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

SEBASTIAN CORDOBA, individually and on behalf of all others similarly situated, and RENE ROMERO, individually and behalf of all others similarly situated, **Plaintiffs,** **v.** **DIRECTV, LLC, individually and as successor through merger to DIRECTV, Inc.,** **Defendant.**	**CIVIL ACTION FILE** **NO. 1:15-CV-3755-MHC**

ORDER

This matter comes before the Court on Defendant DIRECTV, LLC ("DIRECTV")'s Motion to Compel Arbitration and to Stay Litigation [Doc. 154].

I. BACKGROUND

In 2015, Plaintiff Sebastian Cordoba filed the instant lawsuit, alleging on behalf of classes of plaintiffs that DIRECTV violated the Telephone Consumer Protection Act ("TCPA") and the related Federal Communications Commission rules and regulations. Compl. [Doc. 1]. On May 30, 2018, Plaintiff Rene Romero

("Romero") joined the lawsuit, alleging that during litigation DIRECTV disclosed the personally identifiable information of approximately 9,116 individuals (the "Personal Information Disclosure Class") in violation of the Satellite Television Extension and Localism Act of 2010 ("STELA"), 47 U.S.C. § 338(i)(4). Third Am. Compl. [Doc. 143] ¶¶ 8-9, 75-76, 105, 146. Romero and the Personal Information Disclosure Class members seek damages, a permanent injunction prohibiting DIRECTV from committing future violations of STELA, and attorneys' fees and costs of litigation. Id. ¶¶ 147-49.

Romero received DIRECTV services from about November 24, 2014, until around April 3, 2017. See Decl. of Nicole J. Martin in Supp. of DIRECTV's Mot. to Compel Arbitration and to Stay Litig. [Doc. 154-2] ("Martin Decl.") ¶ 4, Ex. 1, Ex. 23 (showing call to disconnect service on Apr. 3, 2017). Romero alleges that DIRECTV created a data file containing Romero's and the Personal Information Disclosure class members' account numbers, first and last names, create dates, activate dates, disconnect dates, account status, and home and business numbers. Third Am. Compl. ¶¶ 80, 83. On or around November 2016, DIRECTV shared this data file with its expert witness in this litigation, Dr. Debra J. Aron. Id. ¶¶ 81, 92-93. Romero alleges that he had not given DIRECTV written or electronic consent to disclose his personally identifiable information; therefore, the disclosure

violated STELA, 47 U.S.C. § 338(i)(4). Third Am. Compl. ¶ 90, 146.

On July 5, 2018, DIRECTV filed its motion asking the Court (1) to compel Romero to arbitrate his claims, and (2) to stay Romero's claims pending the outcome of such arbitration. DIRECTV's Mot. to Compel Arbitration and to Stay Litig.

II. LEGAL STANDARD

Under Supreme Court precedent, "whether parties have agreed to submit a particular dispute to arbitration is typically an issue for judicial determination." Granite Rock Co. v. Int'l Bhd. of Teamsters, 561 U.S. 287, 296 (2010) (internal punctuation and citation omitted); see also Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63, 68 (2010). The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* (2012), "reflects the fundamental principle that arbitration is a matter of contract." Id. Section 2 of the FAA provides:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . 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. "The FAA thereby places arbitration agreements on an equal footing with other contracts and requires courts to enforce them according to their terms." Rent-A-Center, 561 U.S. at 67 (citations omitted).

Parties may contract around the general rule and agree to submit questions of arbitrability to the arbitrator in the first instance. First Options of Chi., Inc. v. Kaplan, 514 U.S. 938, 943 (1995); see also Terminix Int'l Co. v. Palmer Ranch Ltd. P'ship, 432 F.3d 1327, 1332-33 (11th Cir. 2005). For example, "when parties incorporate the rules of the [American Arbitration] Association into their contract, they 'clearly and unmistakably' agree[] that the arbitrator should decide whether the arbitration clause [applies]." U.S. Nutraceuticals, LLC v. Cyanotech Corp., 769 F.3d 1308, 1311 (11th Cir. 2014) (quoting Terminix, 432 F.3d at 1332). However, regardless of whether the parties have delegated arbitrability to the arbitrators, before a court can compel a party to arbitration, it must be satisfied that the parties actually agreed to arbitrate. AT&T Techs., Inc. v. Commc'ns Workers of Am., 475 U.S. 643, 648 ("[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."); Doe v. Princess Cruise Lines, Ltd., 657 F.3d 1204, 1214 (11th Cir. 2011); Kemiron Atl., Inc. v. Aguakem Int'l, Inc., 290 F.3d 1287, 1290 (11th Cir. 2002).

