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8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
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11 CHARLES ERWIN,

12 Plaintiff,

13 v.

14 CITIBANK, N.A.,

15 Defendant.  
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Case No.: 3:16-cv-03040-GPC-KSC

**ORDER:**

**(1) DENYING WITHOUT  
PREJUDICE DEFENDANT’S  
MOTION TO COMPEL  
ARBITRATION; AND**

**(2) GRANTING 60 DAYS LEAVE TO  
TAKE LIMITED DISCOVERY**

**[ECF No. 5.]**

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21 Before the Court is Defendant Citibank, N.A.’s (“Defendant’s” or “Citibank’s”) motion to compel Plaintiff Charles Erwin (“Plaintiff”) to arbitrate his claims in this action on an individual, non-class basis, and to stay the instant action pending the outcome of arbitration proceedings. (Dkt. No. 5.) The motion has been fully briefed. (Dkt. Nos. 7, 23 9.) The Court deems this motion suitable for disposition without oral argument pursuant to Civil Local Rule 7.1(d)(1). Having reviewed the parties’ arguments and the applicable law, the Court **DENIES WITHOUT PREJUDICE** Defendant’s motion to compel  
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1 arbitration and **GRANTS** the parties 60 days leave to take limited discovery regarding  
2 the threshold question of Plaintiff’s opt-out.

### 3 **BACKGROUND**

#### 4 **A. Plaintiff’s Complaint**

5 Plaintiff Charles Erwin opened a consumer credit card account with Defendant  
6 Citibank, N.A. (Dkt. No. 1-2, Compl. ¶ 14.) A Citibank Simplicity credit card account  
7 (“Account”) was issued to Plaintiff on or about May 22, 2014. (Dkt. No. 5-2, Booth  
8 Decl. ¶ 4.) At some point in 2015, Plaintiff fell behind on his credit card payments.  
9 (Dkt. No. 1-2, Compl. ¶ 15.) Plaintiff alleges that Citibank began calling him “numerous  
10 times” every day to collect the debt, amounting to “hundreds of calls in a matter of  
11 weeks.” (*Id.*) Plaintiff alleges that the calls caused him “stress and anxiety,” which in  
12 turn “affected his work.” (*Id.* ¶ 16.) Plaintiff informed Citibank that he refused to pay  
13 the debt, on account of Citibank’s repeated calls to Plaintiff. (*Id.*)

14 Plaintiff alleges that Citibank “used an automated dialer to telephone Plaintiff,”  
15 and that when Plaintiff picked up, or when Citibank left a message for Plaintiff, “Plaintiff  
16 was played a recording with an artificial, pre-recorded voice,” requesting that Plaintiff  
17 return Citibank’s call during a specified time period. (*Id.* ¶ 17.) Citibank made calls to  
18 Plaintiff’s home, cell, and work phones, even after Plaintiff demanded that the calls  
19 cease. (*Id.* ¶¶ 18, 20.)

20 On October 3, 2016, Plaintiff filed a Complaint against Citibank in the Superior  
21 Court of the State of California for the County of San Diego, asserting a claim for  
22 violation of the Telephone Consumer Protection Act (“TCPA”), 47 U.S.C. § 227, *et seq.*,  
23 and state law claims for violation of California’s Rosenthal Fair Debt Collection Practices  
24 Act, Cal. Civ. Code § 1788, *et seq.*, invasion of privacy, negligence, and intrusion upon  
25 seclusion. (Dkt. No. 1-2.) Defendant removed the instant action to federal court on  
26 December 16, 2016. (Dkt. No. 1.)

27 Citibank filed the instant motion on January 26, 2017. (Dkt. No. 5.)

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1           **B. The 2014 and 2015 Arbitration Agreements**

