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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

MADELINE MARTIN, on behalf of herself and
all others similarly situated,

No. C 12-06030 SI

Plaintiff,

**ORDER DENYING MOTION TO
COMPEL ARBITRATION**

v.

WELLS FARGO BANK, N.A.,

Defendant.

Defendant Wells Fargo Bank, N.A.'s motion to compel arbitration came on for hearing on November 22, 2013. Docket No. 30. Having considered the arguments of counsel and the papers submitted, the Court DENIES the motion for the reasons discussed below.

BACKGROUND

On November 28, 2012, Plaintiff Madeline Martin filed a class action complaint for damages and injunctive relief against Wells Fargo. Docket No. 1. Plaintiff alleges three causes of action against Wells Fargo in her complaint: (1) knowing and/or willful violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 277 *et seq.*; (2) violations of the Telephone Consumer Protection Act 47 U.S.C. § 277 *et seq.*; and (3) violations of California's Unfair Competition Law, Cal. Bus & Prof Code § 17200, *et seq.* Compl. ¶¶ 1-3. Martin's allegations stem from her claim that Wells Fargo has repeatedly called her cellular telephone without her consent. *Id.* ¶¶ 16-17; Martin Decl. ¶ 3.

1 On March 7, 2013, Wells Fargo filed a Motion to Compel Arbitration, along with the supporting
2 declarations of Joan Larsen (“Larsen Decl.”) and Marcus O’Sullivan (“O’Sullivan Decl.”). Docket Nos.
3 30-32. On August 16, 2013, plaintiff filed an Opposition to defendant’s Motion to Compel with the
4 supporting declaration of Madeline Martin (“Martin Decl.”). Docket No. 53. On October 2, 2013,
5 Wells Fargo filed its Reply. Docket No. 62.

6 The parties agree on very little with regard to the facts. The complaint states that Martin
7 received repeated, harassing, prerecorded calls from Wells Fargo at all hours of the day. Compl. ¶ 17.
8 While not mentioned in the complaint, Martin’s declaration states that the harassing calls occurred in
9 2010. Martin Decl. ¶ 3. The specific account the alleged calls were made in reference to is not
10 identified with specificity in either the complaint or Martin’s declaration. However, the complaint
11 identifies only one account, a checking account with Wells Fargo that Martin applied for and received
12 in the late 1980s. Compl. ¶ 15. While Martin has opened multiple accounts with Wells Fargo, the
13 personal “Complete Advantage Checking” account Martin applied for and opened on November 4, 1987
14 is the only checking account she applied for and opened in the late 1980s. O’Sullivan Decl. ¶¶ 3-5.
15 This personal checking account is presumably the account at issue in the present dispute. O’Sullivan
16 Decl. ¶ 5, Compl. ¶ 15.

17 Martin’s account was subject to the terms set forth in the “Consumer Disclosure Statement,”
18 effective June 1, 1987. O’Sullivan Decl. ¶ 6. The 1987 Consumer Disclosure Statement did not contain
19 an arbitration clause, nor did it refer to the possibility that an arbitration clause might be added at a later
20 date. It did include the following language on the first page: “NOTICE—We reserve the right to change
21 any of the charges, fees or other information contained in this disclosure. However, we will send you
22 a notice at least 15 days before the effective date of any change in charges, fees, or interest
23 computation.” O’Sullivan Decl., Exh.G.

24 Wells Fargo contends that the 1987 Consumer Disclosure Statement, as it applies to plaintiff,
25 was amended by way of a billing statement insert prepared in December, 2011 and “effective February
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1 15, 2012.” Larsen Decl. ¶ 5.¹ The billing statement insert, entitled “Important Change in Terms
2 Notice,” includes the text of the arbitration provision Wells Fargo now seeks to enforce. Larsen Decl.
3 ¶ 6. According to Wells Fargo, the arbitration provision included in the insert was also published online
4 as a disclosure that Martin would have received upon logging into her account at www.wellsfargo.com
5 any time between December 1, 2011 and May 31, 2012. Larsen Decl. ¶ 7. Wells Fargo presents no
6 evidence that Martin did log in to the account during that time frame.