The FAA "provisions manifest a liberal federal policy favoring arbitration agreements." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991) (quotation omitted); see also Shearson/Am. Express, Inc. v. McMahon, 482 U.S.

220, 226 (1987) (holding that the FAA's "federal policy favoring arbitration" requires that courts "rigorously enforce agreements to arbitrate."). Therefore, "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration" and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). Consequently, arbitration provisions are to be generously construed in favor of arbitration. Id. However, "while doubts concerning the scope of an arbitration clause should be resolved in favor of arbitration, the presumption does not apply to disputes concerning whether an agreement to arbitrate has been made." Brazmore v. Jefferson Capital Sys., LLC, 827 F.3d 1325, 1329 (11th Cir. 2016) (quoting Dasher v. RBC Bank (USA), 745 F.3d 1111, 1116 (11th Cir. 2014) (quotation marks and citation omitted)).

III. ANALYSIS

When ruling on a motion to compel arbitration under the FAA, the Court undertakes a two-step inquiry. Klay v. All Defendants, 389 F.3d 1191, 1200 (11th Cir. 2004). First, the Court determines whether the parties agreed to arbitrate the dispute; second, it decides whether "legal constraints external to the parties' agreement foreclosed arbitration." Id. (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 628 (1985)).

DIRECTV alleges that Romero received, accepted, and therefore was bound by the terms of the Customer Agreement effective as of June 24, 2014 [Doc. 154-2 at 9-18] ("2014 Agreement"), the Residential Customer Agreement effective as of June 24, 2015 [Doc. 154-2 at 20-21] ("2015 Agreement"), and the Residential Customer Agreement effective as of June 30, 2016 [Doc. 154-2 at 23-24] ("2016 Agreement").[1] DIRECTV's Mem. in Supp. of Mot. to Compel Arbitration and to Stay Litig. [Doc. 154-1] ("Def.'s Mem.") at 3-4. Romero does not dispute that he received the 2014 Agreement. Pl.'s Opp'n to DIRECTV's Mot. to Compel Arbitration and to Stay Litig. [Doc. 156] ("Pl.'s Opp'n") at 2, 6. However, Romero contends that he did not receive, and therefore did not accept, the 2015 Agreement or the 2016 Agreement, so he is not bound by the arbitration provisions in those agreements.[2] Id. at 9-11.

A. A Valid Agreement to Arbitrate Exists.

To determine whether an enforceable agreement to arbitrate exists, the Court applies the contract law of the state that governs formation of the agreement.

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[1] The 2014 Agreement (Ex. 2), 2015 Agreement (Ex. 3), and 2016 Agreement (Ex. 4) are exhibits to Nicole J. Martin's Declaration [Doc. 154-2].

[2] The 2016 Agreement contains a broader arbitration provision than the 2014 Agreement and the 2015 Agreement. Compare 2016 Agreement § 9.2 with 2014 Agreement § 9(b)-(d), 2015 Agreement § 9(b)-(d).

Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1368 (11th Cir. 2005). Maryland law[3] provides that, "[b]ecause arbitration is a matter of contract, we use contract principles to determine whether an agreement to arbitrate exists." Cain v. Midland Funding, LLC, 156 A.3d 807, 815 (Md. 2017) (citation omitted); see also Holloman v. Circuit City Stores, Inc., 894 A.2d 547, 552 (Md. 2006) ("The issue of whether an agreement to arbitrate exists is governed by contract principles.") (citations omitted). "In most instances, the determination of a contract's enforceability is decided by the existence of consideration[.]" Holloman, 894 A.2d at 553. Because "[a]rbitration is a process whereby *parties voluntarily agree* to substitute a private tribunal for the public tribunal otherwise available to them," an arbitration clause "cannot impose obligations on persons who are not a party to it and do not agree to its terms." Schneider Elec. Bldgs. Critical Sys., Inc. v. W. Surety Co., 165 A.3d 485, 490 (Md. 2017) (emphasis in original) (citations and internal punctuation omitted).

