

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

AJAY NARULA,

Plaintiff,

v.

DELBERT SERVICES CORPORATION,

Defendant.

Case No. 2:13-cv-15065-NGE-PJK

HONORABLE NANCY G. EDMUNDS

MAGISTRATE PAUL J. KOMIVES

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DELBERT SERVICES CORPORATION'S
MOTION TO DISMISS AND COMPEL ARBITRATION

NOW COMES Defendant, Delbert Services Corporation, by and through its attorneys, Varnum LLP, and hereby moves to dismiss all claims against it, and compel Plaintiff to pursue all claims in arbitration. This Motion is based upon the pleadings in the herein cause of action and the accompany Brief.

There was a conference between attorneys in which the movant explained the nature of the Motion and its legal basis and requested but did not obtain concurrence in the relief sought.

For the reasons discussed in detail in the supporting brief, Defendant respectfully requests that this Honorable Court grant Defendant's motion to dismiss all claims against it and compel Plaintiff to pursue all claims in arbitration.

Respectfully submitted,

VARNUM LLP
Attorneys for Defendant

Dated: May 9, 2014

By /s/ Randall J. Groendyk
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DELBERT SERVICES CORPORATION'S
BRIEF IN SUPPORT OF MOTION TO DISMISS AND
COMPEL ARBITRATION

STATEMENT OF FACTS

On or about March 27, 2013, Plaintiff Ajay Narula ("Plaintiff") obtained a \$5,000 loan from Western Sky Financial, LLC ("Western Sky"). In connection with the loan, Plaintiff signed a Loan Agreement that contains the terms of the loan (*see* Western Sky Consumer Loan Agreement, hereinafter "the Loan Agreement", attached hereto as **Exhibit A**). The Loan Agreement contained detailed and comprehensive arbitration provisions, in which Plaintiff agreed to arbitrate any disputes relating to the loan agreement:

PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. Unless you exercise your right to opt-out of arbitration in the manner described below, any dispute you have with Western Sky or anyone else under this loan agreement will be resolved by binding arbitration. Arbitration replaces the right to go to court, including the right to have a jury, to engage in discovery (except as may be provided in the arbitration rules), and to participate in a class action or similar proceeding. In Arbitration, a dispute is resolved by an arbitrator instead of a judge or jury.

Arbitration procedures are simpler and more limited than court procedures. Any Arbitration will be limited to the dispute between yourself and the holder of the Note and will not be part of a class-wide or consolidated Arbitration proceeding.

Exhibit A, Loan Agreement, pp. 3-4.

On page 6 of the Loan Agreement (**Exhibit A**), Plaintiff checked the box indicating he had read all the terms and conditions of the Loan Agreement and

agreed to be bound by them. Plaintiff also checked a box indicating that he read and understood the arbitration section in the Loan Agreement and agreed to be bound by the terms and conditions of the arbitration section (**Exhibit A**, Loan Agreement, p. 6).

Plaintiff agreed to resolve any dispute he had with the holder or servicer of the Loan Agreement through binding arbitration:

Agreement to Arbitrate. You agree that any Dispute, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.

(**Exhibit A**, Loan Agreement, p. 4).

The Loan Agreement defines "dispute" very broadly to include any controversy or claim between Plaintiff and Western Sky or the holder or servicer of the note:

Arbitration Defined. Arbitration is a means of having an independent third party resolve a Dispute. A "Dispute" is **any controversy or claim between you and Western Sky or the holder or servicer of the Note.** The term Dispute is to be given its broadest possible meaning and includes, without limitation, all claims or demands (whether past, present, or future, including events that occurred prior to the opening of this Account), based on any legal or equitable theory (tort, contract, or otherwise), and regardless of the type of relief sought (i.e. money, injunctive relief, or declaratory relief). A Dispute includes, by way of example and without limitation, any claim based upon marketing or

solicitations to obtain the loan and the handling or servicing of my account whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law, and including any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement. For purposes of this Arbitration agreement, the term "the holder" shall include Western Sky or the then-current note holder's employees, officers, directors, attorneys, affiliated companies, predecessors, and assigns, as well as any marketing, servicing, and collection representatives and agents. (Emphasis added).

Exhibit A, Loan Agreement, p. 4.

As set forth on page 4 of the Loan Agreement, the Arbitration agreement includes Western Sky and any assignees of Western Sky, including servicers of the loan. **Exhibit A**, Loan Agreement, p. 4.

The Loan Agreement provides Plaintiff with a choice of arbitrators, including the American Arbitration Association or JAMS. **Exhibit A**, Loan Agreement, p. 4.

Plaintiff agreed to submit to arbitration and waived his right to a jury trial or to have a court decide any disputes:

Waiver of Rights. YOU HEREBY AGREE THAT YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL, TO HAVE A COURT DECIDE YOUR DISPUTE, TO PARTICIPATE IN A CLASS ACTION LAWSUIT, AND TO CERTAIN DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT. The arbitrator has the ability to award all remedies available by statute, at law, or in equity to the prevailing party, except that the parties agree that the

arbitrator has no authority to conduct class-wide proceedings and will be restricted to resolving the individual disputes between the parties. The validity, effect, and enforceability of this waiver of class action lawsuit and class-wide Arbitration is to be determined solely by a court of competent jurisdiction located within the Cheyenne Rivers Sioux Tribal Nation, and not by the arbitrator. If the court refuses to enforce the class-wide Arbitration waiver, or if the arbitrator fails or refuses to enforce the waiver of class-wide Arbitration, the parties agree that the Dispute will proceed in tribal court and will be decided by a tribal court judge, sitting without a jury, under applicable court rules and procedures.

Exhibit A, Loan Agreement, pp. 4-5.

Plaintiff was given the opportunity to opt out of the arbitration provisions of the Loan Agreement within sixty (60) days after the loan funded, which was March 28, 2013, but failed to do so. **Exhibit A**, Loan Agreement, p. 5.

After Plaintiff executed the Loan Agreement, Western Sky funded the loan on March 28, 2013. It was then sold to WS Funding, LLC and assigned to Cashcall, Inc. for handling on April 9, 2013. On August 2, 2013, the loan was sold again to The Consumer Loan Trust, which assigned it to Delbert Services Corporation for collections.

Plaintiff defaulted on his loan repayment obligations, and continues to be in default. Plaintiff has filed this action alleging that Defendant violated the Fair Debt Collection Practices Act ("FDCPA") and the Telephone Consumer Protection Act.

Defendant now requests that this Court enforce the arbitration provisions in the Loan Agreement.

