UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

№ 17-CV-340 (JFB)(ARL)

JEROLEUM A. BIGGS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

VERSUS

MIDLAND CREDIT MANAGEMENT, INC. AND MIDLAND FUNDING, LLC,

Defendants.

MEMORANDUM AND ORDER
March 9, 2018

JOSEPH F. BIANCO, District Judge:

Plaintiff Jeroleum A. Biggs ("plaintiff") brings this putative class action against Midland Credit Management, Inc. ("MCM") and Midland Funding, LLC ("Midland Funding," and together with MCM, "Midland" or "defendants") under the Fair Debt Collection Practices Act (the "FDCPA"), 15 U.S.C. § 1692 *et seq.*

Pending before the Court is defendants' motion to stay this action, compel arbitration on an individual basis, and dismiss the class action claims. For the following reasons, the Court grants defendants' motion in its entirety.

I. BACKGROUND

A. Facts

The following facts are taken from the complaint (ECF No. 1), the Affidavit of James Collins ("Collins Aff.," ECF No. 14-4), the Affidavit of Jolene White ("White Aff.," ECF No. 14-5), the Supplemental Affidavit of Jolene White ("Suppl. White Aff.," ECF No. 20), and the Supplemental Declaration of Matthew B. Corwin ("Suppl. Corwin Decl.," ECF Nos. 16-1, 16-2) filed in support of defendants' motion to compel arbitration, and the exhibits attached thereto.[1]

On or about January 20, 2012, Synchrony Bank, formerly known as GE Capital Retail

[1] The Court may properly consider documents outside of the pleadings for purposes of deciding a motion to compel arbitration. *See BS Sun Shipping Monrovia v. Citgo Petroleum Corp.*, No. 06 Civ. 839(HB), 2006 WL 2265041, at *3 n.6 (S.D.N.Y. Aug. 8, 2006) ("While it is generally improper to consider documents not appended to the initial pleading or incorporated in that pleading by reference in the context of a Rule 12(b)(6) motion to dismiss, it is proper (and in fact necessary) to consider such extrinsic evidence when faced with a motion to compel arbitration." (citing *Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co.*, 263 F.3d 26, 32-33 (2d Cir. 2001))).

Bank ("Synchrony"), issued an Amazon.com branded credit account to plaintiff, with account number ending 6964 ("the account" or "plaintiff's account"). (White Aff. ¶¶ 2, 5.) Synchrony's records reflect that, on or about that same day, Synchrony mailed plaintiff (i) a letter containing plaintiff's account number, and (ii) a copy of the credit card agreement that governed the account (the "Account Agreement") via the United States Postal Service at her address of record. (*Id.* ¶ 5.) Synchrony mailed these documents to plaintiff in accordance with its regular mailing procedures, and a contemporaneous record was created to document the mailing. (Suppl. White Aff. ¶ 4; White Aff. ¶ 5.)

The Account Agreement contains an arbitration provision titled "**RESOLVING A DISPUTE WITH ARBITRATION**" (the "Arbitration Provision"). (White Aff. Ex. A at 5.) The Arbitration Provision states, in relevant part:

> **PLEASE READ THIS SECTION CAREFULLY. IF YOU DO NOT REJECT IT, THIS SECTION WILL APPLY TO YOUR ACCOUNT, AND MOST DISPUTES BETWEEN YOU AND US WILL BE SUBJECT TO INDIVIDUAL ARBITRATION. THIS MEANS THAT: (1) NEITHER A COURT NOR A JURY WILL RESOLVE ANY SUCH DISPUTE; (2) YOU WILL NOT BE ABLE TO PARTICIPATE IN A CLASS ACTION OR SIMILAR PROCEEDING; (3) LESS INFORMATION WILL BE AVAILABLE; AND (4) APPEAL RIGHTS WILL BE LIMITED.**
>
> **What claims are subject to arbitration**
>
> 1. If either you or we make a demand for arbitration, you and we must arbitrate any dispute or claim between you or any other user of your account, and us, our affiliates, agents and/or Amazon.com if it relates to your account, except as noted below.
>
> 2. We will not require you to arbitrate: (1) any individual case in small claims court or your state's equivalent court, so long as it remains an individual case in that court; or (2) a case we file to collect money you owe us. However, if you respond to the collection lawsuit by claiming any wrongdoing, we may require you to arbitrate.
>
> 3. Notwithstanding any other language in this section, only a court, not an arbitrator, will decide disputes about the validity, enforceability, coverage or scope of this section or any part thereof (including, without limitation, the next paragraph of this section and/or this sentence). However, any dispute or argument that concerns the validity or enforceability of the Agreement as a whole is for the arbitrator, not a court, to decide.
>
> **No Class Actions**
>
> **YOU AGREE NOT TO PARTICIPATE IN A CLASS, REPRESENTATIVE OR PRIVATE ATTORNEY GENERAL ACTION AGAINST US IN COURT OR ARBITRATION. ALSO, YOU MAY NOT BRING CLAIMS AGAINST US ON BEHALF OF ANY ACCOUNTHOLDER WHO IS NOT AN ACCOUNTHOLDER ON YOUR ACCOUNT, AND YOU AGREE THAT ONLY**