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[3] The 2014 Agreement, 2015 Agreement, and 2016 Agreement all provide that "the interpretation and enforcement of this Agreement and any disputes related to your agreements or service with DIRECTV shall be governed by the rules and regulations of the Federal Communications Commission, other applicable federal laws, and the laws of the state and local area where Service is provided to you." 2014 Agreement § 10(b); 2015 Agreement § 10(b); 2016 Agreement § 10(b). The Court applies Maryland law because DIRECTV provided service to Romero in Maryland. See Third Am. Compl. ¶ 7.

The 2014 Agreement, which Romero does not dispute that he received,[4] provided that DIRECTV could change the contract terms as follows:

> **4. CHANGES IN CONTRACT TERMS**
>
> We reserve the right to change the terms and conditions on which we offer Service. If we make any such changes, we will send you a copy of your new Customer Agreement containing its effective date. . . . If you elect not to cancel your Service after receiving a new customer agreement, your continued receipt of Service constitutes acceptance of the changed terms and conditions.

2014 Agreement § 4. The 2014 Agreement also described how DIRECTV would provide notice to its customers:

> **10. MISCELLANEOUS**
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> (a) **Notice**. Notices will be deemed given when personally delivered, addressed to you at your last known address and deposited in the U.S. Mail (which may include inclusion in your billing statement), or sent via internet to the email address you provided us or sent via satellite to your receiver or delivered when a voice message is left at the telephone number on your account.

Id. § 10(a).

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[4] Furthermore, while Romero does not directly acknowledge that he was bound by the 2014 Agreement, he contends that "the 2014 Customer Agreement is the only agreement that DIRECTV could possibly enforce against Mr. Romero . . . ." Id. at 23.

1. Romero Received DIRECTV's 2016 Agreement.[5]

The evidence submitted by DIRECTV indicates that it sent Romero both the 2015 Agreement and the 2016 Agreement. Felicia Lateef, Project Lead at DIRECTV, testified that she is familiar with the process by which customers receive the Customer Agreement. Declaration of Felicia L. Lateef [Doc. 70-7] ("Lateef Decl.") ¶ 1. She testified that DIRECTV updates the Customer Agreement from time to time. Id. ¶ 6. According to Lateef, DIRECTV sends the updated Customer Agreement "to existing customers whenever the Customer Agreement is updated." Id. ¶ 4. The 2015 Agreement states that it became effective June 24, 2015, and the 2016 Agreement states that it became effective June 30, 2016. 2015 Agreement; 2016 Agreement. Romero was a DIRECTV customer from about November 24, 2014, until April 3, 2017. See Martin Decl. ¶ 4, Ex. 1, Ex. 23. In 2012, DIRECTV began e-mailing the updated Customer Agreements to all customers with valid e-mail addresses. Lateef Decl. ¶ 6. If DIRECTV does not have a valid e-mail address for a customer, or the customer chooses not to receive email from DIRECTV, it mails the updated agreement to the

[5] The evidence also indicates that Romero received the 2015 Agreement, but its terms were superseded by the 2016 Agreement, effective June 30, 2016. 2016 Agreement. Romero alleges that DIRECTV violated STELA on or around November 2016. Third Am. Compl. ¶ 92.

customer. Id. Nicole Martin, Lead Internal Business Operations Consultant at DIRECTV, testified that she is familiar with DIRECTV account and billing records and how they are collected. Martin Decl. ¶ 1. Martin testified that DIRECTV sent Romero an email on March 28, 2016, confirming his equipment upgrade. See id. ¶ 9. The March 28, 2016, email directs Romero to "[r]eview your customer agreement and privacy policy" and includes a hyperlink to the agreement online.[6] Id. at Ex. 22.

Responding to this evidence, Romero provides only the bare assertion that he "does not have any record of receiving an email or mailed copy of DIRECTV's 2015 or 2016 Customer Agreements."[7] Pl.'s Opp'n at 10. But Romero cites no

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[6] Given that the email is dated March 28, 2016, the Court infers that the hyperlink referenced the 2015 Agreement because the 2016 Agreement was not yet effective. Regardless, DIRECTV also provided evidence that it also sent the 2016 Agreement to Romero. See Lateef Decl. ¶¶ 4, 6.

