

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DANIEL ZEEVI,

Plaintiff,
vs.

Case No.: 2:19-cv-02206-GMN-BNW

CITIBANK, N.A.,

4

Defendant.

4

ORDER

CITIBANK, N.A.,)
Defendant.)

)
)

I. BACKGROUND

This case arises out of Plaintiff's allegations that Defendant sent automated calls and text messages to his cell phone without consent, violating the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, *et seq.* (Compl. ¶ 1, ECF No. 1).

On March 19, 2019, Plaintiff opened a bank account with Defendant at a Las Vegas, Nevada Citibank branch. (*Id.* ¶ 14). In doing so, Plaintiff allegedly restricted any potential text notifications related to his transaction history to those transactions of \$101.00 or greater. (*Id.*). However, Plaintiff claims that Defendant sends him text messages related to transactions less than or equal to \$100.00. (*Id.*). Further, Plaintiff asserts that Defendant also mistakenly sends him text messages related to an unnamed individual's unidentified account. (*Id.* ¶¶ 13–14). Despite opting out of these messages, Plaintiff states that he receives between one and nine messages related to the unidentified account each day. (*Id.*). Plaintiff also states that he

1 attempted to revoke any consent that he may have given relating to these text messages. (*Id.* ¶
 2 28).

3 Based on these allegations, the Complaint sets forth claims for: (1) negligent violations
 4 of the TCPA; (2) knowing or willful violations of the TCPA; and (3) intrusion upon seclusion.
 5 (*Id.* ¶¶ 37–48). In the instant Motion, Defendant argues that the Court should compel
 6 arbitration of Plaintiff’s claims in accordance with the arbitration agreement detailed in
 7 Defendant’s Client Manual Consumer Accounts (“Client Manual”). (*See* Mot. Compel 1:20–
 8 2:5, ECF No. 18). Defendant asserts that Plaintiff agreed, in a signed writing, to the terms of
 9 the Client Manual when he opened his bank account. (*Id.* 2:4–10). The arbitration policy in
 10 relevant part states:

11 Either you or we may elect, without the other’s consent, to require
 12 that any dispute between us, or concerning your Citibank deposit
 13 account(s), except those disputes specifically excluded below, be
 14 resolved by binding arbitration.¹

15 (Client Manual at 52, Ex. A-1 to Mot. Compel, ECF No. 18-2). Additionally, it contains a
 16 delegation clause, which provides:

17 A party who initiates proceedings in court may elect arbitration
 18 with respect to any dispute advanced in that proceeding by any
 19 other party. Disputes include claims made as part of a class action
 20 or other representative action, it being expressly understood and
 21 agreed to that the arbitration of such claims must proceed on an
 22 individual (non-class, non-representative) basis. *Disputes also*
 23 *include claims relating to the enforceability or interpretation of any*
 24 *of these arbitration provisions.*

25 ¹ The exclusion clause provides as follows: “Disputes filed by you or by us individually in a small claims court
 26 are not subject to arbitration, so long as the disputes remain in such court and advance only an individual claim
 27 for relief.” (Client Manual at 52, Ex. A-1 to Mot. Compel, ECF No. 18-2).

1 (Id.) (emphasis added). Because of this arbitration agreement, Defendant asserts that the
 2 Court should compel arbitration and dismiss this case without prejudice, pursuant to the
 3 Federal Arbitration Act. (See Mot. Compel 5:24–6:5).

4 **II. LEGAL STANDARD**

5 Section 2 of the Federal Arbitration Act (“FAA”) provides that:

6 A written provision in . . . a contract evidencing a transaction involving
 7 commerce to settle by arbitration a controversy thereafter arising out of
 8 such contract or transaction . . . shall be valid, irrevocable, and
 9 enforceable, save upon such grounds as exist at law or in equity for the
 revocation of any contract.

10 9 U.S.C. § 2. “In enacting § 2 of the [FAA], Congress declared a national policy favoring
 11 arbitration and withdrew the power of the states to require a judicial forum for the resolution of
 12 claims which the contracting parties agreed to resolve by arbitration.” *Southland Corp. v.*
 13 *Keating*, 465 U.S. 1, 10 (1984). Courts place arbitration agreements “upon the same footing as
 14 other contracts.” *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489
 15 U.S. 468, 478 (1989).