ACCOUNTHOLDERS ON YOUR ACCOUNT MAY BE JOINED IN A SINGLE ARBITRATION WITH ANY CLAIM YOU HAVE.

(*Id.*)[2]

The Account Agreement further provides that, "[b]y opening or using your account, you agree to the terms of the entire Agreement." (*Id.* at 4.)

Plaintiff made purchases using the Amazon.com credit card. (*See* Compl. ¶¶ 12-14; White Aff. Ex. B.) Plaintiff made her final payment on the account on August 17, 2015. (White Aff. ¶ 7, Ex. C.) At that time, there was $1,437.24 outstanding on plaintiff's account. (White Aff. Ex. C; Collins Aff. Ex. B.)

On or about October 20, 2015, Midland Funding purchased a portfolio of accounts, including plaintiff's account, from Synchrony. (Collins Aff. ¶¶ 5-6, Ex. A; White Aff. ¶ 9.) Following the purchase, MCM serviced plaintiff's debt for Midland Funding. (Collins Aff. ¶ 5.)

MCM sent plaintiff a letter dated January 22, 2016 in an effort to collect the debt. (Compl. ¶ 18, Ex. 1.)

On April 29, 2016, plaintiff filed for Chapter 7 bankruptcy in the United States Bankruptcy Court for the Eastern District of New York. (Suppl. Corwin Decl. ¶ 2.) Plaintiff's bankruptcy petition lists "Synchrony Bank/Amazon" as a creditor in connection with plaintiff's account, in the amount of $1,437.24, and Midland Funding LLC as an entity to be notified about the "Synchrony Bank/Amazon" debt. (Suppl. Corwin Decl. Ex. 3 at 3, 6.)

B. Procedural History

Plaintiff commenced this action on January 20, 2017. (ECF No. 1.) On August 18, 2017, defendants moved to stay this action, compel arbitration on an individual basis, and dismiss the class action claims. (ECF No. 14.) Plaintiff opposed defendants' motion on September 18, 2017 (ECF No. 15), and defendants replied on October 2, 2017 (ECF No. 16). The Court heard oral argument on November 8, 2017. On November 28, 2017, the Court held a telephone conference with the parties to discuss supplemental information regarding Synchrony's mailing procedures. Defendants submitted the Supplemental White Affidavit in support of their motion on December 19, 2017 (ECF No. 20), and on December 28, 2017, plaintiff submitted a letter response (ECF No. 21). The Court has fully considered the parties' arguments and submissions.

II. STANDARD OF REVIEW

Motions to compel arbitration are evaluated under a standard similar to the standard for summary judgment motions. *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003) (citing *Par-Knit Mills, Inc. v. Stockbridge Fabrics Co.*, 636 F.2d 51, 54 n.9 (3d Cir. 1980)); *Hines v. Overstock.com, Inc.*, 380 F. App'x 22, 24 (2d Cir. 2010). The court must "consider all relevant, admissible evidence" and "draw all reasonable inferences in favor of the non-moving party." *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 229 (2d Cir. 2016). "If there is an issue of fact as to the making of the agreement for arbitration, then a trial is necessary." *Bensadoun*, 316 F.3d at 175 (citing 9 U.S.C. § 4). If, however, the arbitrability of the dispute can be decided as a matter of law

[2] The "**No Class Actions**" provision (the "Class Action Waiver") further states: "If a court determines that this paragraph is not fully enforceable, only this sentence will remain in force and the remainder will be null and void, and the court's determination shall be subject to appeal." (*Id.*)

based on the undisputed facts in the record, the court "may rule on the basis of that legal issue and 'avoid the need for further court proceedings.'" *Wachovia Bank, Nat'l Ass'n v. VCG Special Opportunities Master Fund, Ltd.*, 661 F.3d 164, 171 (2d Cir. 2011) (quoting *Bensadoun*, 316 F.3d at 175).