[7] The Court applies a summary-judgment type standard to factual disputes on a motion to compel arbitration. In re Checking Account Overdraft Litig., 754 F.3d 1290, 1294 (11th Cir. 2014); Magnolia Capital Advisors, Inc. v. Bear Stearns & Co., 272 F. App'x 782, 785 (11th Cir. 2008). Therefore, the Court views the evidence presented by the parties in the light most favorable to Romero and has drawn all justifiable inferences in favor of Romero. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986); Sunbeam TV Corp. v. Nielsen Media Research, Inc., 711 F.3d 1264, 1270 (11th Cir. 2013). In addition, the Court has excluded assertions of facts that are immaterial or presented as arguments or legal conclusions or any fact not supported by citation to evidence. LR 56.1B(1), NDGa.

declarations or other evidence to support his contention. See Pl.'s Opp'n. The only evidence before the Court shows that DIRECTV (1) emailed Romero a hyperlink to the 2015 Agreement on March 28, 2016, and (2) emailed or mailed the updated 2016 Customer Agreement to its customers at a time when Romero was a customer.[8] Evidence of DIRECTV's routine practice of sending updated customer agreements is admissible to show that DIRECTV sent the 2016 Agreement to Romero. See FED. R. EVID. 406; Schwartz v. Comcast Corp., 256 F.

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[8] DIRECTV also states that it "regularly reminded Mr. Romero about his Customer Agreement" by notifying him, on the back of each monthly billing statement, that the agreement could be found on its website. Def.'s Mem. at 4. This Court is not persuaded that a note on the back of a billing statement would be sufficient to amend the Customer Agreement. DIRECTV agrees to send the customer "a copy" of the new agreement (2014 Agreement § 4); a note on a bill is hardly a copy of an updated agreement. Further, the note on the back of the bill states:

> **Our Agreement**
> You received your DIRECTV Customer Agreement with your order confirmation. Updates may be mailed periodically. Your Customer Agreement describes the terms and conditions upon which you accept our service. Please consult your Customer Agreement, which is also available at directv.com/agreement, for complete information about billing and payment on your account.

Martin Decl., Ex. 18 (emphasis added). Given that DIRECTV began emailing updated Customer Agreements in 2012, this use of "mailed" is potentially misleading. Moreover, the note merely directs customers to consult the agreement and provides the website where it may be found. It would stretch the language of the Customer Agreement too far to conclude that by including such a note on a bill, DIRECTV is sending the customer a copy of the updated agreement via U.S. Mail or e-mail. See 2014 Agreement §§ 4, 10(a).

App'x 515, 518 (3d Cir. 2007) ("Comcast's evidence of its policy to provide the Subscriber Agreement to new customers was relevant to show that Schwartz did in fact receive a copy.").

"When there is a dispute of fact material to determining whether there is an agreement to arbitrate, the court resolves that dispute before determining whether the agreement to arbitrate exists." Mattingly v. Hughes Electrics Corp., 810 A.2d 498, 504 (Md. Ct. Spec. App. 2002), aff'd sub nom. DIRECTV, Inc. v. Mattingly, 829 A.2d 626 (Md. 2003). However, no genuine dispute of fact exists here because, unlike plaintiffs in the cases Romero cites, Romero provides no evidence to contradict DIRECTV's evidence that he received the 2016 Agreement. See Brent v. Priority 1 Auto. Grp., BMW of Rockville, 98 F. Supp. 3d 833, 837-38 (D. Md. 2015) ("[A] genuine dispute exists regarding [Plaintiff's acceptance of the Arbitration Agreement], as . . . Plaintiff questions the reliability of some of [Defendant's] evidence and provides evidence [by supporting affidavit] that she did not accept it.") (emphasis added); Whitten v. Apria Healthcare Grp., Inc., No. PWG-14-cv-3193, 2015 WL 2227928, at *3-4 (D. Md. May 11, 2015) ("Plaintiff provides evidence [by supporting affidavit] that she did not accept the Arbitration Agreement.") (emphasis added); see also Schwartz, 256 F. App'x at 518 (holding that plaintiff's mere denial that he received a copy of subscription agreement did

not create a material dispute of fact). In the absence of any evidence to the contrary, the Court finds that DIRECTV sent Romero the 2016 Agreement.

