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

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| **SHERRY COOK, individually and as a class representative for all others similarly situated,**<br><br>**Plaintiff,**<br><br>**v.**<br><br>**NORTHSTAR LOCATION SERVICES, LLC,**<br><br>**Defendant.** | **CIVIL ACTION FILE**<br><br>**NO. 1:16-CV-4186-MHC-LTW** |

# ORDER

This action is before the Court on the Final Report and Recommendation of the Magistrate Judge [Doc. 32] recommending that Defendant's Motion to Compel Arbitration and Stay Action [Doc. 24] be granted and that other pending motions be denied as moot. The Order for Service of the R&R [Doc. 33] provided notice that, in accordance with 28 U.S.C. § 636(b)(1), the parties were authorized to file objections within fourteen (14) days of the receipt of that Order. No objections have been filed to the Report and Recommendation. Absent objection, the district court judge "may accept, reject, or modify, in whole or in part, the findings or

recommendations made by the magistrate judge," 28 U.S.C. § 636(b)(1) (2012), and "need only satisfy itself that there is no clear error on the face of the record" in order to accept the recommendation. FED. R. CIV. P. 72(b), advisory committee's note to 1983 amendment. The Court has reviewed the R&R and finds no clear error and that the R&R is supported by law.

The Court **APPROVES AND ADOPTS** the Report and Recommendation [Doc. 32] as the judgment of the Court. It is hereby **ORDERED** that Defendant's Motion to Compel Arbitration and Stay Action [Doc. 24] is **GRANTED**. It is further **ORDERED** that Plaintiff's Motion to Extend Time to File a Motion for Class Certification [Doc. 12], Plaintiff's Motion for Entry of a Scheduling Order [Doc. 23], and Defendant's Emergency Motion to Stay Discovery and Pretrial Deadlines pending Motion to Compel Arbitration and Stat Action [Doc. 25] are **DENIED AS MOOT**.

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 agreement in this case. 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 31st day of January, 2018.

Mark H. Cohen

MARK H. COHEN
United States District Judge

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

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| SHERRY COOK, individually and as a class representative for all others similarly situated, | ) |
| Plaintiff, | ) Civil Action No. ) 1:16-cv-04186-MHC-LTW |
| v. | ) |
| NORTHSTAR LOCATION SERVICES, LLC, | ) |
| Defendant. | ) |

**MAGISTRATE JUDGE'S ORDER AND REPORT AND RECOMMENDATION**

This matter is presently before the Court on multiple motions. Plaintiff Sherry Cook ("Plaintiff") filed a Motion to Extend Time to File Motion for Class Certification and a Motion for Entry of Scheduling Order. (Docs. 12, 23). Also before this Court are Defendant Northstar Location Services, LLC's ("Defendant") Motion to Compel Arbitration and Stay Action (Doc. 24) and Emergency Motion to Stay Discovery Pending Motion to Compel Arbitration and Stay Action (Doc. 25). As discussed below, this Court will treat Defendant's Motion to Compel Arbitration and Stay Action as a response to Plaintiff's Motions. For the reasons outlined below, Plaintiff's Motion to Extend Time to File a Motion for Class Certification (Doc. 12) and Plaintiff's Motion for Entry of Scheduling Order (Doc. 23) are **DENIED as MOOT**. This Court **RECOMMENDS** that Defendant's Motion to Compel Arbitration and Stay Action be

**GRANTED**. (Doc. 24). Accordingly, Defendant's Emergency Motion to Stay Discovery Pending Motion to Compel Arbitration is **DENIED as MOOT**. (Doc. 25).

**DEFENDANT'S MOTION TO COMPEL ARBITRATION**

Plaintiff filed the instant action against Defendant on November 8, 2016, and amended her Complaint on November 30, 2016. (Doc. 1). In Plaintiff's Amended Complaint, she alleges, on behalf of herself and all others similarly situated, that Defendant violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. ("FDCPA") and Georgia's Fair Business Practices Act, O.C.G.A. § 10-1-391 et seq. ("FBPA"). (Id.). On February 6, 2017, the parties filed a Joint Preliminary Report and Discovery Plan ("the Plan"). (Doc. 10). In the Plan, Plaintiff indicated that she would be moving for class certification. (Doc. 10, at 2). Defendant alleged Plaintiff's claims were subject to a binding arbitration agreement and that Plaintiff waived her class claims in the same agreement. (Doc. 10, at 2). Additionally, Defendant indicated that it would file a motion to compel arbitration, and requested that discovery be limited to the issue of whether there was a binding arbitration agreement. (Doc. 10, at 2).

