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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

SCOTT F SAVAGE,
Plaintiff,
v.
CITIBANK N.A., et al.,
Defendants.

Case No. [14-cv-03633-BLF](#)

**ORDER DENYING MOTION TO
COMPEL ARBITRATION**

[Re: ECF 23]

This lawsuit involves claims under the federal Telephone Consumer Protection Act of 1991 (“TCPA”), 47 U.S.C. § 227, as well as various state law claims, in connection with calls made to collect on a debt owed on a Macy’s store credit card. Plaintiff Scott Savage alleges that defendants Department Store National Bank (“DSNB”), FDS Bank (“FDS”), and Citibank N.A. (“Citi,” collectively, with DSNB and FDS, “Defendants”) repeatedly called him on his cellular phone in connection with the debt owed on the Macy’s card despite two written requests that they stop. Before the Court is Defendants’ Motion to Compel Arbitration. Def.’s Mot. 23. The Court heard oral argument on February 5, 2015 and then stayed its ruling for 90 days so that the parties could attempt to settle the case through mediation. On May 8, 2015, the parties informed the Court that they were unable to reach a settlement. After careful consideration of the parties’ respective written submissions and the oral argument of counsel, for the reasons stated herein, Defendants’ Motion to Compel Arbitration is DENIED.

I. BACKGROUND

The underlying claims in this action involve debt collection activities concerning a Macy’s store credit card issued to Plaintiff by defendant DSNB. Compl. ¶ 1, ECF 1. Plaintiff alleges on information and belief that “the department store Macy’s, Inc. is a foreign business corporation

1 doing business in California, which issues lines of credit through its financing arm [DSNB], which
2 are then collected by its agents [FDS] and [Citibank].” *Id.* ¶ 29. DSNB is also alleged to be a
3 subsidiary of Citibank, N.A. *Id.* Plaintiff moreover alleges that “[a]t all times mentioned herein,
4 each defendant and employee of defendant named [in the Complaint] was the agent or employee
5 of each of the other defendants.” *Id.* ¶ 36.

6 In July 2013, Plaintiff stopped paying the Macy’s credit card account. *Id.* ¶ 9. On July 10,
7 2013, he sent a letter to DSNB indicating that he could no longer pay the account and “requesting
8 that it not telephone him anymore.”¹ *Id.* ¶¶ 2, 11. DSNB and its agents, defendants FDS and Citi,
9 did not cease their collection calls and continued to call him nearly every day, “sometimes three
10 (3) to six (6) times a day.” *Id.* ¶ 12. Plaintiff sent DSNB a second letter in September 3, 2013
11 requesting that it stop calling him. *Id.* ¶ 14. The calls continued unabated. *Id.* ¶ 15. Defendants
12 also mailed letters to Plaintiff from August 2013 to January 2014 in an effort to collect on the
13 “delinquent DSNB account.” *Id.* ¶ 16. Plaintiff alleges that this course of conduct violated federal
14 and state law and asserts claims under the California Fair Debt Collection Practices Act, Cal. Civ.
15 Code §§ 1788 *et seq.*, the federal TCPA, as well as state common law claims for inclusion upon
16 seclusion, and negligent training and supervision.

17 On November 14, 2014, Defendants moved to compel arbitration pursuant to arbitration
18 provisions in cardholder agreements concerning not the Macy’s card issued by DSNB, but rather
19 two Sears cards issued to Plaintiff by Citi. It is undisputed that Citi did not issue the Macy’s card.
20 Def.’s Mot. 1.

21 **II. LEGAL STANDARD**

22 The Federal Arbitration Act (“FAA”) governs the enforceability and scope of an arbitration
23 agreement. 9 U.S.C. §§ 1 *et seq.* Under the FAA, a party seeking to invoke an arbitration
24 agreement may petition the district court “which, save for such agreement, would have jurisdiction
25 [to hear the case], for an order directing that such arbitration proceed in the manner provided for in
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27 ¹ Elsewhere in the Complaint, Plaintiff alleges that he “informed” DSNB as well as its agents,
28 FDS and Citi that he could no longer pay and wished the phone calls would stop. *Id.* ¶ 2. It is not
clear whether Plaintiff sent separate letters to FDS and Citi.

1 such agreement.” 9 U.S.C. § 4; *see also Trompeter v. Ally Financial, Inc.*, 914 F. Supp. 2d 1067,
2 1071 (N.D. Cal. 2012).