2           At the time Plaintiff’s Account was opened in May 2014, Plaintiff was mailed the  
3 Card Agreement, which contains the written terms and conditions governing the use of  
4 the Account, including a choice-of-law provision calling for the application of federal  
5 and South Dakota law, and the Arbitration Agreement. (Dkt. No. 5-2, Booth Decl. ¶¶ 5–  
6 6l; Dkt. No. 5-3 at 13.) The Card Agreement specifies that the Agreement comprises the  
7 contract between Plaintiff and Citibank regarding the Account, and that the contract  
8 applies if Plaintiff uses or authorizes use of the card, or if he does not close the account  
9 within thirty days of the card’s issuance. (Dkt. No. 5-3 at 10.) The Card Agreement  
10 authorizes Citibank to change the terms of the Agreement, and notifies cardholders that  
11 Citibank will provide “advance written notice of the changes and a right to opt out, to the  
12 extent required by law.” (*Id.*) It is undisputed that after opening the Account, Plaintiff  
13 used the card. (*See* Dkt. No. 1-2, Compl. ¶¶ 14–15; Dkt. No. 5-2, Booth Decl. ¶ 7; Dkt.  
14 No. 5-3 at 18–22.) The 2014 Arbitration Agreement stated, in pertinent part: “You or we  
15 may arbitrate any claim, dispute or controversy between you and us (called “Claims”).  
16 All Claims (whether based on contract, tort, state, or any other basis) arising out of or  
17 related to your account, a previous related account or our relationship may be arbitrated.”  
18 (Dkt. No. 5-3 at 13.)

19           However, on September 10, 2015, Citibank mailed Plaintiff a new Card Agreement  
20 for the Account, along with a cover letter (“Cover Letter”) and an explanation of changes  
21 to the Card Agreement (“Summary”). (Dkt. No. 5-2, Booth Decl. ¶ 8; Dkt. No. 5-3 at  
22 24–41.) Plaintiff was advised that the new Card Agreement, as well as the changes  
23 detailed in the Cover Letter and Summary, would be effective on November 14, 2015.  
24 (*Id.*) The new terms included changes to the Arbitration Agreement. (Dkt. No. 5-4 at  
25 24.) In particular, the new terms gave Plaintiff the choice to opt-out of the arbitration  
26 provision:

27           You have the right to reject the change to arbitration. If you reject this change,  
28           your account will no longer be subject to an arbitration provision. You can reject

1 the change to arbitration by writing to us at PO Box 6195, Sioux Falls, SD 57117-  
2 6195 stating that you would like to reject the arbitration provision. Your letter  
3 must be postmarked on or before 11/14/2015. We will not close your account if  
4 your reject this change.

5 (*Id.* at 26.) Plaintiff had the right to reject only the change to arbitration, and could not  
6 reject any other changes in the new Card Agreement. (*Id.*)

7 Plaintiff asserts in a declaration that on or about October 28, 2015, he mailed an  
8 opt-out letter pursuant to Citibank's instructions, by first class mail, with proper postage  
9 prepaid, addressed to Citibank's stated address, and deposited it in a United States Postal  
10 Mailbox. (Dkt. No. 7-1, Erwin Decl. ¶¶ 4–5.) The letter was not returned to Plaintiff as  
11 undeliverable. (*Id.* ¶ 6.) Plaintiff attached a copy of the text of his letter to his  
12 declaration. (Dkt. No. 7-2 at 3.)

13 Citibank asserts that it never received Plaintiff's opt-out letter. (Dkt. No. 9-1,  
14 Supp. Booth Decl. ¶ 4.) In support of its assertion, Citibank provides a declaration by  
15 Kelly Booth, an employee with access to Citibank's business records relating to credit  
16 card accounts issued by Citibank. (*Id.* ¶¶ 1–2.) Booth describes Citibank's policy and  
17 procedure for handling a cardmember's request to reject the arbitration agreement. (*Id.*  
18 ¶¶ 6–11.) Upon Citibank's receipt of an opt-out letter, the written request is scanned into  
19 Citibank's system. (*Id.* ¶ 8.) Citibank's practice is to retain a scanned image of the opt-  
20 out letter for ten years in the system, and retain a physical copy for 180 days. (*Id.*)  
21 Receipt of an opt-out letter triggers a process wherein Citibank's Account Maintenance  
22 Team employees review whether an opt-out request had previously been recorded on the  
23 account. (*Id.* ¶¶ 9–10.) If account records indicate that no opt-out requests have  
24 previously been recorded, the employee initiates the opt-out request in the account  
25 maintenance system. (*Id.*) Once the rejection request is initiated in the system, the  
26 system will determine if the arbitration opt-out request was timely received, before  
27 determining whether or not the arbitration rejection was successful. (*Id.* ¶ 11.) A  
28 confirmation letter is sent to the customer, regardless of whether the arbitration opt-out is

1 granted. (*Id.*) Booth asserts that Citibank’s document management system does not  
2 contain the letter Plaintiff attached to his declaration. (*Id.* ¶¶ 12–13.) Rather, Citibank’s  
3 system has a record only of Plaintiff’s September 30, 2016 letter requesting that Citibank  
4 stop calling him. (*Id.*; *see also* Dkt. No. 9-2 at 3.) Booth additionally asserts that no  
5 arbitration opt-out case was created on Plaintiff’s account, that there is no systemic note  
6 regarding a successful or unsuccessful request to opt-out, and that there is no indication a  
7 confirmation letter was sent. (*Id.* ¶¶ 14–16.)

