IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

DANTE GAMBOA,	
Plaintiff,	**CIVIL ACTION FILE**
v.	**NO. 1:16-CV-2349-MHC**
CITIBANK, NATIONAL ASSOCIATION,	
Defendant.	

ORDER

This case comes before the Court on Defendant Citibank, N.A. ("Citibank")'s Motion to Compel Arbitration [Doc. 8] ("Def.'s Mot.").

I. BACKGROUND

Plaintiff Dante Gamboa asserts claims against Citibank for violation of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, *et seq.* See Compl. [Doc. 1] ¶ 1. Specifically, he alleges that Citibank called his cell phone regarding a debt owed to Citibank using an automated telephone dialing system. Id. ¶¶ 10-11. Citibank asserts that Gamboa's claims must be arbitrated pursuant to the binding arbitration provision (the "Arbitration Provision") between Gamboa

and Citibank contained in the card agreement (the "Card Agreement") governing his account. Def.'s Mot.; see also Card Agreement attached as Ex. 1 to the Decl. of Elizabeth S. Barnette, attached as Ex. A to Def.'s Mot. [Doc. 8-1] ("Barnette Decl.") at 10. The Arbitration Provision also explicitly advises that it is governed by the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* ("FAA"). Card Agreement at 11.

Gamboa alleges he began receiving calls from Citibank in approximately December 2013, and that calls continued despite his direction to a Citibank representative to stop the calls. Compl. ¶¶ 8-10. The credit card account at issue is a Citibank credit card account issued to Gamboa on May 28, 2013. Barnette Decl. ¶ 4.

The account is governed by the Card Agreement that contains the Arbitration Provision. The Arbitration Provision was present when the account was opened and is included in the only amendment to the Card Agreement. Barnette Decl. ¶¶ 5, 6, 8, Exs. 1, 3. Gamboa used the account after receiving the Card Agreement. Id. ¶ 7, Ex. 2. Gamboa had the right to opt out of the Arbitration Provision, but elected not to do so and, as of August 31, 2016, carried a $3,010.14 balance on the account. Id. ¶¶ 8-11, Ex. 3.

Gamboa has not filed any opposition to Citibank's Motion.

II. LEGAL STANDARD

The FAA creates a "presumption of arbitrability" such that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Dasher v. RBC Bank (USA), 745 F.3d 1111, 1115-16 (11th Cir. 2014) (citations omitted); see also Bazemore v. Jefferson Capital Sys., LLC, 827 F.3d 1325, 1329 (11th Cir. 2016). However, "while doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration, the presumption does not apply to disputes concerning whether an agreement to arbitrate has been made." Dasher, 745 F.3d at 1116 (quotation marks and citation omitted).

The existence of an agreement to arbitrate between the parties is "simply a matter of contract." First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995). Therefore, in construing arbitration agreements, courts apply state law principles relating to contract formation, interpretation, and enforceability. Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1367-68 (11th Cir. 2005); see also Bazemore, 827 F.3d at 1330. Because an order to arbitrate a contested agreement is "in effect a summary disposition of the issue of whether there ha[s] been a meeting of the minds on the agreement to arbitrate," the Eleventh Circuit applies a standard akin to that used in summary judgment "in deciding what is sufficient evidence to require a trial on the issue of whether there was an agreement to

arbitrate." Magnolia Capital Advisors, Inc. v. Bear Stearns & Co., 272 F. App'x 782, 785-86 (11th Cir. 2008) (quoting and citing Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 & n.9 (3rd Cir. 1980)); see also In re Checking Account Overdraft Litig., 754 F.3d 1290, 1294 (11th Cir. 2014).

III. DISCUSSION

A. Terms and Enforceability of Agreement

Section 2 of the FAA mandates that binding arbitration agreements in contracts "evidencing a transaction involving [interstate] commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2; see also Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006) ("Section 2 [of the FAA] embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts."). The FAA "requires courts to enforce the bargain of the parties to arbitrate" and "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." KPMG LLP v. Cocchi, 132 S. Ct. 23, 25-26 (2011) (per curiam) (citations omitted; emphasis in original).

> Against the backdrop of this policy favoring arbitration, a court uses a two-step process to determine reach of an arbitration agreement.

> First, a court must ascertain if the agreement's terms reach the plaintiff's claims. Second, a court must decide if any "legal constraints external to the parties' agreement" prevent application of the agreement to require arbitration of Plaintiff's claims.

Hopkins v. World Acceptance Corp., 798 F. Supp. 2d 1339, 1344 (N.D. Ga. 2011) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).

