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

CAROLE DOOLEY, Plaintiff, v. FEDERATED LAW GROUP, PLLC and BRYAN MANNO, Defendants.	CIVIL ACTION FILE NO. 1:16-CV-4703-SCJ

ORDER

This matter is before the Court for consideration of the Final Report and Recommendation of Magistrate Judge Catherine M. Salinas [Doc. No. 59], to which no objections have been filed. After reviewing the Report & Recommendation, it is received with approval and **ADOPTED** as the Opinion and Order of this Court.

Accordingly, Defendants' Motion to Compel Arbitration [Doc. No. 47] is **GRANTED**. Because additional proceedings may not be necessary in this Court, it is further **ORDERED** that this case be **administratively closed by the Clerk**. Should additional proceedings become necessary, any party may file a motion to reopen.

IT IS SO ORDERED, this 12th day of February, 2018.

s/Steve C. Jones
STEVE C. JONES
UNITED STATES DISTRICT JUDGE

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FINAL REPORT AND RECOMMENDATION

This Fair Debt Collection Practices Act ("FDCPA") case and putative class action is before the Court on Defendants' Motion to Compel Arbitration. (Doc. 47). For the reasons discussed below, I **RECOMMEND** that Defendants' motion be **GRANTED** and that this action be **STAYED** pending arbitration between the parties.

I. BACKGROUND

In February 2011, First National Bank of Omaha ("FNBO") issued a VISA credit card to Plaintiff bearing an account number ending in -6767 (the "Account"). (Doc. 47-2, Affidavit of Scot Mayo ["Mayo Aff."] at 2 ¶ 3). FNBO's records custodian Scot Mayo ("Mayo") avers that on February 14, 2011, the physical credit card was mailed to plaintiff Carole L. Dooley ("Plaintiff" or "Dooley") at 1740 Rolling Hills Trl SE, Conyers, Georgia, 30094-2595, along with a copy of the Card Member Agreement ("CMA") governing the Account. (Id. ¶ 4; Doc. 47-2 at 7-20 (CMA)). Mayo avers that

neither the physical credit card nor the CMA were ever returned to FNBO as undeliverable. (Mayo Aff. ¶ 5).

The CMA provides that, "Using or allowing someone else to use your account means you accept the terms of the Agreement." (Doc. 47-2 at 8). Following FNBO's mailing of the card to Plaintiff, charges were made on the Account, as reflected in the billing statements attached to Mayo's Affidavit as Exhibit 2. (Mayo Aff. ¶ 6; Doc. 47-2 at 22-66).

The CMA contains an arbitration provision ("Arbitration Provision"), which states in relevant part:

> **THIS CONTRACT CONTAINS AN ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES. PLEASE READ THE FOLLOWING PARAGRAPHS CAREFULLY:**
>
> **WITH LIMITED EXCEPTIONS, THIS ARBITRATION PROVISION ALLOWS EITHER PARTY TO REQUIRE THAT ANY "CLAIM (AS DEFINED ABOVE" BE RESOLVED BY BINDING ARBITRATION.**
>
> **ARBITRATION REPLACES THE RIGHT TO GO TO COURT AND TO HAVE A CLAIM DETERMINED BY A JURY. OTHER RIGHTS YOU MAY HAVE IN COURT, SUCH AS DISCOVERY OR APPEAL RIGHTS, MAY NOT BE AVAILABLE OR MAY BE MORE LIMITED IN ARBITRATION. EXCEPT AS PROVIDED BELOW, THOSE OTHER RIGHTS ARE WAIVED.**

> **YOU WILL NOT BE ABLE TO DO THESE TWO THINGS (IN COURT OR IN ARBITRATION): (1) BRING A CLAIM AS A CLASS ACTION OR IN A REPRESENTATIVE CAPACITY; OR (2) PARTICIPATE IN A CLAIM AS A CLASS MEMBER.**
>
> Except as provided below: (1) you may unilaterally choose to have any Claim that we bring against you resolved through binding arbitration; and (2) we may unilaterally choose to have any Claim that you bring against us (or us and any of Our Related Parties) resolved through binding arbitration. If you assert a Claim against any of Our Related Parties, but you do not also assert that Claim against us, the Related Party (or whoever will be defending the Related Party) may unilaterally choose to have that Claim resolved through binding arbitration. ... **If a party chooses to have a Claim resolved by arbitration pursuant to this arbitration provision, neither you nor we will have the right to litigate that Claim in court, have a jury trial on that Claim, or engage in pre-arbitration discovery, except as provided for in the applicable Arbitration Rules of the selected Arbitrator(s) and as otherwise set forth in this arbitration provision.**

(Doc. 47-2 at 17). In the CMA, the terms "we," us," and "our" are defined as meaning "First Bankcard (a division of First National Bank of Omaha)." (Id. at 8). The words "you" and "your" mean each person named on the application for the Account and anyone else who uses the Account in any way. (Id.).

The CMA defines a "Claim" broadly:

> When this Agreement refers to a "Claim" it means any pre-existing, present or future claim, dispute or controversy that arises from or in any way relates to: (a) this Agreement, any prior Cardmember Agreement, your credit card account, the credit we offer or deny to you in connection with your credit card account ... ; or (b) the acts or omissions of you, of us, or of Related Parties if those acts or omissions affect or relate to your credit card account .... Claims include, but are not limited to, claims based on contract and tort (including intentional torts), claims made in law or in equity, claims based on constitutional, statutory, regulatory and common law rights, and claims for damages, penalties and injunctive, declaratory or equitable relief.
> ...
>
> References to "Our Related Parties" in this Agreement includes affiliated third parties such as our parent, subsidiaries, and affiliates and our and their officers, directors, agents, employees, representatives, successors and assigns.

(Id. at 16). Under "Limitations on Claims," the CMA prohibits class actions:

> You and we both agree, to the fullest extent allowed by law, that: (i) Claims will not under any circumstances be pursued in Class Proceedings; (ii) we waive the right to bring or to participate in Class Proceedings against you; and (iii) you waive the right to bring or to participate in Class Proceedings against us. If some other person initiates a Class Proceeding against you, we may not join that proceeding or participate as a member of that class. If some other person initiates a Class Proceeding against us, you may not join that proceeding or participate as a member of that class. This paragraph is referred to below as the "Class Action Waiver."

(Id. at 17). "Class Proceedings" is defined as "Any Claim or Claims brought by or on

behalf of a class, brought in a representative capacity or otherwise on a class basis, or brought in the form of a private attorney general action ... regardless of whether they are commenced in court or in arbitration." (Id. at 16).

Also relevant to Defendants' motion to compel arbitration is the section of the CMA addressing transfers of the Account:

> *This section explains how we may transfer your account and our rights to other parties. ...*
>
> ***TRANSFERS:*** We may transfer all or part of your account balance, along with our rights under this Agreement, to another person or entity. That person or entity will then be entitled to enforce our rights under this Agreement. You may not transfer your rights or obligations under this Agreement.