## 8 LEGAL STANDARD

9 Pursuant to the Federal Arbitration Act (“FAA”), arbitration agreements “shall be  
10 valid, irrevocable, and enforceable, save upon such grounds that exist at law or in equity  
11 for the revocation of any contract.” 9 U.S.C. § 2. The FAA provides that “a party  
12 aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written  
13 agreement for arbitration may petition any United States district court . . . for an order  
14 directing that . . . arbitration proceed in the manner provided for in such agreement.” 9  
15 U.S.C. § 4. Federal policy favors arbitration. *Moses H. Cone Mem’l Hosp. v. Mercury*  
16 *Constr. Corp.*, 460 U.S. 1, 24 (1983). The FAA “establishes that, as a matter of federal  
17 law, any doubts concerning the scope of arbitrable issues should be resolved in favor of  
18 arbitration, whether the problem at hand is the construction of the contract language itself  
19 or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.* at 24–25.

20 However, notwithstanding the above, “question[s] of arbitrability,” including  
21 “certain gateway matters,” are “presumptively for courts to decide,” *Oxford Health Plans*  
22 *LLC v. Sutter*, 133 S. Ct. 2064, 2068 n.2 (2013); *see also Momot v. Mastro*, 652 F.3d 982,  
23 987 (9th Cir. 2011) (clarifying that issues that “contracting parties would likely have  
24 expected a court to have decided”—such as “whether the parties have a valid arbitration  
25 agreement or are bound by a given arbitration clause, and whether an arbitration clause in  
26 a concededly binding contract applies to a given controversy”—are “gateway questions  
27 of arbitrability” to be determined by the court, not the arbitrator); *Mohamed v. Uber*  
28 *Techs., Inc.*, 848 F.3d 1201, 1208 (9th Cir. 2016) (“[T]here is a presumption that courts

1 will decide which issues are arbitrable; the federal policy in favor of arbitration does not  
2 extend to deciding questions of arbitrability.”).

3 In ruling on a motion to compel arbitration, a court must determine two such  
4 “gateway matters”: (1) whether there is an agreement to arbitrate between the parties; and  
5 (2) whether the agreement covers the dispute.” *Brennan v. Opus Bank*, 796 F.3d 1125,  
6 1130 (9th Cir. 2015) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84  
7 (2002)). If these conditions are satisfied, the court lacks discretion to deny the motion  
8 and must compel arbitration. 9 U.S.C. § 4; *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S.  
9 213, 218 (1985) (“By its terms, the [FAA] leaves no place for the exercise of discretion  
10 by a district court, but instead mandates that district courts *shall* direct the parties to  
11 proceed to arbitration.”). In addition, Section 3 of the FAA provides that once a court  
12 compels arbitration, the court “shall on application of one of the parties stay the trial of  
13 the action” until arbitration has occurred. 9 U.S.C. § 3. However, “[i]f the making of the  
14 arbitration agreement or the failure, neglect, or refusal to perform the same be in issue,  
15 the court shall proceed summarily to the trial thereof.” 9 U.S.C. § 4.

## 16 DISCUSSION

17 Before the Court may compel the parties to arbitration, the Court must first  
18 determine the gateway questions of arbitrability: (1) whether there is an agreement to  
19 arbitrate between the parties; and (2) whether the agreement covers the dispute.<sup>1</sup> *See*  
20 *Brennan*, 796 F.3d at 1130. Plaintiff contends that there is a genuine issue of material  
21 fact as to whether an agreement to arbitrate even exists, given his alleged election to opt  
22 out of the 2015 Arbitration Agreement. (*See* Dkt. No. 7 at 10–12.) Defendant contends  
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25 <sup>1</sup> In ruling on a § 3 “application for a stay while the parties arbitrate, a federal court may consider only  
26 issues relating to the making and performance of the agreement to arbitrate,” *Prima Paint Corp. v.*  
27 *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403–04 (1967), while “a challenge to the validity of the  
28 contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator,” *Buckeye*  
*Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006). Here, the parties do not dispute the  
validity of the 2015 Card Agreement as a whole—rather, the dispute solely involves the arbitration  
provisions within the Card Agreement.