2. Romero Accepted the 2016 Agreement Generally.[9]

DIRECTV alleges that Romero accepted the 2016 Agreement because he "did not cancel his orders or his service. He had his DIRECTV equipment installed and activated, and he later upgraded his equipment." Def.'s Mem. at 12. Romero responds that his conduct was not acceptance of the arbitration provisions because (1) he did not receive the agreement, and (2) under Wexler v. AT&T Corp., 211 F. Supp. 3d 500 (E.D.N.Y. 2016), his general acceptance of the 2016 Agreement did not form an agreement to arbitrate. See Pl.'s Opp'n. at 10-14. As discussed above, the only evidence before the Court shows that Romero received the 2016 Agreement.

A party may also accept a contract by his actions or by his failure to act. Restatement (Second) of Contracts § 19(1) (Am. Law Inst. 1981). Under Maryland law, parties may change the terms of their contract by remaining silent

[9] Because the Court concludes that Romero's claim is not covered by the 2016 Agreement, infra part III.B, it does not discuss Wexler v. AT&T Corp.'s holding that the arbitration provision in this agreement presents a question of contract formation. See Wexler v. AT&T Corp., 211 F. Supp. 3d 500, 504 (E.D.N.Y. 2016); see also Revitch v. DIRECTV, LLC, No. 18-cv-1127, 2018 WL 4030550, at *13-17 (N.D. Cal. Aug. 23, 2018) (discussing and agreeing with Wexler).

if, in their previous course of dealing, the offeree was obligated to notify the offeror that he is not willing to accept the revised terms. Mattingly, 810 A.2d at 506. The 2014 Agreement provides that "[i]f you elect not to cancel your Service after receiving a new customer agreement, your continued receipt of Service constitutes acceptance of the changed terms and conditions." 2014 Agreement § 4. In addition, the first page states:

> IF YOU DO NOT ACCEPT THESE TERMS, PLEASE NOTIFY US IMMEDIATELY AND WE WILL CANCEL YOUR ORDER OR SERVICE . . . . IF INSTEAD YOU DECIDE TO RECEIVE OUR SERVICE, IT WILL MEAN THAT YOU ACCEPT THESE TERMS AND THEY WILL BE LEGALLY BINDING.

2014 Agreement.[10]

Maryland also requires that "[i]n order for the offeree's silence to be an assent to the revised terms of the contract . . . the offeree must have had actual or constructive knowledge that there was a proposal to change the contract terms." Mattingly, 810 A.2d at 507. DIRECTV provided Romero with constructive knowledge of a proposal to change terms by sending Romero the 2016 Agreement. See Schwartz, 256 F. App'x at 518-20 (enforcing arbitration provision in subscription agreement that was sent to customers and available on defendant's

[10] The 2015 Agreement and 2016 Agreement also contain this provision and the notice on the first page. 2015 Agreement § 4, 2016 Agreement § 4.

website); Williams v. MetroPCS Wireless, Inc., No. 09-22890-CIV, 2010 WL 1645099, at *6 (S.D. Fla. Apr. 21, 2010) (holding that consumer accepted contract through continued use of wireless carrier's services after receiving the contract).

Numerous courts around the country have held that DIRECTV customers accept the Customer Agreement by paying for service after receiving the Agreement. See, e.g., Murphy v. DirecTV, Inc., 724 F.3d 1218, 1225 n.4 (9th Cir. 2013) ("[T]he district court's finding that Plaintiffs received the Customer Agreement and continued to accept DirecTV's services is not clearly erroneous and its conclusion that these actions bound Plaintiffs to the terms of the contract is correct."); Joaquin v. Directv Grp. Holdings, Inc., No. 15-8194, 2016 WL 4547150, at *3 (D. N.J. Aug. 30, 2016) ("[C]ourts have held that plaintiffs have agreed to the terms and conditions provided in similar customer agreements by continuing to accept defendants' services.") (citing Stachurski v. DIRECTV, Inc., 642 F. Supp. 2d 758, 766 (N.D. Ohio 2009); Clements v. DIRECTV, LLC, No. 13-4048, 2014 WL 1266834, at *3 (W.D. Ark. Mar. 26, 2014)). This Court agrees that Romero accepted the 2016 Agreement generally by continuing to pay for DIRECTV service after receiving the agreement.