On March 20, 2017, Plaintiff filed a Motion for an Extension of Time to File a Motion for Class Certification, requesting that the Court extend the time for Plaintiff to certify her action as a class action beyond the ninety days granted by Local Rule 23.1. (Doc. 12). On May 1, 2017, Plaintiff filed a Motion for Order, requesting that the Court enter a Scheduling Order for the Parties. (Doc. 23). Defendant did not respond to Plaintiff's motions, instead, Defendant filed a Motion to Compel Arbitration and Stay

Action on May 4, 2017. (Doc. 24).[1] Therein, Defendant seeks to invoke its right to elect arbitration of Plaintiff's claims pursuant to the Parties' Credit Card Account Agreement ("Agreement"), which contains an arbitration clause. (Id.). Defendant also contends that the Credit Card Account Agreement prohibits Plaintiff from asserting classwide claims and requests that this action be stayed pending arbitration. (Id.). On May 9, 2017, Defendant filed an Emergency Motion seeking to stay discovery and pretrial deadlines pending the Court's ruling on the Motion to Compel Arbitration. (Doc. 25).

In response, Plaintiff contends that there is not an enforceable arbitration agreement between the Parties. (Doc. 28). Plaintiff avers that Defendant is not a party to the Agreement, and thus cannot enforce the arbitration clause contained therein. (Id.). Plaintiff also contends that the Agreement is illusory, and therefore the Agreement and the arbitration clause contained therein is not enforceable. (Id.). Even if a valid arbitration agreement is found to exist, Plaintiff contends that Defendant has waived its right to compel arbitration by delaying its filing of a motion to compel arbitration. (Id.). Plaintiff requests limited discovery regarding the enforceability of the Agreement. (Id.).

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[1] This Court notes that Defendant did not respond to Plaintiff's Motion to Extend Time to File Motion for Class Certification and Plaintiff's Motion for Entry of a Scheduling Order. Instead, Defendant's subsequent document is framed as an independent motion, not a response. Under Local Rule 7, if the deadline for a response to a motion passes without a response being filed, the motion is deemed unopposed. See Local Rule 7.1(B). The Court could, therefore, deem Plaintiff's Motions unopposed. This Court will, however, construe Defendant's Motion to Compel Arbitration and Stay Action as a response to Plaintiff's Motions, and Defendants' arguments contained in the brief will be discussed *infra*.

In Defendant's Reply, Defendant argues it has proven the existence of the Agreement, and thereby, the arbitration agreement. (Doc. 31). Secondly, Defendant asserts that there was a valid assignment of Plaintiff's account from Barclays to Defendant and Defendant attached a Declaration and a copy of the Assignment as proof. (Id.). Third, Defendant argues that the language contained in the Agreement is standard language and has not been deemed illusory by any Georgia Court. (Id.). Lastly, Defendant avers that it has not waived its right to arbitration as it has not invoked the "litigation machinery." (Id.).

## I. STATEMENT OF FACTS

Plaintiff opened a L.L. Bean VISA credit card issued by the Barclays Bank Delaware ("Barclays") around July 12, 2008. (Doc. 24-1, at 2). Barclays mailed Plaintiff her credit card, along with the Agreement. (Doc. 24-1, at 2). The Agreement includes a section entitled "Arbitration." (Affidavit of Michael D. Roberts ("Roberts Aff."), Ex. 1). The arbitration clause states, in relevant part:

> Any claim, dispute or controversy ("Claim") by either of you or us against the other, or against employees, agents, or assigns of the other, arising from or relating in any way to this Agreement or your Account, or any transaction on your Account including (without limitation) Claims based on contract, tort (including personal torts), fraud, agency, negligence, statutory or regulatory provisions or any other source of law and Claims regarding the applicability of this arbitration clause or the validity of the entire Agreement, shall be resolved exclusively and finally binding arbitration under the rules and procedures of the arbitration Administrator selected at the time the claim is filed.

(Roberts Aff., Ex. 1, "Arbitration"). The Agreement also defines the parties covered by

it:

> For the purposes of this provision, "you" includes any authorized user on the Account, agents, beneficiaries or assign of you; and "we" or "us" includes our employees, parents, subsidiaries, affiliates, beneficiaries, agents, or assigns.

(Roberts Aff., Ex. 1, "Definitions"). The Agreement has a clear prohibition against a cardmember pursing claims as a class:

> Claims made and remedies sought as part of a class action, private attorney general or other representative action are subject to arbitration on an individual basis, not on a class or representative basis.