III. Discussion

A. The Affidavits Are Admissible

As an initial matter, plaintiff challenges defendants' evidence submitted in support of their motion to compel arbitration. Plaintiff claims that the White and Collins Affidavits fail to meet the requirements of the business records exception under Federal Rule of Evidence 803(6), and, therefore, are inadmissible hearsay. The Court disagrees.

Under Rule 803(6), a record, "made at or near the time by . . . someone with knowledge, [if] kept in the course of a regularly conducted activity of a business, . . . [and if made as] a regular practice of that activity," is admissible upon the "testimony of the custodian or another qualified witness," absent some indication of untrustworthiness. Fed. R. Evid. 803(6).

White's affidavit states that she is a "Lead Litigation Analyst" at Synchrony, and that she has "personal knowledge of the business records of Synchrony and [is] a qualified person authorized to declare and certify" on its behalf. (White Aff. ¶¶ 3, 4.) White avers that, as part of her job responsibilities, she regularly accesses Synchrony's cardholder records; helps maintain and compile credit card agreement histories; and reviews and analyzes account records and transaction histories. (*Id.* ¶ 3.) In addition, White avers that she is "familiar with the manner in which Synchrony's credit card account records and account agreements are maintained and the manner in which mailings are sent to Synchrony cardholders." (*Id.*) Moreover, White's affidavit provides that the records White reviewed in connection with her affidavit, including the exhibits attached thereto, were "made at or near the time of occurrence by, or from information transmitted by, an individual with knowledge of the events described therein"; "were kept in the course of the regularly conducted business activity of Synchrony"; and "were made by Synchrony as a regular practice during its regularly conducted business activity." (*Id.* ¶ 10.)

Collins's affidavit states that he is the Manager of Media Operations for MCM. (Collins Aff. ¶ 3.) Collins avers that, in that capacity, he is responsible for maintaining and overseeing the loan agreements, debt collection records, and other account information for the accounts and debt that MCM manages for Midland Funding, and that he is familiar with Midland Funding's account purchases and Midland's recordkeeping practices and policies. (*Id.*) Collins further avers that he made his affidavit based on his own personal knowledge or upon the review of Midland's records maintained in the ordinary course of business, of which he is a custodian. (*Id.*) Collins states that records relating to plaintiff's debt were "made at or near the times of occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters reflected in such records"; "kept in the ordinary course of business activity conducted by [Midland]"; and made by Midland as part of the regular practice of its business activity. (*Id.* ¶ 4.)

Collins's affidavit also addresses business records that Midland Funding obtained from Synchrony. Collins avers that he has "familiarity with, and first-hand knowledge of, the contents [of such records], including the account history and records of Synchrony related to" plaintiff's account. (*Id.* ¶ 5.) Collins further avers that these

records have been incorporated into Midland's business records and are routinely relied on by Midland in conducting its business. (*Id.*)

The Court concludes that the White and Collins Affidavits and the exhibits attached thereto are admissible. First, White and Collins have demonstrated that they are qualified witnesses or custodians, and that the statements in their affidavits are based on their personal knowledge or their review of their employer's business records. *See Koon Chun Hing Kee Soy & Sauce Factory, Ltd. v. Star Mark Mgmt., Inc.*, No. 04–CV–2293 (JFB)(SMG), 2007 WL 74304, at *2 (E.D.N.Y. Jan. 8, 2007) (collecting cases and finding officer of company could offer evidence in declaration based on personal knowledge from review of company's records); *BS Sun Shipping*, 2006 WL 2265041, at *4 (finding declaration based on declarant's personal knowledge and his review of former employer's files "sufficient . . . to support [declarant's] factual assertions").