B. Romero's Claim is Not Covered by the 2016 Agreement.

The 2016 Agreement contains the following arbitration provision:

> **9.2 Arbitration Agreement**
> (1) DIRECTV and you agree to arbitrate all disputes and claims between us. This agreement to arbitrate is intended to be broadly interpreted. It includes, but is not limited to:
> - claims arising out of or relating to any aspect of the relationship between us, whether based in contract, tort, statute, fraud, misrepresentation or any other legal theory;
> - claims that arose before this or any prior Agreement (including, but not limited to, claims related to advertising);
> - claims that are currently the subject of purported class action litigation in which you are not a member of a certified class; and
> - claims that may arise after termination of this Agreement.

2016 Agreement § 9.2 (emphasis added). DIRECTV claims this arbitration provision covers all claims between it and Romero,[11] including claims arising from a federal statute. Def. DIRECTV, LLC's Reply in Supp. of Its Mot. to Compel Arbitration [Doc. 158] ("Def.'s Reply") at 5. Romero contends that DIRECTV's

[11] In addition to Romero's STELA claim, DIRECTV moves the Court to compel Romero to arbitrate his TCPA claim. Def.'s Mem. at 3, 10, 19-20. Although courts "look to the facts alleged in the . . . complaint" and "are not limited by the way [the plaintiff] couches its allegations in various terms and theories of action" when ruling on a motion to compel arbitration, U.S. Nutraceuticals, LLC v. Cyanotech Corp., 769 F.3d 1308, 1311-12 (11th Cir. 2014) (quotations and citations omitted), Romero's allegations relate only to DIRECTV's alleged violation of STELA. Third Am. Compl. ¶¶ 79-87. Plaintiff Cordoba, not plaintiff Romero, alleges facts supporting a TCPA claim. See id. ¶¶ 48-71.

"disclos[ure] [of his] personal information to a third party to defend itself in litigation" is "in no way connected to any customer service agreement with DIRECTV." Pl.'s Opp'n. at 16. DIRECTV maintains that its disclosure was connected with the 2016 Agreement:

> Romero only has a STELA claim because he entered into the DIRECTV contract and received service from DIRECTV such that STELA obligated DIRECTV to keep his customer information private. Moreover . . . the *agreement itself* set forth the circumstances under which Romero's data could be disclosed through § 6 and the privacy policy.[12] STELA allows disclosure made with the express written consent of the customer, and only if there is no such consent is disclosure prohibited unless a statutory exception applies. 47 U.S.C. § 338(i)(4)(A). Thus, the threshold issue for Romero's STELA claim necessarily is whether disclosure was permitted under the contract.

Def.'s Reply at 8-9 (italics in original, footnote and underlining added).

DIRECTV's arbitration provision purports to cover any claim Romero might bring against DIRECTV, at any time, for any reason. See 2016 Agreement § 9.2. However, the FAA requires that the controversy "aris[e] out of" the contract between the parties. 9 U.S.C. § 2; Dean Witter Reynolds, Inc. v. Byrd, 470 U.S.

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[12] The 2016 Agreement states:

> **6. PERSONAL DATA**
> We collect personally identifiable information about our customers ("Personal Data"). The use and disclosure of this Personal Data is governed by our Privacy Policy and, to the extent not inconsistent with the Privacy Policy, by this agreement. A copy of our Privacy Policy is available at directv.com.

2016 Agreement § 6.

213, 218 (1985). Accordingly, the Eleventh Circuit and courts around the country require that the claim have some relationship to the contract containing the arbitration provision. See Telecom Italia, SpA v. Wholesale Telecom. Corp., 248 F.3d 1109, 1116 (11th Cir. 2001) ("Disputes that are not related—with at least some directness—to performance of duties specified by the contract do not count as disputes 'arising out of' the contract, and are not covered by the standard arbitration clause."); see also Jones v. Halliburton Co., 583 F.3d 228, 238 (5th Cir. 2009); 3M Co. v. Amtex Sec., Inc., 542 F.3d 1193, 1199 (8th Cir. 2008); Cummings v. Fedex Ground Package Sys., Inc., 404 F.3d 1258, 1261 (10th Cir. 2005); Brayman Constr. Corp. v. Home Ins. Co., 319 F.3d 622, 626 (3d Cir. 2003); Fazio v. Lehman Bros., 340 F.3d 386, 395 (6th Cir. 2003); Louis Dreyfus Negoce S.A. v. Blystad Shipping & Trading Inc., 252 F.3d 218, 224 (2d Cir. 2001); Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 721 (9th Cir. 1999); Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd., 1 F.3d 639, 642 (7th Cir. 1993); J.J. Ryan & Sons v. Rhone Poulenc Textiles, S.A., 863 F.2d 315, 321 (4th Cir. 1988).[13]