(Roberts Aff., Ex. 1, "Arbitration"). The Agreement gives Barclays broad power regarding the modification of the Agreement:

> We can at any time change this Agreement, including the annual percentage rate and any fees, and can add or delete provisions relating to your Account or to the nature, extent, and enforcement of the rights and obligations you or we may have under this agreement.

(Roberts Aff., Ex. 1 "Changes in This Agreement"). Plaintiff used the card and later defaulted on payment obligations on the account. (Roberts Aff. ¶¶ 9-11).

Around April 6, 2009, Barclays entered into a Collection Services Agreement ("Assignment") with Defendant whereby Barclays agreed to assign certain credit card accounts to Northstar. (See Declaration of Aaron Castlevetere ("Castlevetere Decl.") ¶ 3, Exs. 1-2). The Assignment states, in pertinent part,

> This Collection Services Agreement, dated as of April 6, 2009, is by and between NORTHSTAR COLLECTION SERVICES, LLC, a New York limited liability company, having a place of business at 4285 Genesee Street, Cheektowaga, New York 14225 ("Supplier") and Barclays BANK DELAWARE, a state chartered bank, having a place of business at 100 S.

> West Street, Wilmington, DE 19801 ("Bank") for an on behalf of its Affiliates. Each Supplier and Bank, individually a "Party"; collectively, the "Parties".

(Castlevetere Decl., Ex. 1).

Around August 2, 2016, Plaintiff's account was assigned to Defendant after Plaintiff defaulted on her account. (Castlevetere Decl. ¶ 3, Ex. 2). Defendant then began its efforts to collect the amount owed from Plaintiff. (Doc. 24-1 at 3). In this case, Plaintiff contends that Defendant violated the FDCPA and FBPA with its debt collection practices, and seeks to establish the instant suit as a class action. (See generally, Doc. 1). Defendant argues that per the Agreement, Plaintiff must arbitrate her claims and cannot establish a class action. (See generally, Doc. 24).

## II. LEGAL ANALYSIS

The Federal Arbitration Act ("FAA"), 9 U.S.C. ¶ 1 et seq., was enacted in 1925 "to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991) (citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219-220 & n.6 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974)). Section 2, in particular, has been recognized as "a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). Section 2 provides that a

"written [arbitration] provision in any . . . contract evidencing a transaction involving 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.

Ordinarily, if a lawsuit or proceeding brought in a district court is referable to arbitration pursuant to an arbitration agreement, the court, upon application of one of the parties, must stay the proceedings pending the outcome of the arbitration. See 9 U.S.C. § 3. If a party, who is bound by an arbitration agreement refuses to arbitrate, the party aggrieved by such failure may petition the court for an order directing the parties to proceed to arbitration. See 9 U.S.C. § 4. Before directing the parties to arbitration, however, the district court must be "satisfied that the making of the agreement for arbitration . . . is not in issue." 9 U.S.C. § 4. "It is, therefore, rudimentary that 'the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate that dispute.'" Wheat, First Secs. Inc. v. Green, 993 F.2d 814, 817 (11th Cir. 1993) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985)). Notwithstanding the strong federal policy favoring arbitration, "parties cannot be forced to submit to arbitration if they have not agreed to do so." Chastain v. Robinson- Humphrey Co., 957 F.2d 851, 854 (11th Cir. 1992) (citing Volt Info. Sci., Inc. v. Bd. of Trs., 489 U.S. 468, 478 (1989); Goldberg v. Bear, Stearns & Co., 912 F.2d 1418, 1419 (11th Cir. 1990) (per curiam)); see also Wheat, First Secs., Inc., 993 F.2d at 817.

When an arbitration clause exists in a contract admittedly signed by both parties,