Second, the White and Collins affidavits also laid a proper foundation for the records attached to their affidavits under Rule 803(6). *See United States v. Komasa*, 767 F.3d 151, 156 (2d Cir. 2014) ("To lay a proper foundation for a business record, a custodian or other qualified witness must testify that the document was 'kept in the course of a regularly conducted business activity and also that it was the regular practice of that business activity to make the [record].'" (alteration in original) (quoting *United States v. Williams*, 205 F.3d 23, 34 (2d Cir. 2000))). Contrary to plaintiff's assertions, "'[t]he custodian need not have personal knowledge of the actual creation of the document' to lay a proper foundation." *Id.* (quoting *Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2d Cir. 1995)). Additionally, "[e]ven if the document is originally created by another entity, its creator need not testify when the document has been incorporated into the business records of the testifying entity." *United States v. Jakobetz*, 955 F.2d 786, 801 (2d Cir. 1992).

Finally, plaintiff has failed to show that the affidavits or the attached exhibits indicate a lack of trustworthiness. *See* Fed. R. Evid. 803(6)(E).[3]

[3] The burden is on plaintiff—the party opposing admission of the White and Collins Affidavits—to demonstrate that the affidavits "indicate a lack of trustworthiness." Fed. R. Evid. 803(6)(e). Although plaintiff does not explicitly argue that the White and Collins Affidavits indicate a lack of trustworthiness—indeed, plaintiff argues that the affidavits fail to meet each requirement under Rule 803(6) *aside from* subsection (e)—the Court interprets plaintiff's arguments as challenging the affidavits on this basis. In any event, the Court does not find any of plaintiff's arguments persuasive.

For example, plaintiff argues that the Collins Affidavit, White Affidavit, Affidavit of Sale signed by Paula Sivels (*see* Collins Aff. Ex. A at 4), and Affidavit of Sale of Account by Original Creditor (*see id.* at 2-3) "appear to contain conflicting statements when compared to each other, [and that there therefore] are questions of credibility of the declarants." (ECF No. 15 at 12.) Plaintiff, however, does not identify any conflicting statements in these affidavits, and her conclusory statement regarding the credibility of the declarants is therefore unsupported.

Plaintiff's challenges to the White Affidavit similarly miss the mark. Plaintiff attacks the White Affidavit for failing to attach the letter that was sent to plaintiff with the Account Agreement, and claims that it is "[c]urious that Synchrony purports to be in possession of one document, but not the other, but still believes it can attest to the mailing of both." (*Id.* at 9.) Plaintiff, however, fails to explain why the letter is relevant to this motion and inaccurately characterizes the White Affidavit, which does not discuss Synchrony's possession of the letter. Plaintiff also questions why the Account Agreement was presented as one of Synchrony's business records, but not as one of defendants' business records, when the Affidavit of Sale regarding Midland Funding's purchase of accounts provides that "electronic records and other records were transferred [o]n individual Accounts to

The Court also notes that its conclusion is consistent with a number of other courts in this district that have found similar affidavits admissible. *See, e.g.*, *Marcario v. Midland Credit Mgmt., Inc.*, 2:17-cv-414 (ADS)(ARL), 2017 WL 4792238, at *2-3 (E.D.N.Y. Oct. 23, 2017) (rejecting plaintiff's counsel's same arguments in admitting affidavit); *Wolin v. Midland Credit Mgmt., Inc.*, CV 15-6996, 2017 WL 3671176, at *2-3 (E.D.N.Y. Aug. 24, 2017) (finding admissible similar affidavit from Synchrony); *Bakon v. Rushomore Serv. Ctr., LLC*, 16-CV-6137, 2017 WL 2414639, at *3 (E.D.N.Y. June 2, 2017) (concluding affidavit based on similar assertions was admissible under Rule 803(6)). Accordingly, because the White and Collins Affidavits are admissible, the Court will consider them in deciding the instant motion.

B. The Court Compels Arbitration

Plaintiff opposes defendants' motion to compel arbitration on two grounds. First, plaintiff disputes whether defendants have standing to enforce the Arbitration Provision, and second, plaintiff argues that defendants have not established that a valid agreement to arbitrate exists. For the following reasons, the Court rejects plaintiff's arguments and compels arbitration.