LAW AND ARGUMENT

When Plaintiff executed the Loan Agreement, he agreed that any disputes between himself and Western Sky or its assignees would be resolved by arbitration. Defendant requests that this Court enforce the clear and unambiguous arbitration provisions in the Loan Agreement.

I. PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED BECAUSE ALL CLAIMS MUST BE SUBMITTED TO ARBITRATION.

A. Legal Standard.

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq., states that arbitration agreements "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 United States Supreme Court recently observed that the FAA "places arbitration agreements on an equal footing with all other contracts, and requires courts to enforce them according to their terms." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S. Ct. 2772, 2776, 177 L. Ed. 2d 403 (2010) (internal citations omitted). The FAA "was designed to override judicial reluctance to enforce arbitration agreements, to relieve court congestion, and to provide parties with a speedier and less costly alternative to litigation." *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir. 2000). The FAA, and the strong federal policy favoring

arbitration it embodies, requires courts to "rigorously enforce agreements to arbitrate." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-626 (1985).

"Courts are to examine the language of the contract in light of the strong federal policy in favor of arbitration. Likewise, any ambiguities in the contract or doubts as to the parties' intentions should be resolved in favor of arbitration." *Stout, supra* at 714. Before compelling an unwilling party to arbitrate, the court "must engage in a limited review to determine whether the dispute is arbitrable; meaning that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 624 (6th Cir. 2003). "Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

B. Plaintiff Agreed To Arbitrate.

The Loan Agreement contains detailed and comprehensive arbitration provisions. As set forth above, the Loan Agreement states:

PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. Unless you exercise

your right to opt-out of arbitration in the manner described below, any dispute you have with Western Sky or anyone else under this loan agreement will be resolved by binding arbitration. Arbitration replaces the right to go to court . . .

Exhibit A, Loan Agreement, p. 3.

The Loan Agreement further states:

Agreement to Arbitrate. You agree that any Dispute, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.

Exhibit A, Loan Agreement, p. 4.

The Loan Agreement clearly informed Plaintiff that by signing the Loan Agreement he was waiving his right to resolve any dispute with Western Sky or its assignees in Court:

Waiver of Rights. YOU HEREBY AGREE THAT YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL, TO HAVE A COURT DECIDE YOUR DISPUTE, TO PARTICIPATE IN A CLASS ACTION LAWSUIT, AND TO CERTAIN DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT. . . .

Exhibit A, Loan Agreement, p. 4

Plaintiff checked the boxes on page 6 of the Loan Agreement indicating that he understood the arbitration provisions, had read the terms and conditions of the

Loan Agreement, and agreed to be bound by them. **Exhibit A**, Loan Agreement, p. 6.

Clearly, Plaintiff agreed to arbitrate his claims.

C. The Scope Of The Parties' Agreement To Arbitrate In The Loan Agreement Covers Plaintiff's Claims.

The agreement to arbitrate in the Loan Agreement is very broad and covers any dispute between Western Sky and the holders or servicers under the Loan Agreement. The Loan Agreement states:

Agreement to Arbitrate. You agree that **any Dispute**, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement. (Emphasis added).

Exhibit A, Loan Agreement, p. 4.

The Loan Agreement defines "Dispute" to include:

. . . **any controversy or claim** between you and Western Sky or the holder or servicer of the Note. The term "Dispute" is to be given its **broadest possible meaning** and includes, without limitation, all claims or demands (whether past, present, or future, including events that occurred prior to the opening of this Account), based on any legal or equitable theory (tort, contract, or otherwise), and regardless of the type of relief sought (i.e. money, injunctive relief, or declaratory relief). A Dispute includes, by way of example and without limitation, any claim based upon marketing or solicitations to obtain the loan and the handling or servicing of my account whether such Dispute is based

on a tribal, federal or state constitution, statute, ordinance, regulation, or common law, and including any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement. . . . (Emphasis added).

Exhibit A, Loan Agreement, P. 4.

Accordingly, Plaintiff's claims in this case are subject to his agreement to arbitrate.

D. Plaintiff Did Not Opt Out Of His Agreement To Arbitrate.

The Loan Agreement gave Plaintiff the opportunity to opt out of the arbitration provisions in the Loan Agreement by giving written notice within 60 days of the funding of the loan. **Exhibit A**, Loan Agreement, p. 5. However, Plaintiff did not do so.

E. The Arbitration Provisions In The Loan Agreement Apply To Assignee Delbert Services Corporation.

The Loan Agreement states that the agreement to arbitrate applies to any disputes "between you (Plaintiff) and Western Sky or the holder or servicer of the Note For purposes of this Arbitration agreement, the term "the holder" shall include Western Sky or the then-current note holder's employees, officers, directors, attorneys, affiliated companies, predecessors, **and assigns**, as well as any marketing, servicing and collecting representatives and agents." (Emphasis added). **Exhibit A**, Loan Agreement, p. 4.

The Loan Agreement states that its arbitration provisions continue after assignment of the Note:

Other Provisions. This Arbitration provision will survive: (i) termination or changes in this Agreement, the Account, or the relationship between us concerning the Account; (ii) the bankruptcy of any party; and (iii) **any transfer, sale or assignment of my Note**, or any amounts owed on my account, to any person or entity. This Arbitration provision benefits and is binding upon you, your respective heirs, successors and assigns. **It also benefits and is binding upon us, our successors and assigns**, and related third parties. The Arbitration Provision continues in full force and effect, even if your obligations have been paid or discharged through bankruptcy. The Arbitration Provision survives any termination, amendment, expiration, or performance of any transaction between you and us and continues in full force and effect unless you and we otherwise agree in writing. If any of this Arbitration Provision is held invalid, the remainder shall remain in effect. (Emphasis added).

Exhibit A, Loan Agreement, p. 5.

Accordingly, the Arbitration provisions in the Loan Agreement apply to Plaintiff's claims against Delbert Services Corporation, the servicer of the loan.

F. Federal Courts Have Routinely Held That Fair Debt Collection Practices Act Claims Are Subject to Arbitration.

Federal Courts have routinely compelled arbitration of FDCPA claims. *See Sherer v. Green Tree Servicing, LLC*, 548 F.3d 379, 382 (5th Cir. 2008); *Koch v. Compucredit, Corp.*, 543 F.3d 466-67 (8th Cir. 2008); *Hodson v. Javitch, Block*

and Rathbone, LLC, 551 F. Supp. 2d 827, 831 (N.D. Ohio 2008); *Green v. G. Reynolds Sims & Associates, P.C.*, 2013 W.L. 1212775 (E.D. Mich.)(**Exhibit B**).