16 Under the FAA, parties to an arbitration agreement may seek an order from the Court to
 17 compel arbitration. 9 U.S.C. § 4. The FAA “leaves no place for the exercise of discretion by a
 18 district court, but instead mandates that district courts *shall* direct the parties to proceed to
 19 arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter*
 20 *Reynolds Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Thus, the Court’s “role under the [FAA]
 21 is . . . limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2)
 22 whether the agreement encompasses the dispute at issue.” *Lee v. Intelius, Inc.*, 737 F.3d 1254,
 23 1261 (9th Cir. 2013). The party seeking to compel arbitration “bears the burden of proving the
 24 existence of a valid arbitration agreement by [a] preponderance of the evidence.” *Bridge Fund*
 25 *Capital Corp. v. Fastbucks Franchise Corp.*, 622 F.3d 996, 1005 (9th Cir. 2010) (internal

1 quotation marks and citation omitted). If a district court decides that an arbitration agreement
 2 is valid and enforceable, then it should either stay or dismiss the claims subject to arbitration.
 3 *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1276–77 (9th Cir. 2006).

4 **III. DISCUSSION**

5 In his Response, Plaintiff claims that the arbitration agreement contained within
 6 Citibank's Client Manual is unconscionable, and thus, unenforceable. (Pl.'s Resp. 6:6–11, ECF
 7 No. 19). In contrast, Defendant asserts that because the arbitration agreement contains a
 8 delegation clause reserving decisions on “claims relating to the enforceability and interpretation
 9 of . . . the arbitration provisions” for the arbitrator, the Court should leave the question of
 10 unconscionability to the arbitrator. (*See* Def.'s Reply 1:18–19, ECF No. 20); (Client Manual at
 11 52, Ex. A-1 to Mot. Compel).²

12 While arbitration provisions are typically enforceable, Courts may invalidate them
 13 through “generally applicable contract defenses, such as fraud, duress, or unconscionability.”
 14 *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996). However, a delegation
 15 clause may create an additional agreement between the parties to submit the threshold question
 16 of arbitrability to an arbitrator instead of the court. *See Brennan v. Opus Bank*, 796 F.3d 1125,
 17 1130 (2015) (“gateway issues can be expressly delegated to the arbitrator where ‘the parties
 18 clearly and unmistakably provide otherwise’”). In *Rent-A-Center, West, Inc. v. Jackson*, the
 19 Supreme Court considered “whether, under the Federal Arbitration Act . . . a district court may
 20 decide a claim that an arbitration agreement is unconscionable, where the agreement explicitly
 21 assigns that decision to the arbitrator.” 561 U.S. 63, 65 (2010). The Supreme Court held that,
 22 unless such a delegation clause itself is challenged, the Court should defer ruling on the

24
 25 ² In this case, Defendant has met its burden to show the existence of an arbitration agreement; Defendant
 provided evidence of the contract including the arbitration agreement that was signed by Plaintiff, and Plaintiff
 neither contested this evince, nor raised any dispute of material fact regarding the arbitration agreement's
 formation.

1 gateway questions to the arbitrator. *See id.* at 70 (“An agreement to arbitrate a gateway issue is
 2 simply an additional antecedent agreement that the party seeking arbitration asks the court to
 3 enforce, and the FAA operates on this additional arbitration agreement just as it does on any
 4 other.”).

5 In the present case, the parties clearly and unmistakably assigned the arbitrability of the
 6 arbitration agreement to the arbitrator by expressly delegating disputes including “claims
 7 relating to the enforceability or interpretation” of the arbitration agreement. *See, e.g., Mwithiga*
 8 *v. Uber Technologies, Inc.*, 376 F.Supp.3d 1052, 1056 (D. Nev. 2019) (deferring to the
 9 arbitrator when the arbitration agreement delegated “disputes arising out of or relating to
 10 interpretation of application of this Arbitration Provision, including the enforceability,
 11 revocability or validity of the Arbitration Provision”). Accordingly, the holding in *Rent-A-*
 12 *Center* controls, and the authority to decide the unconscionability of the arbitration agreement
 13 lies with the arbitrator, unless Plaintiff specifically argues that the delegation clause is
 14 unconscionable.³

15 Here, Plaintiff does not specifically challenge the delegation clause beyond the
 16 unsubstantiated claim that it is unconscionable. First, Plaintiff claims that the delegation clause
 17 is unconscionable because the Client Manual’s “Limitation on Time to Sue or Arbitrate” clause
 18 circumscribes the four-year statute of limitations in the TCPA. (Pl.’s Resp. 3:7–13). However,
 19 this clause is seemingly unrelated to the delegation clause, and in fact, is not even contained
 20 within the arbitration agreement section of the Client Manual. Plaintiff does not explain how
 21 this potential time limitation affects the delegation clause or renders it unconscionable.