3 A district court faced with a petition to enforce an arbitration clause engages in a limited
4 two-part inquiry: first, it determines whether the arbitration agreement is valid, and second, it
5 determines whether the agreement encompasses the claims at issue. *See, e.g., Mitsubishi Motors*
6 *Co. v. Soler Chrysler–Plymouth*, 473 U.S. 614, 627-28 (1985); *see also Trompeter*, 914 F. Supp.
7 2d at 1071. The FAA dictates that arbitration agreements are “a matter of contract,” and “shall be
8 valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the
9 revocation of any contract.” 9 U.S.C. § 2. Here, there is no dispute that the arbitration clause is
10 valid, only whether it pertains to the claims at issue in this lawsuit.

11 When determining whether the arbitration clause encompasses the claims at issue, “all
12 doubts are to be resolved in favor of arbitrability.” *Simula v. Autoliv*, 175 F.3d 716, 721 (9th Cir.
13 1999) (interpreting the language “arising in connection with” in an arbitration clause to “reach[]
14 every dispute between the parties having a significant relationship to the contract and all disputes
15 having their origin or genesis in the contract.”). Consistent with the text of the FAA, “courts must
16 ‘rigorously enforce’ arbitration agreements according to their terms.” *Am. Exp. Co. v. Italian*
17 *Colors Rest.*, 133 S. Ct. 2304, 2309 (2013) (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S.
18 213, 221 (1985)).

19 **III. DISCUSSION**

20 Defendants do not assert that Plaintiff’s Macy’s credit card agreement contained an
21 arbitration clause.² Instead, Defendants contend that Plaintiff’s claims are subject to arbitration
22 because they fall within identical arbitration provisions in cardholder agreements governing two
23 Sears credit cards issued by Citi. The provision is bilateral and provides for binding arbitration
24 concerning: “All claims relating to your account, a prior related account, or our relationship . . .
25 including Claims regarding the application, enforceability, or interpretation of this Agreement and
26

27 ² Defendants did not produce a copy of the card agreement that governs Plaintiff’s Macy’s card
28 issued by DSNB. The Court can only presume that the Macy’s card agreement does not contain
an arbitration provision.

1 this arbitration provision.” Def.’s Mot. 4; Decl. of Elizabeth S. Barnette, ECF 25 Exhs. 1, 3, 6, 9.
2 The provision explains whose claims are subject to arbitration: “Not only ours and yours, but also
3 Claims made by or against anyone connected with us or you or claiming through us or you, such
4 as a co-applicant, authorized user of your account, an employee, agent, representative, affiliated
5 company, predecessor or successor, heir assignee, or trustee in bankruptcy.” *Id.* Moreover, the
6 arbitration provision is to be interpreted “in the broadest way the law will allow it to be enforced.”
7 *Id.* These Sears card agreements are governed by South Dakota law. Def.’s Mot. 8-9; Barnette
8 Decl. Exhs. 1, 3, 6, 9.

9 Defendants contend that Plaintiff’s claims in this lawsuit—premised upon collection
10 activity in connection with a Macy’s card issued by DSNB—fall within the scope of the
11 arbitration provision set forth in the Sears card agreements. Def.’s Mot. 10-11. As to the claims
12 against Citi, Defendants argue that the arbitration provision from the Sears card agreements
13 extends to all claims relating to “our relationship,” meaning the relationship between Plaintiff and
14 the issuer of the Sears cards—Citi. Because Plaintiff’s claims concern unauthorized calls to his
15 cell phone number, and Plaintiff provided the same cell phone number to Citi in connection with
16 his Sears cards, Citi contends that Plaintiff’s claims are based upon their “relationship” and
17 accordingly subject to arbitration. Def.’s Mot. 10; *see also* Barnette Decl. ¶ 5. Defendants
18 moreover contend that Plaintiff’s claims against FDS and DSNB must be sent to arbitration
19 because Plaintiff has alleged that they are Citi’s agents, and the Sears card agreements provide that
20 a cardholder’s claims against the issuer’s agents is also subject to arbitration. Def.’s Mot. 11.

21 Because Plaintiff does not dispute the validity of the Sears card agreements, the Court’s
22 task is limited to contract interpretation. *See* Pl.’s Opp. 12-15, ECF 28. Plaintiff moreover does
23 not appear to challenge Defendants’ contention that South Dakota law governs the interpretation
24 of the Sears card agreements, though he has briefed his arguments under California law. *See id.*
25 In any event, the Court agrees with Defendants that South Dakota has a substantial relation to the
26 parties and that the chosen state’s principles of contract interpretation do not appear to be contrary
27 to any fundamental policy of California. *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal. 4th 459,
28 466 (1992). Even under South Dakota law, however, Defendants’ interpretation of the Sears card

1 arbitration provision is untenably broad.