1. Legal Standard

The Federal Arbitration Act (the "FAA") mandates that arbitration agreements "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. This statutory provision "reflect[s] 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 (2011) (citations omitted). Thus, "courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms," *id.* (citation omitted), including "terms that 'specify with whom the parties choose to arbitrate their disputes,'" *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683 (2010)).

In deciding whether to compel arbitration, the Second Circuit has instructed a district court to conduct the following inquiry:

> [F]irst, it must determine whether the parties agreed to arbitrate; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then decide

the debt buyer." (*Id.* (quoting Collins Aff. Ex. A at 2).) Plaintiff's argument is again based on incorrect assumptions. The affidavits do not provide that every Synchrony business record was transferred to defendants, and plaintiff has presented no evidence to suggest that the Account Agreement attached to the White Affidavit is untrustworthy.

Finally, plaintiff also questions White's use of the phrase "on or about" when discussing when plaintiff opened her account and Synchrony sent plaintiff the Account Agreement. However, White does not attest that she was personally involved in the opening of plaintiff's account or the mailing of the Account Agreement, so the Court does not find that the use of "on or about" language makes her affidavit untrustworthy. Moreover, the exact dates on which plaintiff opened her account and Synchrony sent plaintiff the Account Agreement are not material to the instant motion.

> whether to stay the balance of the proceedings pending arbitration.

Guyden v. Aetna, Inc., 544 F.3d 376, 382 (2d Cir. 2008) (quoting *Oldroyd v. Elmira Sav. Bank, FSB*, 134 F.3d 72, 75-76 (2d Cir. 1998), *abrogated on other grounds by Katz v. Cellco P'ship*, 794 F.3d 341 (2d Cir. 2015)). Whether the parties agreed to arbitrate—the only question at issue here[4]—is determined by state law. *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002) ("[W]hen deciding whether the parties agreed to arbitrate a certain matter (including arbitrability), courts generally . . . should apply ordinary state-law principles that govern the formation of contracts." (second alteration in original) (quoting *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995))).

2. Choice of Law

Here, the applicable state law is not clear from the parties' submissions. Defendants assert that, based on the choice-of-law provision in the Arbitration Provision, Utah state law applies. However, they argue that the Arbitration Provision is valid and enforceable under both Utah and New York state law and cite to cases applying both states' laws throughout their submissions. Plaintiff, on the other hand, relies on New York state law.

Although the Arbitration Provision contains a choice-of-law provision, this provision does not determine the relevant state law where, as here, the non-moving party challenges whether a valid agreement to arbitrate exists. *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 119 (2d Cir. 2012) ("Applying the choice-of-law clause to resolve the contract formation issue would presume the applicability of a provision before its adoption by the parties has been established."); *Pegasus Aviation IV, Inc. v. Aerolíneas Austral Chile, S.A.*, No. 08 Civ. 11371(NRB), 2012 WL 967301, at *5 (S.D.N.Y. Mar. 20, 2012) ("It would make little sense to resort to law simply because it was designated by a contract provision in order to determine whether that very contract is even operative."). Instead, the Court must engage in a choice-of-law analysis to determine which state law to apply.

Under New York's choice-of-law rules,[5] courts look to the "center of gravity" or "grouping of the contacts" in contract cases to determine which state law to apply. *Tri-State Emp't Servs., Inc. v. Mountbatten Sur. Co.*, 295 F.3d 256, 260-61 (2d Cir. 2002). Factors to be considered in determining "the most significant relationship to the transaction and the parties" include "the places of negotiation and performance; the location of the subject matter; and the domicile or place of business of the contracting parties." *Fieger v. Pitney Bowes Credit Corp.*, 251 F.3d 386, 394 (2d Cir. 2001) (quoting *Zurich Ins. Co. v. Shearson Lehman Hutton, Inc.*, 642 N.E.2d 1065, 1068 (N.Y. 1994)).

In applying these factors, the Court concludes that New York state law applies.

[4] Plaintiff does not dispute, and the Court likewise concludes, that plaintiff's claims fall within the scope of the Arbitration Provision and that FDCPA claims are arbitrable. *See Fedetov v. Peter T. Roach and Assocs., P.C.*, No. 03 Civ. 8823(CSH), 2006 WL 692002, at *3 (S.D.N.Y. Mar. 16, 2006) (finding similar arbitration provision encompassed plaintiff's FDCPA claims and collecting cases where "courts have found FDCPA claims to be appropriate for arbitration").