(Id. at 15).

Defendants have submitted billing statements indicating that by the end of 2011, Plaintiff was falling behind in her credit card payments. Starting in or about January 2012, Plaintiff's Account became past due. (Doc. 47-2 at 38). By March 2012, Plaintiff had stopped making monthly payments, and her balance due exceeded her credit limit of $1500.00 (including all late fees and interest charged). (Id. at 32). By August 2012, Plaintiff's overdue Account balance was $1,707.45. (Id. at 22).

According to Defendants, on or about April 16, 2013, FNBO sold a pool of charged-off credit card accounts, including Plaintiff's Account, to CACH, LLC,

pursuant to a Purchase and Sale Agreement and Bill of Sale. (See Mayo Aff. ¶ 8; Doc. 47-2 at 68, Bill of Sale ["First National Bank of Omaha (the "Seller") ... hereby sells, assigns, and transfers to [CACH, LLC (the "Buyer")] "all of the Seller's right, title and interest in each and every one of the Accounts and related Receivables identified in the Receivables Data File."]; Doc. 17-2, Declaration of Yekaterina Livits, custodian of records for CACH, LLC ["Livits Decl."], ¶¶ 9-11; Doc. 17-3, Purchase and Sale Agreement). Defendants contend that as a result of that transaction, CACH, LLC (hereinafter "CACH") stepped into the shoes of FNBO and acquired all rights, title, and interest in Plaintiff's credit card Account. (Doc. 47-1 at 4; Mayo Aff. ¶ 8).

Mayo avers that as part of the sale of accounts to CACH, FNBO transferred electronic records and other records pertaining to the individual accounts to CACH, including a database identifying all of the purchased accounts and information pertaining to each such account, including Plaintiff's Account information. (Mayo Aff. ¶ 9). With regard to Plaintiff's Account, the transferred information included the account number (-6767), tax ID number of the cardholder, the loan type (VISA), the name of the cardholder, the address for the cardholder, the cardholder's home and work phone numbers, date of birth, charge off amount, account balance ($1,707.45), last payment date, the original contract date, and the Card Member Agreement code (FBC310). (Id.; Doc. 47-2 at 69-71).

On November 4, 2015, CACH, represented by the law firm Federated Law Group, PLLC ("Federated"), filed a lawsuit against Plaintiff in the State Court of Rockdale County, Georgia, seeking to collect on Plaintiff's delinquent FNBO credit card balance of $1,707.45, plus interest and costs. (Doc. 17-5 at 3-6, "State Court Action"). In the State Court Action, CACH alleged that it had purchased Plaintiff's VISA card account from the original creditor, FNBO, and attached to the complaint a copy of the Bill of Sale from FNBO to CACH purporting to document CACH's acquisition of Plaintiff's charged-off account from FNBO. (Id. at 3). Although Federated attempted to serve the complaint on Plaintiff, its efforts were unsuccessful, and a sheriff's entry of no service was filed in the State Court Action on December 3, 2015. (Doc. 37, Pl.'s Second Amended Complaint, ¶¶ 14-16).

In early March 2016, Federated sent Plaintiff a collection letter inviting Plaintiff to resolve the debt "out of court," offering a payment plan of three monthly payments of $1,411.10 for "full and final settlement," and setting forth the following information:

> Creditor: CACH, LLC
> Original Creditor: FIRST NATIONAL BANK OF OMAHA
> Awarded Judgment: $1,707.45

(See id. ¶¶ 16-24; Doc. 37 at 25). Plaintiff alleges that on April 14, 2016, Federated filed a dismissal without prejudice of the lawsuit that it had filed on behalf of CACH

in the State Court Action and mailed Plaintiff a copy of the dismissal. (Sec. Am. Compl. ¶ 27).

On December 22, 2016, Plaintiff filed her original class action complaint in this Court against CACH, its parent, SquareTwo Financial Corporation, Federated, and Bryan Manno, the manager and supervising attorney of Federated. (Doc. 1, Compl.). Among other things, Plaintiff's Complaint alleges that all four defendants are "debt collectors" as defined in the FDCPA, and that they violated sections 1692e and 1692f of the FDCPA and Georgia common law when Federated sent the March 2016 collection letter to Plaintiff because (1) the letter implied a judgment had been obtained when in fact it had not; (2) the letter suggested an out of court resolution was possible when a complaint had already been filed in the State Court Action; and (3) the letter offered a repayment plan that far exceeded the balance of the overdue debt. (Compl. ¶¶ 32-90).

On February 8, 2017, all four defendants filed a joint motion to compel arbitration, moving the Court for an order compelling Plaintiff to arbitrate her individual claims and to stay this action pursuant to the CMA. (Doc. 17).

On March 1, 2017, Plaintiff filed a First Amended Complaint against all defendants. (Doc. 22, First Am. Compl.).

On March 31, 2017, CACH and SquareTwo Financial Corporation (collectively, the "SquareTwo Defendants") filed a suggestion of bankruptcy in this case, notifying this Court that they had filed a voluntary petition for relief under Chapter 11 in the U.S. Bankruptcy Court for the Southern District of New York, Case Nos. 17-10663 and 17-10659, jointly administered under In re SquareTwo Financial Services Corporation, et al., Case No. 17-10659. (Doc. 31).

On April 11, 2017, the undersigned stayed Plaintiff's claims against the SquareTwo Defendants pending resolution of their bankruptcy proceedings or lifting of the automatic stay. (Doc. 33, Order). On April 17, 2017, after a telephone conference with the Court, Plaintiff was granted leave to file a second amended complaint voluntarily dismissing the SquareTwo Defendants from this case. (Doc. 35, Order). The motion to compel arbitration filed by all four defendants (Doc. 17) was denied without prejudice to renew. (Doc. 35).

On April 21, 2017, Plaintiff filed the instant Second Amended Complaint against just Federated and Manno, which is now the operative complaint before this Court. (Doc. 37, Sec. Am. Compl.). Plaintiff's Second Amended Complaint raises the same or similar claims against the remaining two defendants under the FDCPA and Georgia common law (negligent misrepresentation) as Plaintiff's original and first amended

complaints. On April 24, 2017, the Clerk made an entry of dismissal approving Plaintiff's notice of voluntary dismissal as to the SquareTwo Defendants.

On May 18, 2017, Federated and Manno (hereinafter "Defendants") filed their answer to Plaintiff's Second Amended Complaint (Doc. 42), and a month later, the instant motion to compel arbitration (Doc. 47). Defendants subsequently filed a motion to stay discovery pending resolution of their motion to compel arbitration (Doc. 53), which I granted (Doc. 58). Defendants' motion to compel arbitration has been fully briefed, and is presently before this Court for consideration.