1 that the dispute over whether Plaintiff successfully invoked his right to opt out of  
2 arbitration is *itself* subject to arbitration, under the 2014 Arbitration Agreement. (*See*  
3 Dkt. No. 9 at 3–6.) Plaintiff’s argument dovetails with the first gateway question of  
4 arbitrability, whereas Defendant’s argument amounts to a contention that the 2014  
5 Arbitration Agreement covers the instant dispute.

6 First, although Defendant contends that the 2014 Arbitration Agreement applies to  
7 the instant dispute, (Dkt. No. 9 at 2), the new terms of the 2015 Card Agreement,  
8 including the new Arbitration Agreement terms, took effect on November 14, 2015, (Dkt.  
9 No. 5-3 at 24). Once the 2015 Arbitration Agreement terms took effect, they superseded  
10 the 2014 terms; Defendant has not provided any support indicating the contrary.  
11 Plaintiff’s election to opt out thus begs one question only—whether the *2015* Arbitration  
12 Agreement applies to him.

13 Second, whether or not Plaintiff opted out of the 2015 Arbitration Agreement is  
14 dispositive of the first gateway question of arbitrability—it goes to the very heart of  
15 whether an agreement to arbitrate exists. If Plaintiff opted out, as he alleges, the  
16 superseding terms of the 2015 Arbitration Agreement do not apply to Plaintiff, and  
17 Plaintiff and Defendant do not have an agreement to arbitrate. If Plaintiff did not opt out,  
18 Plaintiff is bound to arbitrate under the terms of the 2015 Arbitration Agreement. Indeed,  
19 it is “well settled” that whether the parties have agreed to arbitrate a particular dispute is  
20 typically an issue for judicial determination, as is a dispute over an arbitration contract’s  
21 formation. *See Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 296–97  
22 (2010). Requiring Plaintiff to arbitrate where he denies entering into the 2015 Arbitration  
23 Agreement “would be inconsistent with the ‘first principle’ of arbitration that ‘a party  
24 cannot be required to submit [to arbitration] any dispute which he has not agreed so to  
25 submit.’” *Three Valleys Mun. Water Dist. v. E.F. Hutton & Co.*, 925 F.2d 1136, 1142  
26 (9th Cir. 1991) (quoting *AT & T Technologies, Inc. v. Communications Workers*, 475  
27 U.S. 643, 648 (1986)) (reversing district court’s order directing arbitration and remanding  
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1 for determination the gateway question of “whether the signatory had authority to bind  
2 the other plaintiffs to the agreements containing the arbitration clauses”).

3 Moreover, even if the 2014 Arbitration Agreement governs the instant dispute,  
4 there is no clear and unmistakable evidence that the parties agreed to arbitrate questions  
5 of arbitrability. The Supreme Court has observed that

6 [t]he law treats silence or ambiguity about the question “*who* (primarily) should  
7 decide arbitrability” differently from the way it treats silence or ambiguity about  
8 the question “*whether* a particular merits-related dispute is arbitrable because it is  
9 within the scope of a valid arbitration agreement”—for in respect to this latter  
question the law reverses the presumption.

10 *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944–45 (1995). “Although  
11 gateway issues of arbitrability presumptively are reserved for the court, the parties may  
12 agree to delegate them to the arbitrator.” *Momot*, 652 F.3d at 987. Applying federal  
13 arbitrability law,<sup>2</sup> the Court notes that a “more rigorous standard” applies “in determining  
14 whether the parties have agreed to arbitrate the question of arbitrability”—that is, “the  
15 question of arbitrability is left to the court unless the parties clearly and unmistakably  
16 provide otherwise.” *Id.* at 987–88. To evaluate whether clear and unmistakable evidence  
17 exists, courts may examine a course of conduct demonstrating assent, or look to the terms  
18 of the agreement to ascertain an express agreement to do so. *See id.*