[5] Courts generally apply the choice-of-law rules of the forum state (here, New York), instead of federal common law, when determining the validity of a contract under state law in federal question cases. *See Klein v. ATP Flight Sch., LLP*, No. 14–CV–1522 (JFB)(GRB), 2014 WL 3013294, at *5 & n.3 (E.D.N.Y. July 3, 2014) (collecting cases).

Although the place of negotiation of the contract is unclear from the record, the Court accords this factor little weight given there likely was no negotiation surrounding the Account Agreement. *See Kulig v. Midland Funding, LLC*, No. 13 Civ. 4715(PKC), 2013 WL 6017444, at *4 (S.D.N.Y. Nov. 13, 2013) (finding this factor "carries little weight given the likely absence of any negotiation" of a credit card account contract). With respect to the performance and subject matter of the contract, plaintiff received the Account Agreement and account statements at her address of record in New York.[6] The final factor—the domicile or place of business of the parties to the contract—is neutral, given that Synchrony is headquartered in Utah (White Aff. ¶ 2) and plaintiff is a resident of New York (Compl. ¶ 5). Accordingly, because the performance and subject matter of the contract favor New York, the Court will apply New York state law.

3. Application

a. Defendants Have Standing to Compel Arbitration

Plaintiff contests defendants' standing to enforce the Arbitration Provision, claiming that that there is insufficient evidence to establish that defendants are assignees to plaintiff's account. The Court disagrees.

"Under New York law, an arbitration clause is generally held to apply to the assignee of a contract." *Zambrana v. Pressler and Pressler, LLP*, 16-CV-2907 (VEC), 2016 WL 7046820, at *5 (S.D.N.Y. Dec. 2, 2016) (quoting *Variblend Dual Dispensing Sys., LLC v. Seidel GmbH & Co., KG*, 970 F. Supp. 2d 157, 166 (S.D.N.Y. 2013)). Here, the Account Agreement states, in relevant part, that Synchrony "may sell, assign or transfer any or all of our rights or duties under this Agreement or your account, including our rights to payments." (White Aff. Ex. A at 5.) Accordingly, although not challenged by plaintiff, the Court determines that, under the Account Agreement and New York state law, an assignee has standing to enforce the Account Agreement and Arbitration Provision therein.

In addition, the Court also concludes that defendants have standing to enforce the Account Agreement as to plaintiff's account. Defendants submitted the White and Collins Affidavits that attach, among other things, the Bill of Sale, Affidavits of Sale, Account Agreement, and billing account statements for plaintiff's account, in order to show that defendants are entitled to enforce the Arbitration Provision.[7] Upon review of these materials, the Court determines that they demonstrate that defendants purchased plaintiff's account on or about October 20, 2015, and that MCM serviced plaintiff's account following the sale. (Collins Aff. ¶¶ 5-6, Exs. A, B; White Aff. ¶ 9.)

In response, plaintiff neither disputes that these records support that plaintiff's account was assigned to defendants nor submits any evidence of her own to contest this fact. Instead, plaintiff argues that, because these affidavits "appear to contain conflicting statements when compared to each other, there are questions of credibility of the declarants," providing a basis for the Court to deny defendants' motion. (ECF No. 15 at 12-13.) However, plaintiff does not identify any conflicting statements regarding the fact that plaintiff's account was sold to Midland Funding, and as discussed *supra*, plaintiff has

[6] It is unclear from the record where plaintiff used her Amazon.com credit card and/or made payments on her account. Although the Court does not consider these facts, it notes that there is no indication that plaintiff took any of these actions in Utah—instead, it is more likely that plaintiff made purchases and payments on her account in New York.