II. APPLICABLE LEGAL STANDARDS

The subject Arbitration Provision provides that it shall be governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA") and, to the extent state law applies, Nebraska law, "regardless of conflict of law principles." (Doc. 47-2 at 15, 18). Thus, if there is an arbitration agreement governing this dispute, it is governed by the FAA, which "embodies a liberal federal policy favoring arbitration agreements." Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1367 (11th Cir. 2005) (quotation marks omitted). Courts have recognized that 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) (quotation marks omitted); see Granite Rock Co. v. Int'l Bhd. Of Teamsters, 561

U.S. 287, 301, 130 S. Ct. 2847, 2858-59 (2010). Nonetheless, "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 omitted); see Granite Rock, 561 U.S. at 301, 130 S. Ct. at 2858-59 (directing courts to "apply[ ] the presumption of arbitrability only" to "a validly formed and enforceable arbitration agreement").

The threshold question of whether an arbitration agreement exists at all is "simply a matter of contract." First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 943, 115 S. Ct. 1920, 1924 (1995). A district court must compel arbitration if there is a valid agreement to do so. Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1331 (11th Cir. 2005); Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 854 (11th Cir. 1992) (citing 9 U.S.C. §§ 2 & 3). However, absent such an agreement, "a court cannot compel the parties to settle their dispute in an arbitral forum." Klay v. All Defendants, 389 F.3d 1191, 1200 (11th Cir. 2004).

In construing arbitration agreements, courts apply state-law principles relating to contract formation, interpretation, and enforceability. See Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1368 (11th Cir. 2005) ("[I]n determining whether a binding agreement arose between the parties, courts apply the contract law of the

particular state that governs the formation of contracts."). Here, Plaintiff asserts, and Defendants appear to agree, that Georgia law applies. (Doc. 49, Pl.'s Br., at 5; Doc. 47, Defs.' Mot., at 8 (relying on Georgia substantive contract law)). Accordingly, the undersigned will apply Georgia law to determine whether Plaintiff and FNBO entered into an arbitration agreement.

Motions to compel arbitration are reviewed under the standard for summary judgment. Johnson v. KeyBank Nat'l Assoc., 754 F.3d 1290, 1294 (11th Cir. 2014) (describing an order compelling arbitration as "summary-judgment-like" because it is "'a summary disposition of the issue of whether or not there has been a meeting of the minds on the agreement to arbitrate'") (quoting Magnolia Capital Advisors, Inc. v. Bear Stearns & Co., 272 F. App'x 782, 785-86 (11th Cir. 2008))). Thus, a court can consider information outside the pleadings for purposes of resolving the motion. Bazemore v. Jefferson Capital Sys., LLC, No. CV 314-115, 2015 WL 2220057, at *3 (S.D. Ga. May 11, 2015).

III. ANALYSIS

In determining whether the parties agreed to arbitrate a particular dispute, courts consider: (1) whether there is a valid agreement to arbitrate; and (2) whether the dispute in question falls within the scope of that agreement. See Scott v. EFN Invs., LLC, 312 F. App'x 254, 2546 (11th Cir. 2009).

A. Is there a valid agreement to arbitrate?

In Georgia, "[t]o constitute a valid contract, there must be parties able to contract, a consideration moving to the contract, the assent of the parties to the terms of the contract, and a subject matter upon which the contract can operate." O.C.G.A. § 13-3-1. The element of assent requires "'(a) a meeting of the minds (b) on the essential terms of the contract.'" Regan v. Stored Value Cards, Inc., 85 F. Supp. 3d 1357, 1362 (N.D. Ga. 2015) (quoting John K. Larkins, Jr., *Ga. Contracts Law and Litigation* § 3:2 (2d ed.)), *aff'd sub nom.* Reagan v. Stored Value Cards, Inc., 608 F. App'x 895 (11th Cir. 2015). The existence and terms of a contract must be proven by a preponderance of the evidence. Wallace v. Triad Sys. Fin. Corp., 212 Ga. App. 665, 442 S.E.2d 476, 478 (1994); Gentry v. Beverly Enters.-Ga., Inc., 714 F. Supp. 2d 1225, 1229 (S.D. Ga. 2009). "The party asserting the existence of a contract has the burden of proving its existence and its terms." Jackson v. Easters, 190 Ga. App. 713, 379 S.E.2d 610, 611 (1989); see Yates v. CACV of Colo., 303 Ga. App. 425, 693 S.E.2d 629, 634 (2010) ("As the party seeking to enforce the alleged arbitration agreement, CACV bore the burden of proving the existence of such a valid and enforceable agreement.").

In their motion to compel arbitration, Defendants argue that Plaintiff agreed to be bound by the terms of the Card Member Agreement when she received the agreement and thereafter utilized the VISA credit card issued by FNBO to incur charges

on her Account. Defendants contend that the CMA specifically authorized FNBO to transfer its rights under the CMA regarding Plaintiff's Account to CACH. (Doc. 47-1 at 12-13). Defendants argue that pursuant to the Bill of Sale that they have produced and authenticated through the Mayo Affidavit, CACH stepped into the shoes of FNBO and acquired all of FNBO's rights, title, and interest in Plaintiff's Account. (Doc. 47-1 at 13). Having stepped into the shoes of FNBO, Defendants assert that CACH took the place of FNBO and became the "we," "us," and "our" in the CMA entitled to enforce FNBO's rights under the CMA's Arbitration Provision. As a result of the assignment and transfer of Plaintiff's Account to CACH, Defendants argue that they became "Related Parties" under the Arbitration Provision, because they were agents of CACH (and/or representatives and assigns) as the law firm and managing attorney hired by CACH to attempt to collect Plaintiff's delinquent debt on her VISA credit card Account. Defendants contend that as "Related Parties" and agents of CACH – the assignee of FNBO's rights – under the CMA, they are entitled to demand arbitration in any action relating to the Account.[1]

[1] See Doc. 47-1 at 15, quoting Doc. 47-2, CMA, at 17 ("If you assert a Claim against any of Our Related Parties, but you do not also assert that Claim against us, the Related Party (or whoever will be defending the Related Party) may unilaterally choose to have that Claim resolved through binding arbitration").