[13] Accordingly, several courts have questioned the validity of the exact arbitration provision contained in the 2016 Agreement. See Revitch v. DirecTV, LLC, 2018 WL 4030550, at *15 ("[T]he broad interpretation of the arbitration provision advanced by DirecTV leads to absurd results. . . . merely by agreeing to contract to receive wireless service a customer would agree to subject to arbitration . . . virtually any sort of dispute . . . . No reasonable customer would enter into such a contract."); Wexler, 211 F. Supp. 3d at 502-03 ("Mobility's arbitration clause is

In the Eleventh Circuit, "the focus is on whether the tort or breach in question was an immediate, foreseeable result of the performance of contractual duties." Princess Cruise Lines, 657 F.3d at 1218 (quotations omitted) (citing Telecom Italia, 248 F.3d at 1116; Hemispherz Biopharma, Inc. v. Johannesburg Consol. Invs., 553 F.3d 1351, 1367 (11th Cir. 2008)).

DIRECTV maintains that "the threshold issue for Romero's STELA claim necessarily is whether disclosure was permitted under the contract." Def.'s Mem. at 9. It contends that Romero's claim "hinge[s] on the scope of the privacy policy agreed to in the contract itself." Def.'s Reply at 3. It does not. The factual allegations and causes of action in Romero's complaint all relate to STELA's "Consent to disclosure" provisions (47 U.S.C. § 338(i)(4)), not its "Notice" provisions (47 U.S.C. § 338(i)(1)). Third Am. Compl. ¶¶ 8-10, 72-94, 145-49. In other words, Romero does not contend that DIRECTV failed to provide notice of his privacy rights; rather, he contends that DIRECTV disclosed his personally identifiable information without his prior written or electronic consent. Nowhere

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strikingly broad . . . . Mobility's clause . . . is not limited to disputes concerning its service agreement. . . . The Court agrees with its colleague in the Southern District of California that such clauses are cause for concern.") (citing In re Jiffy Lube Intern., Inc., Text Spam Litig., 847 F. Supp. 2d 1253, 1263 (S.D. Cal. 2012) ("[A] suit . . . regarding a tort action arising from a completely separate incident could not be forced into arbitration—such a clause would clearly be unconscionable.")).

does Romero contend that DIRECTV failed to provide him with the privacy policy, violated the privacy policy, or breached Section 6 of the 2016 Agreement. Rather, Romero claims that DIRECTV disclosed his personally identifiable information without his prior written or electronic consent.

Moreover, DIRECTV has not established that the privacy policy referenced in Section 6 of the 2016 Agreement "set forth the circumstances under which Romero's data could be disclosed." Contra Def.'s Reply at 8. DIRECTV asserts that its privacy policy permitted it to share customer information "for other support services on our behalf," "to enforce or apply the DIRECTV Customer Agreement and other DIRECTV policies and agreements," and "to protect our rights and property." Def.'s Mem. at 18-19 n.7. DIRECTV cites to an exhibit titled "DIRECTV Subscriber Privacy Policy Effective as of June 24, 2014, until replaced," but provides no other evidentiary support for its assertions. See Def.'s Mem. at 18-19 n.7; Def. DIRECTV LLC's Opp'n to Pl.'s Mot. for Leave to File Third Am. Compl. ("Def.'s Opp'n to Pl.'s Mot. for Leave"), Ex. C [Doc. 134-3]. DIRECTV asserts that Exhibit C is the privacy policy "in effect when Mr. Romero became a subscriber." Def.'s Mem. at 18 n.7. But the Court has no evidence that this is the case. Just as Romero's assertion in his brief that he has no record of receiving the 2016 Agreement is not evidence, DIRECTVs assertion in its brief

that Exhibit C was effective at a certain time is not evidence.

