Salerno v. Credit One Bank, NA*, No. 15-cv-516 (JTC), 2015 WL 6554977, at *4 (W.D.N.Y. Oct. 29, 2015) (concluding that sworn affidavits of Credit One corporate officers "provide compelling circumstantial evidence of Credit One's compliance with its customary policy to enclose a copy of the Cardholder Agreement within the same envelope used to mail the customer the credit card for activation"). Perhaps not surprisingly, Plaintiff does not claim that he never received documents in the mail from Defendant, nor does he dispute that he activated his Credit One credit card, which further suggests, in light of Defendant's policy, that Plaintiff received an envelope from Defendant containing both a credit card for Plaintiff to activate along with a copy of the Cardholder Agreement. *See Kurz v. Chase Manhattan Bank USA, N.A.*, 319 F. Supp. 2d 457, 463 (S.D.N.Y. 2004) ("[P]roper mailing gives rise to a rebuttable presumption of receipt . . . . Actual

receipt need not be proven[,] as proof of mailing may be accomplished by presenting circumstantial evidence, including evidence of customary mailing practices used in the sender's business." (citation and alteration omitted)). Moreover, Plaintiff's activation and subsequent use of the credit card is sufficient evidence of his consent to the terms of the Agreement. *See, e.g.*, *Tsadilas v. Providian Nat'l Bank*, 13 A.D.3d 190, 190 (N.Y. App. Div. 2004) (finding that the defendant "sufficiently proved that it sent the arbitration provision to plaintiff" based on the plaintiff's "continuing . . . use [of] her credit cards" and that the plaintiff was "bound by the arbitration provision even if she did not read it" (citations omitted)); *Johnson v. Chase Manhattan Bank USA, N.A.*, No. 603101/02, 2004 WL 413213, at *5 (Feb. 27, 2004 N.Y. Sup. Ct.), *aff'd*, 13 A.D.3d 322 (N.Y. App. Div. 2004) ("whether or not plaintiff indicated his assent to the terms of the Cardmember Agreement, his use of the card . . . after receiving the Agreement provides more than sufficient evidence of his consent to its terms"). Accordingly, the Court concludes that Plaintiff received and consented to the Agreement, and is thus bound by its terms, including the arbitration provision.

Next, Plaintiff asserts that even if there is an agreement to arbitrate, the Cardholder Agreement is unconscionable and thus unenforceable. Significantly, Plaintiff's unconscionability and contract of adhesion allegations are directed at the Agreement as a whole – not the arbitration clause in particular. However, "it is well established that a challenge of unconscionability to the whole contract, as opposed to the arbitration provision specifically, is 'an arbitrable matter not properly considered by a court.'" *Kowalewski*, 590 F. Supp. 2d at 487 (quoting *JLM Indus. v. Stolt-Nielsen SA*, 387 F.3d 163, 170 (2d Cir. 2004)). Thus, because Plaintiff seeks to invalidate the entire Agreement as an unconscionable contract, the Court determines that this issue is for an arbitrator, not this Court, to decide, and thus does not impact the Court's conclusion that there

exists a valid agreement to arbitrate between Plaintiff and Defendant.[2]

As to the scope of the Agreement, Plaintiff contends that his TCPA claim falls outside the scope of the Cardholder Agreement's arbitration provision "because the factual allegations [underlying] the claim[] do not pertain to the contract." (Doc. No. 11-1 at 14.) This assertion is plainly contradicted by the Complaint itself, since the automatic telephone calls "that form the basis of [Plaintiff's] claim[]" (*id.*) were consistent with the Cardholder Agreement, which "authoriz[es] Credit One Bank . . . to contact [the customer] at any phone number (including mobile, cellular/wireless, or similar devices) . . . [the customer] provide[s] at anytime, for any lawful purpose" (Cardholder Agreement at 4). Moreover, the arbitration provision expressly applies to "disputes relating to . . . communications relating to [a customer's] account," which is exactly what this case is about. (*Id.* at 6.)

Furthermore, "[w]here, as here, 'the contract's arbitration clause is a broad one, 'the strong presumption in favor of arbitrability applies with even greater force.'" *Carr v. Citibank, N.A.*, No. 15-cv-6993 (SAS), 2015 WL 9598797, at *3 (S.D.N.Y. Dec. 23, 2015) (quoting *Leadertex, Inc.*, 67 F.3d at 27); *see also JLM Indus., Inc.*, 387 F.3d at 172 ("Where the arbitration clause is broad,