In this case, Defendants have met their burden by filing the sworn affidavit of FNBO's records custodian, Scot Mayo, with attached documentary proof of what the terms were in the FNBO CMA governing Plaintiff's credit card Account. Mayo swears and affirms in his or her affidavit that the facts contained therein "are true and correct to the best of his/her knowledge, information and belief, under penalties of perjury ... [that Mayo is] a duly authorized custodian of records for [FNBO], and in such capacity, [is] authorized to make the statements and representations contained [t]herein ... [and that Mayo has] personal knowledge regarding how FNBO maintains and handles credit card accounts, credit card agreements, account terms and conditions, billing statements, and other account information relevant to the credit cards issued by FNBO." (Doc. 47-2 at 2). Mayo avers that FNBO issued Plaintiff a VISA credit card bearing an account number ending in -6767 in February 2011, that the card was mailed to Plaintiff accompanied by the CMA attached to the Mayo Affidavit as Exhibit 1, that neither the CMA nor the credit card were returned to FNBO as undeliverable, and that charges were subsequently made with the credit card on Plaintiff's Account as reflected in the billing statements attached as Exhibit 2 to the affidavit. (Id. at 3). That is all the case law requires. Both parties agree that the CMA need not have been signed by Plaintiff to be binding. Where, as here, a cardholder is not alleged to have signed a credit card agreement, courts routinely enforce unsigned credit card contracts where the contract

is sent to a recipient, it is not returned as undeliverable, and where the cardholder then subsequently demonstrates his or her assent to its terms by using the credit card that was provided. See Bazemore v. Jefferson Capital Sys., LLC, 827 F.3d 1325. 1332 (11th Cir. 2016); Cox v. Midland Funding, LLC, 1:14-CV-1576-LMM-JSA, 2015 WL 12862931, at *8 (N.D. Ga. June 11, 2015).

In response to the motion to compel arbitration, Plaintiff argues that Mayo's Affidavit is insufficient because it lacks certain indices of veracity and reliability, including Mayo's failure to state the precise date FNBO issued Plaintiff the credit card, failure to aver that Mayo has personal knowledge that Plaintiff was mailed the credit card accompanied by the CMA governing Plaintiff's Account, and alleged failure to attach any business records to the affidavit establishing what was, or was not, mailed to Plaintiff. This argument is without factual or legal merit. Mayo not only attached a copy of the CMA governing Plaintiff's Account to the affidavit, Mayo also attached numerous billing statements to Plaintiff from FNBO showing that as of July 12, 2012, Plaintiff had an outstanding balance due on her credit card Account in the amount of $1,707.45. Mayo also attached a copy of the Bill of Sale of Plaintiff's Account and redacted electronic records identifying Plaintiff's Account as one of the accounts purchased by CACH pursuant to the Bill of Sale. (Doc. 47-2 at 5, 7, 22, 68-71). Mayo also averred that in his or her role as records custodian for FNBO, Mayo has personal

knowledge of how FNBO maintains and handles its credit card accounts, credit card agreements, account terms and conditions, billing statements, and other account information relevant to the credit cards issued by FNBO, including Plaintiff's, and that Mayo is authorized by FNBO to make the statements contained in the affidavit and to certify all of the attached business records. (Doc. 47-2 at 2). This would include Mayo's statement that Plaintiff was mailed a credit card on February 14, 2011, accompanied by the CMA attached to the affidavit as Exhibit 1, and that neither was returned to FNBO as undeliverable. (Doc. 47-2 ¶ 5).

Plaintiff does not deny that she accepted the terms of the CMA by activating her card and using it to make purchases. Instead, she merely states that she does not "recognize" the CMA as a document that was sent to her by FNBO. (Doc. 24, Decl. of Carole Dooley ["Dooley Decl."], ¶ 2). Plaintiff has filed a declaration explaining that her general practice is to place cardholder agreements and other correspondence from credit card companies in a file for each credit card account that she has, that her file for FNBO does not contain the CMA that Defendants attached to their motion to compel arbitration, and on that basis, she does not "believe" that she ever received the CMA. (Id.). She has not unequivocally denied, however, receiving a cardholder agreement pertaining to her FNBO credit card; nor has she unequivocally denied that the CMA attached to Defendants' motion is the applicable agreement. Nor has she submitted a

different agreement that she contends governs the FNBO credit card that she received and used.

For all the reasons stated, I find that Defendants have established by a preponderance of the evidence that there was a valid agreement to arbitrate between FNBO and Plaintiff as evidenced by the CMA attached to Mayo's Affidavit and Defendants' motion to compel arbitration.

B. May Defendants, as non-signatories, enforce the arbitration agreement?

The question then arises as to whether as non-signatories, Defendants are entitled to enforce the arbitration agreement. Plaintiff argues that the chain of assignment is broken because Defendants have not authenticated all the necessary documents to show that Plaintiff's Account (including the CMA) was ever validly assigned to CACH. (Doc. 49 at 9, 11). Plaintiff argues that the Bill of Sale does not expressly state that FNBO sold to CACH all of its rights "arising under the CMA itself." (Doc. 49 at 11). In support of her argument, Plaintiff cites several cases, including Hutto v. CACV of Colorado, LLC, 308 Ga. App. 469, 472, 707 S.E.2d 872, 875 (2011); Wirth v. CACH, LLC, 300 Ga. App. 488, 490-91, 685 S.E.2d 433, 435 (2009); and Green v. Cavalry Portfolio Servs., LLC, 305 Ga. App. 843, 844, 700 S.E.2d 741, 742 (2010). Those cases, however, are inapposite.

In Hutto, the Georgia Court of Appeals held that an affidavit purporting to show that JP Morgan Chase & Co. assigned its rights to and interests in a cardholder's account to CACV was insufficient to establish a valid assignment of rights from Chase Manhattan Bank to CACV. Hutto, 707 S.E.2d at 874-75. In other words, the court found that the affidavit named the wrong party as the assignor. In addition, the court held that CACV failed to submit the bill of sale that it was relying on as an exhibit to its summary judgment motion, failed to file an affidavit authenticating the bill of sale, and failed to attach any of the documents referenced therein, including the list of accounts purportedly sold. For those reasons, the court held that the evidence submitted by CACV was insufficient to establish a valid assignment of rights to CACV. Id. at 875.

The court in Wirth similarly found that the bill of sale that was submitted to show a valid assignment between Providian and CACH was contradicted by an affidavit referring to accounts assigned by Washington Mutual to CACH, and there was also no evidence identifying the plaintiff's account number as one of the accounts that Washington Mutual assigned to CACH. Wirth, 685 S.E.2d at 491-92. The Green case also involved a lack of evidence and failure to show an unbroken chain of written assignments necessary to establish that the plaintiff received a valid assignment of

contract rights, making it the real party in interest to sue on an automobile sales contract. Green, 700 S.E.2d at 741-42. These cases are easily distinguishable.

In this case, Defendants have submitted no contradictory evidence, and there are no evidentiary holes or gaps in the record that would justify denying Defendants' motion to compel arbitration. Defendants have established an unbroken chain of assignment from FNBO to CACH via Mayo's sworn Affidavit and attached documentation. The Affidavit (1) authenticates the relevant Bill of Sale of accounts from FNBO to CACH attached to Mayo's Affidavit as Exhibit 3; (2) confirms that Plaintiff's Account ending in -6767 was included in the accounts sold to CACH; and (3) attaches a copy of the electronic record transferred to CACH identifying Plaintiff's Account information, including her past due balance of $1,707.45 and the applicable CMA. (Doc. 47-2 at 4-5, 21-66, 68-71). No probative evidence contradicting that information has been submitted by Plaintiff.

