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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

MICHAEL P. KOBY, et al.,
Plaintiffs,
v.
ARS NATIONAL SERVICES, INC.,
Defendant.

Case No.: 3:09-cv-00780-KSC

**ORDER RE MOTION TO COMPEL
ARBITRATION**

[Doc. No. 130]

Before the Court is defendant, ARS National Services’ (“ARS”), Motion to Compel Arbitration or, in the alternative, Motion to Dismiss. [Doc. No. 130]. For the reasons discussed in greater detail below, Defendant’s Motion to Compel Arbitration is **DENIED WITHOUT PREJUDICE**. The Court will reconsider defendant’s Motion if refiled following a limited, sixty (60) day discovery period, as described herein.

FACTUAL BACKGROUND

On April 15, 2009, plaintiffs filed this case as a putative class action alleging that defendant attempted to collect plaintiff’s alleged debts in a manner that did not comport with the FDCPA, 15 U.S.C. §1692 *et seq.*, specifically §§ 1692d(6) and 1692e(11). [Doc. No. 1]. The Complaint alleges that defendant left voice messages for consumers that failed

1 to disclose the purpose of the call or that the call was from a debt collector. [Doc. No. 1, p.
2 3].

3 On March 29, 2010, the Court entered an Order [Doc. No. 19] granting in part and
4 denying in part defendant's Motion for Judgment on the Pleadings. Defendant's Motion
5 was granted as to the claim that the message left with plaintiff Simmons violated section
6 1692e(11); however, all other claims survived. [Doc. No. 19, p. 10]. On July 21, 2010, the
7 parties jointly moved to certify for appeal the Court's March 29, 2010 Order on defendant's
8 Motion for Judgment on the Pleadings. [Doc. No. 24]. On December 23, 2010, the Court
9 certified the March 29, 2010 Order for interlocutory appeal pursuant to 28 U.S.C.
10 § 1292(b). [Doc. No. 42]. On December 29, 2010, defendant filed a petition for permission
11 to appeal. [Doc. No. 43]. However, on March 28, 2011, the Ninth Circuit Court of Appeals
12 denied defendant's petition for leave to appeal. [Doc. No. 44]

13 During the course of the litigation, and without any admission of liability, defendant
14 ARS adopted a single, uniform, and consistent message for future consumer collection
15 calls. This message was effectively implemented on August 19, 2011. [Doc. No. 81, ¶ 22].
16 Plaintiffs do not object to the revised message, nor do they contend that it violates the
17 requirements of §§ 1692d(b) or 1692e(11) of the FDCPA. *Id.*

18 Shortly thereafter, the parties entered into settlement discussions. On February 17,
19 2012, the parties held a full-day Settlement Conference with Magistrate Judge Jan Adler.
20 [Doc. No. 62]. While the case failed to settle on that date, several months of negotiations
21 ensued, culminating in a January 30, 2013 full-day Mandatory Settlement Conference with
22 the undersigned Magistrate Judge. [Doc. No. 80]. Following serious, informed, arms-
23 length negotiations, the parties reached a settlement, the contents of which were placed on
24 the record before Magistrate Judge Crawford that same day. In June, 2013, intervenor
25 Bernadette M. Helmuth objected to the proposed settlement. [Doc. No. 86]. This Court
26 held a fairness hearing on August 28, 2013, and issued a final approval of the settlement in
27 October, 2013. [Doc. No. 97]. Intervenor Helmuth appealed the final Order of approval in
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1 November, 2013 [Doc. No. 98], and three years later on April 20, 2017, the Ninth Circuit
2 vacated the final Order of approval. [Doc. No. 117].

3 Following the Ninth Circuit’s ruling, plaintiffs requested leave to amend the
4 Complaint. The Court set a briefing schedule for plaintiffs to amend their Complaint [Doc.
5 No. 123], and the First Amended Complaint [“FAC”] was filed on September 6, 2017.
6 [Doc. No. 125].

7 **PROCEDURAL BACKGROUND**

8 Defendant, ARS, filed its Motion to Compel Arbitration and/or Motion to Dismiss
9 on November 6, 2017. [Doc. No. 130]. Plaintiffs filed an Opposition to the Motion to
10 Compel Arbitration, which it style as an “Answer” to defendants “Petition” on December
11 16, 2017. [Doc. No. 135]. Plaintiffs filed their Opposition to the Motion to Dismiss the
12 same day. [Doc. No. 134]. Defendant filed its Reply to Plaintiffs’ Opposition on January
13 12, 2018. [Doc. No. 138].

