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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 MICHAEL DOHERTY, on behalf of
12 himself and all others similarly situated,
13 Plaintiff,
14 v.
15 BARCLAYS BANK DELAWARE, a
16 Delaware Corporation,
17 Defendant.

Case No.: 16-cv-01131-AJB-NLS

**ORDER DENYING WITHOUT
PREJUDICE DEFENDANT'S
MOTION TO COMPEL
INDIVIDUAL ARBITRATION AND
TO STAY
(Doc. No. 25)**

18 Presently before the Court is Defendant Barclays Bank Delaware's ("Defendant")
19 motion to compel individual arbitration and to stay, or in the alternative to dismiss. (Doc.
20 No. 25.) Plaintiff Michael Doherty ("Plaintiff") opposes the motion. (Doc. No. 28.) For the
21 reasons set forth below, the Court **DENIES WITHOUT PREJUDICE** Defendant's
22 motion.

23 **BACKGROUND**

24 This matter comes before the Court alleging Defendant violated the Telephone
25 Consumer Protection Act ("TCPA")¹. (Doc. No. 13.) Plaintiff is a resident of San Diego,
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28 ¹ The TCPA exists to put an end to invasive telephone calls that are autodialed, placed without consent,
and made without regard to the charges such calls can incur. (Doc. No. 13 ¶ 4.)

1 California. (*Id.* ¶ 9.) Defendant is one of the top ten issuers of credit cards in the United
2 States. (*Id.* ¶ 2; Doc. No. 22 ¶ 2.)

3 On June 9, 2012, Plaintiff was added, without his purported knowledge, as an
4 authorized user to his father’s credit card account (the “Account”) through Defendant’s
5 website. (Bell Decl. I ¶ 7, Doc. No. 25-1; Doherty Decl. ¶¶ 2, 3, Doc. No. 28-1.) Plaintiff
6 was at no time an authorized user of his mother’s credit card. (Doc. No. 28 at 9.)

7 Between October 26, 2015, and February 4, 2016, Plaintiff then alleges that
8 Defendant called his cellular telephone number at least fifty-five times. (Doc. No. 13 ¶¶
9 25, 26; Doherty Decl. ¶ 4.) The Court notes that it is disputed whether these calls concerned
10 the credit card account of Thomas Doherty, Plaintiff’s father, or a credit card account of
11 Chona Doherty, Plaintiff’s mother.² (Doc. No. 25 at 8; Doc. No. 28 at 8.) Nevertheless,
12 Plaintiff contends that he never provided his cellular number to Defendant or gave prior
13 express consent for Defendant to call his cellular telephone using a prerecorded or artificial
14 voice. (Doc. No. 13 ¶¶ 22, 24.) In addition, Plaintiff alleges that he incurred a charge
15 through his service provider for each call Defendant made to his cellular telephone. (*Id.* ¶
16 29.)

17 On three separate occasions: June 12, 2012, August 14, 2013, and June 4, 2015,
18 Defendant mailed multiple credit cards for the Account to Plaintiff’s home address. (Doc.
19 No. 25 at 10; Bell Decl. I ¶¶ 8, 10, 12.) The Account cards sent on August 14, 2013, were
20 activated on September 19, 2013, with Plaintiff’s cell phone and without his purported
21 knowledge. (Bell Decl. I ¶ 11; Doherty Decl. ¶¶ 5, 9.) The Account cards sent on June 12,
22 2012, included the following on the back: “Use of this card is subject to the Cardmember
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26 ² Defendant has asserted that it was attempting to contact Plaintiff’s father with the calls from October
27 2015 to December 2015. (Doc. No. 25 at 8; Bell Decl. II ¶ 9, Doc. No. 34-1.) Plaintiff contends the calls
28 concerned his mother. (Doc. No. 13 ¶¶ 24, 25; Doc. No. 28 at 8; Doherty Decl. ¶ 4.) However, Plaintiff
has stated that he does not “recall hearing any messages or speaking to anyone about attempting to
contact [his] father, although that may have happened.” (Doherty Decl. ¶ 4.)