Rather, Plaintiff argues that a document she did find in her FNBO file at home—a collection notice from a different debt collector named West Asset Management, Inc. ("WAMI") dated July 5, 2012 (Doc. 24 at 4)—indicates that FNBO may have assigned at least the right to collect on Plaintiff's Account to a different debt collector, thus breaking the chain of assignments of the same account to CACH in April 2013. Plaintiff argues that because WAMI sent Plaintiff a collection letter in July 2012, "it is

unclear whether FNBO, in fact could or did assign ***anything*** to CACH." (Doc. 49 at 10).

The text of the WAMI collection letter, however, undercuts Plaintiff's argument. The collection letter clearly identifies the creditor of the account as FNBO and states that FNBO had merely assigned the account to WAMI "to assist [Plaintiff] in resolving the outstanding balance." (Doc. 24 at 4). Nothing in the letter indicates that title to the account was sold or transferred to WAMI, thereby breaking the chain of title. It is not unusual for a creditor to place a past due account with different collection agencies or collection attorneys, both pre- and post-charge-off, in an effort to recover the past due balance on an account. (See Doc. 17-3 at 3 ¶ 5).

By contrast, the complaint that CACH, through Federated, filed in the State Court Action alleged that prior to commencement of the action, CACH acquired Plaintiff's Account by purchasing it from the original creditor, FNBO, the complaint attached a copy of the Bill of Sale effecting the transfer of FNBO's rights and title, and also attached a redacted account list showing that Plaintiff's Account was one of the accounts sold by FNBO to CACH. (Doc. 17-5). As custodian of records for FNBO, Mayo's Affidavit addresses and confirms the same sale and transfer. (Doc. 47-2). The Affidavit avers that Plaintiff's Account was validly assigned to CACH, authenticates the Bill of Sale and corresponding account data for Plaintiff's Account, and attaches

copies of same. Plaintiff has failed to demonstrate that Scot Mayo does not have personal knowledge of the relevant issues pursuant to his or her role as custodian of records for FNBO.

The collection letter dated March 4, 2016 sent to Plaintiff by Federated (which forms the basis for Plaintiff's FDCPA claims against Defendants) further supports, rather than contradicts, Defendants' contention (and the Mayo Affidavit) that Plaintiff's Account was sold and validly assigned by FNBO to CACH on April 16, 2013. (Doc. 37 at 25; Doc. 47-2 at 4-5). Federated's collection letter indicates that the original creditor of Plaintiff's Account was FNBO, but that the creditor as of the date of the letter, March 4, 2016, was "CACH, LLC." (Doc. 37 at 25).

Plaintiff's argument regarding WAMI is based purely on speculation, and fails to raise an issue of material fact as to CACH's acquisition of all rights, title, and interest in Plaintiff's credit card Account from FNBO.

C. Do Defendants fit the definition of "Related Parties" in the CMA?

Under both Nebraska and Georgia law, a non-signatory to an arbitration agreement may be bound by the arbitration agreements of others and may enforce the terms of the agreement under traditional principles of contract and agency law. See In re Wholesale Grocery Prods. Antitrust Litig., 707 F.3d 917, 921 (8th Cir. 2013) (stating that "state contract law governs the ability of nonsignatories to enforce arbitration

provisions"); Applied Underwriters, Inc. v. Top's Pers., Inc., No. 8:15-CV-90, 2016 WL 3360419, at * (D. Neb. May 26, 2016); Liles v. Ginn-La West End, Ltd., 631 F.3d 1242, 1256 (11th Cir. 2011) ("the Eleventh Circuit Court of Appeals has recognized that a non-signatory to a contract may invoke an arbitration clause therein ... under agency or related principles"); Lawson v. Life of the South Ins. Co., 648 F.3d 1166, 1170-71 (11th Cir. 2011) (citing Arthur Andersen LLP v. Carlisle, 556 U.S. 624, 632, 129 S. Ct. 1896, 1903 (2009) (holding that a non-party to the relevant arbitration agreement may invoke § 3 of the FAA if the relevant state contract law allows him to enforce the agreement)); Homestead Ins. Co. v. Wachovia Bank, N.A., No. 1:07-CV-2821-JOF, 2008 WL 11334469, at *3 (N.D. Ga. June 23, 2008) (citing World Rentals & Sales, LLC v. Volvo Constr. Equip. Rents, Inc., 517 F.3d 1240, 1244 (11th Cir. 2008)); LaSonde v. CitiFinancial Mortg. Co., Inc., 273 Ga. App. 113, 114, 614 S.E.2d 224, 226 (2005) ("When a plaintiff who has executed a contract containing an arbitration agreement sues both a signatory to that contract and a nonsignatory, the nonsignatory can successfully compel arbitration of claims against him that relate to the contract"); Comvest, LLC v. Corporate Sec. Group, 234 Ga. App. 277, 280-81, 507 S.E.2d 21, 24-25 (1998) (holding that two nonsignatory brokers named as defendants could enforce an unsigned arbitration agreement under general agency principles).

In this case, the CMA defined "we," "us" and "our" as "First Bankcard

(a division of First National Bank of Omaha)." (Doc. 47-2 at 8). The CMA expressly provided that, "We may transfer all or part of your account balance, along with our rights under this Agreement, to another person or entity. That person or entity will then be entitled to enforce our rights under this Agreement." (Id. at 15 [emphasis added]). Thus, the CMA expressly anticipated that upon sale or transfer of Plaintiff's Account balance to an entity such as CACH, that subsequent entity would then be entitled to enforce FNBO's rights under the CMA. This is not a situation, then, where the relevant arbitration provision precludes nonsignatories from enforcing the terms of the governing cardholder agreement. Rather, the agreement expressly anticipates enforcement by nonsignatories to the CMA.