[7] As discussed *supra*, the Court concludes that these documents are admissible.

not shown that these records indicate a lack trustworthiness. In addition, plaintiff is also bound by her statement in her complaint that "[plaintiff's] debt was assigned or otherwise transferred to Defendants for collection."[8] (Compl. ¶ 17; *see also* Suppl. Corwin Decl. Ex. 3 at 3, 6 (identifying Midland Funding as an entity to be notified regarding plaintiff's "Synchrony Bank/Amazon" debt).) Accordingly, because plaintiff has failed to demonstrate that there is a disputed issue of fact as to whether plaintiff's account was assigned to defendants, defendants have standing to enforce the Arbitration Provision against plaintiff.[9]

b. A Valid Agreement to Arbitrate Exists

Plaintiff also argues that defendants have not shown that a valid agreement to arbitrate exists because defendants have neither established that there was an agreement to open a credit card account, nor that the Account Agreement was sent to plaintiff. Under New York law, "the party seeking to compel arbitration has the burden of demonstrating by a preponderance of the evidence the existence of an agreement to arbitrate." *Tellium, Inc. v. Corning Inc.*, No. 03 Civ. 8487(NRB), 2004 WL 307238, at *5 (S.D.N.Y. Feb. 13, 2004) (citing *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional De Venezuela*, 991 F.2d 42, 46 (2d Cir. 1993)). Defendants have met their burden here.

First, the uncontroverted evidence shows that plaintiff opened a credit card account. Plaintiff admits in her complaint and bankruptcy petition that she used the Amazon.com credit card, incurred a debt on the credit card, and thereafter fell behind on payments (Compl. ¶¶ 12-14; Suppl. Corwin Decl. Ex. 3 at 3, 6), and this evidence is corroborated by the account statements in the record (*see* White Aff. Exs. B, C). Plaintiff argues that defendants have failed to establish that there was an agreement to open a credit card account because the White Affidavit does not specify how plaintiff applied for the credit card. Plaintiff, however, does not cite, and the Court is not aware of, any case suggesting that a party must proffer the details regarding how an account holder applied for a credit card in order to establish that the credit account was actually opened. Plaintiff's argument, therefore, is unpersuasive.

Second, defendants have demonstrated that the Account Agreement was mailed to plaintiff. Under New York law, there is a rebuttable presumption that documents that are mailed are received by the addressee. *Mount Vernon Fire Ins. Co. v. E. Side Renaissance Assocs.*, 893 F. Supp. 242, 245 (S.D.N.Y. 1995) (collecting cases). "Proof of mailing may be established either by offering testimony of the person who actually mailed the letter or by showing that it was the regular office practice and procedure to mail such a letter." *Id.* at 245-46. The denial of receipt, alone, is insufficient to rebut this presumption. *Meckel v. Cont'l Res. Co.*, 758 F.2d 811, 817 (2d Cir. 1985). Instead, "[t]here must be-in addition to denial of receipt-some proof that the regular office practice was not followed or was carelessly executed so the presumption that notice was mailed becomes unreasonable." *Id.*

[8] "Plaintiff's admissions in h[er] . . . complaint constitute judicial admissions to this Court and [s]he is therefore bound by these statements throughout the action." *Marcario*, 2017 WL 4792238, at *4.

[9] Under the Arbitration Provision, Midland Funding also has standing to compel arbitration of claims against its affiliate, MCM. (*See* White Aff. Ex. A at 5 ("If either you or we make a demand for arbitration, you and we must arbitrate any dispute or claim between you . . . and us, our affiliates, agents and/or Amazon.com if it relates to your account.").)

Here, defendants submitted evidence that (i) at the time plaintiff's account was opened, "Synchrony had a regular procedure of mailing a letter via United States Postal Service containing the account number, and a copy of the credit card agreement that governed the account for each new Amazon cardholder" to the address of record for the cardholder (White Suppl. Aff. ¶ 4); (ii) pursuant to that procedure, Synchrony created a contemporaneous record to document the mailing (*id.*); (iii) Synchrony maintains a record of correspondence from cardholders, "including requests to reject or opt out of an arbitration provision" (White Aff. ¶ 8); (iv) Synchrony's records reflect that, on or about January 22, 2012, a letter containing the account number and a copy of the Account Agreement were mailed via the United States Postal Service to plaintiff at her address of record in New York (*id.* ¶ 5); (v) there is no record of plaintiff rejecting the Arbitration Provision (*id.* ¶ 8); and (vi) there is no record that the Account Agreement mailed to plaintiff was returned as undeliverable (*id.* ¶ 5). This is sufficient to establish that it was Synchrony's regular practice to send the Account Agreement to the account holder at their address of record.

Plaintiff, on the other hand, has submitted no evidence to rebut this presumption. Indeed, plaintiff does not even deny receiving the Account Agreement. Plaintiff has thus failed to present a genuine dispute of fact with respect to defendants' mailing procedures, and defendants therefore benefit from the presumption that plaintiff received the Account Agreement.