14 **LEGAL STANDARD**

15 The Federal Arbitration Act states that agreements to arbitrate are “valid, irrevocable
16 and enforceable.” 9 U.S.C. § 2. Section 4 provides that where there is an enforceable
17 arbitration agreement, the court “shall make an order directing the parties to proceed to
18 arbitration in accordance with the terms of the agreement.” 9 U.S.C. § 4. The language is
19 mandatory, offering district courts no discretion where a valid arbitration agreement is
20 signed. *Kilgore v. Keybank, N.A.*, 718 F.3d 1052, 1058 (9th Cir. 2013) (citing *Dean Witter*
21 *Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)). The role of the court is “limited to
22 determining (1) whether a valid agreement to arbitrate exists and, if it does (2) whether the
23 agreement encompasses the dispute at issue.” *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*,
24 207 F.3d 1126, 1130 (9th Cir. 2000).

25 Arbitration is a matter of contract, and a party “cannot be required to submit to
26 arbitration in any dispute which he has not agreed to submit.” *Tracer Research Corp. v.*
27 *Nat’l Envtl. Servs. Co.*, 42 F.3d 1292, 1294 (9th Cir. 1996). If state law also governs the
28 validity, revocability, and enforceability of contracts, generally, then state law determines

1 which contracts are enforceable and binding under the FAA. *Arthur Andersen LLP v.*
2 *Carlisle*, 556 U.S. 624, 630-31 (2009). Federal law controls the appropriate *scope* of the
3 agreement, however. *Letiza v. Prudential Bache Sec., Inc.*, 802 F.2d 1185, 1187 (9th Cir.
4 1986) (“Because the issue involves the arbitrability of a dispute, it is controlled by
5 application of federal substantive law rather than state law.”).

6 Discovery in connection to a motion to compel is available “only if ‘the making of
7 the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue.’”
8 *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999) (quoting 9 U.S.C. § 4). And
9 the making of an arbitration agreement is in issue if a plaintiff alleges “that the arbitration
10 clause was fraudulently induced, that one party had overwhelming bargaining power, or
11 that the agreement does not exist.” *Granite Rock Co. v. Int’l Broth. Of Teamsters*, 130 S.
12 Ct. 2847 (2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445 (2006). If
13 a plaintiff requests discovery to contest a motion to compel arbitration, he may do so by
14 also suggesting the evidence he anticipates to acquire from discovery and by identifying
15 circumstances that raise doubt as to the formation of the agreement. *See, e.g., Ameriprise*
16 *Fin. Services, Inc. v. Etheredge*, 277 F. App.’x 447, 449-50 (5th Cir. 2008); *Wolff v.*
17 *Westwood Mgmt., LLC*, 558 F.3d 517, 521 (D.C. Cir. 2009).

18 DISCUSSION

19 **I. Choice of Law**

20 Defendant contends Virginia law applies to this action. [Doc. No. 130-1 at pp. 7-9].
21 Plaintiffs, ultimately, do not dispute defendant’s contention that if a valid contract exists,
22 the Consumer Agreements attached as Exhibits to Mr. Beck’s Declaration clearly have a
23 choice of law clause identifying Virginia contract law. [Doc. No. 135 at pp. 6-7].

24 Federal common law applies to the choice-of-law rule determination because
25 jurisdiction in this case is based on federal question. *See In re Sterba*, 852 F.3d 1175, 1179
26 (9th Cir. 2017); *see also Hyunh v. Chase Manhattan Bank*, 465 F.3d 992, 997 (9th Cir.
27 2006). Federal common law choice-of-law rules in the Ninth Circuit follows the
28 Restatement (Second) of Conflicts of Laws approach “to the extent it is found persuasive.”

1 *Flores v. American Seafoods Co.*, 335 F.3d 904, 919 (9th Cir. 2003). Courts honor the
2 parties' choice-of-law to govern their disputed claims unless: (1) "the chosen state has no
3 substantial relationship to the parties or the transaction", or (2) honoring the parties' choice
4 "would be contrary to a fundamental policy of a state that has a materially greater interest"
5 in the dispute. Restatement (Second) of Conflicts of Laws § 187(2) (1988).