19 Here, there is no clear and unmistakable evidence from the parties’ course of  
20 conduct that they agreed to arbitrate arbitrability—rather, Plaintiff’s conduct has  
21 indicated the contrary. Nor does the language of the Arbitration Agreement clearly and  
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25 <sup>2</sup> The 2014 Agreement states that “[f]ederal law and the law of South Dakota govern this Agreement.”  
26 (Dkt. No. 5-3 at 13; *see also* Dkt. No. 5-3 at 39 (maintaining substantially the same language for the  
27 2015 Agreement).) Because the contract does not clearly and unmistakably indicate that the parties  
28 agreed to apply non-federal arbitrability law, the Court applies federal arbitrability law here. *See*  
*Brennan*, 796 F.3d at 1129 (clarifying that absent clear and unmistakable evidence that the parties  
agreed to apply non-federal arbitrability law, the court is to make the arbitrability determination by  
applying the federal substantive law of arbitrability (internal citations and quotation marks omitted)).

1 unmistakably delegate to the arbitrator questions of arbitrability.<sup>3</sup> Compare Dkt. No. 5-3  
2 at 13 (“You or we may arbitrate any claim, dispute or controversy between you and us  
3 (called “Claims”). All Claims (whether based on contract, tort, state, or any other basis)  
4 arising out of or related to your account, a previous related account or our relationship  
5 may be arbitrated.”) with *Momot*, 652 F.3d at 988 (concluding, based on the following  
6 language, clear and unmistakable intent to have arbitrators decide threshold questions of  
7 arbitrability: “If a dispute arises out of or relates to this Agreement, the relationships that  
8 result from this Agreement, the breach of this Agreement *or the validity or application of*  
9 *any of the provisions of this Section 4*, and, if the dispute cannot be settled through  
10 negotiation, the dispute shall be resolved exclusively by binding arbitration.” (emphasis  
11 in original)).

12 Defendant next contends that Plaintiff’s opt-out claim still fails, as (a) Plaintiff has  
13 not provided sufficient evidence to invoke presumption of receipt under the mailbox rule,  
14 and (b) that even if Plaintiff did so, Defendant has presented sufficient evidence to rebut  
15 the presumption of receipt. (Dkt. No. 9 at 6.) As to Defendant’s first contention, the  
16 Ninth Circuit has stated, in a case Defendant itself cites to, (*see* Dkt. No. 9 at 8), “We  
17 have held a sworn statement is credible evidence of mailing for purposes of the mailbox  
18 rule,” *Schikore v. BankAmerica Supplemental Ret. Plan*, 269 F.3d 956, 964 (9th Cir.  
19 2001) (citing *Lewis v. United States*, 144 F.3d 1220, 1223 (9th Cir. 1998)); *see also*  
20 *Payan v. Aramark Mgmt. Servs. Ltd. P’ship*, 495 F.3d 1119, 1123 n.4 (9th Cir. 2007)  
21 (citing *Schikore* as an example of the Ninth Circuit “accepting a sworn statement that  
22 claimant mailed the requisite form [as] sufficient proof to presume receipt”). Here,  
23 Plaintiff has provided a similar sworn statement, outlining the composing, addressing,  
24 and mailing of his opt-out letter. (Dkt. No. 7-1, Erwin Decl.)

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28 <sup>3</sup> See also Dkt. No. 5-3 at 27 (maintaining substantially the same language in the 2015 Arbitration Agreement).