2 It is axiomatic that arbitration agreements are matters of contract subject to ordinary
3 contract interpretation. The South Dakota Supreme Court has summarized contract interpretation
4 thusly:

5 The goal of contract interpretation is to see to it that the *mutual*
6 *intent* of the parties is carried into effect. The contract is to be read
7 as a whole, making every effort to give effect to all provisions.
8 When the words of a contract are clear and explicit and lead to no
absurd consequences, the search for the parties' common intent is at
an end.

9 *Nelson v. Schellpfeffer*, 2003 S.D. 7, ¶ 8 (2003) (emphasis added). Likewise, “[a]rbitration under
10 the [FAA] is a matter of consent,” *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford*
11 *Junior Univ.*, 489 U.S. 468, 479 (1989), and “the FAA’s proarbitration policy does not operate
12 without regard to the wishes of the contracting parties,” *Mastrobuono v. Shearson Lehman Hutton,*
13 *Inc.*, 514 U.S. 52, 57 (1995). *See also AT & T Technologies, Inc. v. Commc’ns Workers of Am.*,
14 475 U.S. 643, 648 (1986).

15 Here, there is no basis for concluding that in accepting the Sears card agreements, Plaintiff
16 consented to arbitrate all claims that could ever arise between him and Citi. Accepting
17 Defendants’ interpretation that the “our relationship” language extends to any interaction between
18 Plaintiff and Citi would mean that one credit card agreement could be used to dictate the parties’
19 “relationship” *ad infinitum*, regardless of the subject matter of their future interactions. That is an
20 absurd consequence. For one, in collecting on the Macy’s card account, Citi identifies itself as the
21 *servicer* on that card. *See* Decl. of Scott F. Savage, ECF 28 Exh. 1. There is no reason for a
22 consumer in Plaintiff’s position to believe that he had a direct “relationship” with Citi regarding
23 the Macy’s card issued by DSNB when Citi identified itself merely as a servicer of the account.
24 Moreover, there is no evidence that the Macy’s card account and the Sears card accounts are in
25 any way related, other than that they were respectively issued to Plaintiff by DSNB and its alleged
26 parent Citi. Finally, there is no evidence that when Plaintiff entered into an agreement with DSNB
27 regarding the Macy’s card, he was aware or provided notice that such account might one day be
28 serviced by Citi. Similarly, when entering into agreements on the Sears cards, Plaintiff had no

1 notice that Citi might one day call him to collect on a different credit card issued by a different
2 entity. It thus stretches the bounds of reason to interpret the “our relationship” language so
3 broadly to encompass all other interactions with Citi, whether anticipated or not.

4 Defendants have not identified any cases in which the “our relationship” language has been
5 interpreted so broadly. In all of the cases cited by Defendants where Citi successfully compelled
6 arbitration, the applicable agreement was entered between the plaintiff and Citi as the card issuer.
7 Def.’s Mot. 2-3, 7 (collecting cases). Defendants’ arguments in this case are analogous to those
8 advanced—and rejected—in *In re Jiffy Lube Int’l, Inc., Text Spam Litig.*, 847 F. Supp. 2d 1253
9 (S.D. Cal. 2012). There, the court denied an effort to compel arbitration of TCPA claims based
10 upon an arbitration agreement purporting to extend to “any and all disputes” between the plaintiff
11 and Jiffy Lube. Plaintiff allegedly signed that agreement when he visited a Jiffy Lube location to
12 get an oil change. The court reasoned that the “incredibly broad” provision could not possibly
13 pertain to a “tort action arising from a completely separate” transaction. *Id.* at 1262-63. Indeed,
14 the court noted the absurd result, as observed by the Seventh Circuit, if the scope of arbitration
15 provisions is interpreted too broadly:

16 [I]n *Smith v. Steinkamp*, 318 F.3d 775, 777 (7th Cir. 2003), Judge
17 Posner noted that if there were no limiting clause in the arbitration
18 agreement at issue in that case, “absurd results [would] ensue,” such
19 that if a defendant murdered the plaintiff in order to discourage
20 default on a loan, the wrongful death claim would have to be
21 arbitrated.