Third, plaintiff agreed to the terms in the Account Agreement. New York law is clear that "regular use of a credit card constitutes sufficient evidence of the card user's consent to the terms of the agreement governed by the account." *Bakon*, 2017 WL 2414639, at *2 (quoting *McCormick v. Citibank, NA*, 15-CV-46-JTC, 2016 WL 107911, at *4 (W.D.N.Y. Jan. 8, 2016)). As discussed *supra*, plaintiff admits, and the record demonstrates, that plaintiff used the Amazon.com credit card.

In sum, given the unrebutted evidence that plaintiff opened a credit card account, received the Account Agreement, and used the Amazon.com credit card, the Court concludes that that there was a valid agreement to arbitrate.

C. The Court Compels Arbitration on an Individual Basis

Defendants argue that arbitration must be compelled on an individual basis because plaintiff waived her right to participate in a class action in the Account Agreement. Plaintiff does not oppose this portion of defendants' motion.

As noted *supra*, the Arbitration Provision contains a Class Action Waiver that states, in relevant part, that "**YOU AGREE NOT TO PARTICIPATE IN A CLASS, REPRESENTATIVE OR PRIVATE ATTORNEY GENERAL ACTION AGAINST US IN COURT OR ARBITRATION**." (White Aff. Ex. A at 5.)[10] Supreme Court precedent dictates that this Class Action Waiver is enforceable. *See, e.g.*, *Italian Colors*, 570 U.S. at 238 (holding contractual waiver of class arbitration enforceable under the FAA even when plaintiff's cost of individually arbitrating a federal statutory claim exceeds potential recovery); *Concepcion*, 563 U.S. at 352 (FAA preempted a California judicial rule barring as unconscionable the enforcement of class-action waivers in consumer contracts);

[10] The Arbitration Provision further provides that any "dispute about the validity, enforceability, coverage or scope of th[e Arbitration Provision] or any part thereof," including the Class Action Waiver, shall be decided by the Court. (*Id.*)

see also Shetiwy v. Midland Credit Mgmt., 959 F. Supp. 2d 469, 474-75 (S.D.N.Y. 2013) (relying on same Supreme Court precedent in enforcing class action waivers with respect to FDCPA and RICO claims).[11] In light of this precedent, the Court holds that the Class Action Waiver in the Arbitration Provision must be enforced. Accordingly, because plaintiff waived her right to participate in a class in court or arbitration, the Court compels arbitration of plaintiff's claims on an individual basis and dismisses plaintiff's class action claims.

D. This Action is Stayed

Under the FAA, "the court 'shall' stay proceedings pending arbitration, provided . . . certain conditions are met." *Katz*, 794 F.3d at 345 (citing 9 U.S.C. § 3). The Second Circuit has held that this language "mandate[s] a stay of proceedings when all of the claims in an action have been referred to arbitration and a stay requested." *Id.* at 347. Accordingly, because the Court refers all of the remaining claims to arbitration, and because defendants have requested a stay, the Court stays the action pending arbitration.

IV. CONCLUSION

For the foregoing reasons, the Court grants defendants' motion to compel arbitration on an individual basis, dismisses plaintiff's class action claims, and stays plaintiff's remaining claims in favor of arbitration.

SO ORDERED.

[redacted]

JOSEPH F. BIANCO
United States District Judge

Dated: March 9, 2018
Central Islip, NY

* * *

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Defendants are represented by Ellen B. Silverman and Matthew B. Corwin of Hinshaw & Culbertson LLP, 800 Third Avenue, 13th Floor, New York, New York 10022.

[11] Class action waivers in arbitration agreements have also repeatedly been upheld against unconscionability challenges under New York law. *See, e.g.*, *Nayal v. HIP Network Servs. IPA, Inc.*, 620 F. Supp. 2d 566, 573 (S.D.N.Y. 2009) (collecting cases). In addition, class action waivers in consumer credit agreements are likewise permitted under Utah law. Utah Code Ann. § 70C-4-105 ("[A] creditor may contract with the debtor of an open-end consumer credit contract for a waiver by the debtor of the right to initiate or participate in a class action related to the open-end consumer credit contract.").