An arbitration agreement governed by the FAA, like that here, is presumed to be valid and enforceable. The party resisting arbitration bears the burden of showing that the arbitration agreement is invalid or does not encompass the claims at issue. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000). Here, as noted, Gamboa has not filed any opposition to Citibank's Motion, and has not attempted to show the Arbitration Provision is invalid or does not encompass his claims. See LR 7.1B, NDGa. ("Failure to file a response shall indicate there is no opposition to the motion."). Numerous courts have enforced similar consumer arbitration agreements, including those of claims asserted against Citibank. See, e.g., Drozdowski v. Citibank, Inc., No. 2:15-CV-2786-STA-cgc, 2016 WL 4544543, at *9 (W.D. Tenn. Aug. 31, 2016); Taylor v. Citibank USA, N.A., 292 F. Supp. 2d 1333, 1345-46 (M.D. Ala. 2003).

The Arbitration Provision is governed by a South Dakota choice-of-law provision. Card Agreement at 13. Although the FAA governs the enforceability of

the Arbitration Provision, South Dakota law governs the determination of whether a valid agreement to arbitrate exists. See, e.g., Samadi v. MBNA America Bank, N.A., No. CV 104-137, 2005 WL 6111467, at *3 (S.D. Ga. June 10, 2005) (applying Delaware law, pursuant to choice-of-law provision in credit card agreement, to enforce arbitration agreement under the FAA).

Gamboa used the account after receiving the Arbitration Provision, did not opt out of or reject the Arbitration Provision and, as of August 31, 2016, carried a $3,010.14 balance on the account. Barnette Decl. ¶¶ 7-8, 10-11. Under South Dakota law, Gamboa's use of the account constitutes his acceptance of the terms of the Card Agreement, including the Arbitration Provision. See S.D. Codified Laws § 54-11-9. South Dakota law also strongly endorses arbitration. See Rossi Fine Jewelers, Inc. v. Gunderson, 648 N.W.2d 812, 814 (S.D. 2002) ("We have consistently favored the resolution of disputes by arbitration . . . . There is an overriding policy favoring arbitration when a contract provides for it. . . . "If there is doubt whether a case should be resolved by traditional judicial means or by arbitration, arbitration will prevail."). Pursuant to South Dakota law and federal law, the Court finds that the Arbitration Provision at issue is valid and enforceable.

B. Applicability of Arbitration Provision

Once it is determined that the parties have entered into a binding arbitration agreement, an "order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 650 (1986). Where the clause is broad, as here, there is a heightened presumption of arbitrability such that "in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." Id. (internal punctuation and citation omitted).

Here, the Arbitration Provision extends to "[a]ll Claims . . . no matter what legal theory they're based on or what remedy (damages, or injunction, or declaratory relief) they seek, including Claims based on contract, tort . . . statutory or regulatory provisions or any other sources of law," arising out of or related to Gamboa's account or relationship with Citibank. Card Agreement at 10. Because the Arbitration Provision extends to Gamboa's "relationship" with Citibank, as well as the account, the claims asserted are encompassed by the Arbitration Provision. Similarly, Gamboa's TCPA claims are arbitrable, particularly given that the Arbitration Provision applies to any claim. Id.; see also Drozdowski, 2016

WL 454543 (holding TCPA claims are arbitrable). Therefore, the Court concludes that the Arbitration Provision encompasses the claims at issue here. Citibank's Motion to Compel Arbitration is therefore **GRANTED**.

C. Stay Pending Arbitration

Section 3 of the FAA provides that, where a valid arbitration agreement requires a dispute to be submitted to binding arbitration, the district court shall stay the action "until such arbitration has been had in accordance with the terms of the agreement." 9 U.S.C. § 3; see also Cendant Corp. v. Forbes, 72 F. Supp. 2d 341, 342 (S.D.N.Y. 1999) (holding that a stay under Section 3 of the FAA is "mandatory if an issue in the case is referable to arbitration."). Accordingly, this action is **STAYED** pending completion of arbitration pursuant to the terms of the Arbitration Provision.

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that Defendant Citibank, N.A.'s Motion to Compel Arbitration [Doc. 8] is **GRANTED**. It is further **ORDERED** that this action is **STAYED** and shall be **ADMINISTRATIVELY CLOSED** pending completion of arbitration pursuant to the terms of the Arbitration Provision. The parties shall notify the Court upon completion of

arbitration, and either party shall have the right to move to reopen this case to resolve any remaining issues of contention.

IT IS SO ORDERED this 28th day of October, 2016.

MARK H. COHEN
United States District Judge