20 *Id.* at 1263. The court ultimately concluded that the arbitration clause at issue must be interpreted
21 to extend to claims that “arise out of or relate to” the contract that the plaintiff signed. *Id.*;
22 compare *Coppock v. Citigroup, Inc.*, No. C11-1984-JCC, 2013 WL 1192632, at *5 (W.D. Wash.
23 Mar. 22, 2013) (distinguishing *Jiffy Lube* and *Smith* because Citi, as card *issuer*, moved to compel
24 arbitration of claims “relating to your account, a prior related account, or our relationship”).
25 Likewise here, the Court concludes that the “our relationship” language in the Sears card
26 agreements must be limited to the relationship created by those agreements—a relationship
27 between Plaintiff and Citi as the card issuer, and not as the servicer or debt collector on any other
28 unrelated card agreement.

1 Plaintiff has clearly limited this lawsuit to allegations regarding telephone calls to collect
2 on his Macy's card account. To be sure, this might have been a closer question had Plaintiff
3 broadly alleged that Defendants called him on his cell phone without authorization. Because
4 Plaintiff provided the same cell phone number to Citi in connection with the Sears card accounts,
5 there could be some ambiguity as to whether his claims arise in connection with those credit cards.
6 However, it is clear from the Complaint that the gravamen of Plaintiff's claims concern calls made
7 in connection with the Macy's card issued by DSNB. Plaintiff's declaration indicates that he
8 received no further calls from Citi regarding the Sears cards. Savage Decl. ¶ 4. To the extent
9 discovery may demonstrate that some of alleged calls were in fact made regarding the Sears cards,
10 those calls are not the subject of Plaintiff's lawsuit here. See Pl.'s Opp. 4 ("Savage brought claims
11 solely regarding collection harassment relating to the Macy's account." (emphasis added)); see
12 also *id.* ("Savage has not brought any claims relating to any conduct arising from the Citibank
13 Sears account."). As such, "it may be said with positive assurance that the arbitration clause is not
14 susceptible of an interpretation that covers the asserted dispute." *AT & T*, 475 U.S. at 650 (citation
15 and quotation marks omitted).

16 Because the Court has determined that the arbitration provision in the Sears card
17 agreements do not extend to Plaintiff's claims in this lawsuit, the Court need not reach
18 Defendants' argument that DSNB and FDS are also entitled to compel arbitration as Citi's alleged
19 agents. The Court notes only that Defendants' reliance on *San Diego Gas & Electric Company v.*
20 *Mitsubishi Heavy Industries, Ltd.*, No. 13-cv-1726-BEN(KSC), 2014 WL 1245842 (S.D. Cal.
21 Mar. 14, 2014), for that argument is unpersuasive. See Def.'s Reply 4, ECF 29. *San Diego Gas*
22 concerned a party's allegation concerning its own agency relationship with other entities that were
23 party to an agreement with a binding arbitration clause. The court reasoned that "SDG & E cannot
24 avoid this result by asking Defendants to prove SDG & E's own allegations. Defendants are
25 entitled to treat SDG & E's allegations in its Complaint as a judicial admission." 2014 WL
26 1245842, at *6. Defendants here are attempting to use the converse of *San Diego Gas* to bind
27 Plaintiff to his allegations about *Defendants'* relationship. This does not work because Defendants
28 are in the best position to prove their own relationship to one another and cannot simultaneously

1 deny agency and rely on Plaintiff's inartful allegation that they are each other's agents. *See*
2 *Murphy v. DirecTV, Inc.*, 724 F.3d 1218, 1233 (9th Cir. 2013) (record evidence that defendants
3 had disavowed agency relationship with retailer meant that retailer could not be bound by
4 arbitration clause).

5 In any case, the Court has determined that the arbitration provision in the Citi-issued Sears
6 card agreements do not extend to Plaintiff's claims concerning collection on a Macy's card issued
7 by DSNB. Defendant's Motion to Compel Arbitration must therefore be DENIED.

8 **IV. ORDER**

9 For the foregoing reasons, IT IS HEREBY ORDERED that Defendants' Motion to Compel
10 Arbitration is DENIED.

11 The parties are hereby ordered to appear for an Initial Case Management Conference on
12 **June 18, 2015 at 1:30 p.m.** The parties shall submit a joint case management statement by **June**
13 **11, 2015.**

14 **IT IS SO ORDERED.**

15 Dated: May 12, 2015

16 
17 BETH LABSON FREEMAN
18 United States District Judge