1 Agreement issued by Barclays Bank Delaware.”³ (Doc. No. 25 at 10; Bell Decl. I ¶ 8.) The
2 Cardmember Agreement (“the Agreement”) contains an arbitration clause, requiring the
3 parties, including authorized users, to submit any dispute “arising from or relating in any
4 way to th[e] Agreement or [] Account” to arbitration. (Bell Decl. I ¶ 9; Bell Decl. III Ex. I
5 at 6-7, Doc. No. 37-1.)

6 On October 3, 2015, Plaintiff’s mother called Defendant to cancel an automatic
7 payment on the Account. (Lamborn Decl. ¶ 8, Doc. No. 25-2; Doherty Decl. ¶ 8.) Plaintiff
8 and his father were brought onto the call and Plaintiff agreed to make a one-time payment
9 of \$548.19 on the Account. (*Id.*) Plaintiff was removed as an authorized user of the Account
10 during this phone conversation.⁴ (Lamborn Decl. ¶ 9; Doherty Decl. ¶ 7.)

11 Plaintiff instituted this action on May 11, 2016, by filing a complaint seeking redress
12 for Defendant’s alleged noncompliance with the TCPA. (Doc. No. 1.) On July 22, 2016,
13 Defendant filed a motion to strike Plaintiff’s class allegations in the complaint. (Doc. No.
14 9.) On the same day, Defendant also filed a motion to stay. (Doc. No. 10.) Plaintiff filed
15 his first amended complaint on August 9, 2016. (Doc. No. 13.) On August 29, 2016, the
16 Court denied Defendant’s motion to strike and motion to stay. (Doc. No. 19.) Shortly
17 thereafter, on September 29, 2016, Defendant filed the instant motion to compel arbitration.
18 (Doc. No. 25.)

19 LEGAL STANDARD

20 The Federal Arbitration Act (“FAA”) governs the enforcement of arbitration
21 agreements involving interstate commerce. 9 U.S.C. § 2. Pursuant to Section 2 of the FAA,
22 an arbitration agreement is “valid, irrevocable, and enforceable, save upon such grounds
23 as exist at law or in equity for the revocation of any contract.” *Id.* The FAA permits “[a]
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26 ³ It is unclear whether the Account cards that were activated on September 19, 2013, had a similar
statement.

27 ⁴ Plaintiff contends that he asked to be removed as an authorized user during the October 3, 2015
28 conversation. (Doherty Decl. ¶ 7.) Defendant asserts that it was Plaintiff’s mother and father who
requested that Plaintiff be removed as an authorized user. (Lamborn Decl. ¶ 9.)

1 party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a
2 written agreement for arbitration [to] petition any United States district court . . . for an
3 order directing that such arbitration proceed in the manner provided for in [the]
4 agreement.” *Id.* § 4.

5 Given the liberal federal policy favoring arbitration, the FAA “mandates that district
6 courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration
7 agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985)
8 (emphasis in original). Thus, in a motion to compel arbitration, the district court’s role is
9 limited to determining ““(1) whether a valid agreement to arbitrate exists and, if it does, (2)
10 whether the agreement encompasses the dispute at issue.”” *Kilgore v. KeyBank, Nat’l*
11 *Ass’n*, 673 F.3d 947, 955 (9th Cir. 2012) (quoting *Chiron Corp. v. Ortho Diagnostic Sys.,*
12 *Inc.*, 207 F.3d 1126, 1130 (9th Cir. 2000)). If these factors are met, the court must enforce
13 the arbitration agreement in accordance with its precise terms. *See id.*

14 While generally applicable defenses to contract, such as fraud, duress, or
15 unconscionability, may invalidate agreements, the FAA preempts state law defenses that
16 apply only to arbitration or that derive their meaning from the fact that an agreement to
17 arbitrate is at issue. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011). Because
18 of the strong policy favoring arbitration, any doubts are to be resolved in favor of the party
19 moving to compel arbitration. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460
20 U.S. 1, 24–25 (1983).

21 DISCUSSION

22 **I. The Court May Consider Plaintiff’s Arguments**

23 Defendant first argues that the Court may not consider the merits of Plaintiff’s
24 arguments because they go to the arbitration agreement’s applicability, an issue which the
25 Agreement delegates to the arbitrator. (Doc. No. 25 at 21.) In opposition, Plaintiff asserts
26 that as a threshold matter, the Court is required to determine whether a valid agreement to
27 arbitrate exists. (Doc. No. 28 at 14.)