7 The arbitration provision states:

8 If you have a dispute with the Bank, and you are not able to resolve the dispute
9 informally, you and the Bank agree that upon demand by either you or the Bank, the
10 dispute will be resolved through the arbitration process as set forth in this part. A
11 “dispute” is any unresolved disagreement between you and the Bank. It includes any
12 disagreement relating in any way to *services*, accounts or matters; to your use of any of
the Bank’s banking locations or facilities; or to any means you may use to access your
account(s). It includes claims based on broken promises or contracts, torts or other
wrongful actions. It also includes statutory, common law and equitable claims.

13 Larsen Decl., Ex. A.²

14 Martin denies ever receiving or seeing the “Important Change in Terms Notice” or any other
15 notice pertaining to arbitration. Docket No. 53-1, Marin Decl. ¶ 4. She further maintains she did not
16 see the notice on her online Wells Fargo account and has no recollection of logging in to her online
17 account between December 1, 2011 and May 31, 2012. *Id.* ¶ 5.

18 Relying upon the terms of the arbitration provision, Wells Fargo now seeks to compel
19 arbitration of Martin’s claims. Docket No. 30.

20 21 DISCUSSION

22 To determine whether there is an enforceable arbitration agreement between Martin and Wells
23 Fargo the Court “should apply ordinary state-law principles that govern the formation of contracts” to
24 ascertain whether the parties have agreed to some alternative form of dispute resolution. *Circuit City*

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26 ¹Wells Fargo also asserts – without explanation – that plaintiff’s account is now governed by
a “2012 Consumer Account Agreement (effective October 15, 2011).” O’Sullivan Decl., ¶ 7 and Ex.
27 I. Wells Fargo has provided no information regarding whether, when or how notice of the “2012
Consumer Account Agreement (effective October 15, 2011)” was provided to Martin.

28 ²Wells Fargo notes the language contained in the billing statement insert and online disclosure
can also be found in the 2012 Consumer Account Agreement. O’Sullivan Decl., Ex. I.

1 *Stores, Ind. v. Adams* 279 F.3d 889, 892 (9th Cir. 2002) (quoting *First Options of Chicago, Inc. v.*
2 *Kaplan*, 514 U.S. 938, 944 (1995)). Under California and federal law, arbitration is a matter of contract
3 between the parties. *See Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2272, 2776 (2010). As such,
4 “a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”
5 *Kramer v. Toyota Motor Corp.*, 705 F.3d 1122, 1126 (9th Cir. 2013) (quoting *United Steelworkers v.*
6 *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (internal quotation mark omitted)). Pursuant
7 to California Civil Code § 1698, a written contract “may expressly provide for modification.” The
8 California Court of Appeal has explained that “a modification made ‘in accordance with the terms of
9 the contract’ means, at least in part, a modification whose general subject matter was anticipated when
10 the contract was entered into.” *Badie v. Bank of America*, 67 Cal. App. 4th 779, 792 (1998); *see also*
11 *Busch v. Globe Indus.*, 200 Cal. App. 2d 315, 320 (1962) (“When a modification is in accordance with
12 a provision authorizing and setting forth a method for its revision the rule that a contract in writing may
13 be altered only be another written contract or an executed oral agreement has no application because
14 there is no alteration.”). The party seeking to compel arbitration bears the burden of proving the
15 existence of the arbitration agreement by a preponderance of the evidence. *Rosenthal v. Great W. Fin.*
16 *Sec. Corp.*, 926 P. 2d 1061, 1072 (Cal. 1996).

17 Wells Fargo maintains the 2012 Consumer Account Agreement– and the arbitration clause
18 contained therein – governs this dispute and supersedes the 1987 agreement. Motion to Compel p. 2.
19 As noted above, the record does not contain evidence that demonstrates that the 1987 agreement has in
20 fact been superseded by the 2012 Consumer Account Agreement. However, there is evidence in the
21 record concerning the arbitration clause on the billing statement insert, and the Court therefore considers
22 that to be the primary basis of Wells Fargo’s motion to compel arbitration.