there is usually a presumption that arbitration is required. Chastain, 957 F.2d at 854. In these instances, "the making of the arbitration agreement *itself* is rarely in issue [because] the parties have signed a contract containing an arbitration provision, [and therefore,] the district court usually must compel arbitration immediately after one of the contractual parties so requests." Id. (emphasis in original) (citing Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1967)); see also 9 U.S.C. § 4 ("The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration . . . is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement."). On the other hand, when the party seeking to enforce or avoid the arbitration agreement has not signed the agreement, whether an a valid agreement exists is an issue for the court to decide. See Chastain, 957 F.2d at 854 ("The calculus changes when it is undisputed that the party seeking to avoid arbitration has not signed any contract requiring arbitration. In such a case, that party is challenging the very existence of *any* agreement, *including the existence of an agreement to arbitrate)* (emphasis in original); Magnolia Capital Advisors, Inc. v. Bear Stearns & Co., 272 F. App'x 782, 785 (11th Cir. 2008) ("Because it is well established that 'parties cannot be forced to submit to arbitration if they have not agreed to do so,' a district court, rather than a panel of arbitrators, must decide whether a challenged agreement to arbitrate is enforceable against the parties in question." (quoting Chastain, 957 F.2d at 854)); Cont'l Cas. Co. v. Staffing Concepts, Inc., No. 8:09-CV-02036-T-23, 2011 WL 7459781, at *10 (M.D. Fla. Dec. 20, 2011),

R&R adopted, No. 8:09-CV-2036-T-23AEP, 2012 WL 715652 (M.D. Fla. Mar. 5, 2012)("[A]ny power that an arbitrator has to resolve the dispute must find its source in a real agreement between the parties.").

A party seeking to avoid arbitration "must unequivocally deny that an agreement to arbitrate has been reached and must offer some evidence to substantiate the denial." Magnolia, 272 F. App'x at 785 (citing Chastain, 957 F.2d at 854). In assessing whether there is a valid agreement to arbitrate, the Court generally looks to Georgia state law to determine whether an agreement to arbitrate was formed between a plaintiff and defendant. See Lambert v. Austin Ind., 544 F.3d 1192, 1195 (11th Cir. 2008) (assessing whether the contract containing the arbitration clause is valid under Georgia law); Cox v. Midland Funding, LLC, No. 1:14-CV-1576-LMM-JSA, 2015 WL 12862931, at *7 (N.D. Ga. June 11, 2015) ("In determining whether the parties had a valid contract that included an arbitration agreement, the Court generally looks to Georgia state law to determine whether an agreement to arbitrate was formed between a plaintiff and defendant."). Under Georgia law, a contract is valid if there is "(a) a definite offer and (b) complete acceptance (c) for consideration." Anderson v. Am. Gen. Ins., 688 F. App'x 667, 669 (11th Cir. 2017) (quoting Lambert, 544 F.3d at 1195). One may assign to another its contractual rights, but that assignment must be in writing to be enforceable by the assignee. LSREF2 Baron, LLC v. Alexander SRP Apts., LLC, 17 F. Supp. 3d 1289 (N.D. Ga. 2014) (quoting Hutto v. CACV of Colorado, LLC, 308 Ga. App. 469, 471 (2014)).

Here, Plaintiff argues Defendant is not a valid assignee of the Agreement, and therefore, Defendant cannot enforce the arbitration clause contained therein. (See Doc. 28, at 6-8). Thus, Plaintiff has unequivocally denied that she reached an agreement to arbitrate with Defendant. Next, this Court must decide whether Plaintiff has presented "some evidence" to substantiate her denial.

Plaintiff does not submit affirmative evidence to substantiate her denial, rather she asserts that Defendant has not proven that a valid assignment exists. The Eleventh Circuit has applied the summary judgment standard in deciding what is sufficient evidence to require a trial on the issue of whether there was an agreement to arbitrate. See Magnolia, 272 F. App'x at 785-86 ("[W]e agree that 'only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement.'"). Therefore, a district court considering the making of an agreement to arbitrate "should give to the [party denying the agreement] the benefit of all reasonable doubts and inferences that may arise." Id. at 786 (quoting Par-Knit Mills, Inc. v. Stockbridge Fabrics Co., 636 F.2d 51, 54 n.9 (3d Cir. 1980)). Further, "the moving party must show that, on all the essential elements of its case on which it hears the burden of proof at trial, no reasonable jury could find for the nonmoving party." United States v. Four Parcels of Real Prop. In Greene & Tuscaloosa Ctys in State of Ala., 941 F.2d 1428, 1438 (11th Cir. 1991).