1 Defendant's fallback argument that it has presented sufficient evidence to rebut the  
2 presumption of receipt only serves to confirm that there is a genuine dispute of material  
3 fact regarding the mailing, receipt, and processing of Plaintiff's opt-out letter. Defendant  
4 avers simply that "there is no issue of fact," in light of its supplemental declaration  
5 stating that Citibank never received Plaintiff's letter. (Dkt. No. 9 at 10.) But factual  
6 issues do remain at this time—*e.g.*, whether Plaintiff's opt-out letter was lost or processed  
7 incorrectly *after* receipt by Citibank, the potential for error in Citibank's document  
8 management system, and whether Plaintiff has other concrete proof of mailing (such as a  
9 receipt, metadata, etc.). More importantly, Defendant has not provided any legal  
10 authority holding that a successful rebuttal of the presumption of receipt equates to a lack  
11 of a genuine dispute of material fact, or that a successful rebuttal negates the need to  
12 allow limited discovery and proceed summarily to trial. Indeed, the decisions cited by  
13 Defendant support the need to allow the parties to conduct expedited discovery, *see*  
14 *Pondexter v. Allegheny Cty. Hous. Auth.*, No. CIV.A. 11-857, 2012 WL 3611225, at \*7–8  
15 (W.D. Pa. Aug. 21, 2012) (concluding, at the summary judgment stage, that defendant  
16 rebutted plaintiff's mailbox rule presumption through "uncontroverted evidence,"  
17 because plaintiff had not proffered any evidence, despite having conducted fact  
18 discovery), and to summarily proceed to trial, *see Legille v. Dann*, 544 F.2d 1, 4–7 (D.C.  
19 Cir. 1976) (reversing district court's grant of summary judgment and remanding case for  
20 trial, finding that district court was presented with an issue of material fact as to the date  
21 on which appellees' applications were received by the Patent Office).

22 As both parties acknowledge, the FAA requires the court to proceed summarily to  
23 trial on the issue of Plaintiff's opt out, the resolution of which is dispositive of whether an  
24 agreement to arbitrate exists. The Ninth Circuit, quoting the Third Circuit, has advised  
25 courts on how to proceed in light of a genuine factual dispute concerning the formation of  
26 an arbitration agreement:

27 Before a party to a lawsuit can be ordered to arbitrate and thus be deprived of a day  
28 in court, there should be an express, unequivocal agreement to that effect. If there

1 is doubt as to whether such an agreement exists, the matter, upon a proper and  
2 timely demand, should be submitted to a jury. Only when there is no genuine issue  
3 of fact concerning the formation of the agreement should the court decide as a  
4 matter of law that the parties did or did not enter into such an agreement. The  
5 district court, when considering a motion to compel arbitration which is opposed  
6 on the ground that no agreement to arbitrate had been made between the parties,  
7 should give to the opposing party the benefit of all reasonable doubts and  
8 inferences that may arise.

9 *Three Valleys Mun. Water Dist.*, 925 F.2d at 1141 (quoting *Par-Knit Mills, Inc. v.*  
10 *Stockbridge Fabrics Co.*, 636 F.2d 51, 54 (3d Cir. 1980)).

11 Finally, the facts of this case are virtually indistinguishable from those in *Zemel v.*  
12 *Citibank*, No. 2:16-CV-03976 (WJM), 2016 WL 6139912 (D.N.J. Oct. 20, 2016).  
13 Defendant distinguishes *Zemel* by (1) asserting that Citibank did not argue in *Zemel*, as it  
14 does here, that the opt-out dispute should be submitted to an arbitrator, and (2) arguing  
15 that Defendant has offered “uncontroverted evidence” above and beyond that offered in  
16 *Zemel*. However, both attempts to distinguish the cases are unavailing. The Court has  
17 rejected the first argument for the reasons stated earlier, and Plaintiff has not had an  
18 opportunity to take discovery to contravene Defendant’s evidence of non-receipt.  
19 Accordingly, this Court reaches a similar conclusion as that reached by the district court  
20 in *Zemel*—because genuine issues of fact concerning the making and existence of the  
21 agreement to arbitrate remain, the Court **DENIES WITHOUT PREJUDICE**  
22 Defendant’s motion to compel arbitration and **GRANTS** the parties leave to take limited  
23 discovery on the question of Plaintiff’s alleged opt-out.

### 24 **CONCLUSION**

25 For the foregoing reasons, the Court **DENIES WITHOUT PREJUDICE**  
26 Defendant’s motion to compel arbitration and **GRANTS** the parties 60 days leave to take  
27 limited discovery on the question of Plaintiff’s opt-out. The parties are directed to  
28 contact the Magistrate Judge’s chambers with any discovery management issues or  
concerns. Defendant may renew its motion to compel arbitration within five days of the  
conclusion of discovery. In the alternative, if Defendant elects not to renew its motion to

1 compel arbitration, Defendant is ordered to contact the undersigned's chambers within  
2 five days of the conclusion of discovery to schedule a pretrial conference.

3 **IT IS SO ORDERED.**

4 Dated: March 20, 2017

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6 Hon. Gonzalo P. Curiel  
7 United States District Judge  
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