6 Here, the Customer Agreements contain a governing law provision. [Doc. No. 130-
7 3,4]. The Agreements state that the account will be governed by federal and Virginia law
8 because the credit on the account extends from Virginia. [*Id.*]. This Court finds that
9 Virginia has a substantial relationship to this dispute and application of Virginia law would
10 not be contrary to any fundamental policy of California. Thus where applicable, this dispute
11 is governed by Virginia law.

12 **II. Whether a Contract Exists**

13 Plaintiffs allege defendants have failed to show a contract was formed between
14 plaintiffs and Capital One Bank, and that the Beck Declaration submitted by defendant is
15 inadmissible hearsay. [Doc. No. 135 at pp. 6-10]. Plaintiffs assert defendant has not offered
16 any evidence to suggest plaintiffs used a credit card from Capital One Bank, generally a
17 necessary element for contract formation. [*Id.* at p. 7]; see *Bank of America v. Jarczyk*, 268
18 B.R. 17, 22 (W.D.N.Y. 2001) ("The issuance of a credit card constitutes a credit offer, and
19 the use of the card constitutes acceptance of the offer."). ARS appeals primarily to logic in
20 response. [Doc. No. 138 at p. 3]. "If there was no use, then there was no debt" and without
21 debt "there would be no collection all messages", so the agreements identified in the Beck
22 declaration and the very existence of this case, defendant argues, indicates a valid contract
23 with an enforceable arbitration provision. [Doc. No. 138 at p. 3].

24 The Court agrees with ARS that a valid agreement to arbitrate exists. The case of
25 *Jallo v. Midland Funding, LLC* is instructive. 2014 WL 5810203 (S.D. Cal. Nov. 14, 2014).
26 There, the District Court sided with the defendant that the declaration from its Director of
27 Business Development, Mr. Minford, established the existence of a valid contract. *Id.* at
28 *3. The declaration stated, *inter alia*: (1) [defendant] "had access to the [plaintiff's Sears]

1 Card Account” that was at issue in the case; (2) defendant “purchased a pool of loan
 2 accounts from Citibank” and among the loans was plaintiff’s account; and, (3) defendant
 3 incorporated the business records generated by the original creditor into its business
 4 records on which it “regularly relie[s]” to conduct its own business. 3:14-cv-00325-BEN-
 5 NLS, Doc. No. 16-2, at pp. 1-3. The Court can see no material difference between the
 6 contents of Mr. Beck’s Declaration and Mr. Minford’s declaration in *Jallo*.¹ Mr. Beck,
 7 like Mr. Minford, “is qualified to attest that the Agreement received [by ARS] is the
 8 document that [Capital One Bank] sent to [ARS].” *Jallo* at *3. The Court finds Mr. Beck’s
 9 position as Vice President of Operations is such that he would be familiar with plaintiffs’
 10 accounts and their respective use of those accounts to incur the debts that ARS sought to
 11 collect. Therefore a valid contract with an arbitration agreement exists.

12 **III. Whether ARS Can Enforce the Consumer Agreement Under Virginia** 13 **Law**

14 As the assignee of Capital One Bank, defendant asserts it is entitled to enforce the
 15 arbitration clause in the Customer Agreements signed by plaintiffs. [Doc. No. 130-1 at p
 16 9]. Plaintiffs assert Virginia contract law – specifically provisions of the Virginia Uniform
 17 Commercial Code (“UCC”) – precludes ARS from enforcing the arbitration agreement.
 18 [Doc. No. 135 at pp. 10-12]. Defendant’s arguments are unavailing.

19 A third party may enforce an arbitration agreement under the FAA if the relevant
 20 state’s contract law allows the third party to enforce the agreement. *Arthur Andersen LLP*
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 23 ¹ One notable difference, however, is in the exhibits attached to the declaration in *Jallo*. Specifically,
 24 Exhibits A and B: the Affidavit of Sale of Account by Original Creditor and the Bill of Sale and
 25 Assignment, respectively. 3:14-cv-00325-BEN-NLS, Doc. No. 16-2. The exhibits showed that Midland
 26 Funding *purchased* the debt from the debt holder, and thus how Midland could enforce an arbitration
 27 agreement to which it was not an original party. Here, ARS has not appended such an exhibit to the
 28 declaration of Mr. Beck. Nonetheless, the information contained in such an exhibit does not bear on the
 question of whether the declaration suffices to establish a valid contract containing an arbitration
 agreement. How ARS came to be the assignee of Capital One Bank is, however, relevant to the question
 of its ability to enforce the arbitration agreement contained in the Customer Agreements. That open
 question is addressed in detail in Section III, *infra*.