Accordingly, legal precedent supports granting Defendant's motion to compel arbitration of Plaintiff's claims.

G. Dismissal Of Plaintiff's Claims is Proper.

When a court determines that all the claims in the cause of action are to be submitted to arbitration, it may dismiss, rather than stay the action, because "staying the action will serve no purpose". *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992); *G. Reynolds Sims & Assoc.*, *supra*.

Here, if this Court grants Defendant's motion to compel arbitration, staying this action would serve no purpose. For this reason, Defendant respectfully requests that this Court dismiss Plaintiff's claims.

II. **PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED UNDER THE DOCTRINE OF FORUM NON CONVENIENS.**

In the Loan Agreement, Plaintiff agreed that the only proper forum for in-court disputes is the Cheyenne River Sioux Tribal Court (**Exhibit A**, Loan Agreement, p. 1). As the Supreme Court recently decided, "the appropriate way to enforce a forum-selection clause pointing to a state or foreign forum is through the doctrine of *forum non conveniens*." *Atlantic Marine Construction Co., Inc. v. U.S. District Court for Western District of Texas*, 134 S. Ct. 568, 580, 187 L. Ed. 2d 487 (2013).

When the parties have to a valid forum-selection clause, a district court should ordinarily transfer the case to the forum specified in that clause. *Atlantic Marine, supra*, at 581. Only under extraordinary circumstances should a motion to transfer the case to the forum specified in the forum-selection clause be denied. *Id.* The "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations and furthers vital interests of the justice system." *Id.*

When a plaintiff agrees by contract to bring suit only in a specified forum, the plaintiff has effectively exercised its "venue privilege" before a dispute arises. *Atlantic Marine, supra*, at 582. "Only that initial choice deserves deference, and the plaintiff must bear the burden of showing why the court should not transfer the case to the forum to which the parties agreed." *Id.*

"When parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." *Id.* Instead, the plaintiff must show that the interests of the **public** weigh against enforcing the forum-selection clause. (Emphasis added). *Id.* Public-interest factors may include "the administrative difficulties flowing from court congestion; the local interest in having localized controversies decided at home; [and] the interest in having the trial of a diversity case in a forum that is at home with the law." *Id.* The Supreme

Court has recognized that these public-interest factors "will rarely defeat" a *forum non conveniens* motion.¹ The practical result is that forum-selection clauses should control except in unusual cases. *Id.*

There is nothing unusual or exceptional about the circumstances of this case. Plaintiff agreed that any non-arbitratable dispute would be litigated exclusively in the courts of the Cheyenne River Sioux Tribal Court:

This Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation. By executing this Loan Agreement, you, the borrower, hereby acknowledge and consent to be bound to the terms of this Loan Agreement, consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court, and that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation.

(**Exhibit A**, Loan Agreement, p. 1).

Any interest this Court may have in deciding this matter must necessarily be overshadowed by Plaintiff's election to sue in the courts of the Cheyenne River Sioux Tribal Court. Plaintiff cannot meet his burden to show that the interest of the public invalidates the forum-selection clause agreed to by Plaintiff in the Loan Agreement. This Court would suffer no administrative difficulties in dismissing

¹ Although the forum-selection clause in *Atlantic Marine* pointed to a federal forum and involved transfer motions under 28 U.S.C. § 1404, the principles articulated by the Supreme Court apply equally to motions to dismiss for *forum non conveniens* whenever the forum selection clause points to a non-federal forum. *Atlantic Marine*, 583.

the Complaint. Therefore, if this Court does not grant Delbert Services Corporation's Motion to Dismiss and Compel Arbitration, Plaintiff's Complaint should be dismissed under the doctrine of *forum non conveniens*.

RELIEF REQUESTED

Defendant Delbert Services Corporation respectfully requests that this Honorable Court compel Plaintiff to pursue all claims in arbitration and dismiss Plaintiff's claims. In the alternative, Plaintiff's Complaint should be dismissed under the doctrine of *forum non conveniens*.

Respectfully submitted,

VARNUM LLP
Attorneys for Defendant

Dated: May 9, 2014

By /s/ Randall J. Groendyk
Randall J. Groendyk (P37196)
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Bridgewater Place
P.O. Box 352
Grand Rapids, MI 49501-0352
(616) 336-6000
rjgroendyk@varnumlaw.com

8180373_1.DOCX

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 9, 2014, a true and correct copy of the following document:

**Motion to Dismiss and Compel Arbitration
Brief in Support of Motion to Dismiss and Compel Arbitration**

was electronically filed with the Clerk of the Court filing with the Court's ECF electronic filing system which will send a copy to electronically to the following:

Gary Nitzkin
Nitzkin and Associates
22142 W. Nine Mile Road
Southfield, Michigan 48033
gary@micreditlawyer.com

/s/ Randall J. Groendyk
Randall J. Groendyk (P37196)

EXHIBIT A

WESTERN SKY CONSUMER LOAN AGREEMENT

Loan No.: 26954177	Date of Note: March 27, 2013
	Expected Funding Date: March 28, 2013
Lender: Western Sky Financial, LLC	Borrower: AJAY NARULA
Address: P.O. Box 370 Timber Lake, SD 57656	Address: 37761 ROSEBUSH ST STERLING HEIGHTS, MI 48310

This Loan Agreement is subject solely to the exclusive laws and jurisdiction of the Cheyenne River Sioux Tribe, Cheyenne River Indian Reservation. By executing this Loan Agreement, you, the borrower, hereby acknowledge and consent to be bound to the terms of this Loan Agreement, consent to the sole subject matter and personal jurisdiction of the Cheyenne River Sioux Tribal Court, and that no other state or federal law or regulation shall apply to this Loan Agreement, its enforcement or interpretation.

You further agree that you have executed the Loan Agreement as if you were physically present within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation; and that this Loan Agreement is fully performed within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation.

In this Loan Agreement, the words "you" and "your" mean the person signing as a borrower. "We," "us," "our," and "Lender" mean Western Sky Financial, LLC, a lender authorized by the laws of the Cheyenne River Sioux Tribal Nation and the Indian Commerce Clause of the Constitution of the United States of America, and any subsequent holder of this Note ("Western Sky").

TRUTH IN LENDING DISCLOSURES: The disclosures below are provided to you so that you may compare the cost of this loan to other loan products you might obtain in the United States. Our inclusion of these disclosures does not mean that we consent to application of state or federal law to us, to the loan, or this Loan Agreement.