The evidence shows that in April 2013, Plaintiff's Account was sold/transferred to CACH. (Mayo Aff. ¶ 8; Doc. 47-2 at 68). As a result of that transaction, Defendants assert – and the Court agrees – that CACH stepped into the shoes of FNBO and acquired all of FNBO's rights, title and interest in Plaintiff's Account, entitling CACH to enforce FNBO's rights under the CMA as the "we," "us" and "our" in the CMA. Upon the sale of Plaintiff's Account and FNBO's rights, title, and interest in Plaintiff's Account to CACH, the lawyers that CACH hired to try and collect on Plaintiff's Account in the State Court Action – Defendants Federated and Manno – became agents

of CACH,[2] and thus "Related Parties" under the CMA [which expressly provided that if the cardholder asserted claims against a Related Party (or whoever would be defending the Related Party), the Related Party "may unilaterally choose to have that Claim resolved through binding arbitration"]. (Doc. 47-2 at 17). Georgia law is clear that attorneys act as agents of their clients. Champion v. Target Nat'l Bank, No. 1:12-CV-4196-RLV, 2013 WL 8699367, at *5 (N.D. Ga. Apr. 15, 2013) (citing Coffee v. McCaskey Register Co., 7 Ga. App. 425, 66 S.E. 1032, 1034 (1909) (stating that an attorney is an agent of his client)). The same is true under Nebraska law. Thomas & Thomas Court Reporters, LLC v. Switzer, 283 Neb. 19, 24, 810 N.W.2d 677, 683 (2012) (stating that the relationship between attorney and client is one of agency, and general agency rules of law apply to the attorney-client relationship). The law is also clear that where, like here, a principal is bound under the terms of a valid arbitration clause, its agents and representatives are also covered under the terms of such agreements. Comvest, 234 Ga. App. at 280, 507 S.E.2d at 25; Nitro Distrib., Inc. v. Alticor, Inc., 453 F.3d 995, 999 (8th Cir. 2006) ("An agent is subject to the same

[2] The debt collection complaint filed in the State Court Action clearly indicates that CACH was the plaintiff asserting the claim, and that CACH filed the complaint "by and through its undersigned counsel," Federated Law Group, PLLC. (Doc. 17-5). The Livits Declaration also declares under penalty of perjury that CACH hired Federated Law Group, PLLC as its counsel to file the lawsuit in the State Court Action to collect on Carole Dooley's outstanding debt. (Doc. 17-2 at 6 ¶ 13).

contractual provisions, including arbitration contracts, to which the principal is bound.").[3]

Notably, Plaintiff does not dispute that if CACH were still a defendant in this matter, CACH would be entitled to enforce the Arbitration Provision. Rather, Plaintiff argues that CACH could not have become the "we," "us" and "our" under the CMA because that would conflict with Georgia law, which Plaintiff contends provides that an assignee obtains no greater rights than the assignor possessed at the time of the assignment. Plaintiff argues that at the time of the assignment to CACH, FNBO had the right to make the Arbitration Provision applicable to CACH as an assignee, but not to Federated or Manno, who Plaintiff asserts do not fit within the definition of "Our Related Parties." (Doc. 49 at 14). Plaintiff argues that after the assignment, CACH did not acquire a greater right than FNBO to have the Arbitration Provision apply to

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[3] Plaintiff argues (disingenuously, it seems) that Federated and Manno cannot be agents of CACH because in a declaration filed by Federated and Manno in the SquareTwo/CACH bankruptcy matter, Federated and Manno expressly disavowed that they have any relationship whatsoever with CACH. (Doc. 49 at 19). Plaintiff, however, omitted mention of multiple qualifying statements in that declaration indicating that Defendants Manno and Federated "may have in the past represented, currently represent and may in the future represent entities that are claimants or equity security holders of the Debtors in matters unrelated to the Debtors' chapter 11 cases," that the Debtors wished to employ and retain Manno and Federated "to continue" providing collection services during their chapter 11 cases (which implies that Manno and Federated had an ongoing relationship and had been retained in the past to provide such services), and that Manno and Federated are paid by the Debtors any attorneys' fees and costs awarded by courts in favor of the Debtors. (See Doc. 49-1 at 2-3).

Federated or Manno.

To support her arguments, Plaintiff relies on the holding in a 2011 Southern District of Florida case, Mims v. Global Credit and Collection Corp., 803 F. Supp. 2d 1349 (S.D. Fla. 2011). Plaintiff asserts that the judge in that case "exhaustively analyzed nearly identical definitions contained within a purported arbitration agreement, wherein a debt collector defending an FDCPA action argued that it was an intended third-party beneficiary of the agreement." (Doc. 49 at 14). The Mims court held that, notwithstanding a clause providing that an assignee of the original creditor would "take [the original creditor's] place under the Agreement," the debt collector hired by the assignee was not entitled to enforce the arbitration agreement as an authorized representative of the assignee. See id. at 1356-57.

Mims, however, like the other cases cited by Plaintiff, is distinguishable and not on all fours with the facts presented in this case. Moreover, the definitions in the agreement at issue in Mims were not "nearly identical," but in fact were significantly different from the CMA's defined terms in this case.

In Mims, the court was charged with interpreting the plaintiff's credit card agreement with Capital One Bank. The agreement permitted Capital One to transfer the account and its rights under the agreement to an assignee. Id. at 1352. The agreement also contained an arbitration provision that stated: "You and we agree that either you

or we may, at either party's sole election, require that any Claim ... be resolved by binding arbitration." Id. In that agreement, the words "we," "us," and "our" were defined as meaning not only Capital One Bank, but also its successors, assigns, agents and/or authorized representatives. Id.

In June 2009, Capital One sold and assigned the plaintiff's account to Equable Ascent Financial ("EAF"), who then retained defendant Global Credit and Collection Corporation to collect the unpaid balance on the plaintiff's account. Id. The relationship between EAF and Global was governed by a third party collection services agreement, which made clear that Global was an independent contractor rather than an agent or authorized representative of EAF. Id. at 1355.

The Capital One cardholder agreement provided that if Capital One transferred or assigned the plaintiff's account, the "assignee will take [Capital One's] place under the Agreement ... with respect to the agreements and interest transferred." Id. at 1356. Global argued that when Capital One assigned its rights under the agreement to EAF, EAF stepped into the shoes of Capital One and took Capital One's place within the definition of "we," "us," and "our." While that sounds, in very simple terms, a lot like the arguments presented in this case, there are two significant differences that the Mims court found determinative. In the Capital One cardholder agreement, the definition of "we" and "us" included not only Capital One, but also its successors and assigns. The

court reasoned, therefore, that Global's reading of the agreement – that after the transfer, every reference to Capital One in the definition of "us" now referred to EAF – would render the inclusion of "assigns" in the definition of "us" entirely superfluous. The court cited an Eleventh Circuit case explaining that a contract interpretation which gave a reasonable meaning to all provisions of the contract was preferred to one which left a part useless or inexplicable. Id. (citing Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 117 F.3d 1328, 1338 (11th Cir. 1997)). The court further found that by defining "us" as referring only to the enumerated categories of individuals, "the parties evinced a clear intent that the arbitration provision only apply to disputes between the plaintiff and those specific individuals." Id. at 1357.

The Mims court also found that Global's collection agreement with EAF made clear that Global was an independent contractor rather than an agent or authorized representative of EAF. Mims, 803 F. Supp. 2d at 1355. The court found that Global was neither an assign of Capital One nor an authorized agent of Capital One, nor even an authorized representative of an assign of Capital One, but even if it was, the parties' agreement did not include an entity in Global's position in the agreement's definition of "us." Id. at 1356-57.