1 *v. Carlisle*, 556 U.S. 624, 530-32 (2009). Section 8.2-102 of the Virginia UCC “applies to
2 transactions in goods” where “goods” are defined in Section 8.2-105 to mean “all things
3 which are movable at the time of identification to the contract for sale.” Va. Code. Ann.
4 (West). The legislative comments explain that “[t]he definition of goods is based on the
5 concept of movability . . . [and] is not intended to deal with things which are not *fairly*
6 *identifiable* as movables before the contract is performed.” Va. Code Ann. § 8.2-105 (West)
7 (emphasis added). ARS asserts Section 8.2-102 governs its right to enforce the arbitration
8 agreement because it states that “[a]n assignment of the contract . . . or an assignment in
9 similar general terms is an assignment of rights.” ARS’s argument is erroneous. Section
10 8.2-102, as stated, applies to transactions in *goods*. Credit card debt cannot be fairly
11 identified as a “movable”, and so a different section of the Virginia UCC governs this
12 dispute.

13 Here, Title 8.9A, Secured Transactions is the applicable section of the Virginia UCC.
14 Section 8.9A-109(a)(3) states in pertinent part, that “this title applies to [. . .] a sale of
15 accounts.” Va. Code. Ann. (West). Section 8.9A-109(d)(5) clarifies that the title does *not*
16 apply to “an assignment of accounts [. . .] which is for the purpose of collection only.” *Id.*
17 Thus only if defendant ARS *purchased* the credit card debt from Capital One Bank can it
18 rightfully seek to enforce the arbitration agreements in plaintiffs’ contracts. If Capital One
19 Bank merely assigned the accounts to ARS for collection purposes, then it has no authority
20 to enforce the arbitration agreement. *See* § 8.9A-109(a)(3). The Court cannot conclude how
21 ARS became the assignee of Capital One Bank on the evidence and documents provided
22 to the Court at this time. It is apparent from similar cases, such as *Jallo, supra*, that the
23 relationship between a debt collector and the debt holder can be easily ascertained and
24 presented to the Court.

25 Moreover, the Ninth Circuit recently reversed and remanded a District Court’s
26 decision to grant a motion to compel arbitration when presented with similarly paltry
27 evidence from a defendant debt collector. *See Alarcon v. Vital Recovery Services, Inc.*, 706
28 Fed.Appx. 394 (9th Cir. 2017). Therein, defendants submitted a declaration in support of

1 their motion to compel arbitration in which it represented that “[defendant] became the
2 assignee of certain assets [including those at issue in the case].” *Id.* at 395. Despite the
3 declarant stating he had reviewed the documents that detailed the assignment, the Court
4 held that the declaration “contain[ed] no facts to support [that] conclusion” and that “[t]here
5 is no evidence at all that [the debt holder] assigned its rights to [defendant] or any other
6 intermediary assignee.” *Id.* A declaration merely offering a legal conclusion that a debt
7 collector is an assignee “is inadmissible unless defendants produce the original records.”
8 *Id.*

9 The Beck Declaration is inadmissible to show defendant is the assignee of Capital
10 One Bank, let alone whether it is the right class of assignee to enforce the arbitration
11 agreement. As in *Alarcon*, the declaration states only that an assignment occurred without
12 the accompanying documentation to support that contention. Therefore ARS’s Motion is
13 denied.

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CONCLUSION

IT IS HEREBY ORDERED defendant has until **April 6, 2018** to conduct limited discovery to obtain the cardholder agreements governing plaintiffs Michael Simmons and Jonathan Supler's accounts.

IT IS FURTHER ORDERED plaintiff has until **April 6, 2018** to conduct limited discovery regarding the formation or making of the agreement.

IT IS FURTHER ORDERED defendant's Motion to Compel Arbitration is **DENIED WITHOUT PREJUDICE**. Defendant may re-file its motion on or before **May 1, 2018**. There shall be no oral argument unless requested by the Court. Plaintiffs shall file any opposition to defendant's reinstated motion to compel arbitration within fourteen (14) days of defendant's motion, and defendant shall file any reply within seven (7) days of plaintiffs' opposition.

IT IS SO ORDERED.

Dated: February 5, 2018



Hon. Karen S. Crawford
United States Magistrate Judge