

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Honorable Marcia S. Krieger**

Civil Action No. 12-cv-02786-MSK-BNB

WALTER F. WAGNER,

Plaintiff,

v.

DISCOVER BANK,

Defendant.

OPINION AND ORDER

THIS MATTER comes before the Court on the Defendant Discover Bank's Motion for Summary Judgment (**#50**) on its breach of contract and unjust enrichment counterclaims, Plaintiff Walter F. Wagner's Response (**#60**), and Defendant's Reply (**#66**). Also before the Court is the Defendant's Motion for Stay Pending Class Action Settlement Proceedings (**#51**) and Mr. Wagner's Response (**#67**).

The controversy in this case arises from Mr. Wagner's credit card account with Discover. Mr. Wagner brings a TCPA claim against Discover for robo-calls to his cell phone in order to collect amounts he owed Discover. Discover brings counterclaims (breach of contract and unjust enrichment) to collect amounts owed by Mr. Wagner. As noted in this Court's Order of January 13, 2014 addressing Discover's Motion to Compel arbitration, there is an arbitration provision in the Account agreement between the parties that requires arbitration of the counterclaims, but not the TCPA claim.

A. Discover's Motion for Summary Judgment

When issuing the January 13, 2014 Order (#70) on Discover's Motion to Compel Arbitration, the Court had not yet considered the instant motion for summary judgment. Having now done so, it appears that the parties have taken inconsistent positions with regard to what they seek from this Court.

Discover sought to compel arbitration on all claims, but then moved for summary judgment on its counterclaims in this action. Mr. Wagner agreed to arbitration of Discover's counterclaims, but in response to Discover's Motion for Summary Judgment argues that this Court should not exercise supplemental jurisdiction over them, even to confirm an arbitration award.

In deference to the policy favoring arbitration, the arbitration provision in the Account agreement and the parties' agreement to arbitrate the counterclaims, Discover's Motion for Summary Judgment on them is moot. The January 13, 2014 Order on the Motion to Compel is amended to direct the parties to arbitrate such claims. The remaining claim by the Plaintiff brought pursuant to the TCPA will be tried in this Court.

Accordingly, the Defendant's Motion for Summary Judgment (#50) is **DENIED**. The parties shall begin preparation of a Proposed Pretrial Order pursuant to the previously-issued Trial Preparation Order (#20) and shall jointly contact chambers within 14 days to schedule a Pretrial Conference.

B. Motion for Stay

Also pending is Discover's Motion for Stay Pending Class Action Settlement Proceedings (#51). Discover requests a stay of these proceedings due to a pending class action settlement in which Mr. Wagner is a prospective class member. The class action was filed in the

United States District Court for the Northern District of California. The plaintiffs in that case filed a motion for preliminary approval of a class action settlement. Discover asserts that the proposed agreement includes a release of claims that would include the claims asserted by Mr. Wagner in this case.

However, neither party has represented that a class has been certified, that Mr. Wagner is a member of the class, that the proposed settlement will impact his TCPA claim, or that the California court has approved any settlement class. To the contrary, Mr. Wagner represents that to the extent he is a putative class member in that action, he will exercise his right to opt-out of the class and proceed with his case here. The Motion for Stay Pending Class Action Settlement (#51) is therefore **DENIED**.

Dated this 22nd day of January, 2014.

BY THE COURT:



Marcia S. Krieger
Chief United States District Judge