More importantly, the Court has no evidence (nor does DIRECTV even assert) that Exhibit C is the "Privacy Policy" referenced in Section 6 of the 2016 Agreement, that it was available online at directv.com, or that it was effective in November 2016,[14] at the time of DIRECTV's alleged STELA violation. Romero subscribed to DIRECTV service in 2014. Martin Decl. ¶ 4. DIRECTV updated its customer agreement twice while Romero was a subscriber. See 2015 Agreement; 2016 Agreement. Without evidence that Exhibit C is in fact the "Privacy Policy" referenced in Section 6 of the 2016 Agreement, the Court cannot conclude that Exhibit C was incorporated into the 2016 Agreement. Accordingly, because the presumption in favor of arbitration "does not apply to disputes concerning whether an agreement to arbitrate has been made" and the Court must view the evidence in the light most favorable to Romero and draw all justifiable inferences in favor of Romero, the Court finds that DIRECTV has not established that Romero's claim arises from the 2016 Agreement.

Even assuming, *arguendo*, that Exhibit C was incorporated into the 2016

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[14] DIRECTV also attached as Exhibit D a "Full Privacy Policy" "[e]ffective May 2, 2017" downloaded from att.com on March 21, 2018. Def.'s Opp'n to Pl.'s Mot. for Leave, Ex. D [Doc. 134-D]. From this alone, however, the Court cannot conclude that Exhibit C was effective in November 2016.

Agreement, and that Exhibit C authorizes DIRECTV to disclose a subscriber's personally identifiable information to its expert witness to defend itself in litigation, Romero's claim still does not arise from the 2016 Agreement because he did not accept it in writing or electronically. See 47 U.S.C. § 338(i)(4)(A) ("[A] satellite carrier shall not disclose personally identifiable information concerning any subscriber without the prior written or electronic consent of the subscriber concerned . . . ."). DIRECTV asserts that Romero accepted the terms of the 2016 Agreement and the referenced privacy policy by continuing to pay for service. But the plain language of the statute requires that Romero's consent to disclosure of his personally identifiable information be written or electronic. Continuing to pay for DIRECTV service is not written or electronic consent. Nowhere does DIRECTV assert, or provide evidence that, Romero ever gave his written or electronic consent to disclosure of his personally identifiable information. Nor does DIRECTV assert, or provide evidence that, Romero gave such consent by accepting the 2016 Agreement in writing or electronically. The only evidence before the Court indicates that Romero accepted the 2016 Agreement by his conduct; that is, by continuing to pay for DIRECTV service.

Consequently, the Court finds that, at this stage in the litigation, Romero's claim "do[es] not implicate the performance of [defendant]'s duties under the

contract" and therefore "exist[s] wholly part from the contract." See Hersman, Inc. v. Fleming Co., Inc., 19 F. Supp 1282, 1287 (M.D. Ala. 1998), aff'd, 180 F.3d 271 (11th Cir. 1999) (denying motion to compel arbitration of tort claim where plaintiffs "need not inquire into the contract to prove their claims"). Without evidence that Exhibit C was incorporated into the contract, or that Romero consented to the terms of Exhibit C electronically or in writing, Romero's claims do not implicate the 2016 Agreement. They exist wholly apart from it. Accordingly, the Court concludes that Romero's claim that DIRECTV disclosed his personally identifiable information without his prior written or electronic consent does not arise out of his contract with DIRECTV and is not covered by the arbitration provision in the 2016 Agreement.[15]

[15] Because the Court finds that Romero's STELA claim is not covered by the 2016 Agreement's arbitration provision, it need not consider the effect, of any, of the unpublished decision in Gamble v. New England Auto Fin., Inc., 735 F. App'x 664 (11th Cir. 2018) (per curiam) (unpublished).

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED** that DIRECTV's Motion to Compel Arbitration and to Stay Litigation [Doc. 154] is **DENIED**.[16]

IT IS SO ORDERED this 9th day of November, 2018.

Mark H. Cohen

MARK H. COHEN
United States District Judge

[16] Accordingly, the stay on all discovery pursuant to STELA is lifted. See Aug. 1, 2018 Order [Doc. 157] at 2.