23 Wells Fargo argues 1987 agreement expressly allows the bank to add new terms, rights, and
24 obligations and because Martin was notified of the changes, the modifications to her agreement were
25 made in accordance with the contract terms and are therefore valid. Motion to Compel p. 3; Reply p.
26 6. Implicit in this argument is the assumption that by entering into the 1987 agreement, Martin assented
27 to future changes to her account, including the addition of an arbitration agreement. Martin contends
28 the 1987 agreement allowed only for amendments to terms existing at the time of the initial contract and

1 that the notice provided to her was insufficient. Opposition p. 7.

2 Wells Fargo, the party seeking to compel arbitration, bears the burden of proving the existence
3 of the arbitration agreement by a preponderance of the evidence. *See Rosenthal*, 926 P. 2d at 1072. On
4 this record, Wells Fargo treats the question of whether it provided sufficient notice to Martin casually,
5 relying upon a declaration that Martin was notified of the arbitration provision “via a mailing insert that
6 she was targeted to receive in December, 2011” and an online message “she would have received upon
7 logging into her account.” Motion to Compel p. 3; Larsen Decl. ¶ 6-7. Wells Fargo supports its position
8 with the Larsen Declaration, which states only that Martin’s account “was on the list targeted to receive
9 this insert.” Larsen Decl. ¶ 6. In making this declaration, Larsen reviewed only Wells Fargo’s
10 “TeamTrack system that archives the contents of messages generated on the face of statements and the
11 list of accounts that were targeted to receive those messages.” *Id.* Larsen does not rely upon evidence
12 that an insert was actually mailed to Martin and stops short of making a definitive statement the insert
13 containing the arbitration provision was mailed. She states only that Martin “was targeted to receive”
14 the insert. *Id.* Wells Fargo has not provided the Court with any legal precedent to support the premise
15 that “targeting” an individual to receive a mailing constitutes proper notice. As to the online
16 notification, Martin maintains she did not see the notification on her online account, nor does she recall
17 logging in to the online account during the period Wells Fargo asserts the notice was displayed online.
18 Martin Decl. ¶ 5. Wells Fargo has not yet produced evidence to contradict Martin’s position. As to the
19 online notification, the Larsen declaration states only that the disclosure was published online as a
20 message Martin “would have received upon logging into her account” but not that Martin actually did
21 log in and see the disclosure. Larsen Decl. ¶ 7. On the present record at this stage in the proceedings,
22 Wells Fargo has not met its burden to demonstrate Martin received proper notice of the changes to her
23 account agreement.

24 Another question is raised as to whether the addition of the arbitration agreement is a fair
25 amendment to Martin’s 1987 agreement with Wells Fargo. The terms of the 1987 agreement state:
26 “NOTICE–We reserve the right to change any of the charges, fees or other information contained in this
27 disclosure. However, we will send you a notice at least 15 days before the effective date of any change
28 in charges, fees, or interest computation” O’Sullivan Decl., Exh. G. Reading this provision in its


1 entirety, “charges, fees or other information” is structured in parallel to, and thus appears to mean,
2 “charges, fees or interest computation.” It therefore appears that the addition of an arbitration provision
3 is not a change to “charges, fees, or other information,” the only aspects of the 1987 agreement Wells
4 Fargo reserved the right to change. There are no arbitration provisions within the 1987 agreement nor
5 are there references to any form of alternative dispute resolution. The original terms do not indicate the
6 addition of an arbitration agreement was “a modification whose general subject matter was anticipated
7 when the contract was entered into.” *Badie*, 67 Cal. App. 4th at 792. Had Wells Fargo, the drafting
8 party, intended its initial agreement to allow for the subsequent addition of an arbitration provision, it
9 could have included those terms within the 1987 agreement.

10
11 **CONCLUSION**

12 The Court finds that Wells Fargo has failed to prove, by a preponderance of the evidence, that
13 proper notice was provided to Martin as to an addition of an arbitration agreement to her original
14 consumer agreement. Wells Fargo has yet to prove the existence of a valid arbitration agreement with
15 Martin. *See Rosenthal*, 926 P. 2d at 1072. Defendant’s motion to compel is DENIED.

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17 **IT IS SO ORDERED.**

18 Dated: December 2, 2013

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21 SUSAN ILLSTON
22 UNITED STATES DISTRICT JUDGE
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