TRUTH IN LENDING ACT DISCLOSURE STATEMENT

ANNUAL PERCENTAGE RATE	FINANCE CHARGE	AMOUNT FINANCED	TOTAL OF PAYMENTS
<i>The cost of your credit as a yearly rate</i>	<i>The dollar amount the credit will cost you</i>	<i>The amount of credit provided to you</i>	<i>The amount you will have paid after all payments are made as scheduled</i>
116.60 %	\$35,848.38	\$5,000.00	\$40,848.38

PAYMENT SCHEDULE
One payment of \$551.43 on May 01, 2013.

82 monthly payments of \$486.58 beginning on June 01, 2013.

One payment of \$397.39 on April 01, 2020.

Late Charge: If a payment is more than 15 days late, you will be charged \$29.00.

Prepayment: If you pay off this loan early, you will not have to pay any penalty.

Please see the remainder of this document for additional information about nonpayment, default and any required repayment in full before the scheduled date.

ITEMIZATION OF AMOUNT FINANCED

Amount Financed:	\$5,000.00
Amount Paid to Borrower Directly:	\$5,000.00
Prepaid Finance Charge/Origination Fee:	\$75.00

You promise to pay to the order of Western Sky or any subsequent holder of this Note the sum of **\$5,075.00**, together with interest calculated at **115.00 %** per annum and any outstanding charges or late fees, until the full amount of this Note is paid. You promise to repay this loan by making, at a minimum, the payments described on the payment schedule listed above.

Payments will be applied first to any outstanding charges or late fees, then to earned interest and finally to principal. The payment schedule described above may change in the event you do not make all payments as scheduled or in the event you accrue any fees.

Interest is calculated on a 360/360 simple interest basis. This means that interest is calculated by dividing the annual Interest Rate by 360, multiplying that number by the outstanding principal balance, and multiplying that number by the number of days the principal balance is outstanding, assuming that each full month is comprised of 30 days.

You may prepay all or any part of the principal without penalty.

If you fail to make any payment due hereunder, the holder of this Note shall have the right, after a 30-day grace period, to declare this note to be immediately due and payable. If you file for an assignment for the benefit of creditors, or for bankruptcy, the holder of this Note shall have the right to declare this Note to be immediately due and payable.

Except as may be provided in the "Arbitration" section of this Note, if we are required to employ an attorney at law to collect any amounts due hereunder, you will be required to pay the reasonable fees of such attorney to protect our interest or to take any other action required to collect the amounts due hereunder.

The Prepaid Finance Charge disclosed above is fully earned upon loan origination and is not subject to rebate upon prepayment or acceleration of this Note.

LATE FEES. You will be subject to a late fee of \$29.00 if you fail to make your payment within 15 days of the due date. We can collect any late fees immediately via Electronic Funds Transfer (EFT)

from your bank account.

INSUFFICIENT FUNDS. You will be subject to a fee of \$29.00 if any payment you make is returned by your bank for insufficient funds.

E-SIGN/ELECTRONIC COMMUNICATIONS. Although federal law does not apply to this Agreement, this Note is in original format an electronic document fully compliant with the Electronic Signatures in Global and National Commerce Act (E-SIGN) and other applicable laws and regulations, and the one, true original Note is retained electronically by us. All other versions hereof, whether electronic or in tangible format, constitute facsimiles or reproductions only. You understand that you have previously consented to receive all communications from us, including but not limited to all required disclosures, electronically.

CREDIT REPORTS. You agree that we may obtain credit reports on you on an ongoing basis as long as this loan remains in effect. You also authorize us to report information concerning this account to credit bureaus and anyone else we believe in good faith has a legitimate need for such information. Late payments, missed payments, or other defaults on this account may be reflected in your credit report.

CALL MONITORING/RECORDING. You understand that, from time to time, we may monitor or record telephone calls between us for quality assurance purposes. You expressly consent to have your calls monitored or recorded.

TELEPHONE CALLS. You hereby agree that in the event we need to contact you to discuss your account or the repayment of your loan, we may telephone you at any number, including any cell phone number provided, and that we may leave an autodialed or prerecorded message or use other technology to make that contact or to communicate to you the status of your account.

VERIFICATION. You authorize us to verify all of the information you have provided in obtaining approval of this Loan.

GOVERNING LAW. This Agreement is governed by the Indian Commerce Clause of the Constitution of the United States of America and the laws of the Cheyenne River Sioux Tribe. We do not have a presence in South Dakota or any other states of the United States. Neither this Agreement nor Lender is subject to the laws of any state of the United States of America. By executing this Agreement, you hereby expressly agree that this Agreement is executed and performed solely within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation. You also expressly agree that this Agreement shall be subject to and construed in accordance only with the provisions of the laws of the Cheyenne River Sioux Tribe, and that no United States state or federal law applies to this Agreement. You agree that by entering into this Agreement you are voluntarily availing yourself of the laws of the Cheyenne River Sioux Tribe, a sovereign Native American Tribal Nation, and that your execution of this Agreement is made as if you were physically present within the exterior boundaries of the Cheyenne River Indian Reservation, a sovereign Native American Tribal Nation.

ASSIGNMENT. We may assign or transfer this Loan Agreement or any of our rights under it at any time to any party.

WAIVER OF JURY TRIAL AND ARBITRATION.

PLEASE READ THIS PROVISION OF THE AGREEMENT CAREFULLY. Unless you exercise your right to opt-out of arbitration in the manner described below, any dispute you have with Western Sky or anyone else under this loan agreement will be resolved by binding arbitration. Arbitration replaces the right to go to court, including the right to have a jury, to engage in discovery (except as may be provided in the arbitration rules), and to participate in a class action or similar proceeding. In Arbitration, a dispute is resolved by an arbitrator instead of a judge or jury.

Arbitration procedures are simpler and more limited than court procedures. Any Arbitration will be limited to the dispute between yourself and the holder of the Note and will not be part of a class-wide or consolidated Arbitration proceeding.

Agreement to Arbitrate. You agree that any Dispute, except as provided below, will be resolved by Arbitration, which shall be conducted by the Cheyenne River Sioux Tribal Nation by an authorized representative in accordance with its consumer dispute rules and the terms of this Agreement.