In this case, Defendant has submitted sufficient evidence to show that there was a valid contract between Barclays and Plaintiff. Defendant has presented the Affidavit

of Michael D. Roberts, an Assistant Vice President in the Operations Department of Barclays, in which he states that Plaintiff opened an account with Barclays around July 12, 2008. (See Roberts Aff. ¶ 3). The Affidavit also indicates that Plaintiff was mailed a copy of the Agreement at the same time she was mailed her credit card. (See Roberts Aff. ¶ 5). The Agreement is dated "5/2008" and indicates that "[b]y signing, keeping, or using your Card or Account, you agree to the terms and conditions of this Agreement." (Roberts Aff., Ex. 1). The record is clear that Barclays offered an account to Plaintiff via the Agreement, Plaintiff was aware of the terms of the Agreement, and she agreed with those terms, as evidenced by her use. Indeed, Plaintiff does not argue that the Agreement is not valid, that she did not receive it, or that she was unaware of its terms (including the arbitration agreement). Therefore, Defendant has proven that the Agreement between Plaintiff and Barclays is a valid contract. See (Cox, No. 1:14-CV-1576-LMM-JSA, 2015 WL 12862931 at *8 ("[T]he issue is not simply whether [assignor's] file contains a document containing an arbitration clause. The Court must look to whether Defendants have produced evidence affirmatively suggesting that Plaintiff assented to or was even aware of [the arbitration clause] during the relevant time."); Benedict v. State Farm Bank, FSB, 309 Ga. App. 133, 139-40, (2011) (finding that "the evidence was enough" to show that there was a valid agreement between the plaintiff and the defendant when the record included: (1) a copy of the defendant's standard cardholder agreement containing the mandatory arbitration clause, (2) evidence that showed that it was the defendant's customary business practice to send

the agreement to all customers along with the credit card, (3) evidence that showed that the plaintiff subsequently activated and used the card after receiving the agreement, and (4) admission by the plaintiff that he was aware of some of the credit card terms); Davis v. Discover Bank, 277 Ga. App. 864 (2006) ("A contract was effected . . . when the plaintiff issued its credit card to the defendant to be accepted by him in accordance with the terms and conditions therein set forth, or at his option be rejected by him . . . The issuance of the card to the defendant amounted to a mere offer on the plaintiff's part, and the contract became entire when defendant retained the card and thereafter made use of it.") (quoting Read v. Gulf Oil Corp., 114 Ga. App. 21, 22 (1966)).

Next, this Court must decide whether Defendant sufficiently proved an assignment of Plaintiff's account from Barclays to Defendant. With its Reply Brief, Defendant attached the Declaration of Aaron Castlevetere, a Chief Operating Officer within Defendant's company. Castlevetere states that "on or around" April 6, 2009, Barclays and Defendant entered into the Assignment whereby Barclays agreed to assign credit card accounts to Defendant. (Castlevetere Dec.¶ 3 ). Attached to Castlevetere Declaration is a "true and correct redacted copy" of the Assignment. (Castlevetere Dec.¶ 4). Castlevetere further explains that Plaintiff's account was assigned from Barclays to Defendant around August 2, 2016, and Defendant's internal business record is attached to the Declaration to substantiate Castlevetere's claim. (Castlevetere Dec. ¶ 10, Ex. 2). Thus, Defendant has sufficiently shown that there is a valid assignment of Plaintiff's account from Barclays to Defendant. See LSREF2 Baron, 17 F.Supp at 1305 (assignee

must show a valid assignment of contract rights in writing); Wirth v. Cach, LLC, 300 Ga. App. 488, 489 (2009) (For a contract right to be enforceable, the assignment must be in writing and identify the assignor and assignee); Hosch v. Colonial Pac. Leasing Corp., 313 Ga. App. 873, 874 (2012) (finding that the plaintiff's contention that the defendant was not a valid assignee was refuted by the record including affidavits of the assignor's litigation specialist, a written assignment, other documents establishing that the plaintiff's loans were assigned to the defendant, and no contradictory evidence presented by the plaintiff); but cf. Hutto, 308 Ga. App. at 471-72 (finding that the evidence of assignment was insufficient when the assignee failed to authenticate the bill of sale with a supporting affidavit, the documents did not show a specific assignment of the plaintiff's account, and the bill of sale contradicted the affidavit of one of assignee's witnesses). Consequently, Defendant's valid assignment from Barclays enables Defendant to enforce the arbitration clause contained in the Agreement against Plaintiff. See First State Bank of Nw. Arkansas v. McClelland Qualified Pers. Residence Tr., No. 5:14-CV-130 MTT, 2014 WL 6801803, at *6 (M.D. Ga. Dec. 2, 2014) ("Georgia law is clear: an assignee 'stands in the shoes' of the assignor . . . the rights of an assignee 'are neither enhanced or diminished by assignment.'") (quoting S. Telecom, Inc. v. TW Telecom of Ga. L.P., 321 Ga. App. 110, 114 (2013).