28 Under the FAA, “parties can agree to arbitrate ‘gateway’ questions of ‘arbitrability,’

1 such as whether the parties have agreed to arbitrate or whether their agreement covers a
2 particular controversy.” *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–69 (2010).
3 “Because such issues would otherwise fall within the province of judicial review, we apply
4 a more rigorous standard in determining whether the parties have agreed to arbitrate the
5 question of arbitrability.” *Momot v. Mastro*, 652 F.3d 982, 987 (9th Cir. 2011). Thus,
6 “[u]nless the parties clearly and unmistakably provide otherwise, the question of whether
7 the parties agreed to arbitrate is to be decided by the court, not the arbitrator.” *AT&T Techs.,*
8 *Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986). “Such [c]lear and
9 unmistakable ‘evidence’ of agreement to arbitrate arbitrability might include . . . a course
10 of conduct demonstrating assent . . . or . . . an express agreement to do so.” *Momot*, 652
11 F.3d at 988 (citation omitted).

12 However, “arbitration is a matter of contract and a party cannot be required to submit
13 to arbitration any dispute which he has not agreed so to submit.” *Commc’n Workers of Am.*,
14 475 U.S. at 648 (citation omitted). Therefore, “when one party disputes ‘the making of the
15 arbitration agreement,’ the Federal Arbitration Act requires that ‘the court [] proceed
16 summarily to the trial thereof’ before compelling arbitration under the agreement.” *Sanford*
17 *v. MemberWorks, Inc.*, 483 F.3d 956, 962 (9th Cir. 2007) (quoting 9 U.S.C. § 4). The Ninth
18 Circuit has interpreted this to include challenges to the arbitration clause, as well as
19 challenges to the making of the contract containing the arbitration clause. *Id.* (citing *Three*
20 *Valleys Mun. Water Dist. v. E.F. Hutton & Co., Inc.*, 925 F.2d 1136, 1140–41 (9th Cir.
21 1991)).

22 Here, Plaintiff is challenging the existence of a contract with Defendant. Therefore,
23 following relevant Ninth Circuit case law, the Court must first decide whether a valid
24 contract exists. For the reasons set forth below, the Court finds the requisite showing of the
25 existence of a valid contract has not been met.

26 **II. A Valid Arbitration Agreement Does Not Exist**

27 Defendant argues that as Plaintiff was an authorized user of the Account, that there
28 can be no dispute that a valid arbitration agreement exists. (Doc. No. 25 at 21.) In

1 opposition, Plaintiff asserts that Defendant may not compel arbitration because he was
2 never a party to the agreement. (*See* Doc. No. 28.) To determine whether a valid agreement
3 to arbitrate exists, we “apply ordinary state-law principles that govern the formation of
4 contracts.” *Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279, 1283 (9th Cir. 2017)
5 (citation and internal quotation marks omitted). Here, California law governs the issue of
6 contract formation and as the party seeking to compel arbitration, Defendant bears ““the
7 burden of proving the existence of an agreement to arbitrate by a preponderance of the
8 evidence.”” *Id.* (quoting *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir.
9 2014)). After a careful analysis of both parties’ motions, declarations, and in light of the
10 applicable law, the Court finds Defendant has not carried its burden.

11 “It is undisputed that under California law, mutual assent is a required element of
12 contract formation.” *Knutson*, 771 F.3d at 565. Mutual assent may be manifested through
13 words or conduct and acceptance can be implied through action or inaction. *Id.* The mutual
14 consent necessary to form a contract “is determined under an objective standard applied to
15 the outward manifestations or expressions of the parties, i.e., the reasonable meaning of
16 their words and acts, and not their unexpressed intentions or understandings.” *Deleon v.*
17 *Verizon Wireless, LLC*, 207 Cal.App.4th 800, 813 (2012) (citation omitted). “Although
18 mutual consent is a question of fact, whether a certain or undisputed state of facts
19 establishes a contract is a question of law for the court.” *Id.* at 813.