Arbitration Defined. Arbitration is a means of having an independent third party resolve a Dispute. A "Dispute" is any controversy or claim between you and Western Sky or the holder or servicer of the Note. The term Dispute is to be given its broadest possible meaning and includes, without limitation, all claims or demands (whether past, present, or future, including events that occurred prior to the opening of this Account), based on any legal or equitable theory (tort, contract, or otherwise), and regardless of the type of relief sought (i.e. money, injunctive relief, or declaratory relief). A Dispute includes, by way of example and without limitation, any claim based upon marketing or solicitations to obtain the loan and the handling or servicing of my account whether such Dispute is based on a tribal, federal or state constitution, statute, ordinance, regulation, or common law, and including any issue concerning the validity, enforceability, or scope of this loan or the Arbitration agreement. For purposes of this Arbitration agreement, the term "the holder" shall include Western Sky or the then-current note holder's employees, officers, directors, attorneys, affiliated companies, predecessors, and assigns, as well as any marketing, servicing, and collection representatives and agents.

Choice of Arbitrator. Any party to a dispute, including a Holder or its related third parties, may send the other party written notice by certified mail return receipt requested at the address appearing at the top of this Agreement of their intent to arbitrate and setting forth the subject of the dispute along with the relief requested, even if a lawsuit has been filed. Regardless of who demands arbitration, you shall have the right to select any of the following arbitration organizations to administer the arbitration: the American Arbitration Association (1-800-778-7879) <http://www.adr.org>; JAMS (1-800-352-5267) <http://www.jamsadr.com>; or an arbitration organization agreed upon by you and the other parties to the Dispute. The arbitration will be governed by the chosen arbitration organization's rules and procedures applicable to consumer disputes, to the extent that those rules and procedures do not contradict either the law of the Cheyenne River Sioux Tribe or the express terms of this Agreement to Arbitrate, including the limitations on the Arbitrator below. The party receiving notice of Arbitration will respond in writing by certified mail return receipt requested within twenty (20) days. You understand that if you demand Arbitration, you must inform us of your demand and of the arbitration organization you have selected. You also understand that if you fail to notify us, then we have the right to select the arbitration organization. Any arbitration under this Agreement may be conducted either on tribal land or within thirty miles of your residence, at your choice, provided that this accommodation for you shall not be construed in any way (a) as a relinquishment or waiver of the Cheyenne River Sioux Tribe's sovereign status or immunity, or (b) to allow for the application of any law other than the law of the Cheyenne River Sioux Tribe of Indians to this Agreement.

Cost of Arbitration. We will pay the filing fee and any costs or fees charged by the arbitrator regardless of which party initiates the Arbitration. Except where otherwise provided by the law of the Cheyenne River Sioux Tribal Nation, each party will be responsible for its own attorneys' fees and other expenses. Unless prohibited by law, the arbitrator may award fees, costs, and reasonable attorneys' fees to the party who substantially prevails in the Arbitration.

Waiver of Rights. YOU HEREBY AGREE THAT YOU ARE WAIVING YOUR RIGHT TO A JURY TRIAL, TO HAVE A COURT DECIDE YOUR DISPUTE, TO PARTICIPATE IN A CLASS ACTION LAWSUIT, AND TO CERTAIN DISCOVERY AND OTHER PROCEDURES THAT ARE AVAILABLE IN A LAWSUIT. The arbitrator has the ability to award all remedies available by statute, at law, or in equity to the prevailing party, except that the parties agree that the arbitrator has no authority to conduct class-

wide proceedings and will be restricted to resolving the individual disputes between the parties. The validity, effect, and enforceability of this waiver of class action lawsuit and class-wide Arbitration is to be determined solely by a court of competent jurisdiction located within the Cheyenne River Sioux Tribal Nation, and not by the arbitrator. If the court refuses to enforce the class-wide Arbitration waiver, or if the arbitrator fails or refuses to enforce the waiver of class-wide Arbitration, the parties agree that the Dispute will proceed in tribal court and will be decided by a tribal court judge, sitting without a jury, under applicable court rules and procedures.

Applicable Law and Judicial Review. THIS ARBITRATION PROVISION IS MADE PURSUANT TO A TRANSACTION INVOLVING THE INDIAN COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, AND SHALL BE GOVERNED BY THE LAW OF THE CHEYENNE RIVER SIOUX TRIBE. The arbitrator will apply the laws of the Cheyenne River Sioux Tribal Nation and the terms of this Agreement. The arbitrator must apply the terms of this Arbitration agreement, including without limitation the waiver of class-wide Arbitration. The arbitrator will make written findings and the arbitrator's award may be filed in the Cheyenne River Sioux Tribal Court, which has jurisdiction in this matter. The Arbitration award will be supported by substantial evidence and must be consistent with this Agreement and applicable law or may be set aside by a court upon judicial review.

Small Claims Exception. All parties, including related third parties, shall retain the right to seek adjudication in a small claims tribunal in the Cheyenne River Sioux Tribal Small Claims Court for disputes within the scope of such tribunal's jurisdiction. Any dispute, which cannot be adjudicated within the jurisdiction of a small claims tribunal, shall be resolved by binding arbitration. Any appeal of a judgment from a small claims tribunal shall be resolved by binding arbitration.

Other Provisions. This Arbitration provision will survive: (i) termination or changes in this Agreement, the Account, or the relationship between us concerning the Account; (ii) the bankruptcy of any party; and (iii) any transfer, sale or assignment of my Note, or any amounts owed on my account, to any other person or entity. This Arbitration provision benefits and is binding upon you, your respective heirs, successors and assigns. It also benefits and is binding upon us, our successors and assigns, and related third parties. The Arbitration Provision continues in full force and effect, even if your obligations have been paid or discharged through bankruptcy. The Arbitration Provision survives any termination, amendment, expiration, or performance of any transaction between you and us and continues in full force and effect unless you and we otherwise agree in writing. If any of this Arbitration Provision is held invalid, the remainder shall remain in effect.

Right to Opt Out. If you do not wish your account to be subject to this Arbitration Agreement, you must advise us in writing at P.O. Box 370, Timber Lake, South Dakota, 57565, or via e-mail at info@westernsky.com. You must clearly print or type your name and account number and state that you reject Arbitration. You must give written notice; it is not sufficient to telephone us. We must receive your letter or e-mail within sixty (60) days after the date your loan funds or your rejection of Arbitration will not be effective. In the event you opt out of Arbitration, any disputes hereunder shall nonetheless be governed under the laws of the Cheyenne River Sioux Tribal Nation.