22
 23 ³ In *Rent-A-Center*, the contract at issue was a stand-alone arbitration agreement that was not part of a larger
 24 contract. *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 71–72 (2010). However, in *Brennan v. Opus Bank*,
 25 the Ninth Circuit applied the holding in *Rent-A-Center* to an employment contract containing an arbitration
 agreement with a delegation clause. *See* 769 F.3d 1125, 1133 (9th Cir. 2015). Similarly, the present case
 involves a larger contract unrelated to arbitration, Citibank’s Client Manual, but that contract contains an
 arbitration agreement with a delegation clause. Accordingly, like in *Brennan*, the holding of *Rent-A-Center*
 applies.

1 Similarly, Plaintiff claims that the delegation clause is unconscionable because a “disparity in
 2 bargaining power [resulted] in a take-it-or-leave-it contract of adhesion.” (*Id.* 5:14–19).
 3 Nonetheless, Plaintiff again fails to explain the significance of an alleged contract of adhesion
 4 with particular respect to the delegation clause. (*Id.* 5:14–19). Therefore, these first two
 5 challenges are more appropriately aimed at the unconscionability of the arbitration agreement
 6 as a whole, and thus are not specifically challenging the delegation clause. *See Rent-A-Center*,
 7 561 U.S. at 70 (“unless [Plaintiff] challenged the delegation provision specifically, we must
 8 treat it as valid . . . and must enforce it . . . , leaving any challenge to the validity of the
 9 [arbitration agreement] as a whole for the arbitrator”). Finally, Plaintiff claims that the
 10 delegation provision is unconscionable because it restricts the scope of discovery, but the
 11 Supreme Court has determined that this argument does not successfully challenge a delegation
 12 clause. *See Rent-A-Center*, 561 U.S. at 74.⁴ Accordingly, any threshold questions, including
 13 unconscionability, fall within the authority of the arbitrator, and Defendant’s Motion to Compel
 14 Arbitration is granted.⁵

15
 16

17 ⁴ In *Rent-A-Center*, the Court described how disputing discovery procedures could have directly challenged the
 18 delegation provision: Plaintiff “would have had to argue that the limitation upon the number of depositions
 19 causes the arbitration of his claim that the Agreement is unenforceable to be unconscionable.” 561 U.S. at 74. In
 20 other words, an argument that the limitation on discovery specifically applied to the delegation clause, which
 21 would make the arbitration of the arbitrability of the arbitration agreement unconscionable. However, here,
 22 Plaintiff makes no such argument.

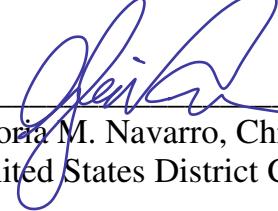
23 ⁵ Even if the Court were to consider the unconscionability of the arbitration agreement, Plaintiff’s arguments
 24 would likely fail. Under Nevada law, both procedural and substantive unconscionability must be present in order
 25 for a court to refuse to enforce a clause as unconscionable. *D.R. Horton, Inc. v. Green*, 96 P.3d 1159, 1162 (Nev.
 2004); *see also Burch v. Second Judicial Dist. Court of State ex rel. Washoe*, 49 P.3d 647, 650 (Nev. 2002).
 Here, Plaintiff failed to demonstrate procedural unconscionability. Plaintiff’s argument for procedural
 unconscionability is that the arbitration agreement is a contract of adhesion. (Pl.’s Resp. 5:14–19, ECF No. 19).
 However, Citibank’s Client Manual contained an opt-out provision that would have allowed Plaintiff to avoid the
 arbitration agreement if he chose to exercise it. (See Client Manual at 55, Ex. A-1 to Mot. Compel, ECF No. 18-
 2). In the Ninth Circuit, an arbitration agreement is conscionable as a matter of law if there is an opportunity to
 opt out of it. *See Mohamed v. Uber Technologies, Inc.*, 836 F.3d 1102, 1111 (9th Cir. 2019) (overruled on other
 grounds).

1 **IV. CONCLUSION**

2 **IT IS HEREBY ORDERED** that Defendant's Motion to Compel Arbitration, (ECF No.
3 18), is **GRANTED**.

4 **IT IS FURTHER ORDERED** that the Complaint, (ECF No. 1), is **DISMISSED**
5 without prejudice because Plaintiff must first comply with the arbitration requirements. The
6 Clerk is instructed to enter judgment accordingly and close the case.

7 **DATED** this 16 day of February, 2021.

8
9 
10 Gloria M. Navarro, Chief Judge
11 United States District Court