20 In this case, it is clear that factual disputes exist. First, the Court notes that the facts
21 are unclear as to whether mutual assent exists between Plaintiff and Defendant. According
22 to Defendant, Plaintiff consented to the Agreement by being an authorized user and using
23 the Account on three separate occasions.⁵ (Doc. No. 25 at 21-22; Doc. No. 37 at 6-8.) Two
24 of these alleged uses were balance transfers from another credit card purportedly belonging
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27 ⁵ Defendant briefly mentions that Plaintiff may have assented by purchasing airline tickets. (Doc. No. 37
28 at 6-7.) In light of Plaintiff’s denial of this allegation, in combination with Defendant’s lack of support
for this assertion, the Court is unpersuaded by this argument.

1 to Plaintiff that totaled \$21,239.69.⁶ (Lamborn Decl. ¶¶ 4-7.) However, both transfers
2 occurred online and it is unclear who made the transfers. (*Id.*) In addition, Plaintiff denies
3 he made the two transfers, and that the other account used in the transfer belonged to him.
4 (Doherty Decl. ¶ 6.)⁷ Second, Plaintiff disputes ever having knowledge that he was an
5 authorized user for the Account. Plaintiff argues that the October 3, 2015 conversation is
6 when he first learned he was an authorized user with the ability to use his father’s account.
7 (*Id.* ¶ 7.) In response, Defendant has failed to show that Plaintiff assented to the Agreement
8 prior to this one-time payment Plaintiff made on October 3, 2015.

9 Given these disputed facts, and under California common law, the Court finds that
10 there are genuine factual issues as to whether Plaintiff consented to be bound to the
11 Agreement. Specifically, with so many facts in dispute, it is unclear to the Court whether
12 Plaintiff’s manifested actions reasonably portray that he consented to the terms of the
13 arbitration agreement. *See Windsor Mills, Inc. v. Collins & Aikman Corp.*, 25 Cal.App.3d
14 987, 992 (1972) (holding that as “the outward manifestation or expression of assent is the
15 controlling factor,” an offeree, “knowing that an offer has been made to him but not
16 knowing all of its terms, may be held to have accepted, by his conduct, whatever terms the
17 offer contains.”). Thus, finding that Defendant has failed to carry its burden in showing the
18 existence of an agreement to arbitrate between the parties by a preponderance of the
19 evidence, arbitration is inappropriate.

20 The Ninth Circuit’s decision in *Three Valleys* supports the Court’s decision. There,
21 plaintiffs sued for losses in their investment accounts. *Three Valleys*, 925 F.2d at 1137.
22 Defendant asserted an arbitration clause in a client agreement and plaintiffs argued the
23 entire agreement was not binding because the signor lacked authority to bind plaintiffs. *Id.*
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26 ⁶ The first transfer occurred on September 29, 2011, almost a year before Plaintiff became an authorized
27 user of the account. (Lamborn Decl. ¶ 4.) The second transfer occurred twenty days after Plaintiff
28 became an authorized user in 2012. (*Id.* ¶ 5.)

⁷ However, both parties agree Plaintiff made a one-time payment on the Account during the October 3,
2015 conversation. (Lamborn Decl. ¶ 8; Doherty Decl. ¶ 8.)


1 at 1138. The Ninth Circuit reversed the district court’s order to compel arbitration of the
2 contract formation issue on the grounds that forcing the formation issue into arbitration
3 would have held the plaintiffs to an arbitration clause upon which they might not have
4 agreed. *Id.* at 1138–42. Similarly, in the present matter, given the array of disputed facts,
5 the Court is unwilling to compel Plaintiff to arbitrate his claims when Defendant has failed
6 to make the requisite showing of Plaintiff assenting to the Agreement and the arbitration
7 clause contained within. Accordingly, the Court **DENIES** Defendant’s motion to compel
8 arbitration.⁸

9 **CONCLUSION**

10 Based on the foregoing, the Court **DENIES WITHOUT PREJUDICE** Defendant’s
11 motion to compel individual arbitration and to stay. Defendant’s alternative motion to
12 dismiss is thus rendered moot.

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14 **IT IS SO ORDERED.**

15 Dated: February 14, 2017

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17 Hon. Anthony J. Battaglia
18 United States District Judge
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27 ⁸As the Court is denying Defendant’s motion to compel arbitration for failure to demonstrate that a valid
28 arbitration agreement exists, the Court finds no reason to analyze both parties’ arguments concerning the
scope of the Agreement and waiver by conduct.