Payments. You have previously authorized and requested us to initiate an automated clearinghouse or other electronic funds transfer ("EFT") from the bank account identified on your Application (the "Bank Account") to make each payment required hereunder on the day it is due. You also authorize us to initiate an EFT to or from the Bank Account to correct any erroneous payment and, in the event any EFT is unsuccessful, to attempt such payment up to two additional times. You understand that unsuccessful EFTs may result in charges by your bank, and you agree that we are not liable for such charges. We will notify you 10 days prior to any given transfer if the amount to be transferred varies by more than \$50 from your regular payment amount. You also authorize us to withdraw funds from your account on additional days throughout the month in the event you are delinquent on your loan payments. Your request and authorization for us to initiate

EFTs is entirely voluntary, and you may terminate this authorization by notifying us in writing via fax (866-347-0666) or email (customer.service@westernsky.com) soon enough to allow us a reasonable opportunity to act on your termination (generally at least three business days in advance).

THIS LOAN CARRIES A VERY HIGH INTEREST RATE. YOU MAY BE ABLE TO OBTAIN CREDIT UNDER MORE FAVORABLE TERMS ELSEWHERE. EVEN THOUGH THE TERM OF THE LOAN IS 84 MONTHS, WE STRONGLY ENCOURAGE YOU TO PAY OFF THE LOAN AS SOON AS POSSIBLE. YOU HAVE THE RIGHT TO PAY OFF ALL OR ANY PORTION OF THE LOAN AT ANY TIME WITHOUT INCURRING ANY PENALTY. YOU WILL, HOWEVER, BE REQUIRED TO PAY ANY AND ALL INTEREST THAT HAS ACCRUED FROM THE FUNDING DATE UNTIL THE PAYOFF DATE.

CAUTION: IT IS IMPORTANT THAT YOU THOROUGHLY READ THIS AGREEMENT BEFORE YOU SIGN IT. YOU ARE ENTITLED TO A COPY OF THIS AGREEMENT.

<input checked="" type="checkbox"/>	YOU HAVE READ AND UNDERSTAND THE ARBITRATION SECTION OF THIS NOTE AND AGREE TO BE BOUND BY THE TERMS AND CONDITIONS OF THAT SECTION.
<input checked="" type="checkbox"/>	YOU HAVE READ ALL OF THE TERMS AND CONDITIONS OF THIS PROMISSORY NOTE AND DISCLOSURE STATEMENT AND AGREE TO BE BOUND THERETO. YOU UNDERSTAND AND AGREE THAT YOUR EXECUTION OF THIS NOTE SHALL HAVE THE SAME LEGAL FORCE AND EFFECT AS A PAPER CONTRACT.

CONSUMER COMPLAINTS - If you have a complaint about our loan, please let us know. You can contact us at P.O. Box 370, Timber Lake, South Dakota, 57656, telephone (877) 860-2274.

Click [here](#) to print out a copy of this document for your records.

EXHIBIT B

Westlaw

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C

Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
Tennie GREEN, Plaintiff,

v.

G. REYNOLDS SIMS & ASSOC., P.C., Defendant.

No. 12-12488.
March 25, 2013.

Larry P. Smith, David M. Marco, Smithmarco, P.C., Chicago, IL, Patrick G. Gagniuk, Patrick G. Gagniuk, P.L.L.C., Royal Oak, MI, for Plaintiff.

Jason R. Sims, G. Reynolds Sims Assoc., Troy, MI, for Defendant.

OPINION AND ORDER GRANTING DEFENDANT'S MOTION TO ENFORCE ARBITRATION CLAUSE AND COMPEL ARBITRATION [10]

NANCY G. EDMUNDS, District Judge.

*1 This matter, alleging violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §§ 1692, *et seq.*, comes before the Court on Defendant G. Reynolds Sims & Associates, P.C. ("Defendant Law Firm")'s motion to enforce an arbitration clause in Plaintiff's credit card agreement.

^{FN1} For the reasons stated below, this Court GRANTS Defendant's motion and STAYS this matter pending arbitration.

^{FN1}. Although titled as a motion for summary judgment, the Court previously ruled that this motion is to be considered as a motion to compel arbitration. (11/02/12 Order.)

I. Facts

Plaintiff brings this FDCPA action alleging that

she is a consumer, as defined in the FDCPA, 15 U.S.C. § 1692a(3), that Defendant is a law firm engaged in the collection of a debt, that the debt was for a credit card that Plaintiff used primarily for personal and/or household expenditures, and that Defendant violated the FDCPA in its attempts to collect a debt she allegedly owed. (Pl.'s Compl., ¶¶ 5-8, 105.) Defendant responds as follows.

On July 15, 2009, Plaintiff entered into a credit card agreement with Bank of America—FIA Card Services, N.A. ("Bank of America") that had an arbitration clause.

On January 31, 2011, Bank of America charged-off Plaintiff's credit card account after she defaulted on her payment obligations.

On March 30, 2012, CACH, LLC purchased Plaintiff's charged-off credit card account from Bank of America. As CACH, LLC's agent/attorneys, Defendant Law Firm made attempts to collect the credit card debt allegedly owed by Plaintiff.

The Credit Card Agreement that Plaintiff allegedly entered into by using the Bank of America Platinum Plus credit card has a broad arbitration clause that covers the FDCPA claims Plaintiff asserts in her complaint. The provisions in that arbitration clause that are relevant here are as follows.

ARBITRATION AND LITIGATION

This Arbitration and Litigation provision applies to you unless you were given the opportunity to reject the Arbitration and Litigation provisions and you did so reject them in the manner and timeframe required. If you did reject effectively such a provision, you agreed that any litigation brought by you against us regarding this account or this Agreement shall be brought in a court located in the State of Delaware.

Any claim or dispute ("Claim") by either you or us against the other, or against the employees,

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agents or assigns of the other, arising from or relating in any way to this Agreement or any prior Agreement or your account (whether under a statute, in contract, tort, or otherwise and whether for money damages, penalties or declaratory or equitable relief), shall, upon election by either you or us, be resolved by binding arbitration. The arbitrator shall resolve any Claims, including the applicability of this Arbitration and Litigation Section or the validity of the entire Agreement or any prior Agreement, except for any Claim challenging the validity of the Class Action Waiver, which shall be decided by a court.

Arbitration shall take place before a single arbitrator and on an individual basis without resort to any form of class action. *Arbitration may be selected at any time unless a judgment has been rendered or the other party would suffer substantial prejudice by the delay in demanding arbitration.*

*2 This Arbitration and Litigation Section applies to all Claims now in existence or that *may arise in the future. This Arbitration and Litigation Section shall survive the termination of your account with us as well as any voluntary payment of the debt in full by you, any bankruptcy by you or sale of the debt by us.*

For the purposes of this Arbitration and Litigation Section, "we" and "us" means FIA Card Services, N.A., its parent, subsidiaries, affiliates, licensees, predecessors, successors, assigns, *and any purchaser of your account, and all of their officers, directors, employees, agents and assigns or any and all of them. Additionally, "we" or "us" shall mean any third party providing benefits or services, or products in connection with the account (including but not limited to credit bureaus, merchants that accept any credit device issued under the account, rewards or enrollment services, credit insurance companies, debt collectors and all of their officers, directors, em-*

ployees and agents) if, and only if, such a third party is named by you as a co-defendant in any Claim you assert against us.