Next, Plaintiff argues the assignment is not valid because the Agreement is illusory, and is therefore, unenforceable. Plaintiff states that "Changes in this Agreement" section of the Agreement gives Defendant the "power to unilaterally re-

write the Agreement without notice." In pertinent part, this section of the Agreement states that

> We can at any time change this Agreement, including the annual percentage rate and any fees, and can add or delete provisions relating to your Account or to the nature, extent, and enforcement of the rights and obligations you or we may have under this agreement.

(Roberts Aff., Ex. 1, "Changes in This Agreement").

Plaintiff's argument fails because she is challenging the contract as a whole, not the arbitration clause itself. In Prima Paint Corp v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967), the Supreme Court held that an arbitrator, not the court, is to decide issues challenging the enforceablity of the contract as a whole. See Prima Paint, 388 U.S. at 402-404; see also Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 445-46 (2006) (stating that Prima Paint stood for the proposition that an arbitration provision is severable from the remainder of the contract and unless the challenge is to the arbitration clause itself, the issue of a contract's validity is to be first considered by the arbitrator). Therefore, it is inappropriate for this Court to decide whether the Agreement itself is illusory.

Lastly, Plaintiff contends that even if the arbitration agreement is enforceable, Defendant has waived its right to enforce it because Defendant waited three months to submit its Motion to Compel Arbitration and Stay Action after it stated its intention to file such in the Joint Preliminary Report and Plan ("the Plan"). Plaintiff avers that she has been prejudiced by Defendant's delay in filing the motion to compel because she

delayed submitting discovery to Defendant.

The Eleventh Circuit applies a two part test to determine whether a party has waived its right to arbitration. First, the Court looks to see whether, "under the totality of circumstances, the party has acted inconsistently with the arbitration right." Garcia v. Wachovia Corp., 699 F.3d 1273, 1277 (11th Cir. 2012) (quoting Ivax Corp. v. B. Braun of Am., Inc., 286 F.3d 1309, 1315-16 (11th Cir. 2002). A party acts inconsistently with that right when the party "substantially invokes the litigation machinery" before demanding arbitration. S&H Contractors, Inc. v. A.J. Taft Coal Co., 906 F.2d 1507, 1514 (11th Cir. 1990). Secondly, the Court assesses whether that party has prejudiced the opposing party by acting inconsistently with that right. Ivan Corp., 286 F.3d at 1316. The Court may consider the length of delay in demanding arbitration and the expense incurred by the opposing party from participating in litigation. S & H Contractors, 906 F.2d at 1514.

In this case, Plaintiff concedes that Defendant has not invoked the "litigation machinery". (See Doc. 28, at 5). Therefore, Plaintiff's only contention to show that Defendant has acted inconsistently with the right to arbitrate is the fact that Defendant waited three months to file a motion to compel. Plaintiff cites no law to show that waiting for such a short period to file a motion to compel indicates that a defendant has acted inconsistently with its right to arbitrate. Indeed, Plaintiff admits that Defendant stated in the Plan that Defendant intended to file a motion to compel arbitration, thereby placing Plaintiff on notice that the motion was forthcoming. (See Doc. 28, at 5). The

Plan was submitted on February 6, 2017, just seven weeks after Defendant filed its Answer to Plaintiff's Complaint. (See Docs. 10, 6). Therefore, this Court cannot say that Defendant acted in a manner inconsistent with its right to arbitrate. Furthermore, there is no indication that Plaintiff has suffered any real prejudice by the three-month delay.[2]

## III. CONCLUSION

Based on the foregoing reasons, Plaintiff's Motion to Extend Time to File a Motion for Class Certification and Plaintiff's Motion for Entry of Scheduling Order are **DENIED as MOOT**. (Docs. 12, 23). This Court **RECOMMENDS** that Defendant Northstar Location Services, LLC's Motion to Compel Arbitration and Stay Action be **GRANTED**. (Doc. 24). Accordingly, Defendant's Emergency Motion to Stay Discovery and Pretrial Deadlines Pending Motion to Compel Arbitration and Stay Action is **DENIED** as **MOOT**. (Doc. 25).

**SO REPORTED AND RECOMMENDED** this 12 day of January, 2018.

Linda T. Walker

LINDA T. WALKER
UNITED STATES MAGISTRATE JUDGE

[2] Plaintiff argues she was prejudiced by the three-month delay because she waited "for several months" to serve Defendant with her discovery requests. (See Doc. 28, at 6). However, Plaintiff does not indicate how she was prejudiced or whether she incurred additional litigation expenses as a result of waiting to serve the discovery requests.