Those facts are not present here. In the CMA at issue in this lawsuit, the terms "we," "us," and "our" are narrowly defined as meaning only First Bankcard (a division

of FNBO), and the CMA expressly provides that the entity to which Plaintiff's Account and FNBO's rights under the CMA are transferred will then be entitled to enforce "our" rights under the CMA, meaning FNBO's. The CMA includes the terms "agents, employees, representatives, successors and assigns" in its definition of "Related Parties," not in its definition of "we," "us," and "our" like the agreement in Mims. Unlike Global's reading of the agreement in Mims, Defendants' reading of the CMA does not render any part or term in the CMA superfluous or extraneous.

For all the reasons stated, I find that Plaintiff assented to be bound by the terms of the CMA by using her credit card to make purchases, that FNBO validly transferred Plaintiff's Account and its rights under the CMA to CACH, who then stepped into the shoes of FNBO, that upon the transfer and sale of Plaintiff's delinquent Account to CACH and CACH's hiring of Defendants to file the State Court collection action against Plaintiff, Defendants, as agents of CACH, fit the definition of Related Parties under the CMA. Thus, as Related Parties and agents of the assignee, CACH, Defendants are entitled to enforce the CMA's Arbitration Provision.

D. Do Plaintiff's claims fall within the scope of the arbitration agreement?

The next issue to consider and determine is whether the claims that Plaintiff has asserted against Defendants fall within the scope of the CMA's Arbitration Provision. Defendants assert that the Arbitration Provision in question is broad and far reaching,

covering any present or future claims, disputes, or controversies arising from "or in any way relate[d] to" Plaintiff's credit card Account and the credit offered or denied to her by FNBO, including claims based on contract and statutory rights. (Doc. 47-2 at 16).

In this case, Plaintiff complains about an alleged misleading notice sent by Defendants in an attempt to collect Plaintiff's overdue balance on her credit card Account. In her Second Amended Complaint, Plaintiff asserts two counts for relief. In Count I, she asserts statutory claims against both Defendants under the FDCPA, and she asserts in Count II a state law tort claim against both Defendants for negligent misrepresentation. (Doc. 37, Sec. Am. Compl., at 18, 20). Plaintiff also asserts putative class action claims.

As set forth earlier, the CMA defines the claims covered by the CMA as including:

> any pre-existing, present or future claim, dispute or controversy that arises from or in any way relates to: (a) this Agreement, any prior Cardmember Agreement, your credit card account, the credit we offer or deny to you in connection with your credit card account ... ; or (b) the acts or omissions of you, of us, or of Related Parties if those acts or omissions affect or relate to your credit card account .... Claims include, but are not limited to, claims based on contract and tort (including intentional torts), claims made in law or in equity, claims based on constitutional, statutory, regulatory and common law rights, and claims for damages, penalties and injunctive, declaratory or equitable relief.

(Doc. 47-2 at 16) (underlining added). Plaintiff's current lawsuit clearly relates to the

conduct of Defendants, as Related Parties, taken in connection with trying to collect Plaintiff's past due balance on her credit card Account. Her claims include both statutory and tort claims, which are both encompassed in the definition of "Claims" subject to the Arbitration Provision of the CMA. Her claims also involve a dispute that arises from or relates to her credit card Account; if she had paid the balance on her credit card Account in a timely fashion, her Account would not have been charged off, sold, and placed for debt collection. The entire focus of Defendants' conduct in filing the State Court Action on behalf of CACH, and then sending Plaintiff the March 4, 2016 collection letter was to try and collect the past due balance on Plaintiff's credit card Account that CACH had purchased from FNBO. For all these reasons, I find that Plaintiff's individual claims fall well within the scope of the Arbitration Provision.

E. Are there any legal constraints that foreclose the arbitration of Plaintiff's claims?

The Court must next decide "whether legal constraints external to the parties' agreement foreclose[] the arbitration of those claims." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). Courts must decide, for example, "whether Congress intended, in the enactment of other statutes, to prevent or limit the arbitrability of statutory claims...." Prudential Ins. Co. v. Lai, 42 F.3d 1299, 1303-04 (9th Cir. 1994).

Courts in this Circuit (and elsewhere) have concluded that federal law imposes

no such restrictions, and that FDCPA claims are arbitrable. See Wilder v. Midland Credit Mgmt., No. 1:09-CV-2039-JOF/AJB, 2010 WL 2499701, at *4 (N.D. Ga. May 20, 2010) (holding that the plaintiff's FDCPA claim was encompassed within the arbitration agreement rider and that it made "no difference that Defendant was not an original party to the loan agreement because a nonparty to an arbitration agreement may benefit from and enforce an arbitration agreement if the language of the agreement is broad enough to encompass claims involving the nonparty"); Koch v. Compucredit Corp., 543 F.3d 460, 466-67 (8th Cir. 2008) (concluding that the arbitration clause covering "any claim, dispute, or controversy arising from or related to either this Agreement or the relationships that result from this Agreement" was sufficiently broad such that a FDCPA dispute over the collection of a debt incurred under the credit agreement was a "controversy arising from or related to ... this Agreement"); Hodson v. Javitch, Block & Rathbone, LLC, 531 F.Supp.2d 827, 831 (N.D. Ohio 2008) ("Congress did not intend FDCPA claims to be non-arbitrable. Courts routinely permit arbitration of such claims.") (citations omitted); see also Athon v. Direct Merchants Bank, No. 5:06-CV-1 (CAR), 2007 WL 1100477, *5 (M.D. Ga. Apr.11, 2007) (holding that where an arbitration addendum stated that it applied to "[a]ny claim, dispute or controversy ... arising from or relating to this Account," and plaintiff's complaint alleged that the credit card issuer's collection practices in attempting to collect past due

amounts on account violated the FDCPA, "[t]here is no doubt that all of Plaintiff's claims relate to the ... credit card account, and are, therefore, subject to the Arbitration Agreement.") *aff'd* 251 F. App'x. 602 (11th Cir. 2007); In re Taylor, 260 B.R. 548, 563 (Bankr. M.D. Fla. 2000) (stating that an FDCPA claim was encompassed within the broad arbitration clause); Fedotov v. Peter T. Roach and Assoc., P. C., No. 03-Civ-8823(CSH), 2006 WL 692002, at *3 (S.D.N.Y. Mar. 16, 2006) (finding that a broad arbitration clause encompassed plaintiff's FDCPA claims); Miller v. Northwest Tree Servs., Inc., No. CV-05-5043-RHW, 2005 WL 1711131, at *4 (E.D. Wash. July 20, 2005) (same). Plaintiff has not disputed that tort claims are encompassed within the definition of Claim under the CMA.