YOU UNDERSTAND AND AGREE THAT IF EITHER YOU OR WE ELECT TO ARBITRATE A CLAIM, THIS ARBITRATION SECTION PRECLUDES YOU AND U.S. FROM HAVING A RIGHT OR OPPORTUNITY TO LITIGATE CLAIMS THROUGH COURT, OR TO PARTICIPATE OR BE REPRESENTED IN LITIGATION FILED IN COURT BY OTHERS. EXCEPT AS OTHERWISE PROVIDED ABOVE, ALL CLAIMS MUST BE RESOLVED THROUGH ARBITRATION IF YOU OR WE ELECT TO ARBITRATE.

(Def.'s Mot., Ex. 1, Bank of America Platinum Plus Credit Card Agreement at 15-16 (emphasis added).) The Credit Card Agreement also has a section titled "We May Sell Your Account," providing that:

We may at any time, and without notice to you, sell, assign or transfer your account, any sums due on your account, this Agreement, or our rights or obligations under your account or this Agreement to any person or entity. The person or entity to whom we make any such sale, assignment or transfer shall be entitled to all of our rights and/or obligations under this Agreement, to the extent sold, assigned or transferred.

(*Id.* at 14.) In addition, the Agreement also provides that it "is governed by the laws of the State of Delaware (without regard to its conflict of laws principles) and by any applicable federal laws." (*Id.*)

II. Analysis

Defendant's motion seeks to enforce the arbitration clause in a Credit Card Agreement between Plaintiff and Bank of America, arguing that Plaintiff's FDCPA claims fall within the scope of the broad arbitration clause contained in Plaintiff's Credit Card Agreement. In response, Plaintiff first

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raises an argument that questions whether the entire Credit Card Agreement is enforceable, i.e., that Defendant cannot show that a Credit Card Agreement exists absent Plaintiff's signature evidencing acceptance. Plaintiff next raises arguments that assume a valid Credit Card Agreement exists between her and Bank of America but question whether the arbitration clause is applicable under the facts and circumstances asserted here. Specifically, Plaintiff argues that the arbitration clause does not apply here because (1) Defendant is a third-party debt collector and the only named defendant in a complaint that raises FDCPA claims; and (2) Defendant waived its right to enforce arbitration by delaying four months before filing this motion demanding arbitration and thus prejudicing Plaintiff who, pursuant to Rule 26(a)(1), provided Defendant with initial disclosures about witnesses' expected testimony.^{FN2} Each of these arguments is addressed below after a brief discussion of the legal principles governing the enforcement of arbitration clauses.

FN2. Plaintiff does not argue that her FDCPA claims would fall outside the scope of the Arbitration and Litigation Section in the Credit Card Agreement. Accordingly, there is no need to address an argument that does not exist.

A. General Principles

*3 Defendant's motion relies on the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, *et seq.*, which provides that arbitration clauses in commercial contracts "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. As the Supreme Court recently observed, the FAA "places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms." *Rent-A-Center, West, Inc. v. Jackson*, — U.S. —, 130 S.Ct. 2772, 2776, 177 L.Ed.2d 403 (2010) (internal citations omitted). "The FAA was designed to override judicial reluctance to enforce arbitration agreements, to relieve court congestion, and to provide

parties with a speedier and less costly alternative to litigation." *Stout v. J.D. Byrider*, 228 F.3d 709, 714 (6th Cir.2000). However, just "[l]ike other contracts," a party can seek to invalidate them by raising "applicable contract defenses." *Rent-A-Center*, 130 S.Ct. at 2776.

The FAA "also establishes procedures by which federal courts implement § 2's substantive rule." *Id.* Section 4 applies here. "Under § 4, a party 'aggrieved' by the failure of another party 'to arbitrate under a written agreement for arbitration' may petition a federal court 'for an order directing that such arbitration proceed in the manner provided for in such agreement.' The court 'shall' order arbitration 'upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue.' " *Id.* (quoting 9 U.S.C. § 4).

"Courts are to examine the language of the contract in light of the strong federal policy in favor of arbitration. Likewise, any ambiguities in the contract or doubts as to the parties' intentions should be resolved in favor of arbitration." *Stout*, 228 F.3d at 714. But a party "cannot be required to submit to arbitration any dispute that the party has not agreed to so submit." *Bratt Enterprises, Inc. v. Noble Int'l Ltd.*, 338 F.3d 609, 612 (6th Cir.2003); *see also Albert M. Higley Co. v. N/S Corp.*, 445 F.3d 861, 863 (6th Cir.2006) (internal citations omitted) (noting that "arbitration under the Federal Arbitration Act is a matter of consent, not coercion").

"Before compelling an unwilling party to arbitrate, the court must engage in a limited review to determine whether the dispute is arbitrable; meaning that a valid agreement to arbitrate exists between the parties and that the specific dispute falls within the substantive scope of that agreement." *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 624 (6th Cir.2003). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to ar-

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bitrability.” *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983).

*4 When determining “whether the arbitration clause itself was validly obtained,” state contract law is applied, “provided the contract law applied is general and not specific to arbitration clauses.” *Fazio v. Lehman Bros., Inc.*, 340 F.3d 386, 393 (6th Cir.2003). State law inconsistent with the FAA’s “broad principle of enforceability” of arbitration agreements, however, is pre-empted by federal arbitration law. *Doctor’s Assoc., Inc. v. Casarotto*, 517 U.S. 681, 688, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996); *Stout*, 228 F.3d at 716.

If a court determines that the cause of action is covered by an arbitration clause, Section 3 of the FAA provides that “it must stay the proceedings until the arbitration process is complete.” *Fazio*, 340 F.3d at 392 (citing 9 U.S.C. § 3). Courts have held, however, that when the court determines that all the claims in a cause of action are to be submitted to arbitration, it may dismiss, rather than stay the action because “staying the action will serve no purpose.” *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir.1992). See *Hensel v. Cargill, Inc.*, No. 99–3199, 1999 WL 993775, *4 (6th Cir. Oct.19, 1999) (rejecting an argument that dismissal was improper, citing *Alford* with approval, and holding that dismissal is proper when all claims in a suit are submitted to arbitration).