[2] Even if Plaintiff's unconscionability arguments were specifically targeted at the arbitration provision itself, the Court would find them unavailing for largely the same reasons that other courts have rejected similar challenges to the same arbitration provision. *See, e.g.*, *Carr v. Credit One Bank*, No. 15-cv-6663 (LAK), 2015 WL 9077314, at *3 (S.D.N.Y. Dec. 16, 2015) (rejecting substantially similar procedural unconscionability argument because Credit One's arbitration provision "was clear, conspicuous, and preceded by a heading written in all capital letters and bold print," "there is no indication that plaintiff was coerced into activating and using [her Credit One] credit card," and the mere "fact that a Cardmember Agreement is a printed form and is offered on a take-it-or-leave-it basis" or that there is "an inequality in bargaining power" is "insufficient to render the contract unconscionable"); *id.* (indicating that a substantive unconscionability challenge would also fail, since the arbitration provision "does not foreclose plaintiff's TCPA claims, is enforceable by either party, permits appeals, and has been enforced by federal district courts around the country"); *Ellin v. Credit One Bank*, No. 15-cv-2694 (FLW), 2015 WL 7069660, at *4 (D.N.J. Nov. 13, 2015) (rejecting unconscionability challenge to Credit One's arbitration provision because "the Agreement effectively called [the p]laintiff's attention to its arbitration clause," the clause was in "bold and capital text and contained an explanation of the arbitration process's implications," and did "not prevent [the p]laintiff from pursing [his] substantive rights [under] the TCPA[;] . . . it merely require[d] him" to do so in arbitration); *Bibee v. Credit One Bank*, No. 3-15-0734, 2015 WL 5178700, at *2 (M.D. Tenn. Sept. 4, 2015) (finding that same arbitration provision was easy to identify and read, was "not one-sided," and thus was not unconscionable).

there arises a presumption of arbitrability and arbitration of even a collateral matter will be ordered if the claim alleged implicates issues of contract construction or the parties' rights and obligations under it." (citation omitted)). "[I]n such cases, [in] the absence of any express provision excluding a particular grievance from arbitration, . . . only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.'" *Ellin*, 2015 WL 7069660, at *4 (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986)).

Here, the arbitration clause "require[s] that *any controversy or dispute* between [Plaintiff] and [Defendant] . . . be submitted to mandatory, binding arbitration." (Cardholder Agreement at 6 (emphasis added).) Thus, even as a general matter, this action by Plaintiff against Defendant is captured by the plain terms of the arbitration provision. The fact that the clause also lists disputes pertaining to "communications relating to [Plaintiff's] account" as among the types of disputes to be arbitrated removes any shred of doubt as to the arbitrability of Plaintiff's TCPA claim. In short, no matter how Plaintiff's claim is framed, it falls squarely within the scope of the Agreement's broadly drafted arbitration clause. *See, e.g.*, *Salerno*, 2015 WL 6554977, at *5 (concluding that "the arbitration provision of the [same] Cardholder Agreement [as here] is . . . susceptible [to] an interpretation that covers . . . claims . . . regarding Credit One's liability under the TCPA for its communications with plaintiff relating to her credit card account"); *see also Citibank, N.A.*, 2015 WL 9598797, at *3 (finding that the arbitration clause in a credit card agreement applied to plaintiff's TCPA claim because it contemplated "arbitration of any claim related to the parties' relationship, and the existence of consent to contact the plaintiff via telephone undeniably implicates the parties' relationship with each other"). Accordingly, the Court finds that the claims alleged in Plaintiff's Complaint fall within the scope of the arbitration provision in the Agreement between the parties.

As for the third inquiry – whether Congress intended the claims at issue here to be non-arbitrable – the Court first notes that, on its face, the Agreement does not appear to impinge on Plaintiff's ability to "effectively . . . vindicate [his] statutory cause of action in the arbitral forum." *Ragone v. Atl. Video at Manhattan Ctr.*, 595 F.3d 115, 125 (2d Cir. 2010) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)). Indeed, it is significant that the Second Circuit and other federal courts have found TCPA claims to be arbitrable, including in the context of credit card agreements. *See, e.g.*, *Moore v. T-Mobile USA Inc.*, 548 F. App'x 686, 687 (2d Cir. 2013); *Velez v. Credit One Bank*, No. 15-cv-4752 (PKC), 2016 WL 324963, at *7 (E.D.N.Y. Jan. 25, 2016) (finding that plaintiff's "TCPA claim is arbitrable under this third prong"); *Citibank, N.A.*, 2015 WL 9598797, at *3 ("Multiple courts in this Circuit have held that TCPA claims are arbitrable pursuant to arbitration provisions contained in a variety of agreements, including credit card agreements, and I so find here." (citations omitted)). The Court finds no reason to hold otherwise. Thus, this final inquiry with respect to arbitrability is also met.

III. CONCLUSION

For the reasons set forth above, the Court finds that Plaintiff's claim is arbitrable and that, pursuant to the terms of the Agreement, Plaintiff will be able to adequately pursue his statutory cause of action in arbitration. Accordingly, Defendant's motion to compel arbitration and to dismiss this action is GRANTED. The Clerk of the Court is respectfully directed to terminate the motion pending at docket entry 9 and to close this case.

SO ORDERED.

Dated: May 11, 2016
New York, New York

RICHARD J. SULLIVAN
UNITED STATES DISTRICT JUDGE