Nor is there any limit to the arbitrability of class action waivers in arbitration agreements. The U.S. Supreme Court has made clear that class action waivers in arbitration agreements are valid and enforceable. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011). Similarly, the Eleventh Circuit has repeatedly held that "arbitration agreements precluding class action relief are valid and enforceable." Jenkins v. First Am. Cash Advance of Ga., LLC, 400 F.3d 868, 877-78 (11th Cir. 2005); Randolph v. Green Tree Fin. Corp.-Ala., 244 F.3d 814, 819 (11th Cir. 2001) (holding "a contractual provision to arbitrate TILA claims is enforceable even if it precludes a plaintiff from utilizing

class action procedures in vindicating statutory rights under TILA"). Nevertheless, a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Stolt-Nielsen S.A. v. AnimalFeeds Internat'l Corp., 559 U.S. 662, 684, 130 S. Ct. 1758, 1775 (2010).

F. Are Plaintiff's class action claims barred by the CMA?

In this case, Plaintiff's Second Amended Complaint, starting at paragraph 42, asserts that Plaintiff "brings this action on behalf of herself and as a class action pursuant to Fed. R. Civ. P. 23 on behalf of all others similarly situated, constituting two classes (the 'Classes'), defined below." (Doc. 37 at 11-21). However, having found that the CMA and its Arbitration Provision are enforceable, the Court must give full force to their terms. 9 U.S.C. § 4. Under the express terms of the CMA's Arbitration Provision, Plaintiff waived her right to bring a Claim as a class action or in a representative capacity, or to participate in a Claim as a class member. The Arbitration Provision at issue in this case explicitly precludes the cardholder – here, Plaintiff– from bringing class claims or pursuing any claim as a class action, either in court or in arbitration. (See Doc. 47-2 at 17 ["You will not be able to do these two things (in court or in arbitration): (1) bring a claim as a class action or in a representative capacity; or (2) participate in a claim as a class member."]). The Arbitration Provision provides that, "You and we both agree, to the fullest extent allowed by law, that: (i) Claims will

not under any circumstances be pursued in Class Proceedings" and that "you waive the right to bring or to participate in Class Proceedings against us." (Doc. 47-2 at 16). "Class Proceedings" is defined as "Any Claim or Claims brought by or on behalf of a class, brought in a representative capacity or otherwise on a class basis ... regardless of whether they are commenced in court or in arbitration." (Id.).

The CMA further provides, in pertinent part, that, "If there is a dispute as to whether any claim, dispute or controversy is a "Claim" subject to this [arbitration] provision, that dispute shall be resolved solely by the Arbitrator(s) (except as noted below with reference to Class Proceedings and except that a court may decide whether a Claim is an Ordinary Claim" as that term is defined in the CMA. (Id. at 17).

With regard to Class Proceedings, the Arbitration Provision provides that, "An arbitration pursuant to this provision may decide only your Claims, our Claims or Claims of Related Parties. The Arbitrator(s) shall have no authority to entertain or determine Class Proceedings. ... The only Claims that may be joined under this arbitration provision are (1) those brought by us and Our Related Parties against you and Your Related Parties; or (2) those brought by you and Your Related Parties against us and Our Related Parties." (Id. at 18).

Based on the terms of the CMA, its Arbitration Provision, and what is described in the Arbitration Provision as a Class Action Waiver, Defendants argue that this Court

is obliged to enforce the Class Action Waiver by dismissing the proposed class claims, submitting Plaintiff's individual claims to arbitration, and staying this action pending arbitration between the parties. (Doc. 47-1 at 16, citing Livingston v. Associates Fin., Inc., 339 F.3d 553, 559 (7th Cir. 2003)).

In response, Plaintiff argues that the definition of Claim in the CMA does not include the FDCPA or related claims asserted in Plaintiff's lawsuit, that the Class Action Waiver is invalid and unenforceable as asserted by Federated and Manno, and that Plaintiff's claims against Federated and Manno do not fit within the ambit of the Class Action Waiver contained in the CMA. (Doc. 49 at 23-24). Plaintiff, however, has cited no binding authority to support her arguments or provided any further factual enhancement or explanation. I have already determined that the definition of Claim in the CMA reasonably encompasses claims under the FDCPA and tort claims such as Plaintiff's. Plaintiff has pointed to no text in the FDCPA that created a non-waivable right to bring a class action, whether in court or in an arbitral forum. Nor has Plaintiff cited any authority indicating that Congress intended to preclude parties from contracting away their ability to seek class action relief under the FDCPA.

Plaintiff next argues that if the Class Action Waiver in the CMA is held to be invalid with respect to any Class Proceeding, that this Court must hold that the entire Arbitration Provision is null and void, under the terms of the CMA. (Id. at 24). This

argument is also without merit. Given my conclusion that Plaintiff's individual claims against Defendants fall within the scope of the Arbitration Provision at issue in this case, that Defendants are entitled to enforce that provision, and that the Eleventh Circuit has held that arbitration agreements precluding class action relief are valid and enforceable, I recommend that this Court enforce the type of arbitration to which Plaintiff agreed, which does not include arbitration on a class basis, or the right to bring a claim as a class action in court. (Doc. 47-2 at 17).

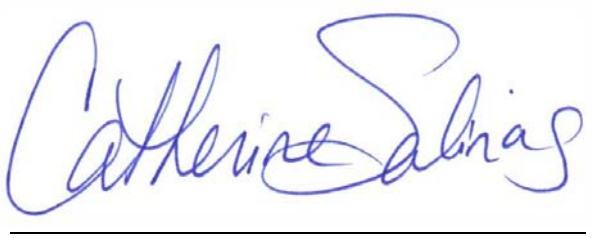
By the express terms of the FAA, the finding that Plaintiff's claims against Defendants are properly referred to arbitration warrants a stay of those claims in this proceeding. See 9 U.S.C. § 3 (providing that where an issue is to be referred to arbitration, courts "shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement"). Accordingly, for all the reasons stated, and pursuant to 9 U.S.C. § 3, I **RECOMMEND** that the Court (1) dismiss Plaintiff's proposed class action claims, (2) direct the parties to arbitrate Plaintiff's individual claims, and (3) stay this case pending arbitration between the parties of Plaintiff's individual claims against Defendants.

IV. CONCLUSION

For the reasons stated above, I **RECOMMEND** that Defendants' Motion to Compel Arbitration (Doc. 47) be **GRANTED**.

Because additional proceedings may not be necessary in this Court, I further **RECOMMEND** that the Clerk of the Court be **DIRECTED** to **administratively close this case**. Should additional proceedings become necessary, any party may file a motion to reopen the case.

IT IS SO RECOMMENDED, this 22nd day of January, 2018.



CATHERINE M. SALINAS
UNITED STATES MAGISTRATE JUDGE