B. The Credit Card Agreement Has An Arbitration Section With A Delegation Provision

Just as in *Rent-A-Center*, the Agreement at issue here provides for the arbitration of a broad category of disputes and has a provision delegating to the arbitrator the authority to decide specific gateway questions of arbitrability. See *Rent-A-Center*, 130 S.Ct. at 2777.^{FN3} Specifically, the Arbitration and Litigation section of the Credit Card Agreement states that “[a]ny claim or dispute (‘Claim’) by either you or us against the other ... arising from or relating in any way to this Agreement ... or your account ... shall, upon election by either you or us,

be resolved by binding arbitration.” (Def.’s Mot., Ex. 1, Credit Card Agree. at 15.) The Arbitration section also has a delegation provision stating that “[t]he arbitrator shall resolve any Claims, including the applicability of this Arbitration and Litigation Section or the validity of the entire Agreement” (*Id.*) (emphasis added).

FN3. In *Rent-A-Center*, the underlying contract was itself an agreement to arbitrate claims arising out of the respondent’s employment with petitioner, but the Supreme Court clarified that “inakes no difference” to its analysis and holding. 130 S.Ct. at 2779.

As the Supreme Court recognized in *Rent-A-Car*, “[t]he delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement.” *Rent-A-Car*, 130 S.Ct. at 2777. The Court observed that it had previously held “that parties can agree to arbitrate ‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy .” *Id.* (citing cases). It explained that “[t]his line of cases merely reflects the principle that arbitration is a matter of contract.” *Id.* “An agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.” *Id.*

*5 Here, Defendant asks the Court to enforce both the arbitration section and the delegation provision within the Arbitration and Litigation section. As discussed below, the Court must consider Plaintiff’s arguments against enforcement; specifically, whether they address the contract as a whole, the arbitration section, or the delegation provision.

C. Plaintiff’s Challenges to the Contract As Whole

The Supreme Court in *Rent-A-Center* distinguished between challenges that question the valid-

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ity of an agreement to arbitrate and those that "challenge [] the contract as a whole, either on a ground that directly affects the entire agreement (e.g., the agreement was fraudulently induced), or on the ground that the illegality of one of the contract's provisions renders the whole contract invalid." *Rent-A-Center*, 130 S.Ct. at 2778 (internal quotation marks and citation omitted). It observed that it has "held that only the first type of challenge is relevant to a court's determination whether the arbitration agreement at issue is enforceable." *Id.* (citing cases).

In her response, Plaintiff raises several arguments challenging the validity of the contract as a whole, e.g., there is no signed Credit Card Agreement and thus no evidence of Plaintiff's acceptance; and in light of Defendant's admission that Plaintiff does not owe a debt to Bank of America, there is no evidence that a Credit Card Agreement existed between Bank of America and Plaintiff. (Pl.'s Resp. at 3-6.) As the Supreme Court observed in *Rent-A-Center*, these challenges are not relevant to this Court's determination whether the arbitration agreement in the Credit Card Agreement is enforceable. Moreover, like the petitioner in *Rent-A-Center*, Plaintiff fails to mention, let alone challenge the delegation provision that expressly provides that "[t]he arbitrator shall resolve any Claims, including ... the validity of the entire Agreement...." (Def.'s Mot., Ex. 1, Credit Card Agree. at 15.) Thus, Defendant's arguments that the delegation provision is enforceable is uncontested. Accordingly, because Plaintiff failed to challenge the "delegation provision specifically, [the Court] must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole to the arbitrator." *Rent-A-Center*, 130 S.Ct. at 2779.

C. Plaintiff's Remaining Challenges Question Whether The Arbitration Section of the Credit Card Agreement Applies to Defendant

Plaintiff's additional arguments do not question the validity of the Credit Card Agreement as a

whole. Rather, Plaintiff assumes that a valid Credit Card Agreement with an arbitration section exists but then raises arguments challenging whether that arbitration section applies to Defendant. Specifically, Plaintiff argues that the arbitration clause does not apply here because (1) Defendant is a third-party debt collector and the only named defendant in a complaint that raises FDCPA claims arising out of a Credit Card Agreement she had with a different entity-Bank of America (Resp. at 6-9); and (2) Defendant waived his right to enforce arbitration by delaying four months before filing this motion demanding arbitration and thus prejudicing Plaintiff who, pursuant to Rule 26(a)(1), provided Defendant with initial disclosures about witnesses' expected testimony (Resp. at 9-15).

*6 Once again, Plaintiff's arguments fail to mention, let alone challenge the delegation provision that expressly provides that "[t]he arbitrator shall resolve any Claims, including the applicability of this Arbitration and Litigation Section...." (Def.'s Mot., Ex. 1, Credit Card Agree. at 15.) Accordingly, because Plaintiff failed to challenge the "delegation provision specifically, [the Court] must treat it as valid under § 2 [of the FAA], and must enforce it under §§ 3 and 4 [of the FAA], leaving any challenge" to the applicability of the Arbitration and Litigation Section "to the arbitrator." *Rent-A-Center*, 130 S.Ct. at 1229.

Even if there were no provision in the arbitration clause that delegated the task of determining whether the arbitration clause applied to the Defendant despite a four month delay in demanding arbitration, there is a procedural provision within the Arbitration section that addresses this issue of waiver. It provides that:

Arbitration shall take place before a single arbitrator and on an individual basis.... Arbitration may be selected at any time unless a judgment has been rendered or the other party would suffer substantial prejudice by the delay in demanding arbitration.

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(Def.'s Mot., Ex. 1, Credit Card Agree. at 15.)

Plaintiff argues in her response that she was prejudiced by Defendant's delay in demanding arbitration; and in its reply, Defendant argues that Plaintiff cannot show that any prejudice she suffered by the delay was substantial. As the Sixth Circuit recently observed in *United Steel Workers of America, AFL-CIO-CLC v. Saint Gobain Ceramics & Plastics, Inc.*, the Supreme Court has held that, absent an agreement to the contrary, procedural questions of arbitrability like laches, waiver, time limits, and estoppel are for arbitrators to decide. 505 F.3d 417, 420–22 (6th Cir.2007) (discussing *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964) and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84–85, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002)). Thus, even without the delegation provision in the Arbitration and Litigation Section, binding case law compels the conclusion that Plaintiff's waiver argument is for the arbitrator to decide, not the Court.

III. Conclusion

For the above-stated reasons, Defendant's motion to enforce arbitration clause and compel arbitration is GRANTED, and this matter is STAYED pending arbitration.

E.D.Mich.,2013.

Green v. G. Reynolds Sims & Assoc., P.C.

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